CIV/APN/118/92

IN THE HIGH COURT OF LESOTHO

In the matter between:

OSMAN SALLY MAHOMED MOOSA APPLICANT

vs

HOOSEN KHAN RESPONDENT

Before the Honourable Chief Justice B.P. Cullinan

For the Applicant : Mr C. Edeling,
Mr S.L. Buys
For the Respondent : Dr W.M. Tsotsi

Judgment

Cases referred to:

(1) Rex vs Hohls (1959) 2 S.A.656 (N);
(2) Kader vs Haliman (1958) 4 S.A. 31 (N);
(3) Estate Logie vs Priest (1926) A.D. 312;
(4) Van Vuuren vs Jansen (1977) 3 S.A. 1062 (T);
(5) Mostert NO vs Van Hirschberg (1961) 1 S.A. 146 (O);
(6) Benade vs Boedel Alexander (1967) 1 S.A. 648 (O);
(7) Leadenhall Meat Market vs Hartman (1938) W.L.D. 99;
(8) Cohen vs Jocobs (1949) 4 S.A. 474 (C);
(9) Dunn & Co. vs Rehman (1938) N.L.R. 86;
(10) In re Provincial Trading Co (1921) C.P.D. 781;
(11) Lawclaims (pty) Ltd vs Rea Shipping Co. S.A. (1979) 4 S.A. 745 (N);
(12) Kahn vs Shabodien 7 C.T.R. 315;
(13) Abbatoir Meat Market vs Ismail (1922) C.P.D. 177;
(14) Roodt vs Roodt 27 S.C. 122;
(15) Jagger & Co vs Pachter (1915) C.P.D. 55;
(16) Amod vs Khan (1947) 1 S.A. 150: (1947) 2 S.A. 432 (N);
(17) Dal's Service Station (Pvt) Ltd vs Labuschagne (1962) 3 S.A. 723 (SR).

This is a petition to sequestrate the respondent's estate. The Court per Molai J. has already made an order of provisional sequestration and granted a rule nisi, calling upon the respondent to show cause why his estate should be sequestrated finally. The respondent has filed an opposing affidavit and the petitioner a replying affidavit, Mr Edeling for the petitioner and Dr Tsotsi for the respondent have filed detailed heads of argument and made extensive verbal submissions at the hearing.

The petition is brought under section 8 (b) and (c) and section 9 (1) of the Insolveney Proclamation, 1957, No.51 of 1957 ("the Proclamation"). Those provisions and those of sections 8 (d) and 12 (1) read thus:

> "8. (a) debtor commits an act of insolvency -
> .....
>
> (b) if a Court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;
>
> (c) if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;.....
>
> (d) if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another.
>
> 9. (1) A creditor (or his agent) who has a liquidated claim for not less than one hundred rands, or two or more creditors (or their agent) who in the

aggregate have liquidated claims for not less than two hundred rands against a debtor who has committed an act of insolvency or is involvent, may petition the Court for the sequestration of the state of the debtor.

12. (1) If at the hearing pursuant to the aforesaid rule nisi the Court is satisfied that

(a) the pertitioning creditor has established against the debtor a claim such as is mentioned in sub-section (1) of section nine: and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may sequestrate the estate of the debtor."

The petitioner claims that the respondent is indebted to him .n the following liquidated amounts:

(i) M66,000.00, being a judgment debt arising from a judgment obtained by the petitioner in this Court in case No.CIV/T/504/90, with interest at 23% p.a. calculated from 30th January, 1991, plus taxed costs in the amount of M2,670.79;

(ii) M26,495.25, which amount is claimed by the petitioner in a defended action in this Court in case No. CIV/T/2/91 in respect of "monies lent and advanced by your Petitioner to the Respondent, interest, and goods sold and delivered at the Respondent's special instance and request".

The petitioner claims that the respondent is further indebted to him "for costs awarded in favour of your Petitioner by the Court of Appeal, which have not been taxed as yet". It is not not stated what proceedings are there involved, but in any event, the particular claim is not liquidated. The petitioner also states that he holds no security for claims (i) and (ii) above.

As will be seen, the respondent, who admits all of the above claims, in turn claims that the petitioner is indebted to him in a total sum far in excess of the petitioner's claims: thus, the respondent avers, the petitioner holds security for all his claims. Mr Elding points to the definition of security in section 2 of the Proclamation, that is as

"property of (the debtor's) estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention"

The petitioner holds no such security and his claims are unsecured therefore. In any event, section 9 (3) of the Proclamation requires a petitioner in his petition to,

"state whether the claim is or is not secured and, if it is, the nature and value of security."

The section, however, nor the Proclamation for the matter, contains, as Mr Elding submits, no prohabition against the filling of a petition by a secured creditor. Indeed, section 9 (2) indicates that a secured creditor may file a petition, and this has been the law in the Republic of South Africa since 1923, the Proclamation being vertually a *verbatim* reproduction of the insolvency legislation in that country: see mars on *The Law of Insovency in South Africa,* 8 Ed. at p 79 and see also Rex vs Hohls (1).

The petitioner then alleges that the respondent committed the following acts of insolvency;

"1. He failed in terms of Section 8 (b) of th Insolvency Proclamation to satisfy a Judgment granted against him and upon demand by the Deputy Sheriff of this

Your Petitioner respectfully submits to the above Honourable Court that the Respondent is the owner of at least two motor vehicle which he purchased from your Petitioner on the 25th April, 1990. The registration numbers of the vehicles are A3786 and A0450, the latter being a Mercedes Benz 450 SEL. Which I allege is worth a substantial amount of money.

Your Petitioner respectfully submits that if the Respondent is not in possession of these vehicles and in the event he has disposed of these vehicles, he has done so with the intention to prejudice his creditors.

The Petitioner is also aware that the Respondent is a director and shareholder of a company DYNAMIC INVESTMENTS (PROPRIETARY) LIMITED, and his shares should at least be worth something. The Respondent failed to point this out to the Deputy Sheriff, and your Petitioner respectfully submits that the intention is to withhold these assets from his creditors, to their prejudice.

Your Petitioner further respectfully submits that the Respondent has various business interests, and is also conducting a business at Main North 1 Maseru. He also took over certain stocks of building material from a company BUILDING WORLD (PTY) LIMITED in an amount of R90,000.00 (NINETY THOUSAND RAND).

Honourable Court who executed against the Judgment, the Responsdent failed to satisfy the judgment and it appears from the return of service of the Deputy Sheriff that he has not found sufficient disposable property to satisfy the Judgment. In this regard your Petitioner attaches hereto annex "A" being a copy of the return of service filed by the Deputy Sheriff indicating that the Respondent failed to point out sufficient assets to meet the Judgment.

2. The Respondent is disposing of his property, or has already disposed of his property which be to the prejudice of his creditors as envisaged in Section 8 (c) of the aforesaid Proclamation."

The return of service annexed to the petition is specifically endorsed by the Deputy Sheriff as being a *Nulla Bona return. Therein he states that*

"Defendant failed to show me whether he has any assets to satisfy the demands of this writ but Defendant he got no assets. He got no any thing"

It proves convenient to deal first with the second alleged act of insolvency. In this respect the petition in part reads in paragraph 5:

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The respondent in his answeting affidavit denies that he carries on business in Lesotho or elsewhere, or that he has any shares in Dynamic Investments (Proprietary) Limited: he maintains that he is employed by that company as a Manager and that he "travels to the Republic of South Africa on his employer's business." With regard to the two vehicles mentioned above, and also the stock valued M90,000, he averred that the parties had been co-directors in the company Building World (Pty) Limited ("Building World") and that they had signed the following deed of agreement "dissolving our partnership in the said company":-

"25/04/90

DEED OF AGREEMENT

BETWEEN : O.S.M. MOOSA and HOOSEN KHAN

It is hereby agreed upon that:

(A) Hoosen Khan resigns as Director of Building World.

(b) H. Khan takes over stocks valued R90,000.00 (Ninety Thousands Rands) for which he has to pay O.S.M. Moosa.

(c) H. Khan takes over 2 motor vehicles valued at R66,000.00 (Sixty-six Thousand) A 3786 and A 0450 for which he has to pay O.S.M. Moosa.

(d) H. Khan is liable to pay for drawings of R21,591.00 (Twenty-one Thousand, Five Hundred and Ninety-one Rands).

(E) His Share (Hoosen Khan) in the N E T T worth amount R84,640.00 (Eighty-four Thousand, Six Hundred and Forty Rands)

(F) THAT N E T T Final balance owed to O.S.M. Moosa amounts to R93,000.00 (Ninety-three Thousand Rands).

(G) Payment of the said R93,000.00 to be agreed upon on terms, from A R M C O NETT worth to him or from Q Construction or any other source."

To return to the alleged second act of insolvency, I observe that even if it were the case that the respondent were possessed of all the property alleged by the petitioner, his actions would amount to no more than a failure to disclose such to the Deputy Sheriff. There is however no evidence whatever before me of any 'disposition', or attempted 'disposition' of property as envisaged by the provisions of sections 2 and 8 (c) of the Proclamation. Neither for the matter isthere any evidence of a removal or attempted removal of property (see Mars op. cit. at pp 71/72) under section 8 (d), even if those particular provisions had been pleaded. There is then no act of insolvency under the provisions of section 8 (c) or (d).

With regard to the deed of agreement between the partie's that is, when the respondent withdrew from Building World, the latter conceded that the vehicle A 3786 had all along been registered in his name and in his possession and that he had ultimately sold it in June 1990. As to the other vehicle, the Mercedes A 0450, there are issues of credibility. The respondent maintains that it is still, contructively, in the petitioner's possession and that the latter has failed to pay garage repairs fees therefore and deliver it to the respondent. The petitioner, in whose name the vehicle is still registered, avers that the vehicle is in the respondent's possession. I observe that it was

in respect of both vehicles that the petitioner obtained judgment (CIV/T/504/90) for M66,000 plus costs. In this respect, the respondent, despite such judgment, has filed an action (CIV/T/111/92) claiming delivery of the Mercedes or M50,000 in respect of the non-delivery thereof.

As to the stock to be taken over by the respondent under the agreement, the respondent denies that he took over any of such stock. The petitioner, in his replying affidavit. Avers in turn that the respondent did take it over: he refers to an annexure ("D") wherein the respondent apparently valued the stock. No such annexure is attached to the affidavit, however, and another issue remains unresolved. In this respect, the respondent instituted an action (CIV/T/36/92) claiming delivery of the stock, or altermatively payment of the sum of M90,000.00, and obtained a judgment, apparently in default of appearance. The petitioner maintains that summons was never served in that action: he has introduced much hearsay evidence, alleging fraud of service. In any event, he applied for a stay of execution and an application for rescission of judgment is pending.

The respondent has also instituted action (CIV/T/98/92), against Building World, claiming the amount of M84,640.00 as the nett value of his shares in that company on his resignation therefrom. I must confess that an overall view of the actions filed by the respondent is one of some difficulty. It will be seen that the deed of agreement between the parties gives rise to the following mathematical situation:-

Purchase of motor vehicles by respondent	:	M66,000
Purchase of stock by respondent	:	90,000
Repayment of drawings by respondent	:	21,591
Total payment by respondent	:	M177,591
Less value of respondent's shares	:	84,640
Net payment by respondent to petitioner		M92,951

The figure of M93,000 contained in paragraph (F) of the deed of agreement is clearly a nounded figure, that is, of the net balance owed to the petitioner *after the respondent had taken possession of the motor vehicles and stock and paid the amount of drawings outstanding.* Nowhere has the respondent, incidentally, averred that he duly paid the petitioner M90,000 for the stock, or M66,000 for the vehicles. I could well understand, if it is the case that the respondent did not receive the Mercedes, that he should, in the light of the judgment in case no. CIV/T/504/90, seek delivery of that vehicle, of alternatively payment of the sum of M50,000: I do not, however, appreciate, if he did not receive the vehicle, why non-delivery, if advanced as a defence, did not apprently succeed as such in case No. CIV/T/504/90.

The respondent has not, as I have said, averred in these proceedings that he paid M90,000 to the petitioner in respect of stock. I fail then to appreciate why he should institute an action (CIV/T/36/92) for the delivery of such stock, or alternatively payment of the latter sum, much less why he was

granted judgment in the matter, though of course such judgment was in default of appearance.

Further, if the respondent were to receive stock to the value of M90,000, or payment to him of the latter sum, and also delivery of the Mercedes or payment of the sum of M50,000, he clearly would not be entitled to also receive the sum of M84,640, as representing the value of his shares in Building World. It will be seen from the deed of agreement that the latter sum was only to act as a set off against payment by respondent in respect of the *purchase* by him of the stock and the two motor vehicles, not to mention his debt to the company in the amount of M21,591.

The respective court files are nt before me, and it may be that the claim for M84,640 was intended to depend on the outcome of the other claims. Suffice it to say however that the overall picture is not without difficulty and it would seem that consolidation of claims would be advantageous. The three claimes by the respondent arising out of the selling of his shares in Building World total M224,640, though as I have indicated, it would seem that they are overlapping. But that is not the sum total of the respondent's claims against the petitioner. The respondent in fact filed an action against the petitioner (CIV/T/168/91) sometime in 1991, claiming the sum of M707,000 plus interest at 24% p.a. with effect from 12th April, 1991. The respondent refers to the court file in the latter proceedings, but neither that file, nor the other court files, nor even a copy of the pleadings therein were placed before me.

In his replying affidavit the petitioner deposed:

"I specifically state that the amount of R707,000.00 (seven hundred and seven thousand rand) claimed by the Respondent is firstly *not the amount agreed upon* with the Respondent, and secondly it is *not due and payable*.

I also deny the Respondent would be entitled to the payment of the amount R707,000.00 (seven hundred and seven thousand) together with interest thereon at the rate of 24% per annum as this is not the nett value of the company under discussion. In an agreement entered into between the Respondent and I which is annexure "HKI" to the opposing papers, the Respondent himself admitted that the nett value of his share in BUILDING WORLD (PROPRIETARY) LIMITED was R84 640.00 (eighty four thousand six hundred and forty rand).

The agreement I had with the Respondent clearly states "Payment of the said R93 000.00 (ninety three thousand) to be agreed upon on terms: from ARMCO debt worth to him or from Q CONSTRUCTION or any other source".

The real interpretation of the agreement dated 25th April, 1990 is not as stated by the Respondent. When we parted as shareholders in BUILDING WORLD and *other companies* that we were involved in together, the Respondent stated that he

would establish a company in Swaziland similar to ARMCO and selling the same products. We agreed that BUILDING WORLD or I would not become involved in competition with the Respondent. He would in turn pay me from the nett profit he made in Swaziland. This would also apply to the company known as Q CONSTRUCTION. This did not in any way mean that I would pay the net value of the assets of ARMCO or BUILDING WORLD to the Respondent." (Italics added)

I pause here to observe that the deed of agreement of 25th April, 1990 seems to have been misread by the petitioner, point not taken at the hearing. The deed is in manuscript, and reads, in my view, in paragraph (G) thereof, "From ARMCO NETT worth to him....", and not, as the petitioner has put it, "From ARMCO *debt*worth to him." The word "NETT" is twice used elsewhere, thus providing a basis of comparison, in the agreement. In any event, if the petitioner agrees that a debt is owed to the *respondent* from the proceeds of the ARMCO dealings, the point is semantic.

The question is what exactly does the petitioner concede? As Dr. Tsotsi submits, to state that the amount of M707,000.00 is,

"not the amount agreed upon with the Respondent, and secondly it is not due and payable",

and again that such amount, "is not the nett value of the company under discussion",

is not exactly a model of clarity. The pleadings in case no. CIV/T/168/91 are not before me, but Dr Tsotsi has summarised the statement of claim, in his heads of argument, thus:

"(i) The parties purchased goods for resale from a company called ARMCO superlite. They agreed that the nett profits of the business would immediately accrue to the Respondent and the Petitioner in the proportion of 40% to 60%.

(ii) The nett profits amounted to 2 million Maloti and the Respondents 40% share thereof amounts to M800,000.

(iii) According to the agreement between the parties dated 25/04/90 the Respondent was indebted to the Petitioner in the sum of M93,000 payable from his share of the ARMCO transaction profits i.e. M800,000. This leaves a balance of M707,000 due to the Respondent by the Petitioner".

Dr Tsotsi goes on to record in a fourth paragraph that "the allegation by the Petitioner that the agreement between the parties was that the Respondent would pay the Petitioner from the nett profits he made from operations of ARMCO in Swaziland is a distortion of the truth". But I presume that that statement of claim, and that there Dr Tsotsi is but advancing his clients position in the matter, that is a his reaction to the

petitioner's replying affidavit. There is of course no affidavit from the respondent before me to advance such denial, and Mr Edeling makes the point that the respondent has not specifically varified his various claims against the petitioner under oath. But it seems to me sufficient for the respondent to aver that the petitioner is indebted to him in the various amounts: this he has done in his answering affidavit, referring to the particular court file in each case, stating that he will ensure that the court files are placed before this Court.

That then covers the situation concerning the various claims between the parties: The respondent's claims are summarised thus:-

	Proceedings	Subject	Amount
(i)	CIV/T/168/91	Sale of ARMCO goods	M707,000
(ii)	CIV/T/36/92	Puchase of Stock	40,000
(iii)	CIV/T/98/92	Sale of Shares	84,640
(iv)	CIV/T/111/92	Delivery of Mercedes	50,000
			M931,640

The last three claims, relating to Building World may well, is I have indicated, be overlapping, despite the deduction of M93,000 from the "ARMCO nett worth", and bearing in mind also the respondent's debt of M21,591 for drawings. But in any event, the total of the Building World claims represents but 24% of the total of all four claims above. That then was the situation when

the Deputy Sheriff sought to execute the writ of execution of the judgment in the amount of M66,000, plus costs, obtained by the petitioner. The question then arises as to whether the respondent committed an act of insolvency under section 8 (b) of the Proclamation, or alternatively was insolvent. I propose to deal first with the latter aspect. In brief, I cannot see how the petitioner can succeed thereon. Firstly, he blows hot and cold in the matter: while he assests that the respondent is insolvent, in his attempt to establish an act of insolvency under section 8 (c) of the Proclamation, he claims that the respondent is in possession of two vehicles, one, the Mercedes being "worth a substantial amount of monwy," that he is a director of and shareholder in Dynamic Investments (Proprietory) Limited that he has various business interests, that he is conducting a business at Main North I Maseru, that he took over stock worth M90,000 from Building World, that he regularly travels to South Africa on business and that accordingly he "must therefore have assets".

Secondly, Dr Tsotsi points to the respondent's claims before this Court and submits that they are "contingent rights" bringing them within the definition of the word 'property' in section 2 of the Proclamation. Such claims of course would all form part of the respondent's estate and could, if the estate were sequestrated, be realised as to their value if prosecuted by the liquidator, hearing aside the claim for M707,000 the other three claims are certainly contingent' in nature, but whether they involve 'rights' will only be ascertained upon final judgment. In brief, the claims are disputed, there are issues of

credibility involved, and I cannot in these proceedings place a value upon such claims.

The claim for M707,000 however is in a different category. The deed of agreement signed and acknowledged by the petitioner indicates that the ARMCO dealings had a "NETT worth" for the respondent, or involved a debt owed to the respondent. Considering the respondent's specific allegation and reference to the pleadings in CIV/T/168/91, nothing less than a specific categorical denial would suffice from the petitioner. He does not however, aver that he is *not* indebted to the respondent in *any amount*. On the contrary, we have the vague statement that the amount of M707,000 is "not the amount agreed upon with the Respondent" . That indicates that there was an agreement that the respondent was due an amount of money. The petitioner does not stale however what amount was agreed upon. Again he stales that M707,000 "is not the nett value of the company under discussion". He does not stale what the net value is: neither for that matter does he specify the company which is "under discussion". He does stale that the amount of M707,000 "is not due and payable." He does not, however, stale that "the amount agreed upon with the Respondent," whatever that may be, is "not due and payable." Even if that is what the petitioner intended to say, he still did not say when the amount agreed upon would be due and payable.

The petitioner's replying affidavit is clearly reticent about the parties' dealings. That is the course chosen by the

petitioner. If he wishes to rebut the allegation of debt to the respondent, however, he would need to specify such dealings. His replying affidavit falls far short of the necessary detail and indicates, as I have said, that he is in debt to the respondent. The parties' Building World dealings pale into insignificance in contrast with their ARMCO dealings. In particular, the petitioner's three liquidated claims totalling M95,166.04 (plus interest) are but a fraction of the respondent's claim for M707,000. The probabilities are, therefore, that the amount owed by the petitioner to the respondent, in respect of the ARMCO dealings, well exceeds the sum of M95,166.04, and that the respondents assets thus exceed his liabilities. I am not satisfied therefore that the respondent is insolvent.

I turn then to the allegation of an act of insolvency under section 8 (b) of the Proclamation. I have reproduced the contents of the nulla bona return of the Under Sheriff. When the Under Sheriff served the respondent with the Court's order of provisional sequestration, however, he made the following return:

> "..... when I served him this Order of Court *he told me same thing* he told me that he has also got a judgement against the Plaintiff Osman Mahomed Moosa for the sum of M90,000.00 he shown me when I served him writ CIV/T/504/90 he showed me the writ for the sum of M90,000.00 he say he got no assets but if the Plaintiff he can pay him he will try to pay his Judgement." (Italics added)

In addition to the above, the Under Sheriff has sworn an affidavit deposing that

> ".... I have served Mr Hoosen Khan personally a Writ on CIV/T/504/90 and he told me that he has also got a judgement against the Plaintiff Mr O.S.M. Moosa by Order of the Court for the sum of M90,000, CIV/T/36/92. I have read it personally. He says that if the Plaintiff O.S.M. Moosa pays him the M90,000 then he could pay him the M66,000.00 plus costs. I spoke to him in a little English and Sesotho."

Mr Edeling submits that nonetheless the act of insolvency under section 8 (b) is based upon the contents of the executing officer's return, and that return in this case is the *nulla bona* return to the writ of execution. He submits that the wording of the return should be construed by the Court with a degree of sympathy, being in mind the lack of sophistication thereof. If was held in the case of Kader vs Haliman (2) at p32 that where a *nulla bona* return is made, the executing officer *should* state that,

(i) he explained the nature and exegency of the warrant;

(ii) he demanded payment;

(iii) the defendant failed to satisfy the judgments;

(iv) the defendant failed, upon being asked to do so, to indicate sufficient disposable property to satisfy it;

(v) he (the executing officer) had not found sufficient disposable property to satisfy the judgment, despite deligent search and enquiry.

That may well be a counsel of perfection, extending perhaps beyond the requirements of section 8 (b). I observe, for example, that the section requires, no more than that it should 'appear' from the return made by the officer that he did not find sufficient disposable property to satisfy the judgment. The learned author of mass *op cit*. After quoting section 8 (b) of the Insolvency Act of South Africa, section 8 (b) of the Proclamation being in verbatim terms, observed at p 63.

> "The question here is not whether the execution officer has carried out the various duties imposed by the particular law under which he is acting, but simply whether, in terms of the Insolvency Act alone, here quoted, it can be founded that this particular act of insolvency has in fact been committed."

The Deputy Sheriff's *nulla bona* return in the present case states that the "nature and exigency" of the writ "was explained to him" (the respondent). Thereafter the return indicates without expressly stating, that the Deputy Sheriff made demand

of the respondent and that the latter failed to satisfy the judgment. Thereafter again, the return states that the respondent failed to show the Deputy Sheriff *"any* assets to satisfy the demands of this writ". That is lantamount to saying that the respondent failed "to indicate to (the Deputy Sheriff) disposable property sufficient to satisfy (the judgment)". Thereafter again, the Deputy Sheriff does not say "that he *has not found* sufficient disposable property to satisfy the judgment", "despite deligent search and enquiry". But then it was held in the case of Estate Logie vs Priest (3) that it is not necessary that the executing officer should actively search for disporable property sufficient to satisfy the judgment, the mere failure to find same being sufficient. The is how 8 (b). it sufficient, as I have indicated, "if it *appears* from the return ... that he (the executing officer) has not found sufficient disposable property to satisfy the judgment". In the present case the Deputy Sheriff stated.

> "...but the defendant he got no assets, he got no any thing."

That statement, coming after the statement, "Defendant failed to show me whether he has any assets to satisfy the demands of this writ," indicates that the Deputy Sheriff took matters further and looked for disposable assets. Certainly I can only say that it *appears* from the return that the Deputy Sheriff" has not found sufficient disposable property to satisfy the judgment." I agree therefore with Mr Edeling's submission

that the *nulla bona* return is, on the face of it, a valid return and that *prima facie* an act of insolvency was committed. Thereafter the onus falls upon the respondent of proving the contrary : see the case of Van Vuuren vs Jansen (4)

In this respect, there is the affidavit from the Under Sheriff. The petitioner submits that such affidavit may be false. He claims indeed that the respondent sought to influence a Deputy Sheriff in the matter of a false affidavit in case no CIV/T/36/92, involving the default judgment against petitioner in the amount of M90,000. But the allegations are hearsay in the matter.

In any event, for my part, I observe that the Deputy Sheriff's affidavit in these proceedings is somewhat vague. He does not stale specifically that *when* he served the writ of execution on the respondent, on 24th February, 1992, the respondent *then* informed him of the judgment for M90,000 in CIV/T/36/92. The word "and" in the phrase, "and he told me that he has also got a judgment ...", no doubt suggests that the service of the writ and the respondent's statement were contemporaneous. Nonetheless, in the circumstances of this case I would have expected the Deputy Sheriff to have stated in categorical terms that the respondent showed him the judgment in CIV/T/36/92 on 24th February, 1992, when he served the writ of execution upon the respondent.

Furthermore, the Deputy Sheriff's affidavit does not answer the question if he thought fit when serving the order of provisional sequestration upon the respondent to record that the latter had shown him a judgment, for a considerable sum of money, against the petitioner, why he had not seen fit to record the "same thing" when serviing the writ of executiion. In brief, if the Deputy Sheriff regarded the possession of the judgment for M90,000 as being of some value, sufficient for him to make record thereof when he served the order of provisional sequestration, why did he not record it when he served the writ of execution: why indeed did he then make a *nulla bona* return, and why did he so emphatically record, "Defendant he got no assets. he got no any thing"?

To say the least of it, on the papers before me, the suspicion is there that the respondent showed the Deputy Sheriff the judgment for M90,000 only when the latter served the order for provisional segrestration. I am inclined to believe that the respondent, not being aware of the legal implications, simply resisted execution, by decllining to show any assets to the Deputy Sheriff, in the belief that he could thus frustrate the pretitioner, then a plaintiff: thereafter I suspect that when the order of provisional seguestration was served upon him, it was only then that the legal implications crystallized and the respondent revealed the judgment for M90,000.

This of course is speculation upon my part and such issues could only be resolved by viva voce evidence. In the view I take

of this case, that course will not be necessary. Mr Edeling submits that, in any event, execution of the judgment for M90,000 had been stayed, that an application for rescussion thereof was pending and that accordingly that judgment did not constitute "*disposable property*" for the purposes of section 8 (b). I observe that in the case of Mostert No vs Van Hirschberg (5) it was held that where a debtor produces to the executing officer sufficient incoporeal assets, such as book debts, no act of insolvency is committed. I imagine however that in such a case the book debts are undisputed. The question remains whether the property is *disposable*, that is, whether it can be sold or auctioned forthwith so as to satisfy the judgment.

When it comes to a judgment in which the petition itself is based, where it is a default judgment and the petition is filed before the time within which to apply for rescission has expired, and the respondent states that he intends to make such applicant, the Court may postpone or even dismiss the petition: see the case of Benade vs Boedel Alexander (6) at p655. Again where an appeal has noted against a judgment, and a stay of execution is in force, such judgment may not form the basis of a creditor's petition: see Mars *op. cit. at p 84. In such cases the creditor's claim is dependent on a contingency and is uncertain and hence cannot be said to be "liquidated". Similarly, I do not see that such a judgment, obtained by a respondent to a petition in sequestration, is disposable. Mr Edeling submits that in the present case if the Deputy Sheriff were to attach the judgment for M90.000 and attempt to sell it on auction, that would be unlawful, in view of the stay of execution. If the auction was*

expressly effected subject to such stay and the application for rescision, I cannot see that any such sale would be unlawful. I agree however with Mr Edeling that any such auction would be the subject of an urgent interdict. I observe that in any event the value of the judgment under such restrictive circumstances would be negligible and even if it could be said to be disposable, and I am satisfied it could not, I am also satisfied that it could not be said to be sufficient in value to meet the petitioner's judgment of M66,000, plus interest of approximately M85,000. I am accordingly satisfied that the respondent committed an act of insolvency.

Two aspects remain. Under section 12 (1) (c) of the Proclamation the Court may now sequestrate the estate of the respondent if "satisfied that ..... there is reason to believe that it will be to the advantage of creditors". The respondent desposed that "the Petitioner is the only creditor of the Respondent and there are no other creditors". There is no averment from the petitioner in his replying affidavit to the contrary. The law of insolvency was surely developed to protect creditors and of course their debtor, to prevent a race of the swiftest and preserve equality among creditors, on the basis of the maxim *par est condicio creditorum.* I cannot see how those considerations apply when there is but one creditor.

The onus is on the petitioner in the matter, even though an of an act of insolvency has been committed (Leandenhall Meat Market vs Hartsman (7). Nonetheless, it was held in the case of Cohen vs Jacobs (8) that where an act of insolvency is

proved, very strong grounds would need to be adduced to cause the Court even to doubt whether sequestration would be to the advantage of creditors: indeed in the case of a nulla bona return, it almost necessarily follows that sequestration will be to the creditors' advantage. Undoubtedly creditors must be taken to know better than the Court whether sequestration would be to their advantage or not, and again each creditor surely knows what is best in his own interests: see Dunn & Co vs Repman (9).

But it has nonetheless benn held that the expression "to the advantage of creditors" means to the advantage of all the creditors, or at least the general body of creditors, and not the advantage of a mere majority of them: see e.g. the cases of in re Provincial Trading Co (10) and Lawclaims (pty) Ltd vs Rea Shipping Co. S.A. (11) at p 755. Those decisions tend to indicate that the insolvency legislation was intended to benefit a body of creditors rather than a single creditor. Nevertheless under section 4 (3) of the Interpretation Act, 1977, "words and expressionsin the plural include the singular", and strictly speaking it seems that sequestration can be ordered for the advantage of a single creditor: see e.g. the old case of Kahn vs Shabodien (12).

I have little doubt that the petitioner considers sequestration to his advantage, hence this petition. But the question then arises as to whether such is a *bona fide* advantage, as that I believe is what the legislature had in mind. Suffice it to say that I am not satisfied that sequestration would be to the *bona fide advantage of the petitioner*.

in Lesotho at some time within that period, that is, for the purposes of section 150 (1) (b) of the Proclamation.

As to costs, I am not satisfied, as I have said, as to the *bona fides* of the petition. Nonetheless, I am also satisfied that the respondent committed an act of insolvency. In all the circumstances therefore, I consider it equitable that each party should pay his own costs.

Accordingly the rule *nisi* is discharged, the petition is dismissed and I order that each party pay his own costs.

Dated this 19th Day of September, 1995.

B.P. CULLINAN

(B.P. CULLINAN)

CHIEF JUSTICE