47/56

G.P.-S.103675—1954-5—4,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

JAMES ALEXANDER MACLEAN Appellant,

versus

T. D. HAASBROEK & OTHERS Respondents

Appellant's Attorney / Prokureur vir Appellant [illegible] *Respondent's Attorney / Prokureur vir Respondent* [illegible] (1-3 Respts)

Appellant's Advocate / Advokaat vir Appellant [illegible], Q.C. & [illegible] *Respondent's Advocate / Advokaat vir Respondent* [illegible], Q.C. & H. T. Steyn (2nd Respt)

Set down for hearing on / Op die rol geplaas vir verhoor op Tuesday, 11th Sept, 1956.

(ORD) 1,3,5,6,7.

9.45 – 12.50 (Eng. Record)
2.15 – 3.20 — C.A.V.

(Written argument to be lodged by 21/9/56) Replies by 28/9/56

Appeal allowed – the order of the Provincial division is set aside and the following order substituted "[illegible] in terms of prayers A, B & C of petition".

[illegible]
Regr 1/10/56

1,3,5,6,7.

Reinstated: Tuesday, 4th Dec, 1956.

[illegible handwriting]

[illegible handwriting] C.A.V.

Costs: Thursday, [illegible] 1956.

[illegible handwriting]

In THE SUPREME COURT OF SOUTH AFRICA. Record

(APPELLATE DIVISION)

In the matter between :

JAMES ALEXANDER MACLEAN — Appellant

&

J. D. HAASBROEK N.O. — 1st Respondent

FARMERS' ASSISTANCE BOARD — 2nd Respondent

MATTHUYS DANIEL NAUDE N.O. — 3rd Respondent

CORAM : Centlivres C.J., Hoexter, Steyn, de Beer et Reynolds JJ.A.

Heard :- 4th December 1956. Delivered : 13-12-56

J U D G M E N T

CENTLIVRES C.J. :- When the Court gave judgment in this matter on October 1st, 1956, it said that "there will at this "stage be no order as to costs in the Provincial Division or "in this Court but the appellant or the respondents may on "notice to the Registrar on or before October 15th request "this Court to hear argument on the question of costs. "

Notice was duly given by both the appellant and the first and third respondents that they desired to have the question of costs argued.

In his petition to the Provincial Division the appell-

ant asked for costs of the application to be paid out of the costs of his estate and "no order as to costs against any of "the respondents or any of the creditors unless they oppose "this application." The creditors, who were served with a copy of the petition but were not cited as respondents, did not appear in court to oppose the granting of the application. The first respondent, who is a magistrate and who was cited in his capacity as chairman and presiding officer at a meeting of creditors of the appellant, made common cause with the third respondent in opposing the application. The third respondent had been elected trustee under Sec. 16(3) of Act 48 of 1935. He was cited in his capacity as trustee of the appellant's estate. At a meeting of appellant's crédítors the following resolution was passed :

" Dat ingeval die aansoek om hersiening mag slaag en dit bly dat die boedel van die applikant nie aanspreeklik is vir die koste wat aangegaan is tot op datum van beslissing nie, dan sal die krediteure verantwoordelik wees vir die gemelde koste. "

In the Provincial Division as well as in this Court both the first and the third respondents were represented by counsel. On appeal to this Court the first and third respondents were represented by separate counsel. The second respondent,

the Farmers' Assistance Board, took no steps to oppose the application made by the appellant. We were informed by counsel for the first respondent that his client had been duly authorised by the State Attorney to contest the proceedings.

Mr. Steyn, who appeared for both the first and third respondents, contended that the first respondent should not be ordered to pay any costs, because it is an accepted principle that when a public officer acts in a judicial or quasi-judicial capacity costs should not be awarded against him. That is no doubt the position when an order for costs is sought against a public officer acting in such a capacity ; he is entitled to resist the order not only on the ground that he acted correctly but also on the ground that, even if he acted incorrectly, he acted in a judicial or quasi-judicial capacity. But where, as in the present case, no costs are sought against him unless he opposes, the position is different. In such a case I can see no reason why, if he opposes unsuccessfully, he should not be ordered to pay the costs occasioned by his opposition unless there are circumstances which entitle the Court in the exercise of its discretion to make no order as to costs. As the first respondent acted in a judicial or quasi-judicial capacity he had no personal interest in the

per se

result and he should not have taken sides. He should have submitted to the judgment of the Court and he could, if he had wished to do so, have filed his reasons for coming to the decision which was the subject of the attack. If authority is required for the view I have expressed reference may be made to Alexander v Boksburg Municipality (1908 T.S. 413 at p. 419).

Mr. Steyn relied strongly on the case of Paarl African Trust Company Limited v Magistrate, van Rhynsdorp and Others (1941 C.P.D. 78) which was also a case under the Farmers' Assistance Act. In that case the Court set aside a certain ruling given by the presiding officer at a meeting of creditors and made no order as to costs. The applicant in that case sought an order for costs against the debtor "and also such other of the respondents who appear to "oppose." Costs were not awarded against the debtor because (p. 86) "he was in no way responsible for the ruling and has "not appeared to oppose." The magistrate, who had presided at the meeting of creditors, opposed the granting of the application. On p. 86 Howes J. said :-

" As regards the question of costs, it is true that the applicant has been compelled to come to Court to establish his rights which have been infringed. This infringement, however, was caused by what was in my opinion an incorrect ruling of the magistrate, as presiding

" officer, on a difficult point of law. The ordinary rule is that costs are not given against a court appealed from, or the decisions of which are brought under review. Lansdown's Liquor Law (p. 81). See also the remarks of De Villiers C.J. in Klipriver Licensing Board v Ebrahim (1911, A.D. 458 at p. 462). "

The passage referred to by Howes J. in Ebrahim's case appears in the judgment delivered by Lord De Villiers C.J. and is as follows :-

" I am satisfied, however, that in a case like the present where the tribunal from which the appeal comes has acted in a judicial or quasi-judicial capacity, and no question is raised as to the good faith of such tribunal, or as to the legality or regularity of its proceedings, it should not, in case of an appeal to a Superior Court, be subjected to the payment of the costs of such appeal. In the present case the Board acted in a quasi-judicial capacity, there was perfect good faith on its part, and although it may have gone wrong in its interpretation of the law there was no irregularity or illegality in its proceedings. "

The passage which I have cited from Lord De Villier's judgment must be read with what he said on pp. 462 and 463 viz:

" As to the case of Alexander v Boksburg Municipality (1908 T.S. 413), that has no application to the present case. For here the Board did not appear to oppose the appeal" (to the Natal Provincial Division) "It is not necessary to decide what the position would have been if it had appeared in opposition. "

In my opinion the Court in the Paarl Africa Trust case (supra) erred in not awarding costs against the presiding officer.

Another case referred to by Mr. Steyn is Deneysville Estates Limited v Surveyor-General (1951 (2) S.A. 68). In that case also costs were asked against a public officer if he opposed. He did oppose but notwithstanding this Ogilvie Thompson J. said at p. 82 :-

" While I am not without some sympathy for the applicant who has been obliged - no doubt at considerable expense - to come to Court to vindicate what I have held to be its rights, it seems to me that, having regard to the general current of the decisions and in the light of the specific precedent of the Marais' case, I should exercise my discretion by making no order as to costs . "

The Marais case referred to by Ogilvie Thompson J. is the case of Marais v Surveyor-General (1930 C.P.D. 291). Ogilvie Thompson J. pointed out at p. 82 of the Deneysville case that the petition in the Marais case contained a prayer for costs. In the Marais case, therefore, the Surveyor-General was entitled to come to Court and oppose the prayer for costs against himself and for the reason I have already given the Court in that case was justified in making no order as to costs. In my view the Court in the Deneysville case erred in not awarding costs against the public official.

Mr. Steyn did not contest the liability of the third respondent to pay costs in so far as he represented the appellant's creditors who by resolution authorised him to defend the application made to the Provincial Division but he contended that no order should be made compelling the third respondent to pay costs de bonis propriis. The third respondent was elected as trustee by the appellant's creditors under Sec. 16 of the Farmers' Assistance Board Act and under Sec. 17(2) the provisions of the Insolvency Act apply mutatis mutandis. Sec. 73 of the Insolvency Act (No. 24 of 1936) requires a trustee to obtain the authority of creditors or the Master before he institutes or defends any legal proceedings. In the present case the third respondent duly obtained the authority of the creditors to oppose the application made by the appellant. That opposition was made in what were conceived by the creditors to be in their interests and it cannot be said that the third respondent in carrying out the wishes of the creditors did anything improper. It is true that the third respondent may also be said to have been acting in his own interests also in opposing, for if the application had failed he would have been entitled to remuneration for his work in administering and liquidating the appellant's estate but I do not think that

that alone is a ground for ordering him to pay costs de bonis propriis. In view of the resolution of creditors he would have failed in his duty if he had not taken active steps to oppose the application and the mere fact that he was also personally interested in maintaining his position as trustee cannot, in my view, render him liable to pay costs de bonis propriis.

As a result of the order made by this Court on appeal the third respondent is no longer a trustee : the effect of the order is that he has been divested of the assets belonging to the appellant. The third respondent has therefore no tangible assets other than his own out of which costs can be paid. The persons who should pay the costs are the creditors, as they were vitally interested in the result of the proceedings but no order can be made against them in the present proceedings as they were not cited as respondents. If an order as to costs is made against the third respondent in his capacity as a representative of the creditors he may - I do not want to prejudge this - be able to recover them from the creditors. That is a matter which would have to be decided in other proceedings, should the creditors resist a claim by the third respondent to pay the costs incurred by the appellant in the present proceedings.

that is a ground for ordering him to pay costs de bonis propriis. In view of the resolution of creditors he would have failed in his duty if he had not taken active steps to oppose the application, and the mere fact that he was also personally interested in maintaining his position as trustee cannot, in my view, render him liable to pay costs de bonis propriis.

As a result of the order made by this Court on appeal the first respondent is no longer a trustee to the extent of the order in that he has been divested of the assets belonging to the said Trust. The third respondents has however no tangible assets other than his own out of which costs can be paid. The persons who should pay the costs are the creditors, as they were vitally interested in the result of the proceedings but no order can be made against them in the present proceedings as they were not cited as respondents. If an order [illegible] it [illegible] - [illegible] not [illegible] [illegible] creditors. [illegible] [illegible] claim [illegible] by [illegible] the [illegible]

Counsel for the appellant asked that the first and third respondents should be ordered to pay appellant's costs jointly and severally, the one paying the other to be absolved. As those respondents made common cause with one another in opposing the order sought for both in this Court and in the Court a quo I am of opinion that couhsel's request should be acceded to. See Minister of Labour and Others v Port Elizabeth Municipality (1952 (2) S.A. 522 at p. 537).

In answer to a question from the Bench counsel for the appellant stated as regards the costs in the Court a quo that the appellant did not object to paying the costs of an unopposed application and that the respondents should pay the costs occasioned by their opposition.

The result is that the first respondent in his capacity as chairman and presiding officer at the meeting of the appellant's creditors and the third respondent in his capacity as the representative of the appellant's creditors are ordered to pay, jointly and severally, the one paying the other to be absolved, the costs of the appeal, including the costs of the further hearing on the question of costs and such costs as were occasioned in the Orange Free State Provincial Division through their opposition to the appellant's application in that Division.

Record

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

JAMES ALEXANDER MACLEAN — Appellant

&

J. D. HAASBROEK N.O. — 1st Respondent

FARMERS' ASSISTANCE BOARD — 2nd Respondent

MATTHYS DANIEL NAUDE N.O. — 3rd Respondent

CORAM : Centlivres C.J., Hoexter, Steyn, de Beer et Reynolds JJ.A.

Heard : 11th Sep. 1956. Delivered : 1-10-56

J U D G M E N T

CENTLIVRES C.J. :- The appellant, who is a farmer as defined in Act 48 of 1935, applied for assistance to the Farmers' Assistance Board established under that Act. At a meeting of creditors convened under Sec. 10 of the Act a duly appointed representative of the Board made the following proposal in terms of Sec. 12(4) of the Act :-

" (1) To pay secured creditors in full subject to :-

" (a) Secured creditor S.A.N.T.A.L.

" (i) All arrear interest to be paid within three months.

" (ii) Capital amount owing under bond is to be paid in terms of the bond.

" (b) Secured creditor HYLAND AND DARE - to be
" paid in full out of the proceeds of the sale
" of the business conducted by applicant known
" as the LITTLE CALEDON MILLS on the sale of the
" business.
" (2) Concurrent creditors to receive 20/- in the
" pound payable in the manner following :-
" (i) On the sale of the business known as the
" LITTLE CALEDON MILLS the net proceeds of
" the sale are to be paid to creditors pro
" rata to their claims.
" (ii) On or before the 1st. March, 1956, an
" amount of £1500. 0. 0. is to be paid to
" creditors pro rata to their claims.
" (iii) The balance owing thereafter is to be
" paid in three equal instalments, the
" first instalment to be paid on or before
" the 1st March, 1957, the second instalment
" to be paid on or before the 1st. March
" 1958, and the third instalment is to be
" paid on or before the 1st. March 1959."

After providing that "all amounts which are to be dis-"tributed amongst creditors in terms of this offer are to "be payable to the Secretary of the Ladybrand Co-Op Society, "who is to effect payment of such amounts" the proposal goes on to provide as follows :-

" All amounts belonging to the applicant are to
" remain vested in the applicant. The applicant is
" to be entitled to dispose of the business known as
" the LITTLE CALEDON MILLS carried on by him in Basuto-
" land, and the net proceeds of the sale are to be

" paid to the Secretary of the LADYBRAND CO-OP SOCIETY,
" who shall pay the proceeds of the sale to creditors
" as provided for herein."

The proposal makes provision for the liquidation of the costs and provides that "the applicant is entitled to con-
"tinue farming operations, to dispose of crops to the LADY-
"BRAND CO-OP SOCIETY, and to collect the proceeds of the sale
"of such crops, save the sum of £1500. 0. 0. which is to be
"retained by the Secretary of the LADYBRAND CO-OP SOCIETY
"each year for distribution to creditors as provided for
"herein."

In conclusion it was stated that on acceptance of the offer of compromise applicant would :-

" (a) Pass a Second Mortgage Bond over the farm GOSCHEN in favour of the LADYBRAND CO-OP SOCIETY, up to the amount owing by the applicant to concurrent creditors.

(b) Pass a Notarial Bond hypothecating all his movable assets in favour of the LADYBRAND CO-OP SOCIETY as collateral security for the amount owing to concurrent creditors in terms hereof. "

When the above proposal was made appellant's attorney contended that it was binding on the creditors because all creditors were to be paid in full. He relied on Sec. 12(5) of the Act which provides that "the said proposal shall

"be deemed to have been accepted by all the creditors of the "applicant and shall..... bind them to him, whether "they have or have not proved any claim against the applicant, "unless -

" (a) the majority of those creditors whose claims are, " in terms of that arrangement not to be paid in " full and whose claims against the applicant " (irrespective of the amount of the claim of any " such creditor) amount, in the aggregate, to more " than half of the aggregate of all claims which are " not to be paid in full ; or

" (b) any creditor whose claim against the applicant is " secured by a mortgage, pledge or right of retent- " ion and is, in terms of the said proposal, not to " be paid in full or to an amount equal to the value " which, he placed upon the said security when prov- " ing his claim,

" reject or rejects the said proposal. "

The magistrate who presided at the meeting of creditors and is the ~~second~~ first respondent in this appeal ruled that the creditors were entitled to discuss and vote on the proposal. The proposal was rejected by creditors whose claims amounted in the aggregate to more than half of the aggregate of all the claims. The appellant's representative intimated that the magistrate's ruling would be tested in the Supreme Court and requested that before the provisions of Sec. 16 of the Act were

applied, a time should be specified within which appellant should test the matter in the Supreme Court. The magistrate ruled that the business of the meeting must be concluded and that the provisions of Sec. 16 should operate forthwith.

The magistrate thereupon asked the appellant in terms of Sec. 16(1) of the Act whether he desired that his estate should be dealt with in terms of that section. The appellant applied in the affirmative and his creditors in terms of sub-sec. (3) of that section elected a trustee who is the third respondent in this appeal. The second respondent is the Farmers' Assistance Board.

The appellant applied to the Orange Free State Provincial Division for an order declaring that :-

A the magistrate had erred in ruling that the creditors were entitled to vote and reject the proposal ; and that

he had erred in ruling that by virtue of the rejection of the proposal section 16 of the Act came into operation ;

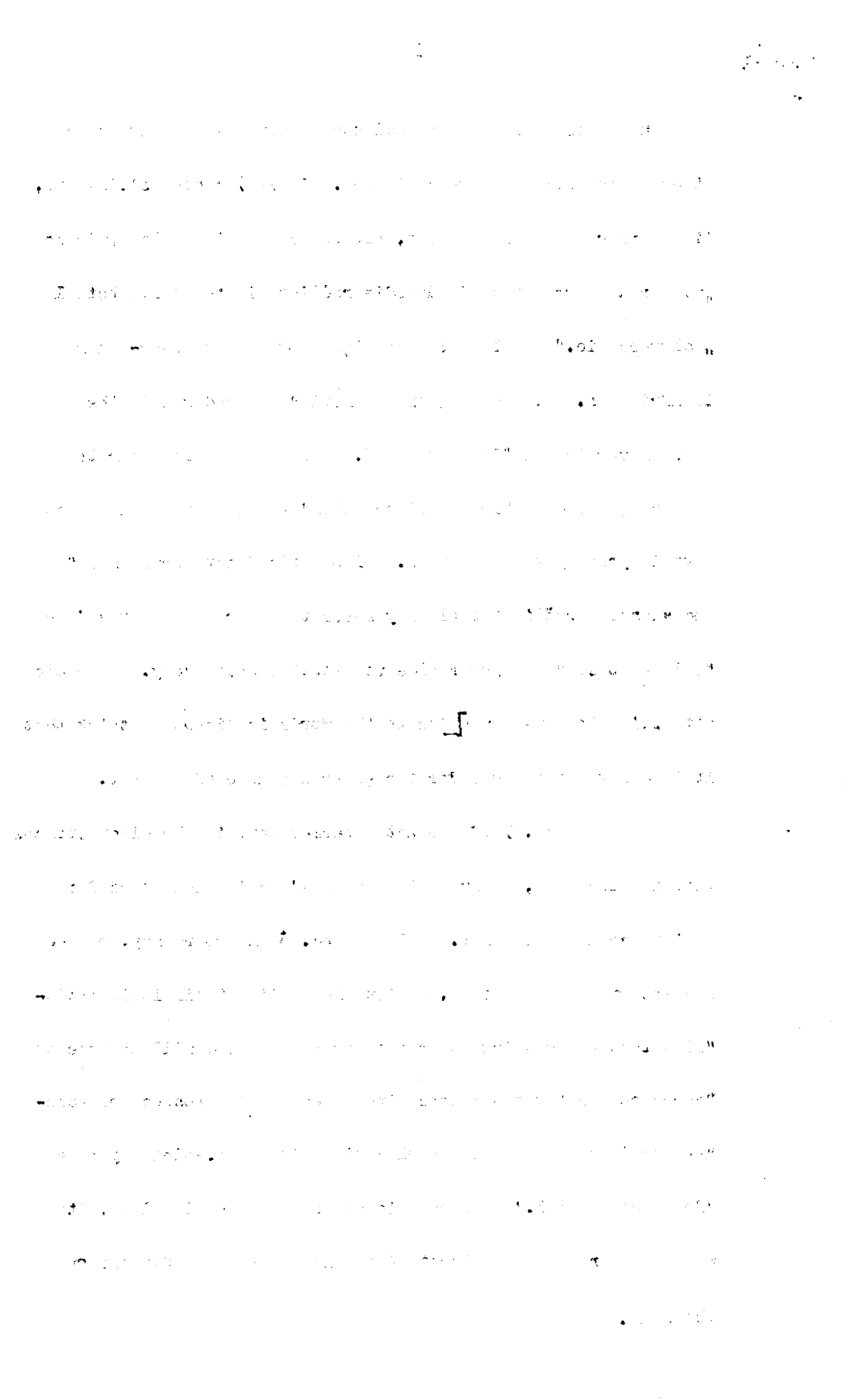
B the proposal be deemed to have been accepted by all the creditors in terms of Sec. 12(5) of the Act, and

C the election of the trustee was void.

The Provincial Division dismissed the application with costs and ordered those costs to be paid by the appellant or his estate. Hence the present appeal.

The decision in this appeal turns upon the meaning to be given to the following words in Sec. 12(5)(a) "whose claims are, "in terms of that arrangement, not to be paid in full" „wie se „vorderings ooreenkomstig daardie reëling nie ten volle betaal „sal word nie." The Act was signed by the Governor-General in Afrikaans. The word „ooreenkomstig" is rendered in the English version as "in terms of ". Perhaps a more accurate rendering would be "in accordance with" but I do not think that anything really turns on this. The words "that arrangement" and „daardie reëling" obviously refer to the opening words "the "said proposal" and „voormelde voorstel" respectively. Before attempting to give a meaning to the words in dispute I think that it is desirable to consider the general scheme of the Act.

Under Sec. 5 of the Act a farmer may, in the circumstances therein described, apply to the Farmers' Assistance Board for assistance under the Act. Under Sec. 8 the Board may, on the receipt of an application, assist the applicant "if it is satis- "fied that by so doing the person to be assisted will be able to "carry on farming operations with a reasonable proppect of succ- "ess or it may refuse the application without stating any reason "for such refusal." From this section and section 10(1) it would appear that the object of the Act is to keep farmers on the land.



Sec. 10(1) provides that "if the board is of the opinion "that in order to enable an applicant..... to carry on "farming with a reasonable prospect of success, it is desirable "that an arrangement be effected with his creditors whereunder "they relieve him of part of his liabilities or grant him an "extension of time for payment of his liabilities, the board "may..... call a meeting of the applicant and his cred-"itors for the purpose of proving their claims and of consider-"ing any suggestions for such an arrangement as aforesaid."

The words "whereunder they" (i.e. the creditors) "..... "grant him an extension of time" suggest that the creditors must decide whether to grant or refuse an extension of time. But whether they are deemed to have accepted a proposal to grant an extension of time must be determined in accordance with the provisions of Sec. 12(5).

The words at the end of Sec. 10(1) "for the purpose of "..... considering any suggestions for such an arrange-"ment" cannot in my view be construed as permitting any cred-itors, other than those not to be paid in full, to vote on a proposed arrangement. Those words enable the creditors at a meeting of the applicant and themselves to discuss a proposal put forward by a representative of the board at such a meeting

in terms of Sec. 12(4) and to point out any weaknesses in the proposal. Sec. 12(4) provides that at any meeting of the applicant and creditors "any person appointed by the board for the "purpose may, on behalf of the board propose to the creditors ".....any arrangement.....whereunder the applicant is to be "relieved wholly or in part of any of his obligations towards his "creditors or is to be granted an extension of time for the ful- "filment of those obligations and any such proposal may at such "meeting be altered in such manner as the person so appointed "may, within the scope of the authority given to him by the "board, deem fit. "

It will be noted that under Sec. 12(4) it is only a representative of the board who can propose an arrangement and that that arrangement cannot be altered unless that representative agrees to the alteration. From this it appears that the creditors in considering a suggestion for an arrangement may in the course of debating the suggested arrangement point out that there are defects in that arrangement and may induce the representative of the board to agree to an alteration of the arrangement. Consequently full effect can be given to the word "considering" at the end of Sec. 10(1) without going to the length of holding that that word imports the right to vote - a right which is

specifically defined in Sec. 12(5) and is not dealt with in sec. 10.

Section 19(2) provides that "if the board is for any "reason unable to give effect to a compromise or if..... "the board is of opinion..... that as a result of the "happening of any event after the effecting of the compromise "it is undesirable to give effect to the compromise, the board "may cancel the compromise and the proceedings under this Act "in regard to the applicant shall thereupon fall away. "

Reading the Act as a whole it becomes clear that the Farmers' Assistance Board has overriding authority under the Act : it alone can place before creditors a compromise ; it alone can consent to an alteration of the terms of any compromise so placed before creditors ; it can cancel the compromise.

Returning now to Sec. 12(5), what is the meaning of the words "whose claims are, in terms of that arrangement, not to "be paid in full " ? Clearly we must examine the arrangement in order to ascertain whether any claims are not to be paid in full. There is nothing that I can find in the arrangement in this case to show that any of the claims are not to be paid in full. The arrangement clearly intends that all secured creditors are to be paid in full and that concurrent creditors

are to be paid 20/- in the pound, which is only another way of saying that they are to be paid in full.

I should add that if Sec. 12(5) had been cast in a positive form e.g. if it had provided that all creditors who are to be paid in full in terms of the arrangement shall not have the right to vote and that other creditors should have that right there would be much to be said for the view that what the Legislature intended was that only that class of creditor whose claims would without doubt be paid in full would not have the right to vote. For instance an arrangement may provide that certain creditors should be paid in full out of moneys advanced by the board. But in this case the Legislature has used the negative and the language it uses constrains me to ascertain from the arrangement itself whether it contains any provision whereby any creditors are not to be paid in full. I may add that if the words employed by Parliament do not carry out its real intention, it is at hand to remedy the defect. To do so is the function of Parliament, not of the Courts. See Wellworths Bazaars Ltd. v Chandlers Ltd (1947 (2) S.A. 37 at p. 45).

The Court a quo followed the case of Bekker v Reichardt N.O. and Others (1956 (1) S.A. 717). In that case the only proposal made by the Farmers' Assistance Board at a meeting of the farmers concerned and his creditors was that all the farmer's creditors should agree to grant him an extension for a period of two years from June 30th, 1954. There was apparently nothing in that proposal to show that any of the creditors were not to be paid in full. The ratio decidendi in that case is to be found on p. 720. The Court relied on Sec. 10(1) "from which it clearly "appears that it is the creditors and not the Board who decide "whether an extension of time should be granted." I am unable to agree with this view. Sec. 10(1) does not prescribe the voting powers of creditors : those powers are to be found in Sec. 12(5) which in the circumstances therein mentioned "deems" a proposal to have been accepted. There is nothing in the latter section which suggests that the creditors must in fact have accepted the proposal : by a fiction the proposal is deemed to have been accepted unless the proposal is rejected by a majority of those creditors whose claims are in terms of the arrangement not to be paid in full and whose claims against the applicant amount, in the aggregate, to more than half of all claims which are not to be paid in full. On p. 721 in Bekker's case (supra) the Court apparently took the view that if the proposal had provided for

full payment of all the applicant's debts on or before a certain date the creditors would not have been entitled to vote. It apparently held that a proposal to grant an applicant an extension of time within which to pay his debts, with nothing more, was not a proposal to pay the applicant's debts in full. It cannot, however, be said that according to such a proposal creditors are not to be paid in full : in the absence of such a provision the creditors relinquished no part of their claims : they simply agreed to grant an extension of time within which their debts must be paid.

In the present case the Court a quo went further than the Court did in Bekker's case. The learned judge who delivered the judgment of the Court said :

" In my view when the Legislature prescribed that there should "be an offer to be paid in full before a creditor was disenfranc- "hised, the Legislature was referring to an unconditional offer "to pay the full sum forthwith, or at least without delay or "postponement."

The above view would, in my opinion, defeat the object of the Act which is to assist farmers to remain on the land. In the nature of things a farmer approaches the Farmers' Assistance Board for assistance when he is unable to pay creditors in full on due date.

There are various ways in which he may be assisted : the board may provide financial assistance under Sec. 9 of the Act, the creditors may forego part of their claims or an extension of time may be granted within which to pay the claims or a combination of all three methods may be adopted. In the present case only the third method has been adopted and not only is there no provision in the arrangement before the Court whereby any creditor is not to be paid in full but there is also express provision that all creditors are to be paid in full. To construe the words "not to be paid in full" as meaning "not to "be paid in full forthwith" would defeat the object of granting an extension of time which is to relieve a farmer of the obligation to pay his creditors at once and to enable him to pay his creditors in full at a future date. When a farmer is able to pay all his debts forthwith there is no necessity to grant him an extension of time and in fact he would not approach the board for assistance/and if he did the board would no doubt refuse his application.

In my view a court of law is not entitled to construe Sec. 12(5) as if the word "forthwith" or a similar word appeared after the words "in full". To adapt the language of Tindall J.A. in Moser v Milton (1945 A.D. 517 at p. 525) to the present

case one may say that/this Court gave the words "paid in full" if the meaning which the Court a quo gave to them, it would not be interpreting but altering the language used and this Court would have to be certain that the result of such an alteration would be to carry out the intention of the lawgiver. See too R. Gaffen & Another (1946 A.D. 1086 at p. 1093). In de Villiers v Cape Law Society (1937 C.P.D. 428) which was quoted with apparent approval by Tindall J.A. in Moser v Milton (supra at p. 525) it was laid down that before a court, in construing a statute, tampers with the strict words of the statute by adding to, varying or subtracting from such words, it must be certain that any "amendment" it makes in the actual words of the statute expresses the intention of the Legislature ; otherwise it is better to adhere to the strict wording of the statute. And in that case Davis J. said at p. 434 : "This is, in my view, "one of those cases where the Court should find that the law "actually means what it says." See too Steyn's Die Uitleg van Wette at p. 61. This seems to me to be a case where the intention of Parliament is clear : effect must therefore be given to such intention, however great the hardship may be to creditors who have to wait for their money. Cf. Rose's Car Hire (Pty.) Ltd. v Grant (1948 (2) S.A. 466 at p. 471). It should, however, be pointed out that the hardship on creditors must not

be exaggerated because if they were to force their debtor into insolvency, instead of giving him time, they may in the result receive considerably less than they would through the medium of proceedings under the Act. ~~of insolvency proceedings~~. I should also point out that the Act was designed to interfere with the rights of creditors and to prevent them from sequestrating the estate of a farmer in order to enable him to remain on the land.

Reliance was placed by counsel for the respondents on the case of Paarl African Trust Co. Ltd v van Rhynsdorp & Others (1941 C.P.D. 78 at p. 85) where Howes J. said :

" If the words are to be taken as meaning that only those, who, in terms of the proposal, relinquished a portion of their claims are entitled to object, then, when 'the said proposal' is only for an extension of time..... it is deemed to be accepted and no opposition of any sort can be effectual. Such an interpretation would render the whole proceedings nugatory in a proposal of this sort. "

I am not sure what the learned judge meant by "proceedings". If he had in mind the proceedings at the meeting of the applicant and his creditors then I am unable to agree for the reasons I have already given as to the construction to be placed on Sec. 10(1) read with Sec. 12(4) and (5). If he used the word "proceedings" in a wider sense then, again, I am unable to agree

as an extension of time will carry out the main object of the Act viz: to keep the farmer on the land.

It was contended on behalf of the respondents that if the meaning I have assigned to Sec. 12(5) is correct it would lead to the absurd result that if an extension of time were granted for an unreasonable period, say 20 years, the creditors would have no remedy and that Sec. 12(5) should be construed in such a way as to avoid such a result. There is some force in this contention but I find it impossible to place another meaning on the sub-section without doing violence to the language used by the Legislature. In this connection it must be realised that the Act is administered by the Farmers' Assistance Board and that the Legislature must have regarded it as a responsible body which would not put forward absurd proposals and whose representative at the meeting of the applicant and his creditors would naturally be influenced by the views expressed by the creditors at such a meeting.

A further point remains to be considered. During an argument on costs by Mr. Munnik for the appellant after his leader had completed his reply on the merits, the Court raised the question whether, by reason of the fact that the appellant had, in terms of Sec. 16 of the Act, stated that he desired his estate to be dealt with in terms of the section, he was not perempted from challenging the ruling of the first respondent that the creditors were entitled to vote on the proposal which had been placed before them. I do not think that the appellant is perempted. Peremption is usually raised as a point *in limine*: there is nothing to show that that point was raised in the Provincial Division and it was not taken in the respondent's heads of argument before this Court nor was it raised in the oral argument until it was mentioned by the Court. Had it been raised before the Provincial Division the appellant would have been entitled to put on record further facts to show that he did not intend to abandon his right to challenge the ruling of the first respondent. In my opinion the defence of peremption cannot be taken at this late stage.

All we have to go on in the present case is the record of the proceedings at the meeting of creditors. At that

meeting the appellant's representative clearly intimated that the first respondent's ruling would be tested in the Supreme Court and requested that, before the provisions of Sec. 16 of the Act were applied, a time should be specified within which the appellant should test the matter in the Supreme Court. This was a reasonable request but the first respondent ruled that the provisions of Sec. 16 must operate forthwith. This ruling obviously placed the appellant in a dilemma. If he replied in the affirmative to the question put to him in terms of sub-sec (1) of Sec. 16 he had the advantage under subpection (5) of not being deemed to be an insolvent but if he had failed to reply in the affirmative all proceedings taken under the Act would in terms of sub-sec. (2) have fallen away : in that event his estate could at any time have been sequestrated and he may then have lost his chance of challenging the ruling of the first respondent. The fact that he chose a course least detrimental to himself cannot, in my opinion, be held against him and does not constitute proof that he took a course which was necessarily inconsistent with his right to challenge the first respondent's ruling.

Peremption must be clearly proved. The case of Hlatshwayo v Lare & Deas (1912 A.D. 242) is very much in point. In that case a defendant, against whom judgment had been given by default,