Case No 518/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPèLLATE DIVISION)

In the matter between:

D G SINGER NO Appellant

and

MASTER OF THE SUPREME COURT

TRANSVAAL PROVINCIAL DIVISION First Respondent

ABSA BANK LIMITED Second Respondent

CORAM: E M GROSSKOPF, NESTADT, EKSTEEN, HARMS, JJA

et OLIVIER, AJA

HEARD: 17 MARCH 1994

DELIVERED: 30 MARCH 1994

J U D G M E N T

E M GROSSKOPF, JA

The appellant is the executor in the deceased estate of the late Reuben Plotkin. Shortly after his appointment as executor, the appellant established that the estate was insolvent. He reported the position of the estate to creditors in terms of sec 34(1) of the Administration of Estates Act, no 66 of 1965, (" the Estates Act"). The creditors did not instruct him in terms of that section to surrender the estate under the Insolvency Act, no 24 of 1936, and he consequently proceeded to administer the estate in terms of sec 34 of the Estates Act as an insolvent deceased estate.

Sec 34(7) of the Estates Act requires an executor to submit to the Master, within time periods fixed in the section, an account in the prescribed form of the liquidation and distribution of the estate. Sec 34(7)(b) lays down that this account is to provide for the distribution of the proceeds in the order of preference prescribed under the Insolvency Act in the case of a sequestrated estate.

Volkskas Bank Limited held a first mortgage bond over certain fixed property of the deceased. This bank has been taken over by Absa Bank Limited and the latter bank has been substituted on the record as the second respondent herein. I shall refer to it as the Bank. The Bank submitted a claim to the appellant in respect of the debt secured by its bond, with interest from the date of sequestration (which is determined pursuant to a deeming provision in sec 34 (5) of the Estates Act) until date of payment.

The appellant prepared a liquidation and distribution account. He knew that the Bank disagreed with him about the manner in which the Bank's claim had been dealt with. He consequently arranged a meeting between himself, a representative of the Bank and an official in the Master's office. The matters in dispute were discussed, and the Master gave directions as to how they were to be handled in the account.

The appellant was dissatisfied with the Master's

decision, and applied to the Transvaal Provincial Division for review, citing the Master as first respondent and the Bank as second respondent.

The application for review was dismissed in the court a quo (Smit J) and with the necessary leave the matter now comes before us on appeal. There was no appearance on behalf of the Master who abides the judgment of the court.

Before considering the matters in dispute it is necessary first to examine the legal basis of the present review proceedings. On appeal before us it was common cause that the review was brought in terms of sec 35(10) of the Estates Act, which was made applicable to insolvent deceased estates by sec 34(9) of that act. Sec 35 deals generally with the framing and lodging of liquidation and distribution accounts. Sub-sec (4) provides that an account is to lie for inspection at the Master's office (and in some cases a magistrate's office), and sub-sec (7) allows interested persons to lodge objections to the account with the Master.

Sub-sec (9) then provides that if the Master is of opinion that an objection is well-founded, or if he, mero motu, "is of opinion that the account is in any respect incorrect and should be amended, he may direct the executor to amend the account or may give such other direction in connection therewith as he may think fit."

Sec 35(10) then provides:

> "Any person aggrieved by any such direction of the Master ... may apply by motion to the Court ... for an order to set aside the Master's decision and the Court may make such order as it may think fit".

I turn now to the disputes between the parties.

They mainly concern the interpretation of sec 95(1) of the Insolvency Act which was made applicable to insolvent deceased estates by sec 34 (7)(b) of the Estates Act. In so far as it is relevant sec 95(1) of the Insolvency Act reads as follows:

> "The proceeds of any property which was subject to a special mortgage... [or],..pledge ..., after deduction therefrom of the costs mentioned in sub-section (1) of section eighty-nine, shall be applied in satisfying the claims secured by the said property, in their order of preference, with

interest thereon ... from the date of sequestration to the date of payment ...".

Originally the appellant raised three matters in its notice of motion. Two concerned the ambit of the expression "proceeds of ... property" in sec 95(1) and I deal with them first. The facts in this regard were as follows. The property subject to the Bank's mortgage had been sold on instalments by the appellant. The purchaser paid interest on the unpaid portion of the purchase price. The first question was whether such interest constituted part of the proceeds of the property which, in terms of sec 95(1), should be applied in satisfying the Bank's secured claim.

The second question must be expressed in an abstract way because, as 1 shall show, the facts are not entirely clear. Sec 28(1)(a) of the Estates Act requires an executor to open a cheque account with a bank in the name of the estate and to deposit the moneys of the estate in it. Sub-sees 28(1)(b) and (c) allow the executor to transfer money not immediately needed from the cheque account to a

savings account, or to place it on interest-bearing deposit with a bank or building society. In this way an estate can earn interest on moneys realized in the course of liquidation. The second question posed was this: if the instalments of the purchase price of the bonded property paid by the purchaser were placed in an interest- bearing account, would the interest so realized constitute part of the "proceeds" of the property within the meaning of sec 95(1) of the Insolvency Act?

The first question posed by the appellant in his papers was never in dispute between the parties. The appellant had, in his account, included the interest paid by the purchaser of the bonded property in the proceeds of the property available to the Bank under sec 95(1) of the Insolvency Act and the Master had approved this course. The Master had consequently not given any "direction" under sec 35(9) of the Estates Act, and there was nothing about which the appellant could have been aggrieved so as to entitle him

to institute review proceedings under sec 35(10). In the result the appellant abandoned this ground of review before the court a quo.

The second question raised by the appellant, it will be recalled, related to the interest derived from the deposit of portions of the purchase price of the property in interest-bearing accounts. This matter was fully argued in the court a quo. The Bank contended that such interest fell within the ambit of the "proceeds" of the bonded property on which the Bank had a preferential claim. The appellant, on the other hand, maintained that the interest did not constitute a part of such "proceeds" and should fall within the free residue. The court decided in favour of the Bank.

On appeal before us the Bank contended that the second question, like the first, was not properly before the court because here also there was no "direction" by the Master which the appellant, if aggrieved thereby, might have taken on review in terms of sec 35(10) of the Estates Act.

The circumstances are as follows. In his notice of motion (as amended) the appellant asked, in his prayer 2.3, for

> "an order directing that the proceeds of [the Bank's] security ... do not include interest received by the Applicant as a result of having Invested same [in an interest-bearing account] after the date of realisation of the security".

There was, however, nothing in the founding affidavit to support this prayer. There was no allegation that the proceeds of the sale of the bonded property had been invested at interest, that the appellant had, in his account, treated such interest in any particular way, or that the Master had given any direction in this regard. The Master's comments on the account are contained in a letter dated 6 August 1990 which is attached to the papers. These do not include any reference to interest earned on the proceeds of the sale of the bonded property.

It seems clear therefore that the application made out no case for a review of any direction in regard to such interest. However, both the Master (the first respondent) and

the Bank (the second respondent) dealt with the merits of

this prayer. The Master did not oppose the application, but

filed a report. This contains the following paragraph:

> "Prayer 2.3 seeks an order that the proceeds of the security do not include interest on the proceeds after realization of the security. Here again the legal basis for the order sought is not clear. An Executor or a Trustee in an insolvent estate usually invests the proceeds of different assets (in fact I think he will be blamed by the heirs or creditors if he does not) and when the time comes to draw up his Liquidation and distribution account, he divides the interest on a pro rata basis between his free residue and encumbered asset accounts. In terms of section 95(1) of the Insolvency Act 1936 he then awards interest to the secured creditor (encumbered asset account(s)) and free residue account (section 103)."

The Bank filed no opposing affidavit, but gave

notice in terms of rule 6(5)(d)(iii) of the Uniform Rules of

Court that it proposed opposing the application on certain

legal grounds. Amongst these was the following:

> "Op 'n behoorlike uitleg van die tersaaklike artikels van die Insolvensiewet ... moet rente wat toeval op die gerealiseerde deel van die gesekureerde eiendom wel as deel van die opbrengs ontvang word."

In the court a quo and on appeal this point was fully argued on behalf of the appellant and the Bank, although before us the Bank's argument was an alternative to its main submission that the matter was not properly before the court.

On appeal Mr Lane, who appeared for the appellant, conceded that there was no direction of the Master in regard to this issue which could be taken on review in terms of sec 35(10) of the Estates Act. He contended, however, that the two respondents had dealt with the merits of this question and that this court could therefore accept that there was a dispute on this issue between the parties which required resolution. The matter was fully argued before two courts and it would be in the interest of all parties if it could now be finally disposed of. If this were not done, the likelihood was that further litigation would follow.

It seems clear that this issue was not properly before the court in terms of sec 35(10) of the Estates Act.

The question arises, however, whether it would not be desirable for us to deal with it as if it were the subject of an application for a declaration of rights in terms of sec 19 (l)(a)(iii) of the Supreme Court Act, no 59 van 1959. Mr Smalberger, who appeared for the Bank, contended that such an approach would not be proper because any order granted by the court might turn out to be purely academic since there is no certainty on the papers that any part of the purchase price of the bonded property was, or was expected to be, placed in an interest-bearing account. It is true that there is no express averment in the papers to this effect, but the accounts make it overwhelmingly likely that this is in fact the position. The property was sold on 31 January 1989 for R490 000. The liquidation and distribution account was drawn up as at 12 March 1990. On that date R448 254,14 of the purchase price had not been received yet. On the same date the estate had an amount of R35976,20 in a current account and R288 151,06 in a call account. An amount of R39603,80 had

been received as interest on the call account. There can be no reason why the approximately R40 000 which had been paid on the purchase price, or a substantial part of it, would not have been placed on call, and the same applies to payments received after 12 March 1990. In this regard it may be recalled that the Master commented on the account on 6 August 1990. The notice of motion was dated 21 December 1990. Judgment was given in the court a quo on 5 December 1991. Although one does not know precisely what happened to the purchase price during this period, it is more than likely that some of it would have been earning interest in the call account. Indeed, the action of the appellant in raising this point, and that of the Bank in opposing it, tends to negative any suggestion that there might not have been any relevant interest. Both parties clearly accepted that there was such interest, and wanted to obtain a ruling from the court on the manner of dealing with it. The fact that the Bank, having obtained a judgment in its favour which will presumably be

applied by the Master, now wishes to prevent an appeal, does not, in my view, affect the probabilities I have mentioned.

To sum up: the parties to this appeal made divergent claims in respect of interest earned by the appellant on the purchase price of the property, the matter was fully argued before the court a quo and before us, and the question clearly is a real one which arose in the administration of the estate. In these circumstances I consider that we should not be prevented by technicalities from answering it as if it were the subject of an application for a declaration of rights.

I turn now to the merits of the question, which depend on the ambit of the expression "proceeds of ... property". "Proceeds" is defined in the Shorter Oxford Dictionary as "that which proceeds from something; produce, outcome, profit". It is clearly not a word with a very precise meaning. In argument it was common cause that in the present context "proceeds of ... property" was not limited to

the purchase price of the property, but included fruits derived after the date of sequestration such as rent paid by a tenant before the property was sold or interest paid by the purchaser. Cf Standard Bank v Odendaal's Trustees (1887) 5 SC 331 at p 333, 334-5; Barclays Bank v The Master And Another 1934 CPD 413 at 422. Interest paid by a bank on a deposit of the purchase price is a step further removed but, as a matter of language, can still in my view properly be described as part of the proceeds of the property. But what I consider decisive is the context. Sec 95 (1) defines the funds which are to be employed in paying secured claims. One would expect that all funds which have their origin in the security should be included. The interest with which we are now concerned flows directly from the bonded property. It has no connection with any of the other assets of the insolvent deceased. In accordance with the scheme of the Insolvency Act it would be natural for it to be assigned to the bondholder rather than to the general concursus creditorum. And, as I have indicated

above, the language is wide enough to allow such a construction.

Mr Lane contended in argument that a different result is reached when sec 95(1) is read in conjunction with certain provisions of sec 83 of the Insolvency Act. These latter provisions concern claims secured by movable property. Sec 95(1) deals with securities over both movable and immovable property, and I accordingly agree that it is necessary to reconcile the provisions of sec 95(1) with those of sec 83. In terms of sec 83 a creditor may in certain circumstances realize the movable property which he holds as security for his claim. Sub-sec (5) then provides that he shall, as soon as possible after he has realized the property, prove his claim and attach to the affidavit submitted in proof of his claim, inter alia, a statement of "the proceeds of the realization". In terms of sub- sec (10) he must then forthwith pay the "net proceeds of the realization" to the representative of the insolvent estate,

and "thereafter the creditor shall be entitled to payment, out of such proceeds, of his preferent claim..."

Now "net proceeds of the realization" prima facie means no more than the purchase price of the property less expenses, and Mr Lane contended that, because the word "proceeds" was used in both sections, the same meaning should be attached to "proceeds of ... property" in sec 95(1). In my view this does not follow. Although there is a presumption that a word used in a statute normally bears the same meaning throughout, this is not an inflexible rule and cannot apply where the word is used in different contexts. As a matter of logic there is no reason to assume that the proceeds of the realization of property must be the same as the proceeds of the property.

Mr Lane also based another argument on sec 83(10). It went thus. In terms of this sub-sec the creditor who has realized the movable property which he held as security for his claim, is entitled to payment of his preferent claim out

of the "net proceeds of the realization" of the property. Under sec 95(1), which applies also to security over movables, "the proceeds of [the] property" shall be applied to satisfying a secured claim. A creditor, who, in terms of sec 83, realized the property which he held as security, clearly should not be in a worse position than any other secured creditor. Therefore, the argument concludes, the "proceeds of ... property" in sec 95(1) must be limited to the "net proceeds of the realization" of the property, i e, the purchase price less expenses.

I have already accepted that it is necessary to reconcile sec 83 (10) and sec 95(1). In doing this one must, however, have regard to the purpose served by the two sections. Sec 83 deals with the manner in which movables may be realized by creditors holding them as security, and what is to be done with the proceeds of the realization. In the latter regard it lays down that the creditor is entitled to payment out of such proceeds of his preferent claim. This is

obvious. The purpose of the security was to provide security for the debt and the proceeds of the realization should be available for that purpose. The section does not, however, say that the creditor is limited to the proceeds of such a realization for the payment of his preferent claim.

Sec 95(1), on the other hand, does not look at the matter with a view to determining the limited question of how the proceeds of the realization of a particular asset are to be applied. Its purpose is to lay down generally what assets are available for the satisfaction of secured claims. And in that regard it lays down that a creditor with a secured claim must look to the proceeds of the property over which the security was held. This clearly includes the proceeds of the realization of the property, but is not necessarily confined to it. Indeed, as I said earlier, it was common cause in argument that a secured creditor was entitled to benefits arising from the property such as rent and interest. There can accordingly be no question that the "proceeds of the

property" should in all cases be limited to the purchase price less expenses.

It follows, in my view, that the provisions of sec 83 of the Insolvency Act do not detract from the conclusion that, as a matter of language in the context of the Insolvency Act, the expression "proceeds of ... property" in sec 95(1) includes interest derived from the deposit of the purchase price of the property. I consider therefore that the court a quo was correct in so holding.

I come now to the third and final question raised by the appellant. In regard to this issue also it may be doubted whether the requirements for a review pursuant to sec 35(10) of the Estates Act were fully satisfied. It does not appear that the account ever lay for inspection as required by sec 35(4) of the Estates Act. There was, however, a direction by the Master concerning the relevant item on the account. The appellant was dissatisfied with this direction and the Bank had no objection to the matter being heard. Here

again I do not think that technicalities should stand in the way of our deciding the issue between the parties as if this were an application for a declaratory order.

The question here is how interest on the Bank's claim accruing after the date of sequestration is to be dealt with. The question arises as follows. In terms of sec 95(1) of the Insolvency Act the proceeds of the property which was subject to the mortgage are to be applied in satisfying the claims secured by the said property "with interest thereon ... from the date of sequestration to the date of payment ...". The rate of interest is determined by sec 103(2). Nothing turns on the rate for present purposes.

Sec 95(1) of the Insolvency Act is the only section of the act which deals specifically with interest on secured claims after sequestration and it is rather strangely worded. It does not provide that the secured creditor is entitled to such interest, but merely states that the proceeds of the security is to be applied to, inter alia, such interest. As a

matter of language this may conceivably provide room for an argument that such interest is only payable if the proceeds of the security are sufficient to cover it. Such a reading would however lead to such anomalous results that this argument could hardly be seriously advanced. In fact it was not advanced before us. Mr Lane accepted (and I wish to emphasize this) that sec 95(1) impliedly granted a secured creditor a right to interest on his secured claim from the date of sequestration to the date of payment.

The difficulty is to determine where this claim to interest would rank in the administration of an insolvent estate. Now, of course, if the proceeds of the security are sufficient to satisfy the principal debt plus interest, there is no problem. Both are paid from such proceeds.

In the present case the position was different. The proceeds of the property were insufficient for principal as well as interest, and some provision had to be made for the balance. It is common cause that this situation is catered

for by sec 83(12) of the Insolvency Act, which, in so far as it is relevant, provides -

> "If the claim of a secured creditor exceeds the sum payable to him in respect of his security he shall be entitled to rank against the estate in respect of the excess, as an unsecured creditor ...".

It is clear that the "claim of a secured creditor" to which this provision refers, includes his entitlement to post-sequestration interest. If that were not so, there would be no provision at all for the payment of such interest in cases where the proceeds of the security are insufficient to satisfy both the principal debt and the claim for interest. And, as I have already said, the act recognizes the right of a secured creditor to receive post- sequestration interest.

The parties before us were accordingly ad idem that sec 83(12) applied to the principal sum as well as to post-sequestration interest, and that the Bank would rank in respect of the amount not covered by the proceeds of the security as an unsecured creditor. This brings into play sec 103 of the Insolvency Act which lays down that the balance of

the free residue after payment of preferent claims is to be applied -

> "(a) in the payment of the unsecured or otherwise non-preferent claims proved against the estate in question in proportion to the amount of each such claim;
> (b) if the unsecured or otherwise non-preferent claims have been paid in full, in the payment, thereafter, of interest on such claims from the date of sequestration to the date of payment, in proportion to the amount of each such claim."

Here lies the nub of the dispute between the parties. The appellant contends that, where the proceeds of the security are not sufficient to pay both principal debt and interest, the balance of the interest would rank in terms of para (b), i e, after the concurrent debts have been paid in full. This would in practice almost invariably mean that it will not be paid at all. The Bank for its part contends that, after exhaustion of the proceeds of the security, the whole balance of its claim, however it is made up, including both principal and interest, should rank with the concurrent claims under para (a). The court a quo decided this issue in

favour of the Bank.

In considering this point one must, I consider, first have clarity on the composition of the balance of a claim, previously secured, which, in terms of sec 83(12) of the Insolvency Act, ranks as an unsecured claim. The creditor starts off with a secured claim which consists of principal and interest. The proceeds of the security are not enough to pay the whole claim, leaving an excess. How does one determine whether, or to what extent, this excess is principal or interest? There appear to be three possibilities. The first is that the distinction between principal and interest disappears when sec 83(12) is applied, leaving a colourless excess which falls to be dealt with in terms of sec 103(1)(a) of the Insolvency Act. The second is that the proceeds of the security are appropriated first to the interest component of the claim and, after the interest is paid in full, to the principal debt. If this is done the excess will be weighted in favour of the principal debt. The

third is that the proceeds of the security are appropriated first to the principal debt and then to interest. The effect of this would be that the interest component of the excess would be relatively large.

In fact in the present case the proceeds of the security were enough to cover the interest component of the Bank's claim and some capital. It follows that to succeed the appellant has to show that the third possibility mentioned above is the correct one, i e, he must show that in calculating the excess for purposes of sec 83(12) the distinction between principal debt and interest remains unimpaired, and that the proceeds of the security are applied first to the payment of principal. Only in this way, on the facts of the case, can the excess include interest which can rank in terms of sec 103(1)(b).

In my view there are formidable difficulties in the appellant's way. In the absence of insolvency it would have been open to the debtor, and failing him, for the creditor,

to indicate at the time of payment to which of more items than one such payment should be imputed. On the failure of both, the law steps in to make the appropriation. (Stiqlingh v French (1892) 9 SC 386 at 411). However, even where the parties have the power to appropriate payments, it would seem that a debtor who owes interest to a creditor under a mortgage bond cannot compel the creditor to impute any payment to capital rather than to interest (Brink N 0 v The High Sheriff and Others (1895) 12 SC 414 at 420). Be that as it may, it was not contended that the appellant, as executor of the insolvent deceased estate, could decide how he wanted to appropriate payments, or that he in fact purported to appropriate the payment, at the time when it was made, to the principal debt rather than to interest. Both parties accepted that appropriation has to be determined by law. The common law rule in this regard is clear. In Brink's case (supra) at p 420 Lord de Villiers said:

> "Now the very first rule mentioned by Voet (46.3.16) as being applicable in such a case is that, if the debtor is in arrear for interest, the

> payment must first be credited to account of the interest and thereafter of the principal, and his statement of the law is fully supported by the authorities cited by him. According to Van der Linden (Book 1, Ch. 18), the same rule was observed in his time."

See also Ex parte Attwell's Estate 1938 CPD 543 at p. 545, Central Africa Building Society v Pierce, N 0 1969 (1) SA 445 (RAD) at 454 A-D and Western Bank Ltd v Woodroffe and Others 1976 (1) SA 482 (N) at p 488D-E.

In the present case, as Mr Lane emphasized, we are dealing with interest payable by statute, and the common law rule would not necessarily apply. This may be conceded, but it is trite law that a statute is applied in accordance with the common law unless a contrary intention appears from the statute itself. In regard to unsecured claims sec 103 (1) of the Insolvency Act clearly indicates that the common law rule is to be reversed - the principal debt is to be paid in full before the interest is paid. No such provision is found for interest on secured claims. Some point has been made of the wording of sec 95 (1). It lays down that the proceeds of the

security are to be applied in satisfying "the claims secured by the said property ... with interest thereon". By mentioning the claims first and the interest second, it is contended, the legislature indicated that payment must also be appropriated in that sequence. I do not agree. In practice a principal debt is almost invariably mentioned before interest. The reason is clear. The debt for interest is ancillary to the principal debt, and it cannot be calculated without regard to the amount of the principal debt. This manner of describing the obligation does not, however, affect the manner in which the common law appropriates payment to the respective debts. I cannot believe that if the legislature had intended to reverse the common law rule, it would have done so by using a common form of expression which in ordinary usage has no bearing on the appropriation of payments.

There is another, and perhaps more fundamental, flaw in the appellant's argument. To succeed, the appellant

has to show that the interest, forming the whole or a part of the excess for which sec 83(12) of the Insolvency Act makes provision, can be accommodated by sec 103 (l)(b) of that act. Now sec 103(1)(b) provides for interest on "unsecured or otherwise non-preferent claims". But we are not concerned (or not mainly concerned) with interest on unsecured claims. For instance, if the proceeds of the security satisfied the whole principal debt, leaving only interest to be paid under sec 103, such interest would be interest on a secured claim, not on an unsecured claim. There would, on appellant's argument, be no provision in the section, or anywhere else, for the ranking of such interest. The position would not be essentially different if only a part of the principal debt were paid from the proceeds of the security. In such a case the interest on the part which was so paid, would still have no home. It seems clear therefore that sec 103(1)(b) does not make adequate provision for the ranking of Interest on secured claims not fully satisfied out of the proceeds of the

security.

For the reasons I have given, I do not think the appellant's contention can be upheld on the facts of this case. This conclusion may possibly render it unnecessary to state positively what I consider the correct interpretation of the relevant sections to be, but in my view it would nevertheless be desirable for me to do so.

In my view the first possible construction which I mentioned above is the correct one, i e, that sec 83(12) of the Insolvency Act does not contemplate that any excess arising under the section should still retain its character of principal and interest. Sec 83(12) deals with a single "claim", which includes components of principal and Interest, and with a single "excess", in respect of which the creditor ranks as an unsecured creditor. One then moves to sec 103(1) of the act, which in sub-sec (a) provides for the ranking of unsecured claims. A claim in respect of an excess under sec 83(12) is an unsecured claim. As a matter of language it

would seem to fall squarely within the terms of sec 103(1)(a). Cf Bezuidenhout v Sackstein N 0 en Andere 1986 (1) SA 493 (O) at 497 G-H. And this conclusion is, in my view, strengthened by the consideration that no separate provision is made for interest which might be included in the excess - a clear indication that the legislature did not contemplate that such interest would be dealt with separately.

On the construction I have suggested a secured creditor might in effect get compound interest. This would happen if the excess, containing an interest component, and all other concurrent claims were fully paid under sec 103(1)(a). Interest would then be paid on all these claims under sec 103(1)(b). The act seems to lead ineluctably to this conclusion. If it is an anomaly, it is of little practical significance. The occasions on which a secured creditor will actually receive interest on his interest will be very few. And the Insolvency Act does not, of course, in

principle reject the possibility of compound Interest. Thus arrear pre-sequestration interest claimable under sec 50(1) and 89(3) may be included in a secured creditor's claim. In terms of sec 95(1) interest on the whole claim, including the arrear interest, is payable from the date of sequestration to the date of payment. See the Central Africa Building Society case, supra, at p 455D. The case of Boland Bank Ltd v The Master and Another 1991 (3) SA 387 (A) is not authority for the proposition that compound interest can never be claimable. It decided no more than that the word "interest" in secs 95(1) and 103(2) must be interpreted as meaning simple interest.

Mr Lane pointed out that anomalies might arise if unpaid interest on a secured debt could share in the free residue with the claims of concurrent creditors. So, for instance, it might be advantageous for a creditor to obtain some trifling security for his claim in order to ensure that his interest is paid pro tanto with concurrent creditors

rather than only after all of them have been paid in full. This seems rather fanciful. For this example one must assume of course that one is not dealing with a creditor who is trying to obtain some improper preference for the interest on an existing debt. Such a transaction may be set aside (secs 29, 30 and 31 of the Insolvency Act). A person who bona fide contemplates granting credit to someone who he foresees might possibly become insolvent, would try to obtain as much security as possible. If he cannot get sufficient security, he is likely to refuse credit, and is not likely to change his mind because there is a stratagem whereby his interest, like the greater part of his principal, will have the status of only a concurrent claim.

It follows from what I have said that the court a quo was in my view correct on both issues before it.

The appeal is dismissed. The second respondent's costs of appeal, including the costs of two counsel, are to be paid from the estate.

E M GROSSKOPF, JA

NESTADT, JA )
EKSTEEN, JA ) Concur
HARMS, JA )
OLIVIER AJA )