necessity for making out the second list, unless there is good cause for thinking that the present holder of the shares will not be able to pay what is due in respect of them.

The result is that the list must be altered in the way recommended by the Master—namely, that the column headed "amount due" is struck out; S. Cotzias' 1,000 shares are transferred to and put under the name of P. Cotzias, so that the latter will be put on the list in respect of 1,500 shares, and the name of S. Cotzias will be struck out. Subject to these changes, the list of contributories is confirmed. As regards costs, an arrangement has been made that the two contributories, P. and S. Cotzias, for whom Mr. *Roos* appears, shall be entitled to their taxed costs out of the estate. The taxing officer will consider the points raised in the Master's report.

Attorneys for Contributories: *Wagner & Klagsbrun.*

[Reported by *Gey van Pittius*, Esq., Advocate.]

MOOSA AND OTHERS v. FOYER.

1913. *January* 30. GREGOROWSKI, J.

Insolvency.—Voluntary surrender.—Notice of application for compulsory sequestration.—Interests of creditors.

The Court will permit a creditor to anticipate an application for the voluntary surrender of an estate as insolvent where a large majority of the creditors consider such course to be in the interest of all the creditors.

Return day of a rule provisionally sequestrating the respondent's estate. Respondent had published notices of intention to surrender his estate on February 6th, 1913, and applicants obtained a provisional order of sequestration on January 16th, anticipating the surrender. According to the schedules of the respondent his liabilities amounted to £424 13s. 10d., and all the creditors, with the exception of one, whose claim amounted to £1 1s. 0d., approved of the application. Further facts appear from the judgment.

B. A. Tindall, for the applicants, moved that the rule be made final.

T. J. Roos, for the respondent: Unless applicants can show that the additional expenses in making their application were justified they are not entitled to the order; see *Edwards* v. *Oldbury & Smith Bros:* (1912, T.P.D. 671). The onus rests on the applicants to show good cause for anticipating the surrender.

B. A. Tindall, in reply: Applicants have shown a good cause. The business of the respondent has been closed, and that may result in the goodwill being lost. All the creditors, except one, are in favour of the course adopted by the applicants, and the Court must look at the interests of the creditors.

GREGOROWSKI, J.: In this matter the whole question is really one of costs. The petitioners are the principal creditors in the estate of the respondent, and they applied for compulsory sequestration of the estate on certain grounds which are mentioned in the petition. They set forth that the respondent had given notice of his intention to surrender his estate, and that the application would be made on the 6th February, but stated reasons why they considered that the date of the sequestration ought to be anticipated, and the estate compulsorily sequestrated and a provisional trustee appointed to take charge of the assets of the business. The petition states that the assets consist of the stock-in-trade in the respondent's store on the farm Windheuvel, in close proximity to the Windheuvel Gold Mine, and outstandings due by mining employees and others who are not permanently resident in the district. Reference is also made to another asset, being a stand on the farm Windheuvel. The petition goes on to state that the business had been closed, and that on account of the closing of the store the stock had been deteriorating and the soft goods would be destroyed by moths, and that the goodwill of the business would be damaged owing to the closing of the business and the customers going elsewhere. The petition further alleges that a genuine offer had been made for the purchase of the business as a going concern, and that it would be to the interest of creditors that a provisional trustee should be appointed, so that he could dispose of the business as a going concern. A provisional order was granted, which the applicants took at their own risk. On the return day the respondent opposed the confirmation of the order on the ground that he had made application for the voluntary surrender of his estate, and that it was in the interests of the estate that the provisional order should be set aside, and that he should be allowed to surrender his estate volun-

tarily on the 6th February. The extraordinary feature in the application is that all the creditors, with the exception of one (who is a creditor for £1 1s.), concur in the action of the principal creditors in obtaining the compulsory order. In a case of this kind the respondent has very little interest left in his estate. He is insolvent, and is preparing to surrender his estate, and it is really only the interest of creditors which has to be looked to. I take it that the rule which has been repeatedly laid down in this Court, that where a debtor is applying voluntarily to surrender his estate it is not for a creditor to rush into Court for a compulsory sequestration, was primarily laid down in the interests of creditors. They are the persons interested. The estate has to pay the costs of sequestration, and it is not to the interest of creditors generally that one creditor should pile up costs in connection with the sequestration of the estate. In the present instance it is the creditors who, as a body, apply for the compulsory sequestration of the estate, and it is the insolvent who claims a sort of right to surrender the estate voluntarily, because he was first in the field with his notice of intention to surrender. It does not seem to me that it was ever intended by the Court that a debtor should have a kind of prior right of voluntarily surrendering his estate, if the whole body of creditors consider that it is best to compulsorily sequestrate the estate and to have a provisional trustee appointed at once to take possession of the assets, and if they consider that it is inadvisable that the business should be closed for a period and all chance lost of disposing of it as a going concern. In the present instance the petitioning creditors allege—and I believe that they were quite *bona fide* in the statement which they made when applying for compulsory sequestration of the estate—that an advantageous offer had been made for the acquisition of the respondent's business as a going concern, and that the chances were that if a provisional trustee were appointed an opportunity would be afforded of disposing of the business as a going concern. It appears that that is so, and from the affidavit made by the provisional trustee it would seem that he has already received an offer which would be advantageous to the creditors. It appears from the affidavits filed on behalf of the petitioning creditors that although the respondent had received an offer for the business as a going concern he did not accept it, and according to Salinger's affidavit, he failed to keep an appointment which had been made in connection with that offer; at any rate, although there were overtures for taking over the busi-

ness, he closed it. Under these circumstances it seems to me that the creditors were entitled to come to the Court and make their application for the compulsory sequestration of the respondent's estate. It does not seem to me that an insolvent ought to get the idea that he has a kind of inherent right, if he makes an application for voluntary surrender, to be allowed to carry that application through, although all the creditors, or the great bulk of them, may be of opinion that the more rapid procedure of compulsory sequestration is more for the benefit of creditors. In all these matters, after all, it is the interest of the creditors which has to be looked to. Under the circumstances I consider that the petitioning creditors (who are creditors for more than half the liabilities stated in the schedules) were justified in making the application. The estate must be finally sequestrated.

Applicants' Attorneys: *Rooth & Wessels;* Respondent's Attorneys: *Findlay, MacRobert & Niemeyer.*

[Reported by *Gey van Pittius*, Esq., Advocate.]

REX v. BOTHA.

1913. *February* 10. DE VILLIERS, J.P., and CURLEWIS, J.

Practice.—Appeal.—Records lost.—Proceedings quashed.—Case remitted.

Where the records of a criminal trial in a magistrate's court, against which an appeal had been noted, were lost, the Court by consent of parties quashed the proceedings and remitted the case to the magistrate for retrial.

Appeal against a conviction by the A.R.M., Johannesburg.

Accused was charged with contravening sec. 46 of Ordinance 32 of 1902, in selling liquor to natives; he was found guilty and sentenced to six months' imprisonment with hard labour.

The records of the trial of this case, as also of the magistrate's reasons for judgment, had been lost, and the only papers before the Court were an affidavit by the attorney of the accused, wherein he stated what he remembered of the evidence at the trial, as also affidavits of the magistrate and the public prosecutor. The magis-