CIV/APN/310/86

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

M K DAVIES
trading as PANALEC — Petitioner

and

OCRIM SOCIETE per AZIONE — Respondent

and

ADRIMAR ENGINEERING (PTY) LTD — Intervening Creditor

and

DESIGN PROJECTS (PTY) LTD — Intervening Creditor

J U D G M E N T .

Delivered by the Honourable Acting Chief Justice Mr. Justice J.L. Kheola on the 24th day of November, 1986.

On the 24th September, 1986 the petitioner obtained ex parte an order in the following terms:-

"1. That the respondent is placed in Provisional Liquidation in the hands of the Master of the High Court;

2. That the respondent is called upon to show cause if any on 27th day of October, 1986 why this Provisional Order should not be made final;

3. That publication of this Order shall be placed in the "Lesotho Today";

4. That service of this Order shall be effected on the respondent at its place of business at Maseru Industrial Sites, Maseru, Lesotho;

/.....

5. That STEPHAN CARL BUYS is appointed as Provisional Liquidator of the respondent to take immediate control of the respondent's assets and the powers provided for in Section 188 (a) and (c) and Section 188 (2)(a), (b), (c), (d), (e), (f), (g) and (h) of the Companies Act 1967, as amended, are hereby granted to him and that the Provisional Liquidator be authorised in terms of Section 188 (2) specifically to adopt and carry on the Contract between the respondent and the Ministry of Agriculture and Marketing of the Government of Lesotho dated 11th March, 1985;

6. That the costs of this Petition be paid out of the assets of the respondent's Estate."

The order was returnable on the 27th October, 1986. The respondent anticipated the return day and set down the matter for hearing on the 10th October, 1986. However, on the 9th October, 1986 Mr. Molete for the respondent appeared before me in chambers and indicated that the matter could not proceed on the 10th. He informed me that the petitioner's counsel had been notified of the postponement. For some unknown reason what transpired on the 9th October was not recorded but I recall that Mr. Molete said the reason why the case could not proceed on the following day was that the petitioner's counsel would not be available that day. On the 10th October Mr. Edeling for the petitioner and Mr. Moiloa for the respondent appeared before me.

It was argued on behalf of the petitioner that the matter should be removed from the roll with costs to the petitioner. Mr. Moiloa argued that the petitioner was not entitled to costs because it was notified of the postponement at 11.00 a.m. on the 9th October, 1986. He submitted that the petitioner's counsel ought not to have come to Court. I reserved my ruling on the question of costs until the 27th October.

On the 23rd October an application was made by two creditors that they be allowed to intervene. The two intervening creditors were Adrimar Engineering (Pty) Ltd. and Design Projects (Pty) Ltd. The application was granted and the rule was extended to the 10th November, 1986. The matter was argued on the 10th, 11th and 12th November and judgment was reserved to the 24th November, 1986.

On the 11th March, 1985 the respondent entered into a contract with the Ministry of Agriculture and Marketing of the Government of Lesotho for the supply of plant and equipment for the contract known as the "Maseru Maize Mill and Silo Complex. The respondent is a company with limited liability incorporated in Italy.

The petitioner is a South African company with limited liability incorporated according to the laws of the Republic of South Africa. On the 23rd March, 1985 the petitioner entered into a contract with the respondent for the supply of engineering plant and equipment and related services for the Maseru Maize Mill and Silo Complex contract. The sub-contract is annexure "MKD6". The petitioner carried out its part of the contract and received several payments for the work it had done. The payments appear in Annexure "MKD10" which shows the grand total outstanding excluding retention as R303,899-00. It is this amount which led to serious litigation between the parties.

On the 1st April, 1986 the petitioner obtained an order against the respondent in Case No. 6941/86 in the Witwatersrand Local Division of the Supreme Court of South Africa for the attachment of certain funds in a current banking account in order to found jurisdiction for an action to be instituted against the respondent. On the 10th April, 1986 the order granted on the 1st April, 1986 was set aside and the present petitioner was ordered to pay the costs of the application, including the costs of two counsel.

/.....

On the 10th April, 1986 Mr Burger obtained an order in this Court in Case No. CIV/APN/126/86 against the respondent to attach to confirm jurisdiction certain monies owing by the Government of Lesotho to the respondent and certain assets. This order was also set aside with costs including costs of two counsel on the 16th April, 1986. On the 20th May, 1986 an appeal was lodged and no date has been fixed for its hearing.

On the 28th April, 1986 the petitioner obtained an order against the respondent in Case No. CIV/APN/138/86 of this Court to attach to confirm jurisdiction certain monies owing by the Government of Lesotho to the respondent and other assets. The order was set aside on the 30th May, 1986 and the petitioner was ordered to pay costs. On the 11th July, 1986 the petitioner lodged an appeal and no date has been fixed for the hearing of the appeal.

On the 28th April, 1986 Mr. Burger sought and obtained an order against the respondent in Case No. CIV/APN/139/86 of this Court, it was an order for the attachment of property in terms similar to those in Case No. CIV/APN/138/86. The order was set aside on the 30th May, 1986.

On the 20th August, 1986 the petitioner sought and obatained an order for the arrest of Mr. Mecke who is the respondent's project engineer and an order to sue Mr. Mecke and the respondent by edictal citation. The order was also set aside with costs. This was under Case No. 15086/86 in the Transvaal Provincial Division of the Supreme Court of South Africa.

In Case No. 15210/86 in the Transvaal Provicial Division of the Supreme Court of South Africa Burger's toustee, Fisher brought an

application seeking an order similar to the one in Case No. 15086/86. It was also set aside with costs.

I have given a short summary of these cases in order to show that a lot of litigation had been going on between the present petitioner and the present respondent long before the former obtained a provisional winding-up order of the latter on the 24th September, 1986. It is clear that in all the applications brought by the petitioner against the respondent the orders that were obtained were eventually set aside with costs. The petitioner, having lost in all the applications, decided to have the respondent wound up on the grounds that it (respondent) is unable to pay its debts, and that it would be just and equitable that it should be wound up.

In his founding affidavit the petitioner deposes that he proceeded with the sub-contract works in accordance with the agreed programme of works without any problems, save that some payments due to him were not paid timeously by the respondent. The last payment was made on the 12th February, 1986. However, the petitioner states that he continued with the sub-contract work until the 27th March, 1986 when he was forced by the respondents illegal conduct to remove his personnel and equipment from the contract site.

In paragraph 7 of his founding affidavit the petitioner states:

> "In or about the second week of January, 1986, representatives Binnies carried out an inspection of the work which Your Petitioner had done and listed a number of defects which required your petitioner's attention. Your petitioner immediately commenced with the necessary work and, whilst this was being done, the respondent's representative, Mecke, suggested that respondent should send four technicians from Italy to the contract site to assist your petioner with the completion of its work. The Italian team duly arrived, headed by one Bresciani as Foreman. The said Bresciani adopted the attitude that he was in charge of the Sub-Contract works and that

> your petitioner was subject to his control and directions. He arbitrarily condemned certain work which had been done by your petitioner although this work conformed to the specifications as contained in the Sub-Contract. A few days later he brought five more Italian technicians to the site. Without reference to your petitioner or Bennies, respondent's employees dismantled certain work carried out by your petitioner and substituted other equipment which did not conform to the original Sub-Contract specification. In or about mid-February, the respondent brought a further team of ten South African electricians to the contract site who, together with Respondent's employees, effectively and unilaterally took over the balance of the Sub-Contract works from your petitioner".

On the 26th March, 1986 Mr. Carlisle, acting for the petitioner, wrote a letter to the respondent notifying it that because of its conduct the respondent [illegible] had rendered it impossible for the petitioner to complete the sub-contract and that the petitioner would remove his personnel and equipment from the site on the 27th March, 1986. The letter is Annexure "MKD8".

The opposing affidavit was made and sworn to by one Rochus Mattias Mecke who is the project engineer in the employ of the respondent. He deposes that the respondent is not indebted to the petitioner in the amount which the petitioner claims is owing to it. The reason being that the petitioner was consistently late in the performance of his obligations in terms of the contract, and that much of the work that the petitioner did was not done properly and accordingly had to be redone. The respondent went to considerable expense in bringing in extra technicians from Italy and later from the Republic of South Africa. and incurred further expenditure in regard to additional materials by reason of the petitioner's defective performance of the work.

The affidavits in the present application are very bulky because an attempt is being made to cover all what was said in the numerous applications which were previously made in this Court and

in the various divisions of the Supreme Court of South Africa. However, the most important issue in this application is whether the respondent is unable to pay its debts. The respondent's argument is that it is able to pay its debts but refuses to pay the petitioner on the simple ground that the alleged debt is seriously disputed on the ground that petitioner failed to perform its part of the contract properly and in accordance with the terms of the sub-contract.

Section 172(c) of the Companies Act No. 25 of 1967 provides as follows:

> "A company shall be deemed to be unable to pay its debts -
>
> (c) If it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company."

The onus is on the petitioner to prove on a balance of probabilities that the respondent is unable to pay its debts. In Wackrill v. Sandton International Removals (Pty) Ltd and others, 1984 (1) S.A. 282 (W) it was held that the standard of proof of the relevant facts required for the confirmation of a provisional winding-up order should not be anything less than that required in civil cases, that is proof on a clear balance of probabilities, with the admission of viva voce evidence where necessary to resolve material disputes on the affidavits.

It seems to me that in the present case there are no material disputes on the affidavits and there was no need to hear oral evidence.

/.....

It is common cause that the petitioner lodged numerous applications against the respondent in this Court and in the Republic of South Africa in an attempt to attach certain properties of the respondent in order to found jurisdiction. All the applications were dismissed on various grounds. In one of such applications the petitioner sought and obtained ex parte the order for the arrest of Mecke. The order was set aside only after four days spent by Mr. Mecke in prison. Having failed in all the applications the petitioner decided that he would solve the problem by making a petition for the winding up of the respondent. He was well aware that there was a dispute concerning the alleged debt. In all the previous applications the respondent had disputed the debt.

It is trite law that the Court will not grant a winding-up order where there is a bona fide dispute as to the existence of a debt (Mcleod v. Gesade Holalings (Pty) Limited, 1958 (3) S.A. 672 (W), Walter McNaughtan (Pty) Ltd v. Impala Caravans Ltd., 1976 (1) S.A. 139). Where there is a bona fide dispute, the Court may order the applicant to prove his debt by action before applying for a winding-up order. Winding-up proceedings cannot be used as a means of enforcing payment of debt where there is a bona-fide dispute of the existence of a debt because a winding-up is not designed for resolution of disputes as to the existence or non-existence of a debt (Henochsberg on the Companies Act, 4th edition (Vol. 2) p. 583).

Mr. Farlam, for the petitioner, submitted that although the amounts of the petitioner's claim may not be admitted, it is at least common cause that as at March, 1986 there were amounts owing by the respondent to the petitioner and that no payments had been made by the respondent since the 12th February, 1986. According to him the only dispute between the parties is whether the respondent has a counterclaim for damages against the petitioner.

/.....

He further submitted that a disputed counterclaim is no defence to a debt which is due and payable. Furthermore, the counterclaim is a claim for damages and is accordingly unliquidated. It accordingly cannot even be set off against such debt. (Rosettenville Motor Exchange v. Grootenboer, 1956 (2) S.A. 624 (T). I agree with this submission as far as the law is concerned. The facts of the present case are different from those in Rosettenvill Motor Exchange case in that in the present case a certain amount of money was to be paid to the petitioner by the respondent on the proper completion of some specified work. The petitioner failed to do the work properly and repudiated the contract on the ground that the respondent's employees made it impossible for him to execute his part of the contract.

I say the petitioner failed to do his part of the sub-contract properly because there is evidence to that effect. The petitioner also admits that his work was defective and had to be redone. See paragraph 48.2 of the petitioner's replying affidavit in which he admits that his work was defective. As proof that petitioner failed substantially to perform in terms of the contract, on the 17th January, 1986 Binnie and Partners, Lesotho, who are the consulting engineers appointed by the Lesotho Government to supervise the work and to satisfy themselves that work under the contract was done properly, sent a telex to the respondent which reads as follows:-

"To: OCRIM CREMONA - ATTN. A. MILAZZO
MASERU MAIZE MILL - CONTRACT 1
17.01.86/RJW/5216-31

ELECTRICAL INSTALLATION

(A) DESIGN AND SUPERVISION

/.....

We refer to your undertaking of 19/20 December in which you stated that you would have an Electrical Engineer on site/in RSA "Early January" and to our telex of 10.1.86 in which we (again) draw attention to the situation in respect of Panalec, and stated that the presence of an Electrical Engineer in Maseru was urgently required.

We have received no response to our telex of 10.1.86, and we cannot accept that your statement in your telex of 9.1.86 that your Electrical Engineer will be arriving "within the next few weeks" is adequate.

We re-iterate that it is now absolutely essential that you send an Eletrical Engineer to Maseru immediately to carry out outstanding design work and to supervise Panalec.

We should like to draw your attention to your statement at the commencement of this contract that in respect of Panalec "Design and Supervision" would be by Ocrim. We are not aware of any Design or Supervision being carried out by Ocrim so far, despite the limitations of Panalec being clear for some considerable time.

(B) INSTALLATION

In an effort to establish what further problems remained we requested the presence in Maseru for 2 to 3 days of Malcolm Davies.

The meetings held confirmed our impression that there is a widespread disregard for the technical and functional requirements of the specification together with a lack of technical competence.

MAIN POINTS ARE:

(A) The two MCCS on site fail substantialy to meet the specification or even to comply with the relevant SABS. Under normal circumstances we would rejects these items totally and have them removed from site. Under the current circumstances we are obliged to accept that they be re-built on site and that it is not possible to remedy certain defects which we would normally not accept. This must of course be drawn to the clients attention.

(B) Only by obtaining unofficially from Panalecs erectors their cable schedules, and re-calculating all cable sites ourselves, were we are able to prevent the installation in the worktower of many undersize cables, some slightly so but some

/.....

significantly so. This is of particular concern as we had already some months ago shown Davies how to calculate cable sizes and rejected many of his original proposals. His promised revised calculations were never received (or carried out?).

(c) The arrangement set out in the specification and shown on the DRGS in respect of the Mill SDB, SUB, SDBS, lighting and small power has been totally ignored. Again, to avoid delay a compromise must be accepted.

(d) No transformer/MV switchboard or MV switchboard/MCC cable size calculations were available. In fact it was clear that Panalec were not able to carry these out properly. In the case of the TRANS/MVS cables, and the MVS/Worktower MCC cables, we have been through calculations with Panalec and agreed cable sizes. Davies was unable even to provide the technical criteria for the other cables. No cable sizing was therefore been agreed for feeders to the Mill MCCS.

Davies Statement that these cables are "oversized" is unsupportable.

It has been clear to both of us for a long time that Panalec are a firm of limited resources. It is difficult to see how they are to complete all outstanding design work, procurement, workshop fabrication and site installation without assistance.

We are doing what we can to rectify this including becoming involved in design work which is your own responsibility but which cannot wait any longer if the project is not to be delayed. This is most unsatisfactory.

Please let us know by return what steps you intend to take to remedy this state of affairs.

Regards
Binnie and Partenrs Lesotho."

On the 31st January, 1986 the respondent sent a telex to the petitioner and it reads as follows:-

"PLS give this message to Mr Des Flett urgently.

CREMONA, 31.1.86

TLX No. 586/AM/AD

/.....

We regret to inform you that Panalec is on its way to create. big problems and a disaster should Panalec not proceed to take our advice as per attached TLX.

You had given us your guarantee for Panalec's experience, seriousness and well-established company.

You have also written this in your agreement with us your full responsibility.

We are forecasing very big and costly problems and your commission may have to be withdrawn in part or in full as guarantee. We therefore ask you to review FLWG TLX to Panalec.

Quote
Cremona, 31.1.86
TLX No. 581 MC/AM/AD

ATTN. MR. MALCOLM DAVIES

RE: MASERU MAIZE MILL

We have received report from Mr. Mecke/Mr. Bresciani regarding your progress of works, and we must now take action to avoid disaster.

1. FLWG are main points from report!

A) Works performed by you or in progress do not comply with basic electromechanical . standards and are not of good quality construction. This is in contrast with your contract obligations.

B) Construction of MCC on site is unacceptable therefore these panels must be remedied immediately.

C) Remaining MCC seen in your workshop are only 5 constructed. Only one person was seen working.

D) Erection on site is slow (very slow)

F) Above points will create delay of final commissioning to our view about 30 days. The client will charge penalities for R. 5,400 x day which are your responsibilities. If you then also add costs for maintaining our people on site, inoperable because of delay, htese sums are very high and they will be all to your charge.

2. Ocrim is not interested in wasting time over controversies, but to get the job finished in time and to be professional with client.

We want to continue working relationship with Panalec in friendly way as done in past. We believe that on your part it is not a matter of lacking good will but lack of experience in the field of electrical 'Turn-key' supply for Milling Plant, especially when heavy penalities are involved.

/.....

3. After December visit of our Mr. Milazzox Mr. Donno and present visit of Mr. Mecke/Mr. Bresciani, we have sufficient proof that Panalec is not capable to finish works in time. Only six weeks remain until start of commissioning. Only solution left to avoid this disastrous problem is to send 4 or 6 persons skilled electricians from Italy that will work with you, your people on site will follow them closely obey decisions made by our chief site engineers.

4. Examples of works not in compliance to contract.

A. Your contract signed in Cremona 23.3.85 clearly states that you must first have approval from Ocrim, and not to deal directly with Binnie and Partners.

Our Mr. Mecke/Mr. Bresciani for example have asked you not to make motor connection cable coming from top but from floor below. You refused this solution even though any Miller today knows how useful it is for maintenance in a Mill.

B. You have not yet ordered second unit for backup to TELEM/PROTEA as requested by us in December and recently by TLX. AFH devers is making software for one VDU contrary to our contract agreements (Annex 2). You also did not give them copy of operator's manual/specifications as required.

C. The only two MCC delivered so far have been unaccepted not only by Ocrim but also by Binnie and Partners: These require immediate modifications.

5. Conclusions

We had overlooked exclusions from your quotation, and if we have decided to order supply of signal cabling even though agreements were to be for Turn-key supply, do not think it is a result of being weak, but instead because we are determined to finish job in time and avoid controversies.

With this spirit of good will we now propose to send 4 technicians immediately to site to help you with works. Should you not confirm this to us by TLX within Monday Feb. 3, we remind you that you will be charged with not only penalities deriving from delay but also any costs or damages that will be as an outcome of your unfulfillment of contract obligations.. Mr. Mecke/Mr Bresciani are authorized to discuss with you all details and to define programme of works.

Best Regards.

M. Cinquetti/A. Milazzo

We believe the time has come to take immediate action and your involvement will be a denefit to everyone.

Kind Regards.
Mario Cinquetti".

/.....

The two telexes appear as annesures "RA2" and "RA3" respectively in CIV/APN138/86.

It is clear from the above telexes that the work done by the petitioner was not satisfactory and had to be redone. As a result of his lack of expertise, the petitioner agreed when the respondent sent four technicians from Italy to the contract site to assist the petitioner in the completion of the work. If the petitioner was able to complete the work on his own, why did he agree to the suggestion that technicians be brought from Italy to come and assist him? He was aware that he could not do that kind of work without the assistance of people who had the right knowledge. The expenses of bringing technicians from Italy must be borne by the petitioner because, according to the respondent, it was because of the petitioner's incompetence and lack of experience that it had to bring technicians from both Italy and the Republic of South Africa.

It is not correct to say that the petitioner is entitled to an amount of R303,899-00. He cannot be entitled to that amount because he left the site before he completed the work he was supposed to do in terms of the contract. He alleges that he was forced to leave the site by the illegal conduct of the respondent; the respondent alleges that the petitioner left because it had become very clear that he lacked the skill to do the work in terms of the contract. It seems to me that the probabilities are in favour of the respondent. Binnie and Partners Lesotho found a number of defects and notified the respondent that the petitioner lacked technical competence and that the petitioner was a firm of limited resources (See "RA2"). As a result of the petitioners incompetence nine technicians were brought to Lesotho from Italy. Apparently the petioner did not see eye to eye with the Italian technicians as to how the defects had to be rectified and decided to repudiate the contract.

/.....

In an attempt to rebut the overhelming evidence regarding the petitioner's incompetence and limited resources, an unsigned supporting affidavit by one Siegfried George Kuryszczyis was filed by the petitioner. I do not regard that document as evidence before this Court.

Another supporting affidavit came from one Stephen John Lambert who describes himself as a freelance engineer. He was employed by the petitioner on ad hoc basis to carry out design, drawing and supervision functions. He confirms that he and other employees of the petitioner were forced to leave the contract site by the illegal conduct of the respondent's employees. In CIV/APN/138/86 this gentleman described himself as a freelance draughtsman but in the present case he describes himself as a freelance engineer. I agree with the submission that in the present proceedings the deponent is trying to give the Court the impression that he is a highly qualified engineer and in a position to tell this Court that the petitioner carried out his work properly and in terms of the contract. His evidence cannot stand against the evidence of Binnie and Partners Lesotho who are qualified engineers appointed by the Government of Lesotho to do supervisory work.

Where the respondent disputes the indebtedness upon which the applicant relies, the onus is on the respondent to prove, not that it is not indebted to the applicant, but that the indebtedness is bona fide disputed on reasonable grounds (Paragraph 408 of the Law of South Africa, Vol. 4), Machanick Steel and Fencing (PTY) LTD. v. Wesrhodan (PTY) 1979 (1) S.A. 265 at 269B). I am of the view that in the present case the respondent has proved on a balance of probabilities that the indebtedness upon which the petitioner relies is bona fide disputed on reasonable grounds.

/.....

It was submitted on behalf of the petitioner that the respondent is in breach of sections 286 and 113 of the Companies Act No.25 of 1967 inasmuch as it had no people responsible for its management in Lesotho and that its books of account are no longer in Lesotho. It seems to me that because of the harassment of the chief agent of the respondent in Lesotho by the petitioner, it is understandable why Mr. Mecke had to leave this country. He was at one time arrested and had to spend four days in gaol and there was no guarantee that the petitioner would not again embarrass him again by having him arrested. In any case there is no proof that Mr. Mecke has permanetly left this country. As far as the books of account are consent the proviso to section 112 (3) of the Companies Act seems to suggest that the books of account need not be kept in Lesotho all the time.

It was as a result of the above harassment that the respodent decided to transfer its funds into the name of its chief agent so as to take them out of the reach of the petitioner. It was submitted that this conduct by the respondent was done fraudulently and with the intention of concealing from the respondent's creditors the true position regarding its assets. I do not agree with this submission because it is the petitioner who is unwilling to comply with the terms of the contract.

Paragraph 14 of the contract Annexure "MKD 6" reads as follows:

"Arbitration

Any dispute or difference arising out of this Agreement directly or indirectly between the parties hereto shall be settled amicably between them.

If the parties should not reach an amicable settlement the dispute or difference shall be referred to the decision of an Arbitrator to be appointed by the parties.

/.....

> Failing agreement between the parties to appoint the Arbitrator within 30 days, the dispute shall be referred to the Board of Arbitrators composed of an Arbitrator named by each party and an umpire named by the two Arbitrators as aforesaid.
>
> Failing the two Arbitrators to appoint the umpire within 15 days from their appointment, this latter shall be designated by the President of the International Chamber of Commerce in Paris, France.
>
> The venue of arbitration shall be Paris and the arbitration shall be governed by the Rules of said Chamber of Commerce.
>
> The Board of Arbitration shall finally settle ex-bono et equo.
>
> The arbitration award, including assessment of the costs of Arbitration, shall be final and binding on both parties and judgment upon the arbitration award may be entered in any Court having jurisdiction.
>
> During the period of dispute and/or arbitration, the parties are not authorised to suspend the works according to the contract no.1".

Although the arbitration clause in the contract does not oust the jurisdiction of this Court, especially as regards the winding up of the respondent, I am of the view that as far as the existence or non-existence of the debt is concerned the petitioner had to resort to arbitration first. In the case of Yorigami Maritime Construction Co. LTD v. Nissho-Iwai Co. LTD., 1977 (4) S.A. 682 (c) Friedman, J. had this to say on an arbitration clause (at p. 692 E-F):

> "In our law an arbitration clause does not oust the jurisdiction of the Court and, if a party to an agreement seeks to rely on an arbitration clause when sued on that agreement, the Court has a discretion as to whether or not it should itself determine the dispute or whether it should order the proceedings to be stayed pending the arbitrators decision."

As I stated earlier in this judgment the petitioner ought to have proved the debt by action before he applied for the winding-up of the respondent. He failed to disclose to the Court that a bona fide dispute exists between him and the respondent. Having failed to find any property of the respondent that he could attach to found

/.....

jurisdiction the petitioner suddenly decided to circumvent this problem by claiming that the respondent was unable to pay its debts and applying for its winding-up. This is obviously not true because the respondent deliberately transferred its funds to Mr. Mecke's bank accounts. The petitioner had to go to Paris and arbitrate and obtain an arbitration award against the respondent before applying for the winding-up of the respondent. Such an award would be executed in Italy or in Lesotho as well as in South Africa.

It was again contended that the petitioner has no locus standi because on the 22nd January, 1986 the petitioner ceded, in securitatem debiti, all its right, title and interest in and to its book debts and other debts, present, past and future, to a company called Elcentre (West Rand) (PTY) Limited; this cession would have included any claim against the respondent. It was submitted that petitioner had in law divested himself of any interest in that claim, save a reversionary interest in the ceded right. Reference was made to the case of Holzman v. Knight Engineering and Precision Works (Pty) Ltd., 1979 (2) S.A. 784 (W) in which it was held that a cedent of a debt in securitatem debiti is not a "contingent or prospective creditor" of the debtor within the meaning of section 346 (1) (b) of the South African Companies Act No.6 of 1973 and, therefore, has no locus standi to bringing proceedings for the winding-up of the debtor company. Section 174 (1) of the Lesotho Companies Act No.25 of 1967 is couched in identical terms as section 346 of the South African Act.

In a recent case of the Appellate Division of the Supreme Court of South Africa of The Bank of Lisbon and South Africa v. The Master of the Supreme Court (Transvaal Provincial Division) and others (unreported) dated the 30th September, 1986 the Court reaffirmed its previous decisions in the National Bank of South Africa Ltd. v. Cohen's Trustee 1911 A.D. 235 and Leyds N.O. v. Noord Westerlike Kooperatiewe Landboumaatskappy Bpk en Andere, 1985 (2) S.A. 756 in which it was held that the cedent in

securitatem debiti retains dominium in the right concerned. It is clear that Holzman's case has been overruled. I come to the conclusion that the petitioner has locus standi.

The intervening creditors' support to the petitioner's case that the respondent is unable to pay its debts must be dismissed on the same ground that the respondent is able to pay its debts but has a bona fide defence why it is refusing to pay the petitioner's alleged debt .

In the second alternative prayer the intervening creditors seek to obtain an order for provisional winding-up order of the respondent on their own papers. This cannot be done at this stage because no certificate has been issued by the Master of the High Court in respect of each intervening creditor that due security has been found for payment of all fees and charges necessary for the prosecution of all proceedings until the appointment of a liquidator. Furthermore, the intervening creditors made it clear in their affidavits that they intend lodging a petition for the winding-up of the respondent if the Court should discharge the provisional order. Now that the provisional order is to be discharged the intervening creditors will probably lodge their own petition for the winding-up of the respondent.

For the reasons stated above the provisional order of liquidation is discharged with costs and the applications of the intervening creditors are dismissed with costs. Such costs should be paid by the petitioner and the intervening creditors jointly and severally and include costs of two counsel.

/.....

The petitioner is not entitled to the costs fo the 10th October, 1986. No order as to costs for the 10th October, 1986.

J.L. KHEOLA
ACTING CHIEF JUSTICE.

27th November, 1986.

For Petitioner - Mr. Farlam
For Respondent - Mr. Kuny.