advisers and by an exchange of views narrow the differences between them.

Where it appears, in an action for damages for personal injuries, that a plaintiff has a pre-existing condition or weakness which renders him more liable to injury than other persons, the defendant is still liable for such injuries or such aggravation of the pre-existing injury although their extent could not be foreseen.

In an action for damages for personal injury it appeared that the medical advisers of both the plaintiff and the defendant had examined the plaintiff individually and that, while agreeing on some aspects they had disagreed on others. The Court was of the opinion that justice might better have been done if the defendant's doctors had examined the plaintiff in the presence of the plaintiff's medical adviser who should serve as a "watchdog" at least for those essential aspects of the inquiry or certain stages of the procedure. An exchang
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Paget v *Santam Insurance Co Ltd.*

81/1/815 ENSOR NO v RENSCO MOTORS
appl: Gore & Ano NNO v Saficon Ind 94/4/542/W

CASES

DECIDED IN

THE SUPREME COURT OF SOUTH AFRICA

SA LAW REPORTS, MARCH 1981 (1)

ENSOR NO v RENSCO MOTORS (PTY) LTD

(APPELLATE DIVISION)

1980 *September* 2; *November* 14 TROLLIP JA, MULLER JA, JOUBERT JA, VILJOEN JA and GALGUT AJA

*Insolvency—The insolvent—Alienation of goods by trader "except in the ordinary course of that business" as intended in s 34 (1) of Act 24 of 1936—Action by trustee for return of such goods or payment of their value—*Onus *on trustee to allege and, if allegation is denied, to prove that alienation was not in the ordinary course of the trader's business.*

Insolvency—The insolvent—Alienation of goods by trader "except in the ordinary course of that business" as intended in s 34 (1) of Act 24 of 1936—What amounts to an alienation "in the ordinary course of that business"—Test is whether alienation was one which would normally have been transacted by a solvent businessman carrying on a business of that kind—Regard to be had to what is done or would be done in other similar businesses in similar circumstances.

In the absence of any express or implied provision, dealing with the incidence of *onus*, in s 34 (1) of the Insolvency Act 24 of 1936, it must be accepted that the incidence of the *onus* of proof in any litigation under that section must be governed by ordinary principles. Thus, if the trustee exercises his right under s 34 (1) and sues the alienee to recover the subject-matter of the alienation or its value, the *onus* is on him to allege and, if the allegation is denied, to prove that the alienation was not in the ordinary course of the trader's business.

There are two elements in the critical phrase "except in the ordinary course of that business" in s 34 (1) of Act 24 of 1936, namely (i) "the ordinary

course", and (ii) "of that business". Both are equally important in construing or applying the requirement; neither should predominate over the other; and, when these two elements are read together, they in substance and effect pose the objective test: "whether, having regard to all the circumstances, the alienation was one which would normally have been transacted by a solvent businessman carrying on a business of that kind". Indeed, how else could one determine whether the alienation was "*in the ordinary course*" of that business except by also having regard to what is done or would be done in other similar businesses in similar circumstances?

Joosab v *Ensor NO* 1966 (1) SA 319 (A) approved and applied.

The decision in the Durban and Coast Local Division in *Ensor NO* v *Rensco Motors (Pty) Ltd* confirmed.

Appeal from a decision in the Durban and Coast Local Division (FRIEDMAN J). The facts appear from the judgment of TROLLIP JA.

P M Meskin SC (with him *M P Freemantle*) for the appellant: In terms of s 34 (1) of the Insolvency Act 24 of 1936, as substituted by s 12 of Act 32 of 1952, a trader who alienates any business belonging to him, or the goodwill of such business or any goods or property forming part thereof, must publish the notice required by the section unless the alienation is in the ordinary course of that business. Since, *prima facie,* there is an obligation on the trader to publish the requisite notice, and since, *prima facie*, that obligation must be performed, unless the alienation is one in the category of those excepted from the ambit of the section, the *onus* in the instant case was upon the respondent to prove that the alienation of the property was in the ordinary course of the business of the company. See *Pillay* v *Krishna and Another* 1946 AD at 950-951; *Mobil Oil Southern Africa (Pty) Ltd* v *Mechin* 1965 (2) SA at 711D-G. Alternatively, and even if it is held that the *onus* was upon the appellant to prove that the alienation of the property in the instant case was not in the ordinary course of the business of the company, the appellant discharged such *onus*. By its use in s 34 (1) of the expression "the ordinary course of *that* business", as contrasted with the expression "the ordinary course of business", the Legislature intended that regard was to be had, in each case, not only, or even predominantly, to the characteristics in general of a business of the type carried on by the insolvent, but to the actual characteristics of the business carried on by the insolvent as he had established them. See *Joosab* v *Ensor NO* 1966 (1) SA at 326D-327A and the judgment in this case on the facts thereof. Cf *Hendriks* v *Swanepoel* 1962 (4) SA at 345A-G; s 29 (1) of the Insolvency Act (as amended). Section 34 (1) is designed for the protection of a trader's creditors: *Joosab* v *Ensor NO* (*supra* at 326H); *Galaxie Melodies (Pty) Ltd* v *Dally NO* 1975 (4) SA at 744A-745A. Given that this is the purpose of s 34 (1), the Legislature could not have intended that regard was to be had, in each case, only to the characteristics in general of the business of the type carried on by the insolvent; if it had, the section would in fact be a dead-letter in the vast majority of cases where the Legislature obviously intended that it should apply: since, irrespective of the general characteristics of *any* type of business, the ordinary course of it, when the trader ceases to conduct it, would entail the alienation by the trader of it or of property forming part of it: no solvent businessman ordinarily retains a business or property forming part of a business, the conduct of

which is to cease. The judgment *a quo* is wrong because it applies s 34 (1) as if it referred to "the ordinary course of business". On the evidence, the company's business involving the exploitation of the franchise was not only terminated by the loss of the franchise, but the termination itself was not in the ordinary course of business. With the actual characteristics of the company's business, to the extent that it comprised the exploitation of the franchise, eliminated, the ordinary course of that business terminated. In this situation, however reasonable and businesslike in a general sense it might have been to have alienated the property as being of no further use to the company, the alienation cannot be regarded as one in the ordinary course of the company's business: it was, in fact, an extraordinary response to an upheaval in the company's affairs. The alienation occurred in the context of an abandonment by the company of that part of its business comprising the exploitation of the franchise; that the abandonment was forced upon the company cannot alter this situation. An alienation by a trader of property forming part of his business in the context of an abandonment of it is precisely the type of alienation which the Legislature intended should be subject to compliance with the provision of s 34 (1). Cf s 33 (1) of the Insolvency Act 32 of 1916; *Michel's Trustee* v *Morris and Rosowsky* 1920 TPD at 400-402. The only alienation of the property which could be in the ordinary course of that business would have been an alienation of it pursuant to retail disposal of it to others, particularly to its customers in the course of the effecting by it of repairs and servicing of those customers' vehicles. Any other alienation, and particularly the alienation which occurred in the instant case, could only be outside the ordinary course of that business. If the alienation in the instant case was not hit by s 34 (1), then it must inevitably follow that in *any* type of business where the conduct of it stops, thus rendering the stock-in-trade therein useless to the trader, his *en bloc* alienation of that stock will be outside the ambit of the section simply on the footing that it is reasonable and businesslike to dispose of stock which has become useless to the trader concerned. It was never the intention of the Legislature to countenance such a situation. On the contrary, it is precisely in this situation that the Legislature intended that there should be compliance with the section; it was not intended that the trader's creditors should lose the "security" for payment of their claims represented by his stock-in-trade because from his point of view it would be businesslike to dispose *en bloc* of such stock-in-trade. *Harrismith Board of Executors* v *Odendaal* 1923 AD at 538. The Legislature intended that, if the trader wished to effect such disposal, he should advertise as required by the section so that his creditors could take steps to protect their interests in a situation where, instead of his stock-in-trade being sold in the normal course of events, it was being sold *en bloc* in the context of a cessation of his trading.

J H de la Rey for the respondent: The *onus* of proving that the transaction was not in the ordinary course of business was upon the plaintiff. The Legislature, throughout the Insolvency Act 24 of 1936, as amended, lays down clear guidelines as regards the *onus* of proof. See, eg, ss 24 (1), 26 (1), 29 (1), 21 (2). If the Legislature in the case of s 34 (1) intended placing the *onus* upon a person in the position of respondent, it could

and would have done so in clear terms. A trustee or liquidator is entitled to abandon the statutory rights created by s 34 (1). See *Harrismith Board of Executors* v *Odendaal* 1923 AD at 539. Unless a liquidator or trustee comes to light and claims an alienation to be void, the alienee would not know whether the transaction is under attack. The official, who wishes to disturb a purchaser's possession, should therefore be obliged to say why he wishes to do so. In that case, the plaintiff had to prove the validity of its claim. The appellant was the plaintiff in the Court *a quo*. There is no reason for departing from the ordinary rule that the plaintiff carries the *onus* of proving his case. Not all alienations by a trader are affected by s 34 (1). Had the present appellant failed to allege in his particulars of claim that the alienation was not in the ordinary course of the said business, this pleading would have been excipiable. The reference in appellant's heads of argument to the judgments of this Court in *Pillay* v *Krishna and Another* 1946 AD at 950-951 and *Mobil Oil Southern Africa (Pty) Ltd* v *Mechin* 1965 (2) SA at 711D-G does not assist the appellant. As plaintiff, the appellant had the *onus* of proving that the transaction was not in the ordinary course of business. See, by analogy, *Stocks & Stocks (Pty) Ltd* v *T J Daly & Sons (Pty) Ltd* 1979 (3) SA at 766D. In addition, it is more equitable to place the *onus* upon the liquidator. A purchaser in the position of the respondent would normally not have sufficient knowledge of the nature of the business of an alienator. A liquidator is entitled to take charge of the books and other records and to thoroughly investigate the affairs of the alienator. It will normally be the liquidator who approaches the Court for relief. It is highly unlikely that an alienee would move a Court for an order declaring an alienation to be void.

Are the words "in the ordinary course of that business" in s 34 (1) of the Insolvency Act to be interpreted as referring solely to that business and no other business, or to that particular type of business? The second alternative is clearly the appropriate one. This approach accords with what was held by this Court in *Joosab* v *Ensor NO* 1966 (1) SA at 326D-F. The approach suggested by appellant is therefore in conflict with what was held in *Joosab's* case. *Hendriks NO* v *Swanepoel* 1962 (4) SA 338 does not support the appellant's point at all. If the appellant's submission is correct, it means that the company in liquidation had ceased to become a trader. Section 34 (1) only applies to an alienation by a trader. The definition of "trader" in s 2 is couched in the present tense. It does not include a person who formerly carried on a trade, business etc, but who has ceased to do so at the time of the alienation. It is clear that the Judge *a quo* was aware of the test laid down by this Court in *Joosab's* case, and that he applied same. In addition, if the company in liquidation had ceased to be a trader at the time of the alienation complained of by the appellant, the goods alienated would then not form part of the *business* of the company, but would, on the contrary, be mere *assets,* unaffected by s 34 (1). See *Bruyns NO* v *Aerogrande (Pty) Ltd* 1964 (3) SA 554. When judging the transaction, solvency is to be presumed. See *Joosab's* case *supra* at 326D-F. Is an ex-franchisee, who deals in a variety of commodities, and who is, in terms of his agreement, after termination thereof, prohibited from trading in the "franchise goods", still

to continue selling these goods piecemeal? The answer must clearly be in the negative. To say that, before he can sell useless goods in bulk, he must publish the notices referred to in s 34 (1) would be wrong. See *Michel's Trustee* v *Morris and Rosowsky* 1920 TPD 397. Even if appellant is correct, it should be borne in mind that, when judging the ordinary course of business of the company now in liquidation, it always operated subject to the option and right of repurchase of Illings (Pty) Ltd upon termination of the agreement. That was part of its ordinary business — upon termination it did not have the right to freely dispose of "franchise assets". It is in the ordinary course of business to honour one's contractual obligations. See *Fourie's Trustee* v *Van Rhijn* 1922 OPD at 5, quoted with approval in *Hendriks NO* v *Swanepoel* 1962 (4) SA at 343A. Before appellant could succeed in his action, he had to prove that there was a sale of the whole of the assets of the business of the company, or, at any rate, a very substantial portion of these assets. See *Michel's Trustee* v *Morris and Rosowsky* (*supra*). Whatever the position may be with regard to *onus,* the respondent succeeded in proving that the transaction was in the ordinary course of business as explained by this Court in *Joosab's* case *supra* at 326D-F.

Meskin SC in reply.

Cur adv vult.

Postea (November 14).

TROLLIP JA: The sole issue in this appeal is whether or not the alienation to the respondent of certain goods by an insolvent company just before its liquidation was "in the ordinary course of that business" of the company within the meaning of that phrase in s 34 (1) of the Insolvency Act 24 of 1936, as amended. It was common cause that no notices of the alienation, as are mentioned in that sub-section, were published. The liquidator of the company (appellant) maintained that the alienation was void for not being in the ordinary course of the business of that company and claimed the return of the goods or payment of their value. The respondent resisted the claim, maintaining the contrary. The Durban and Coast Local Division (FRIEDMAN J) gave judgment with costs in favour of respondent, holding that the alienation was in the ordinary course of the company's business. The liquidator has appealed to this Court against that decision.

The company, MacKenzie's Garage (Pty) Ltd ("MacKenzies"), carried on the business of a garage and dealer in motor vehicles in Port Shepstone on the South Coast of Natal. The business included the running of a filling station for the sale of fuel, and also a workshop for the repair and servicing of motor vehicles. For the latter purpose equipment and tools were used and spare parts were kept. For example, as at 30 June 1974 MacKenzies had R54 000 worth of spare parts on hand. From time to time in the past MacKenzies had held the franchise for various motor vehicles like Citroen and Leyland. But at the time relevant to these proceedings it only had the franchise from Illings (Pty) Ltd ("Illings") for Mazda vehicles and spare parts. It had held it since about 1969. Its

acquisition of Mazda vehicles from Illings was financed by an associated company of the latter, Illings Acceptances Co (Pty) Ltd ("Illings Acceptances") to whom it became liable for the payments in respect of their purchase. For the spare parts and special tools it had to pay Illings direct. As at 26 July 1975 MacKenzies owed Illings Acceptances about R30 159 and Illings about R7 416.

The franchise was granted under a written agreement. In terms thereof Illings appointed MacKenzies as its dealer in the Port Shepstone area for Mazda products including vehicles and spare parts; the agreement was to endure until terminated by either party on at least 30 days' written notice; on such termination MacKenzies had to pay Illings immediately all amounts then due to it, and:

"Illings shall . . . have the right and option to repurchase from (MacKenzies) at the nett prices which were paid by (MacKenzies) for . . . the products of (MacKenzies) then in its stores and remaining unsold and which are then new, unused, undamaged, of current model and in good condition."

By about mid-1975 MacKenzies was in financial difficulties. On 9 July 1975 its attorney apparently advised it against liquidation and told it not to give up its lease or part with any of its assets. By then Illings Acceptances had stopped all financial assistance for the purchase of new vehicles and Illings had suspended the supply of vehicles and spare parts. By the end of June 1975 Illings decided to cancel the franchise agreement and to replace MacKenzies with respondent as its dealer in the Port Shepstone area. Respondent carried on the same kind of business as MacKenzies at nearby Uvongo, also on the South Coast of Natal. On 11 July 1975, at Port Shepstone, Williams and Keyter of the Illings Group met Frölich and Willems, directors of MacKenzies, and its shareholders. At this meeting Williams announced, much to the surprise and consternation of those representing MacKenzies, that its franchise had been terminated. The latter asked to be given another chance, but the request was refused. They were informed that respondent would be appointed and enfranchised as the new dealer for the area. Ultimately the MacKenzies' representatives reluctantly accepted the termination of its franchise. Willems anxiously inquired about what would be done about the Mazda spare parts etc that MacKenzies still had on hand. Williams informed him that Illings would, in terms of the franchise agreement, take them back unless respondent was agreeable to taking them over. Thereafter, on the same day, Williams and Keyter procured respondent's signature to the new franchise agreement in its favour and its consent to taking over MacKenzies' stock of spare parts etc provided the payment therefor could be spread over three months. MacKenzies agreed to that. By arrangement with Williams and Keyter the latter also undertook to pass such payments over to Illings Acceptances in reduction of its debt of R30 159. On 18 July 1975 Illings wrote to MacKenzies giving it 30 days' notice in terms of the franchise agreement of cancellation of the franchise. As the cancellation had already been effected by Illings and accepted by MacKenzies on 11 July 1975, it is not apparent why this notice was given. Possibly it was done merely *ex abundanti cautela* in case MacKenzies still insisted on its contractual right of 30 days' notice of cancellation. Subsequently, about 23 July 1975, MacKenzies and respondent negotiated about the Mazda spare parts etc and settled on the

price of R12 864,81 for their acquisition by respondent. They were delivered to respondent who paid this amount by cheque for R864,81 and three post-dated cheques each of R4 000, all made in favour of MacKenzies. The latter immediately endorsed them over to Illings Acceptances. (Nothing turned on this aspect in the present proceedings.) All these cheques were paid in due course. By now MacKenzies' financial position was parlous. In particular it had no funds with which to pay cash for its fuel supplies. It was liquidated provisionally on 25 July and finally on 12 September 1975. Appellant was its duly appointed liquidator.

The basis of the appellant's action against respondent in the Court *a quo* was s 34 (1) of the Insolvency Act. As substituted by s 12 of Act 32 of 1952 the sub-section, in so far as it is relevant, reads:

"If a trader alienates any business belonging to him, or the goodwill of such business or any goods or property forming part thereof (except in the ordinary course of that business) and such trader does not publish a notice of such intended alienation . . . the said alienation shall be void as against his creditors for a period of six months after such alienation, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period."

This provision is rendered applicable to a company wound-up for being unable to pay its debts by s 339 or 340 of the Companies Act 61 of 1973. Whether a liquidator's claim under this provision is a vindicatory one on the company's behalf and must therefore comply with the requirements of the true *vindicatio rei* was not raised on the pleadings or debated before us, so nothing need be said about that aspect. It was apparently common cause too that the R12 864,81, the price paid by respondent, was the fair and reasonable value of the Mazda tools and spare parts taken over by it from MacKenzies.

At the outset counsel joined issue before us as to the incidence of the *onus* of proof. Has the trustee (or liquidator) to prove that the alienation was not "in the ordinary course of that business", as the respondent maintained, or on the alienee to prove the converse, as the appellant submitted? This problem has hitherto not been definitively resolved by this Court (cf, eg, *Joosab* v *Ensor NO* 1966 (1) SA 319 (A) at 326B-C where it was left open).

The section itself does not expressly cast the *onus* of proof on either party. True, this element of the alienation is enacted in the form of an exception in parenthesis: "(except in the ordinary course of that business)". But I do not think that that impliedly casts the *onus* of proving it on to the alienee. It was so enacted, not so much with any ensuing litigation in mind, but rather as a directive to traders concerning the kind of alienations about which they had to publish the requisite prior notification. For the precepts of s 34 (1) are not intended to apply generally to all alienations by traders — that would have been too drastic or extraordinary an interference with the freedom of trade to have been even contemplated — but only to a particular, limited kind: those alienations that occur outside the ordinary course of that business of the trader in question. Hence, although negatively cast in the form of an exception in parenthesis, in substance this element serves as a positive characterization of the limited kind of alienations of a trader to which s 34 (1) was intended to apply. These are the only alienations that are to be "void

against the trustee" for the lack of the requisite publications. Hence, despite the form of this element, that is not by itself sufficient to impliedly fasten the *onus* of proof on to the alienee (cf *R* v *Zondagh* 1931 AD 8 at 14-16). Moreover, good reason exists why the Legislature should not have wanted to do that. Often the alienee, if *bona fide,* would not know or have the means of knowing, at the time of the alienation or subsequently when litigation ensues, whether the alienation was within or without the ordinary course of the business of the trader; that would, however, be peculiarly within the knowledge of the trader and eventually his trustee. If, despite that, the Legislature had intended to impose the *onus* of proof on the alienee, it would surely have said so plainly. Cf ss 21 (2), 24 (1) and (2), 26 (1) (*a*) and (*b*), and 29 (1) of the Insolvency Act where it does deal expressly with the *onus* of proof. Therefore, in the absence of any similar express or implied provision in s 34 (1), it must be accepted that the incidence of the *onus* of proof in any litigation thereunder must be governed by ordinary principles, as to which see *Pillay* v *Krishna* 1946 AD 946 at 951-2 and *Mobil Oil Southern Africa (Pty) Ltd* v *Mechin* 1965 (2) SA 706 (A) at 711E-G. Thus, if the trustee exercises his right under s 34 (1) and sues the alienee to recover the subject-matter of the alienation or its value, the *onus* is on him to allege and, if the allegation is denied, to prove that the alienation was not in the ordinary course of the trader's business.

In the present case appellant duly alleged in the particulars to his claim that the alienation by MacKenzies to respondent of the Mazda spare parts etc was not in the ordinary course of MacKenzies' business. Respondent denied that allegation in its plea. So the *onus* of proving that rested throughout on the appellant.

The Court *a quo* assumed that respondent bore the *onus* of proving that the alienation was in the ordinary course of MacKenzies' business. Relying on the *dicta* of BOTHA JA in *Joosab's* case *supra* 1966 (1) SA at 326D-327A, it held that respondent had discharged that *onus* for these reasons. Ostensibly the sale for a lump sum by a garage keeper and motor dealer of his stock of spare parts and tools at one and the same time would not normally be in the ordinary course of that business. But here an extremely important factor intervened that led to that alienation — the cancellation by Illings of MacKenzies' Mazda franchise. Because of that MacKenzies was then confronted with the problem about what to do with its appreciable stock of Mazda spare parts etc. The "normal solvent business man" in that situation would want to dispose of them as soon as possible for a fair price, since henceforth they would have "diminishing utility" for him. On the other hand, the new dealer, respondent, would require them immediately for exercising its franchise in the area. In addition, Illings had the right under its franchise agreement with MacKenzies to take over the latter's stock of Mazda spare parts etc on its termination. Hence, if Illings had thereupon exercised its right under the franchise agreement of repurchasing those Mazda spare parts etc, as it intimated it would do, MacKenzies would have had to submit thereto. The alienation to Illings thereof would then undoubtedly have been in the ordinary course of MacKenzies' business. Had Illings then resold those spare parts etc to respondent, since the latter needed

them, that would not have affected the position — it would have been of no concern of MacKenzies. Instead of doing that these three parties in fact agreed in a practical way to "short circuit" that devious procedure by MacKenzies selling them direct to respondent. That could not, in the Court *a quo's* view, "alter the transaction's basic form". The "normal reaction of a solvent business man" in MacKenzies' situation would have been to do the same "package deal" in order to liquidate his entire stock of these "specialised" spare parts etc and to be able to use the now "liquid" proceeds for some other purpose. That is the gist of the reasoning of the Court *a quo.*

I should interpolate here that Keyter, who has considerable experience in the motor trade, and whose evidence "in all respects" favourably impressed the learned trial Judge, also testified on this particular aspect. He said that MacKenzies' alienation of the Mazda spare parts etc to respondent was the "normal" and "practical" way, one that he would have recommended, for a garage keeper and motor dealer in a similar situation to adopt. That was also the view of Mr Penfold, called by respondent. He is himself an experienced garage keeper and motor dealer. He at present carries on such business at Amanzimtoti on the South Coast. He said it would be unwise for a trader to retain the stock of spare parts etc relating to the relinquished or terminated franchise; as he would no longer be the appointed dealer in those items, he may not be called upon to sell or use them; the best course would be to sell them to the newly appointed dealer; once, when he (Penfold) had relinquished a franchise, he could not sell his stock of spare parts etc relating thereto since no new dealer was appointed to replace him, so he had to retain them, and he lost "an awful lot of money" in consequence. No criticism of his evidence was advanced.

Before us the main submission of counsel for the appellant took the following form.

(*a*) That the critical phrase in s 34 (1) is "in the ordinary course of *that* business", not "in the ordinary course of business"; what had therefore to be solely or at any rate predominantly considered were the particular features or characteristics of the business being actually carried on by MacKenzies, and not merely those of businesses of the same kind carried on by other such traders; hence the Court *a quo* erred in its approach set out above in that it gave far greater weight to the latter than to the former consideration.

(*b*) That virtually the sole business being carried on by MacKenzies was the exploitation of the Mazda franchise; it alienated the Mazda spare parts etc to respondent for the purpose or in consequence of the termination of the franchise which had ended that business; that could not be regarded as an alienation "in the ordinary course of that business" since that phrase envisages only an alienation made during the continuance of the business and not for the purpose or in consequence of its cessation; indeed (so the argument emphasized) the latter is one of the very kinds of alienation to which s 34 (1) was intended to apply, according to *Michel's Trustee* v *Morris & Rosowsky* 1920 TPD 397 at 401.

(*c*) That having regard to the particular kind of business conducted by MacKenzies the only alienations of Mazda spare parts etc that fell within

the ordinary course of its business were the retail selling, supplying, and/or fitting to vehicles of individual items thereof "across the counter", as it were, as and when customers required them; the alienation of all those spare parts etc at one and the same time for a lump sum was obviously not of that kind; indeed, that was another kind of alienation to which s 34 (1) was intended to apply for the protection of creditors, since otherwise a trader could suddenly and without due notification so dispose of his stock-in-trade without his creditors' knowledge and then dissipate the entire proceeds to their prejudice (cf *Harrismith Board of Executors* v *Odendaal* 1923 AD 530 at 538).

(*d*) That by assenting to Illings' immediate termination of the franchise on 11 July 1975, instead of insisting on its contractual right of receiving 30 days' notice thereof, MacKenzies did not act within the ordinary course of its business; consequently, the ensuing alienation of the Mazda spare parts etc to respondent was also not within the ordinary course of its business, because, instead of having to dispose of them in that way, it could have retailed them "across the counter" during those 30 days.

(*e*) That however reasonable and businesslike in a general, objective sense such an alienation of spare parts etc relating to a franchise might be in the case of some other similar business, it could not here be regarded as having occurred within the ordinary course of MacKenzies' business for the reasons advanced above; it was in fact an "extraordinary response to an upheaval" in its affairs.

At the outset, in dealing with that argument, it is necessary to quote in full the relevant *dicta* in the judgment of BOTHA JA in *Joosab's* case *supra* 1966 (1) SA at 326D-G:

> "It will be observed that what is excepted from the ambit of s 34 (1) is not, as is the case in some of the other sections of the Act (see eg s 29 (1)), an alienation 'in the ordinary course of business' but an alienation 'in the ordinary course of that business'. The test for determining whether a transaction was 'in the ordinary course of business' is an objective one, namely whether, having regard to the terms of the transaction and the circumstances under which it was entered into, the transaction was one which would normally have been entered into by solvent business men . . . The word 'that' in the expression 'in the ordinary course of that business' in s 34 (1) introduces the necessity of an inquiry into the kind of business in question, and the usual or ordinary business transactions of a business of that kind, in relation to which the above test is to be applied. It follows that the test to be applied, to determine whether an alienation by a trader of goods forming part of his business was in the ordinary course of that business, is whether having regard to all the circumstances, the alienation was one which would normally have been transacted by a solvent business man carrying on a business of that kind."

And at 328E the learned Judge concluded that the alienations there in question were not in the ordinary course of the trader's business, since no solvent business man carrying on the kind of business that the trader carried on would normally have made those alienations.

As to the argument in (*a*), there are two elements in the critical phrase in s 34 (1): (i) "the ordinary course", and (ii) "of that business". Both are equally important in construing or applying the requirement; contrary to counsel's argument, neither should predominate over the other; and, according to the above *dicta* in *Joosab's* case, when these two elements are read together, they in substance and effect pose the objective test:

> "whether, having regard to all the circumstances, the alienation was one which would normally have been transacted by a solvent business man carrying on a business of that kind".

Indeed, how else could one determine whether the alienation was "*in the ordinary course*" (my italics) of that business except by also having regard to what is done or would be done in other similar businesses in similar circumstances? It follows that, for example, the evidence of Keyter and Penfold on this latter aspect is most relevant and can be taken into account. In other words, I agree with respondent's counsel that the argument for appellant in (*a*) conflicts with the above *dicta* in *Joosab's* case and cannot therefore prevail. The Court *a quo* consequently was correct and did not err in having regard to what the "normal solvent business man", carrying on the same kind of business as MacKenzies, would have done in the same situation that confronted the latter.

As to the arguments in (*b*), I shall assume without deciding in favour of appellant that, for an alienation to be "in the ordinary course of that business", it must be made during the continuance of that business. Nevertheless, on the accepted facts in the present case, the other arguments are untenable for these reasons. The exploitation of the Mazda franchise was not the sole business carried on by MacKenzies. In addition it operated a filling station and workshop for the repair of other kinds of vehicles too. For the latter purpose it kept an appreciable stock of other spare parts and tools. Despite the importance to it of the Mazda franchise, the termination thereof on 11 July 1975 did not end its business activities. It continued with its other activities until it was provisionally liquidated for being unable to pay its debts on 25 July 1975. If that had not occurred, it might have procured another or other different franchises, as apparently it had done in the past. In any event, and this is of importance, it did not alienate the Mazda spare parts etc for the purpose or in consequence of ceasing business, but because of its obligation and the expediency to do so that arose on termination of the franchise agreement.

Indeed, a major fallacy underlying the entire argument for appellant is that it ignores the crucial, relevant terms of the franchise agreement, binding on MacKenzies and subject to which it had to conduct its business. In terms thereof Illings was entitled (i) to terminate it on 30 days' notice at any time and for any or no reason, and (ii) to repurchase from MacKenzies on such termination its then extant stock of Mazda spare parts for a determinable lump sum. That agreement, including those terms, was entered into in the ordinary course of MacKenzies' business. Such franchise agreements, it would appear, are normal incidents in the motor trade. At any rate appellant did not assert, let alone prove, the contrary. Consequently, it is quite unrealistic and wrong to consider what was the ordinary course of MacKenzies' business without having close regard to those terms of the agreement, since they were part and parcel of its business. MacKenzies at all times held its stock of Mazda spare parts etc subject to those contingent rights of Illings. In submitting to Illings' exercise of those rights and fulfilling its own obligations thereunder (the question of the 30 days' notice will be dealt with presently), MacKenzies therefore acted in the ordinary course of its

business. That is precisely what the solvent business man carrying on a business of that kind would normally have done. For it must necessarily be a paramount principle of carrying on business that a solvent trader should duly honour his obligations under a contract entered into in the ordinary course of his business (see *Fourie's Trustee* v *Van Rhyn* 1922 OPD 1 at 5; *Hendriks NO* v *Swanepoel* 1962 (4) SA 338 (A) at 343A-B).

True, MacKenzies ultimately alienated the Mazda spare parts etc, not to Illings, but to respondent. But that was done merely for the sake of convenience and pragmatism at Illings' request and with its concurrence. In substance and effect it was done in fulfilment of Illings' right and MacKenzies' obligation relating to the Mazda spare parts etc under the franchise agreement on termination thereof. I agree with the similar view expressed by the Court *a quo* thereanent which appears above.

As to the argument in (*c*), it is, of course, correct that selling the Mazda spare parts etc "across the counter" in the way there stated would be "in the ordinary course of (MacKenzies') business". It does not follow, however, that disposing of them in some other way would not also be in the ordinary course of that business. And for reasons just given MacKenzies' alienation of them to respondent was in all the circumstances in the ordinary course of its business.

As to the argument in (*d*), it is necessary to appreciate MacKenzies' dilemma as at the time of the meeting with Illings on 11 July 1975. By then Illings had suspended supplies of Mazda vehicles and spare parts to it, it was indebted to Illings and Illings Acceptances for substantial sums, and Illings announced at the meeting that its franchise was terminated and respondent would be appointed as the Mazda dealer in its place for the area. MacKenzies' main if not only concern, as was evident from Willems' immediate anxious inquiry, was what would happen to its appreciable stock of Mazda spare parts etc that it still had on hand? Illings gave the assurance that it would then re-purchase them in terms of the franchise agreement but would preferably arrange for respondent to take them over. MacKenzies' dilemma was whether to assent then to the termination of the franchise and immediately get rid of that entire stock at a fair and reasonable lump sum price, or whether to insist on its contractual right to receive 30 days' notice of termination of the franchise, during which period it would try to dispose of that stock "across the counter" by retail. The difficulties attending the adoption of the latter course, were, first, that MacKenzies might have had to compete with respondent during that period in selling Mazda products; secondly, it might not have been able during that period to dispose of the entire stock, especially its "slow-moving parts", ie slow-selling spare parts, and, thirdly, Illings may not have been willing to take over the remainder of the stock at the end of that period (indeed Keyter testified that that would not have happened). Not surprisingly MacKenzies chose the former course. Respondent's counsel justifiably emphasized that it thereby received immediately a fair and reasonable price for the stock. In my view, in all the circumstances a solvent business man carrying on a business like MacKenzies would have done precisely the same. That is also borne out by the testimony of Penfold and Keyter.

For all the aforegoing reasons the concluding argument in (*e*) cannot

prevail. I therefore do not think that appellant discharged the *onus* of proving that MacKenzies' alienation to respondent of the Mazda spare parts etc was not in the ordinary course of its business; indeed, the conclusion of the Court *a quo* that it was proved to have been within the ordinary course of that business appears to be well founded. In either case the alienation was not void under s 34 (1) of the Insolvency Act against the appellant as MacKenzies' liquidator.

The appeal therefore fails and is dismissed with costs.

MULLER JA, JOUBERT JA, VILJOEN JA and GALGUT AJA concurred.

Appellant's Attorneys: *Lionel Meskin & Levy,* Durban; *Lovius, Block, Meltz, Steyn & Yazbek,* Bloemfontein. Respondent's Attorneys: *Ditz Inc,* Durban; *Rosendorff, Venter & Brink,* Bloemfontein.

DUZE v EASTERN CAPE ADMINISTRATION BOARD AND ANOTHER

(APPELLATE DIVISION)

1980 *September* 23; *November* 14 TROLLIP JA, KOTZÉ JA, MILLER JA, JOUBERT JA and VILJOEN JA

Blacks—Act 45 of 1971—Act 25 of 1945—Black residential area—What constitutes—Appellant residing in dwelling not situated in such area—Administration Board having power under Act 4 of 1966 to determine rental in respect thereof with Housing Commission—Such determination can be performed administratively—Need not be done legislatively—Minister's regulations regarding rental promulgated under Act 25 of 1945 in regard to adjacent Black residential area not yet defined as a "Black residential area"—Appellant cannot be ejected from such area.

The appellant was the occupant of a dwelling in a Black area near Port Elizabeth known as new Zwide. He was required to pay, in respect of rental of his house, which had been constructed with funds made available under the Housing Act 4 of 1966, and service charges a monthly amount of R36,38 to second respondent, the Port Elizabeth Community Council. To this he objected on the ground that the equivalent amount paid by tenants in old Zwide, as contained in regulations published by the Minister of Co-operation and Development in terms of the Black Affairs Administrtion Act 45 of 1971 and the Black (Urban Areas) Consolidation Act 25 of 1945, was R14,11 per month. Applicant had sought a declaratory order that he was not liable to pay more than R14,11 per month, that there had been no valid determination of house rental in respect of his property and that the respondents were not entitled to recover from him more than the said R14,11 per month. He had also sought an order restraining second respondent from ejecting him from his house on the grounds of his failure to pay the monthly amount of R36,38. A Local Division had dismissed the application. In a direct appeal by consent to the Appellate Division, it appeared that the foundation of appellant's application was that new Zwide was a location set apart, defined and laid out