CIV/APN/197/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

LESOTHO BANK LIMITED PETITIONER

and

MPAKA JEREMIAH MPAKA RESPONDENT

REASONS FOR JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 5th day of March 2001

Below follows full reasons to my decision of the 12th October 2000 except that for convenience pages 15 to 19 will be by way of a repetition of those reasons to the ruling that I made then.

On the 13th day of June, 2000 my Learned Brother Maqutu J granted to Applicant an order of provisional sequestration returnable on the 7th August 2000. The application was argued later, after filing of opposing papers and a few postponements. The argument resulted in my confirmation of the provisional orders on the 12th October 2000.

The Petitioner Bank (the Bank) had on certificate of urgency applied for the following orders:

1. That the Respondent be placed under compulsory sequestration in the hands of the Master of the High Court.
2. That the Provisional Order of Sequestration, together with a copy of the Notice of Motion, Affidavit and annexures be served on the Respondent.
3. That the Oder be published forthwith in the Government Gazette and a Maseru daily newspaper.
4. That the MASTER be directed to appoint STEFAN CARL BUYS as the Provisional Trustee with leave in terms of Section 18(3) of the Insolvency Proclamation No. 51 of 1957 under the direction of the MASTER to dispose of any movable or immovable property forming part of the Estate of the Respondent, and/or the further powers set out in the aforesaid Proclamation.
5. That the costs of this Application be costs in the Estate of the Respondent.
6. That a Rule Nisi be issued calling upon the Respondent and/or interested parties to show cause on the 7th day of August 2000 why this Order should not be made a Final Order of Court.

To the founding statement was attached the following documents. First, a resolution of the Board of Directors of the Bank of the 12th April 2000 (annexure "A"). Second, a memorandum of loan agreement entered into between the Bank and the Respondent dated the 22nd day of December 1992 (annexure "B"). Third a letter of demand from the Bank to Respondent dated the 14th April 2000 (annexure "C"). Fourth, a current open market valuation of Respondent's bonded commercial property at Ha Marakabei, Butha-Buthe (annexure "D"). Fifth, a current open market valuation of Respondent's residential property at Ha Mopeli, Butha Buthe. And finally financial year statement for the year ending 31 March 1995 of the Respondent's business known as Cindi Supermarket and Bottle Store.

A notice of intention to oppose was filed by the Respondent. This notice was

followed by a notice of anticipation of return date which was supported by an affidavit. It was only sufficient to note that the matter was not argued on the appointed date but about there months later. This Court was told that this had been a a result of a certain negotiations between the parties which fell through. And such negotiations having continued even after the launching of the petition.

What was important in the supporting affidavit of the Respondent's notice to anticipate was that besides the twenty three (23) paragraphs contained therein which dealt with the merits certain points-in-limine were raised in paragraph 3 thereof as follows:

(a) Lesotho Bank Limited has no *locus standi* to petition for sequestration of any estate inasmuch as I have had banking dealings with your petitioner herein.

(b) There is no urgency in the matter which warrants to have come to Court *ex parte.*

(c) The provisional trustee has conflict of interest in that the petitioner his firm to prosecute proceedings against me and also recommend him to be appointed trustee.

(d) the provisional order has deprived me of my rights without hearing.

(e) in terms of sections 165 and 166 of the Labour Code this trustee has no right to work in Lesotho.

The Bank's replying affidavit by Mr. Jan Hendrick Vos ran up to twenty six (26) paragraphs to which was attached the following documents: First, ten (10) pages of bank statements of Cindi Supermarket (JHV 1) page 85-94. Second, a registered and lease document of Respondent's plot 33061-001 situated at Marakabei - Malere Butha Buthe Rural Area (AR "1"). Third, a Deed of Hypothecations in favour of the Bank (7th May 1986) securing a loan of M70,000.00 (AR"3") . Fifth, advise by letter dated 9th December 1987 from Attornevs Hlaoli & Co. to the manager

Lesotho Bank, that Deeds of Hypothecations referred to earlier have been registered (AR "6"). Sixth, a Deed of Hypothecation dated 23rd November 1987 securing a loan of M50,000.00. Seventh, a Deed of Hypothecation dated the 27th September 1993 securing a loan of M590,000.00. Eighth, a letter of demand dated 14th April 2000 to Respondent from Petitioner Bank's deponent CJH Vos - senior manger) for a total of M2,335,954.223 arising from four loan accounts ending that:

> "Should you fail to respond to this letter of demand we will list your name with the credit bureau".

Ninth, a request for default judgment by Cecil Aaron and Sons against Cindi Supermarket (CC 52/97) (AR "8") for the sum of M4,244.44. Tenth, a warrant of execution against property by Cecil Aaron and Sons against Cindi Supermarket for the sum of M12,567.03. Eleventh, three cheques drawn by Respondent in favour of Cecil Aaron & Sons endorsed "Refer to drawer", totalling M8,071.09. Twelfth, a Warrant of Execution against property by Theba Enterprises against Cindi Cash Store in the sum of M25,877.96 (AR "9"). Thirteenth, a warrant of execution against property by Brown Cash and Carry (Pty) Ltd against J Mpaka Ha Cindi Supermarket in the sum of M74,695.55 with interest at the rate of 18.25 per annum from 30th June 1999. Finally, three cheques in favour of Brown Cash and Carry from Respondent totalling M79,179.88 endorsed "Return to Drawer".

It became common cause that the Respondent had been the Bank's customer since about 1980. Certain overdraft facilities were extended to the Respondent who was running a trading store and a bottle store. Things appeared to have got out of hand in the otherwise smooth arrangement, there were two written argument fixed term agreement about terms or repayment schedules in about 1992 allowing for discharge of the loans in a seven (7) year period which allowed for repayment at the rate of M27,000.00 per month. This was apparent from continuing overdraft facilities which were obviously interest bearing as was to be expected. The Bank in

the end (after the agreed period) felt that the two long loans should have been paid in full. The consolidated loans had escalated to the sum of M1,479,510.00. The interest factor as aforesaid was recurring so rapidly on a daily basis to the detriment of all concurrent creditors. The anxiety and the need to take proper remedial steps was beyond question when it became was obvious that the Respondent was not taking proper action.

At the time of the letter of demand there had been about five properties or bonds used as collaterals as has been detailed in paragraph 7 of the founding affidavit. It was in most cases one bond over the other. With what is normally called an economic lapse overheads and costs must have climbed over and beyond the securities. It was a deterioration of all sorts in which the bank was being severely prejudiced business wise and there being all appearance that the Respondent did not seem to cope; despite various attempts at rescuing Respondent in the years 1995 and 1996. This resulted in tension because as the Bank said in paragraph 15

> "The Respondent simply stopped servicing the aforesaid loans and his various overdrafts accounts did not receive much better attention."

The Bank then thought that it would be no surprise to the Respondent that legal steps ought to be taken which he was not responding to requests to sought out his financial affairs and when all loans should have been paid in 1999. Then lately the Bank has struggled to get any reaction at all from the Respondent and simply chose to ignore the last letter of demand directed to him altogether. See Annexure "C".

The Bank then perceived that with accumulating debt in the circumstances where Respondent continued to trade he had become was insolvent and was trading in insolvent circumstances to the detriment of the Bank and other creditors such Cecil Aaron & Sons and Browns Cash and Carry and Thebe Enterprises.

These are part of what the Bank said were unsatisfied judgments against Respondent which could not be executed as a result of frustrations of all kinds which resulted in hopelessness. This was coupled with what the bank alleged the Respondent obstructed execution and had hidden assets from attachment to the detriment of his creditors. It concluded those that was further proof a further judgment against Respondent and attempted execution would bear no fruit. The Bank has made a summary of unsatisfied warrants of execution in paragraph 3 of its deponent affidavit's.

The Bank said it had been aware of an avalanche of unupdated valuations and financial statements of the Respondents business despite demand. This (if demands were satisfied) would have gone a long way and enabled the Respondent to assist the Court in the face of overwhelming indication that he was insolvent. The valuation that the Bank is in possession of plot no. 33061-001 of August 1995 indicating M990,500.00. And that of plot no. 31074-001 indicating M51,100.00. The Bank has no reason to believe that the respective values of the properties had become less than what they were in 1995. On the contrary their values could very well have increased since then "albeit only slightly."

The Bank alleged that the Respondent had on occasions been unable to buy for cash from certain suppliers who refused to release stock unless paid in full. This was so despite that Respondent could not have stock valued at less than M301,750.00 judging from his standing in March 1995, together with the value of his property it could amount to M1,341,600.00. The securities represented by mortgage property amount to M810,000.00. This would then leave a free residue available for distribution amongst all the concurrent creditors in the sum of M532,600.00. If the amount the Respondent was indebted to the Bank was M2,335,954.00 and real security was only up to M810,000.00 this meant that the

unsecured position of the Bank's indebtedness was in the sum of M1,525,954.00 in respect of which it was a concurrent creditor as it was not the only creditor as aforesaid.

The Bank has emphasized the contents of its deponents paragraph 31 which I though deserved a full quotation much as it was clearly avoided in the Respondent's answer. The statement in paragraph goes as follows:

> "During an inspection of business premises of the Respondent it was found that all sign writing in regard to CINDI SUPERMARKET AND CINDI LODGE AND OFF SALES have been removed and replaced with CINDI HOLDING (PROPRIETY) LIMITED consequently your petitioner alleges that the Respondent is attempting, in the least to defraud, mislead or avoid creditors' messengers of Court/Deputy Sheriffs have reported that the business against which judgments have been granted does not exist and they were not allowed to attach so called assets of CINDI HOLDINGS (PROPRIETY) LIMITED. The Respondent has therefore committed another act of insolvency by changing the name of his business purporting to place them into the name of another entity."

As I observed the above harmful statement was not issuably addressed in the Respondent's answer.

The Bank therefore submitted that if sequestration of the Respondent was proceeded with a reasonable dividend would accrue to Respondent's concurrent Creditors whose interest generally it was for the Respondent's estate to be sequestrated. This would enable the Trustee to take control of the Respondents business affairs and to protect stock-in-trade which consisted of relatively small items which could be disposed of quite easily in both business of the Respondent if

requisite steps were not taken with expedition. A trustee would take care of the assets of the Respondent bring about a proper liquidator to achieve the best possible value. Finally to distribute in an equal and fair manner amongst creditors to bring about a reasonable dividend if sequestration is done orderly.

I had to be satisfied that before finally sequestrating the Respondent's estate that firstly the petitioning creditor (the Bank) has established against the Respondent a claim of the nature and the amounts which gives it *locus standi* to sequestrate. Secondly, that he Respondent was in fact insolvent or had committed an act of insolvency and finally that there was reason to believe that it will be to the advantage of the creditors of the Respondent if his estate was placed under sequestration. See Mars THE LAW OF INSOLVENCY IN SOUTH AFRICA, 7th edition at pp 95-96. See also JHATAM AND OTHERS v JHATAM 1958(4) SA 36(H) at 38 where Holmes J dealing in the main with a defence that the petitioners claim would have been prescribed endorsed the above requirements citing section 10 of Insolvency Act 1943 of South Africa. See again ISMAIL v MOOSA 1954(1) SA 441(W) where once it was established that the Respondent's liabilities exceeded his assets the Court felt the above requirements were satisfied in terms of the said section 10 especially 10(c) that and then it became "..... of opinion that *prima facie* there is reason to believe that a sequestration order will be to the advantage of creditors of the respondent ....." It was the case herein that in an overwhelming manner it was demonstrated that the Respondent's liabilities exceeded his liabilities. He was also unable to pay his debts, he was unable to service his debt with the bank and in terms of what was contained in paragraph 31 of the Bank replying affidavit he was involved in an act of insolvency.

I agreed with respect with the Bank's submission that it had in its founding and replying affidavits established that the Respondent had committed acts of

insolvency and was in fact insolvent. This was in addition to the inability of the Respondent to take the Court into its confidence by pointing out a basis upon which this Court could make a finding that the Respondent's estate was indeed solvent. This the Respondent had to do in order to displace the *prima facie* view held by the Court that his estate was insolvent.

The Respondent has on the contrary contented himself by making unsubstantiated and sweeping statements about the following issues. First about the extent of his indebtedness to the petitioner Bank. Towards this he started by admitting that he "may be" indebted to the Bank as he has had commercial dealings with it. He however denied that he was indebted in the amount stated and the Bank "is put to the proof thereof": (At paragraph 6 (a) of the answering affidavit). Respondent admitted that some securities were held by the Bank. And -----:

> "But also state that the debts in respect of which securities were held have been paid but am unable to agree with Lesotho Bank on what balance if any is left."

Res ipsa loquitur. This he says in response to a serious allegation that he was owing M2,335,954.23 (see paragraph 3 of petition).

Secondly, when it is put to him Respondent he is insolvent he is satisfied with saying that he denies that he is unable to pay his debt. That all his debt get paid as soon as he knows how much is involved. He charges the Bank with being unable to justify the amount he owed it. This was while the bank was saying that quite apart from the said loans the Respondent also operated overdraft accounts with the Bank which in its words "escalated alarmingly over the past year or two."

Thirdly Respondent's reply to that his creditors will benefit from his estate

if sequestrated is a rambling statement in paragraph 4 of his answering affidavit that:

> "Sequestration proceedings will or have only succeeded to unfairly bring me under without a hearing but it is not and cannot be in the interest of creditors if some individual with unknown qualifications is given trusteeship of some more than 100 estates let alone a foreigner who has no assets in this country."

Judging from this statement quoted immediately above I agreed with Counsel's submission that it was an attempt to disguise the lack of substance to his averments in the answering affidavit in an emotional and unsubstantiated way be used insulting remarks about and attacked the integrity of the proposed liquidator. It is such outbursts that would not sway the Court.

I concluded that the Bank had proved that it had a liquidated claim against the Respondent. It was not denied that the Petitioner Bank had considered Respondent's overdraft facilities into two long term loans since 1992 and that Respondent undertook to pay in monthly instalments of M27,000.00 per month over a period of seven years. All that the Respondent said was that he has always made regular payments into his accounts with the Bank. And "All that is left is for the said Lesotho Bank and yourself to agree on the exact balance "if any". That was not good enough.

I accepted the Bank's version that it was being owed in a huge way and if the loans had in fact been paid the Respondent would not have conceded that there was a balance outstanding. On the Respondent's, own version there has not been full and regular payment of instalments. I accordingly accepted the Bank's version to the effect that the Respondent was indebted to it in the sum of M2,335,954.33 when there was nothing of substance that gainsaid the allegation. Moreover the

Bank proved by bank statements annexed as "JAV "1" that it was owed.

I agreed with respect that it was trite and accepted law that a debtor who alleges that he has paid or discharged his indebtedness bears the onus to prove and establish that. One would have expected that the Respondent should have been in a position to substantiate his alleged payment of the said instalments by attaching to his affidavit either receipts for the monies so paid or copies of cheques or deposit slips with which such payments had been made. He did not do so. He evaded addressing the issue. He did not attempt to prove any such payments. He did not explain why he did not.

At the risk of repetition I would say that the Respondent's reply t the fact that there was deterioration in the accounts due mainly to his indiscipline in controlling the accounts was met with Respondent's response in paragraph 13 of his affidavit that charges the Bank with inability to justify its final figures. And having avoided "working out through our experts our books and calculations" Respondent then proceeds to attack the integrity of the Bank and made the rather remarkable statement that it was the Bank's intention to sabotage the economy of Lesotho. This scurrilous attack as the Bank called it can only serve to disguise the admission that the Respondent was indebted to the Bank and was unable to pay his debts because of his lack of discipline and control which has resulted in the indebtedness to the Bank being out of control because it has escalated "alarmingly".

The Bank submitted that it was in the nature of the onus that a respondent has that if he is wrongfully accused of being indebted to a petitioner such as the Bank that he is to show that he has paid or discharged his indebtedness. One would have expected the same from the present Respondent. That is to show how the debt if it is denied has been discharged. This was more so when faced the

computation of statements of the Bank's claim as shown in Annexure "C". If it was true that the letter was reacted to the Respondent should have considered it necessary to attach his attorney's reply showing the basis of his attack or denial to Respondent by way of showing or referring to cheques receipts and bank statements. If the Bank's postings or entries were supposedly wrong Respondent was to quickly indicate so. The Respondent as I also concluded had however for one unexplained and undisclosed reason done none of these things. He was not candid to this Court. Alternatively in the light of admission and in the face of overwhelming facts against him one would be unfair to expect him to do better than what he did. That is not to be as reticent as possible most of the times.

It was apparent from the Respondent's affidavit that he was not prepared to accept what the Bank states in the outstanding amount could only be indicative of his attitude. He will deny and he will not place evidence to Court what the Bank says which is part of his onus. It was inevitable in the circumstances for the Court to accept that in the premises Respondent was hardly in a position to attack the accuracy of the petitioner's claim nor put up his own version. It was correctly admitted that therefore in the premises the Bank has clearly established that it had a valid and liquid claim against the Respondent and that it had the necessary *locus standi* to bring the application.

It was submitted that the Respondent was insolvent. In paragraphs 20 to 27 of the Bank's founding statement it gave an explanation of the assets of the Respondent. This indicated his properties with values attached thereto as determined by the Respondent's own valuation in respect of fixed properties. As far as the stock was concerned the Bank attached it to the value which the Respondent's own book keeper placed thereon in final statements.

In paragraph 17 of his opposing affidavit the Respondent alleged that the prices were no much higher

> "Making it more reliable to do business with me. Respondent however did no untrue any suggestion as to how high the prices would be. This thereby show failure once again to take the Court into his confidence as he was duty bound to do. At the same time in the paragraph following the Respondent mentioned the downturn in the economy which could not have made things as attractive as he previously suggested. This solvency of his the Respondent proclaims "despite difficult economic circumstances."

I have already concluded having already found on a *prima facie* basis, that Respondent was insolvent. And where despite allegations of insolvency made against him, one would have expected Respondent if he was indeed solvent to have with all eagerness shown the Court the basis of his allegations. I observed that he made no effort whatsoever to rebut the *prima facie* finding already made against him and confine himself to sweeping and unsubstantiated averments about his solvency.

One of the things that Respondent should have done in the face of allegations that his creditors were under threat, would have been to identify the creditors, indicate their respective indebtedness or extent thereof. In addition he should have responded in a direct way as what his attitude was to a particular creditor of those and all those specified by the Bank. His failure to do so can only be attributed to his unwillingness to take the Court into his confidence. In the circumstances the Court was left with the Bank's substantiated allegations that the Respondent was insolvent.

If the Respondent's allegations that he is fully solvent by referring to other

properties which he owns which he says are of a high commercial value he should have gone further to mention the values of properties. In addition it would be of great help to indicate whether the properties were free hold and without any encumbrance if that was the case. Having failed to do so the *prima facie* view held regarding his solvency can only be confirmed because it remains unrebutted. This is bolstered by the Respondent's continued unwillingness to confide in this Court. I would have no doubt in concluding that the Bank has succeeded in establishing that the Respondent was indeed insolvent.

The Bank has done more than enough to indicate that the Respondent is a large debtor. In any event authorities abound that it is not necessary that direct evidence of a respondent's indebtedness be placed before a Court. It is enough if facts are proved from which the inference of insolvency is fairly and properly deducible. As far as a debtor is concerned the best proof of his solvency is payment of his debt. It is consequently significant if he fails to pay his debts. In that regards Counsel referred me to Mars: THE LAW OF INSOLVENCY 7th Edition pp 104 and PRUDENTIAL SHIPPERS SA LTD v TEMPEST CLOTHING CO. (PTY) LTD & ORS, 1976(2) SA 856 W.

It was submitted that in the present case sufficient evidence had been placed before the Court to deduce that the Respondent was insolvent. The Respondent had not discharged its indebtedness and neither had he offered to do so. Nor had he placed any evidence before the Court from which it could be inferred that the Respondent was not insolvent.

I agreed with respect that in the premises the Bank had succeeded in establishing that the Respondent was indeed insolvent. All that remained would be to investigate whether it would be in the interests of the Respondent's creditors if

his estates was to be sequestrated. It was submitted that having regard to the financial position of the Respondent that a sizeable dividend would accrue to his creditors should his estates be wound up. The fact that the Respondent was in possession of further assets in the form of residential and business property could only save to improve the dividend. See THE LAW OF INSOLVENCY IN SOUTH AFRICA (supra) p. 107 and MAMACOS v DAVIDS 1975(2) PH A 91(c).

There was evidence that the Respondent did not fulfill judgments already granted against him as clearly pointed out which included unsatisfied judgments of execution in certified cases what the Respondent did when this was put forward was to simply deny the allegations without saying whether he was insolvent in litigation against the plaintiff and judgment debtor, what stage the litigant was and where there were judgments already entered whether he had paid or discharged the judgment debt. It was in the circumstances submitted that the Respondent was once again "cagey" with this Court not to represent in a direct and forthcoming manner. Probabilities were overwhelming therefore such were debts against him. And furthermore that in the premises it would be in the interest of other creditors of the Respondent as well as the petitioner Bank that a trustee be appointed to investigate the affairs of the Respondent. I was referred to THE LAW OF INSOLVENCY IN SOUTH AFRICA (supra) p.108 and various cases referred to in the relevant footnotes.

I agreed further that it would be unfair to certain creditors if those creditors who have already obtained judgment against Respondent went along and sell his assets in execution. In this manner certain creditors would be preferred at the expense of others. In the premises I concluded that it would be in the best interests of the general body of creditors should the estate of the Respondent be sequestrated.

I decided the points-in-limine by saying something firstly about *loco standi.* When admission was made firstly by the Respondent that he dealt with the Petitioner as a customer and that he was indebted to the Petitioner in a demonstrable way I do not see how *loco standi* could be questioned when it was undisputed that there have been dealing with Lesotho Bank and then Lesotho Bank Limited which is, as said from the bar, a successor to Lesotho Bank unless something more was shown by Respondent.

On urgency I said it may be that Respondent felt that he should have had notice of the application in which case he still must have spoken about and shown prejudice which was said to have been caused by the application having been made *ex parte.* The prejudice in the way the application was served. That is when the *rule nisi* had already been issued. But urgency was justified by Petitioner when it showed that Respondent had gone about to change the nature of his business in a way that could suggest most probably an intention to divert the activity or dissipate the commercial assets to the prejudice of creditors. When this was unanswered there was a proper case for having moved the case *ex parte* without notice for the *rule nisi.*

On that question of conflict between provisional trustee and his firm of attorneys I spoke about the remote way in which the likelihood of conflict of interest was said to have been suspected between the appointed firm and the appointed trustee. I felt that the Respondent's argument was not persuasive enough in the light of and in the context of the Petitioner having in fact been represented in these proceedings by the firm of T. Matooane & Co. It may be, objectively, having regard to the resolution of the Board and annexure "C" that conflict would be suspected but it is no easy matter unless there is more of a demonstration of this likelihood because the principle is that the Master exercises control over the liquidation of the estates such as the instant one. The participation by the creditors,

the respondents such as the present one in respect of accounts, administration of accounts, closing of the statement, inventories lessens the likelihood of that conflict. Unless the complaint has to do with the integrity or honesty of a trustee which is a serious allegation which the Court cannot be said lightly and which when seriously suggested the Court will take cognisance of it by way of a proper investigation.

There was an allegation that there had been absence of hearing, when the Respondent said he has not been given a hearing. I felt this point was unfounded and had not been seriously demonstrated. As the law stands it is the practice to issue *rule nisi* originated by *ex parte* motions which are premised on urgency which I have already commented about. It is rare that on confirmation of an order a respondent will not have been afforded a hearing to be heard or an opportunity. In such a rare case one would correctly speak of a hearing not having been afforded and the final rule being a nullity. That would be where for example there has been no service of *rule nisi* at all.

Indeed one cannot suggest that the procedure of provisional liquidation will not spell hardships to the Respondent. But it is a procedure which is recognized and still stands together with our rules of Court. In some countries such as South Africa as I have been informed the South African Law Commission is looking for ways of changing the procedure of interdicts and notices on respondents in liquidation or insolvency cases. This is being done presumably to ameliorate certain difficulties or hardships. May be this question of *ex parte* procedure is one of the issues that are being addressed by the said Commission.

On this question of the section 165 and 166 of the Labour Code whereby there is an objection to the appointment of the Trustee, in way it has been put, my comment would be that the labour regulations regulating labour issues cannot

invalidate authority given by Court to a Legal Practitioner admitted in this Court when being appointed as a Trustee. Alternatively the trusteeship relationship or such a status as this one in a liquidation situation is not a master and servant relationship. One can arguably be appointed or an appointment can arguably be made in a situation such as this one where Mr Buys is appointed by virtue of being an Attorney not as being an employee nor an employer.

On the merits I feel that the petitioner has proved a claim which was not denied that the Respondent has committed acts of insolvency. He has failed to discharge the onus of rebutting a *prima facie* case mainly that his estate was insolvent and was not paying its debts. I did not see any dispute of fact where the indebtedness to the Petitioner was not challenged. It is not a dispute of fact that the Respondent merely said that the Petitioner should have filed an action as against going for liquidation procedure.

Again on the vexed the question of appointment of Mr. Buys, the allegation is made against him about his having dealt with certain estate or estates in a dilatory careless or negligent manner. This does not take into account that the trustee is effectively speaking a servant of the Court and of the Master of the High Court. The administration of an estate is under the supervision of the Master. These allegations against Mr. Buys are scanty and are unsubstantiated. I would loath to act on the allegations which appear on their face to be vague as those. If there was more or enough evidence for example of the Master or from people intimately associated with the alleged badly dealt with estates I would perhaps have been persuaded to consider this matter. It is unsafe for the Court to lightly take allegations that border on or are disguised charges of dishonesty against Legal Practitioners not least on anybody or a citizen. It would be interesting as to how the Master dealt with these complaints against Mr. Buys if there were such

complaints.

I had no hesitation in confirming the rule with costs to the estate. I have already dismissed the points-in-limine with the comments I have already made.

T. Monapathi
Judge

For Applicant : Mr Van Heerden - Instructed by Du Preez Liebetrau, Maseru

For Respondent : Mr T Hlaoli

Judgment noted by : Mr D Metlae