IN THE SUPREME COURT OF SOUTH AFRICA (APPELLATE DIVISION)

In the matter between

Case No 133/93

BARBARA KILROY COURT — Appellant

and

STANDARD BANK OF SOUTH AFRICA LIMITED — Respondent

Case No 638/93

BARBARA KILROY COURT — Appellant

and

LAMBERTUS VON WIELLIGH BESTER NO — 1st Respondent

BAREND JOHANNES VORSTER DURANDT NO — 2nd Respondent

STANDARD BANK OF S A LTD — 3rd Respondent

SYFRETS BANK LIMITED — 4th Respondent

CORAM: Joubert, Vivier, Eksteen, F H Grosskopf et Nienaber JJA.

HEARD: 28 February 1995.

DELIVERED: 30 March 1995.

J U D G M E N T

VIVIER JA:

The appeals in these two matters were heard together for reasons which will become clear later. In case no 9245/91 ("the sequestration proceedings") the appellant appeals to this Court against a final order for the sequestration of her estate granted by Scott J in the Cape Provincial Division on 8 March 1993. The order was granted on the application of the respondent in this appeal ("Standard Bank"). The application was supported by an intervening creditor, Syfrets Bank Ltd ("Syfrets Bank"), whose costs were ordered by Scott J to be paid out of the assets of the estate. The appeal was brought in terms of sec 150 of the Insolvency Act 24 of 1936 ("the Act") prior to its amendment by sec 1 of Act 129 of 1993. After the appellant had failed to lodge the record of the proceedings in the Court appealed from by 7 June 1993, as required by Rule 5(4)(c) of the Rules of the

Appellate Division ("the AD Rules"), case no 9716/93 was instituted in the Cape Provincial Division. In that case the joint trustees in the insolvent estate ("the trustees") as first and second applicants, Standard Bank as third applicant and Syfrets Bank as fourth applicant, sought an order on notice of motion declaring the appeal in case no 9245/91 to have lapsed and authorising the trustees to realise the immovable properties vesting in the insolvent estate. The matter came before Brand J who granted the relief claimed. With the leave of this Court the appellant appeals in forma pauperis against the judgment of Brand J and the orders granted by him. The respondents in this appeal are the joint trustees as first and second respondents (Barend Johannes Vorster Durandt NO having been substituted as second respondent for Marius van den Berg NO), Standard Bank as third respondent and Syfrets Bank as fourth respondent. There is also before us an

application for condonation of the late lodging of the requisite copies of the appeal record in the sequestration proceedings. This application is opposed by Standard Bank.

It is convenient to deal first with the application for condonation. The background facts may be summarised as follows: The sequestration proceedings were launched on 11 July 1991. After answering and replying affidavits had been filed an agreement was reached in terms of which the application for sequestration would be held over pending an attempt to sell certain of the appellant's immovable properties in order to pay her creditors. The properties were not sold and the matter proceeded. A further set of answering and replying affidavits was filed and the matter eventually came before Scott J ("the first hearing"). Having reserved judgment thereon the learned Judge on 14 September 1992 delivered judgment placing the appellant's estate under provisional

sequestration. The judgment has been reported: Standard Bank of SA Ltd v Court 1993 (3) SA 286 (C). I shall refer to this judgment as the first judgment.

The return day of the provisional order was extended from time to time and the appellant was allowed to file a further opposing affidavit. On 24 February 1993 the appellant's biggest creditor, Syfrets Bank, applied to intervene, also seeking a sequestration order. On 8 March 1993 the return day of the provisional sequestration order was argued before Scott J, ("the second hearing"), the appellant appearing in person after her erstwhile attorneys had withdrawn. On that day Scott J granted a final order of sequestration. I shall refer to this judgment as the second judgment.

On 31 March 1993 the appellant lodged a notice of appeal but she thereafter failed to lodge the record within three months of

the date of the judgment appealed against, ie on or before 7 June 1993. On 13 May 1993, ie within the three month period, the appellant requested Standard Bank to agree to an extension of eight weeks for the lodging of the record and she gave notice to the registrar of this Court that she had so requested an extension. Standard Bank's attorneys reacted in a fax on 18 May 1993 stating that they would in due course take instructions from their client. It was only on 4 June 1993 that they notified the appellant that Standard Bank would not accede to her request. By then it was clearly too late to lodge the record in time. It had not yet been lodged when case no 9716/93 for an order declaring the appeal to have lapsed was instituted on 10 August 1993.

The appellant's explanation for the delay is the following. The day after the final order of sequestration was granted ie on 9 March 1993 she asked Sneller Recordings ("Snellers"), the sole

contractors for the preparation of appeal records, for a quotation for the preparation of the requisite number of copies of the record. She only received this on 26 March 1993. She was unable to raise the amount required and on 14 April 1993 she requested a quotation for only one copy which was given to her the following day. She then investigated the possibility of preparing the record herself and after being advised against doing so, she instructed Smellers on 30 April 1993 to prepare one copy of the record. She was then informed that Snellers required a deposit of R3 000,00 before they would start preparing the record. After further negotiations Snellers on 5 May 1993 agreed to commence the preparation of the record upon payment of a deposit of R300,00, the balance of R2 700,00 being payable on a date to be arranged. Snellers undertook to have the record available by 28 May 1993. The deposit was duly paid. On 6 May 1993 Mrs Digue from

Snellers informed her that some of the documents in the case were missing and had apparently been misplaced. The appellant consequently on 7 May 1993, 25 May 1993 and 8 June 1993 addressed letters to the registrar of the Supreme Court in Cape Town asking him to attend to the incomplete record as a matter of urgency. No reply was received to any of these letters. On 28 May 1993 Snellers notified her that "a bundle of missing documents, about 400 in number", had been found which needed to be sorted out. The attorneys for Standard Bank were requested to make their file available to Snellers in order to reconstruct the record from these documents and their file was handed to Snellers on 16 June 1993. Snellers thereafter required some further documents which caused a further delay. On 1 September 1993 Snellers completed the preparation of one copy of the record which the appellant uplifted the following day. On

10 September 1993 the requisite number of copies of the record were lodged with the registrar of this Court and delivered to Standard Bank's attorneys. The record consists of nine volumes and runs to 755 pages. The application for condonation was filed on 20 September 1993.

In my view it is clear from the aforegoing that the delay in lodging the record was mainly due to the fact that documents were mislaid in the Cape Town Supreme Court. For that the appellant can certainly not be blamed. I cannot accept, as has been suggested on behalf of Standard Bank, that the appellant was all along in possession of a fully paginated and indexed copy of the Court's papers and that she could have seen to the preparation of the record herself. She denies this suggestion, the facts do not support it and it is highly unlikely. I accordingly accept that the delay in complying with AD Rule 5(4)(c) was largely caused by

factors beyond the appellant's control.

Other factors usually weighed by this Court in considering a petition for condonation under AD Rule 13 include the importance of the case, the prospects of success, the respondent's interest in the finality of the judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie 1969(3) SA 360 (A) at 362 F-G).

The appeal is without doubt a matter of vital importance to the appellant. On the other hand her creditors clearly have an interest in the finality of the judgment which is a factor militating against the granting of the indulgence (per Trengove AJA in Mbutuma v Xhosa Development Corporation Ltd 1978(1) SA 681 (A) at 686 F - 687 A). Two other factors mentioned viz the

convenience of the Court and the avoidance of unnecessary delay are not important in the present circumstances. There is no or minimal inconvenience to the Court and the delay was not great and was largely beyond the control of the parties.

In view of the fact that the other factors, either alone or cumulatively, are not of decisive importance, it becomes necessary to consider the appellant's prospects of success on appeal.

The appellant, who appeared in person at the hearing of this appeal, submitted that the application for sequestration was fatally defective for want of compliance with sec 9(3) of the Act in that when the application was issued by the Registrar and served on her it was not accompanied by a certificate of the Master that security had been given. The same point was raised at the first hearing and rejected by Scott J (see the first judgment at 288C-291G). The security certificate requirement of sec 9(3) is presently to be found

in sec 9(3) (b) which was inserted in the former sec 9(3) by sec 1

of Act 122 of 1993. The wording of the requirement has, however,

remained unchanged.

Sec 9(3) (b) provides :

> "The facts stated in the petition shall be confirmed by affidavit and the petition shall be accompanied by a certificate of the Master given not more than ten days before the date of such petition that sufficient security has been given for the payment of all fees and charges necessary for the prosecution of all sequestration proceedings and of all costs of administering the estate until a trustee has been appointed, or if no trustee is appointed, of all fees and charges necessary for the discharge of the estate from sequestration."

Sec 9(4) further provides that before a petition is presented to the court, a copy of the petition and of every

affidavit confirming the facts stated in the petition must be lodged with the Master or designated

officer who may report to the court on the petition. In

terms of sec 1 of the Petition Proceedings Replacement Act 35 of 1976 the reference in sec 9 to proceedings by way of petition must be read as a reference to proceedings by way of notice of motion. The relevant facts are the following: The notice of motion and founding affidavit were signed on 11 July 1991. The bond of security was executed on the same day. Also on the same day the notice of motion and founding affidavit (without the certificate) were filed with the Registrar who issued the application and allocated a case number to it. The original papers and copies were immediately uplifted and copies were served on the Master on the same day ie 11 July 1991, together with the original bond of security. A combined Master's report in terms of sec 9(3) and 9(4) of the Act was issued by the Master on 12 July 1991. On 15

July 1991 the application without the Master's report was served on the appellant. The original papers, together with the certificate, were returned to the Registrar and the application came before the Court on 17 July 1991. To sum up, the certificate did not accompany the application either when it was signed, filed with the Registrar, issued or when it was served. By the time the papers were served on the appellant security had however, already been furnished and the certificate had come into existence. It was before the Court when the matter was heard.

Sec 9(3) (b) of the Act requires the application to be accompanied by the certificate and requires further that the certificate must have been issued not more than ten days before the date of the notice of motion (Anthony Black Films v Beyl 1982

(2) SA 478 (W)). The subsection is silent as to when the certificate must accompany the application. It seems clear that the certificate need not be attached to the application when it is signed and that it need not even then exist. (Rennies Consolidated (Transvaal) (Pty) Ltd v Cooper 1975 (1) SA 165 (T) at 166 E-H; Mafeking Creamery Bpk v Mamba Boerdery (Edms) Bpk; Mafeking Creamery Bpk v Van Jaarsveld 1980 (2) SA 776 (NC)at 781C and De Wet NO v Mandelie (Edms) Bpk 1983 (1) SA 544 (T) at 546 C-D).

Different views have been expressed in the Provincial Divisions as to when thereafter the certificate must accompany the application. In the Transvaal it has been held that the certificate must be obtained before the application is filed and served and must

accompany such filing and service. (Arnawil Investments (Pty) Ltd v Stamelman and Another 1972 (2) SA 13 (W) at 14 A; the Rennies Consolidated case, supra at 166 F-H; A Holman Trading Co (Pty) Ltd v Pipeweld Construction and Erection (Pty) Ltd 1977 (4) SA 360 (T) at 363 B-D; and De Wet NO v Mandelie (Edms) Bpk., supra, at 547 G-H.)

In the Arnawil Investments case, supra, Marais J stated (at 13-14) that the purpose of the security requirement of sec 9(3) was to discourage frivolous or vexatious proceedings against solvent persons and to safeguard such persons against monetary loss where such proceedings are nevertheless brought. For security to be an effective brake on unfounded petitions for sequestration it was thought to be necessary to insist on security being furnished at some

stage prior to the incurring of costs by the respondent. That stage would be reached before the service of the application on the respondent. Hence the words "the petition shall be accompanied by a certificate". Marais J went on to say (at 14 B-C) :

> "The use of the word 'shall' in conjunction with 'accompanied' in my view also closes the door to means of proof other than a prescribed certificate, of the fact that the Master has been furnished with the required security for costs. If this is the correct construction of the sub-section, a respondent served with a petition for his sequestration would not be put to any expense whatever if, at the time of service, he finds no security certificate in the papers served on him. And that does seem to have been the result intended by the Legislature."

As was pointed out by Leon J in RSA Factors Ltd v Hansen 1983 (4) SA 873 (D & CLD) at 874 H, there is nothing in sec 9(3) which provides that the security must in any way relate

to the respondent's costs. The costs of opposition are not the costs referred to in the subsection. The precursor to the present sec 9(3) (b) was sec 9(2) (b) of Act 32 of 1916, which was similarly worded and required security to be furnished "for payment of all fees and charges necessary for the prosecution of all sequestration proceedings until a trustee has been appointed, or if no trustee is appointed all fees and charges necessary for the discharge of the estate from sequestration". In Sliom v Couzyn 1924 TPD 279 it was held (per Tindall J) that the security required by the subsection is not security for the costs of opposition incurred by the respondent, but the costs of the Master and the Sheriff. A similar view was expressed in Buirski and Herbstein v Estate Hunter and Another 1937 CPD 180 at 182 (per Van Zyl JP).

These two decisions were not referred to in the Arnawil Investments case, supra. In Melcost Investments (Pty) Ltd v Kruger 1968(2)SA 69(0) Klopper J, following Sliom v Couzyn, supra, and Buirski and Herbstein v Estate Hunter and Another, supra, held (at 72 B) that the security referred to in sec 9(3) of the Act must be furnished before the provisional order is granted. In the first judgment Scott J approved of the following passage in Meskin, Insolvency Law, at 2-29 as correctly stating the purpose of the security requirement of sec 9(3).

> "It is submitted that the intention is to ensure that there is a fund available to meet the costs which as a result of the operation of the process of administration necessarily will be incurred in case it should transpire that no trustee is appointed and the estate is discharged from sequestration or, although such appointment ensues, there is no, or insufficient, property from which such costs can be met."

The decision in the Arnawil Investments case and the other similar decisions in the Transvaal have not been followed in the other provinces. In the Mafeking Creamery case it was held that the certificate need not accompany service of the application on the respondent. In that case security had at the time of service in fact been furnished and the point was left open as to whether it was necessary for security to have been given at that stage. Zietsman J pointed out (at 781 H) that the Act did not require that applications for a provisional order of sequestration be served on the respondent, and went on to say the following at 782 A-B :

> "Dit is na my mening duidelik dat die nodige sertifikaat deur die Meester uitgereik moet word en voor die Hof moet wees voordat 'n voorlopige bevel uitgereik kan word, maar aangesien betekening van die stukke op die respondent nie 'n wetlike vereiste is nie is dit my mening dat die betekening van 'n afskrif van die aansoek op die respondent voordat die sertifikaat van die Meester ontvang is, en die versuim om op enige stadium daarna 'n afskrif van die genoemde sertifikaat op die respondent te beteken, nie 'n versuim is om aan 'n

bepaling van die Wet te voldoen nie en derhalwe nie noodwendig 'n fatale defek tot die aansoek is nie."

In RSA Factors Ltd v Hansen, supra, the application for a provisional order of sequestration was served on the respondent without the certificate which was riled the day before the hearing and was before the Court when the matter was heard. A point in limine that the application was fatally defective for want of compliance with sec 9(3) was dismissed. Leon J referred (at 875H - 876C) to the long-standing practice in Natal to the effect that, where an applicant for a provisional order of sequestration relies upon a nulla bona return or upon documentary evidence of an independent nature which is confirmatory of the allegations in the application, no notice need be given to the respondent and an

order for provisional sequestration can be obtained ex parte.

The learned Judge went on to say the following at 876 B-D :

> "Where, as here, a nulla bona return is relied upon, there was thus no need in terms of the Natal practice for the application to be served upon the respondent at all before a provisional order of sequestration was obtained. And in the case of such an application the long-standing practice of the Natal Provincial Division is that the security certificate need not be lodged with the Court when the petition is filed: it is sufficient if the security certificate (which must not be stale) is lodged before the hearing."

A similar practice prevails in the Cape Provincial Division

where, in terms of Court Notice No 59, promulgated on 8 March

1984, no notice of an application for a provisional order of

sequestration need be given to a respondent if the applicant relies

on a nulla bona return or an act of insolvency in terms of sec 8(g)

of the Act. An earlier Court Notice No 44, promulgated on 6

November 1975, requires the applicant first to lodge his application for a provisional order of sequestration with the Registrar (who issues the application and allocates a case number) before a copy of the papers are served on the Master. In practice a copy of the issued application and the original bond of security are handed simultaneously to the Master who does not furnish a separate certificate and report but combines both in one document. In his first judgment Scott J stated (at 289 C) that the practice in the Cape Provincial Division was that the Master's report, incorporating the security certificate, need not be served on the respondent. The learned Judge held (at 291 E-G) that all that is required by sec 9(3) is that the security must have been given before the provisional order is granted. The practice in the Cape

Provincial Division, followed in the present case, of lodging the Master's report, incorporating the security certificate, with the Court prior to the application being set down for hearing, was, according to the learned Judge, not contrary to the provisions of sec 9(3) of the Act.

The Act does not expressly require that notice of an application for a provisional order of sequestration be given to the debtor or that the papers in such application be served on the debtor prior to the hearing. And in my view there is no implied requirement to be found in sec 9(3) (b) of the Act that the security certificate must be served on the respondent before the hearing. With regard to the purpose of requiring the applicant to furnish security I prefer the view expressed in Sliom v Couzyn, supra,

to that expressed in the Arnawil Investments case. I agree with what Leon J said in the RSA Factors case (at 874 H) that there is nothing in the subsection to indicate that the security must in any way relate to the respondent's costs. Had that been the intention, one would have expected the Legislature to have said so clearly, in the same way as it did in sec 125 of the Act which requires the insolvent who applies for his rehabilitation to furnish security "for payment of the costs of any person who may oppose the rehabilitation and be awarded costs by the court". I accordingly do not think that sec 9(3)(b) can be construed so as to extend the security to the respondent's costs of opposition to the sequestration application. The process of administration of the insolvent estate follows mainly upon the issue of the provisional order of

sequestration, and it is the costs necessarily incurred in that process

which the subsection intends to cover. Ail that is thus required by

the subsection is that security must have been given before the

matter is heard and that the security certificate shall then accompany

the application. In the Melcost Investments case, supra,

Klopper J put it thus (at 72 A-C) :

> "Dit is duidelik dat sodra 'n voorlopige bevel van sekwestrasie verkry word, masjinerie in werking gestel word wat onmiddellike kostes meebring. Behalwe vir die kostes wat deur die Weesheer aangegaan moet word, moet die Balju
> of Adjunk-Balju ook kostes aangaan..... Dit is na my
> mening dus duidelik dat die Wetgewer sekuriteit vir hierdie kostes verlang voor enige bevel nog gemaak word, sodat gemelde persone nie in 'n posisie geplaas kan word, dat waar hulle ingevolge 'n Hofbevel verplig word om sekere handelinge te verrig en in sekere omstandighede dit dringend moet doen, dit gedoen word sonder dat die nodige sekuriteit vir die kostes voorsien is nie."

I am accordingly of the view that sec 9(3) (b) of the Act does not require the security certificate to accompany the application either when it is filed with the Registrar or when it is served on the respondent and that the practice in the Court a quo, followed in the present case, does not conflict with the provisions of the subsection. The point taken by the appellant that the application was fatally defective for want of compliance with the subsection cannot therefore succeed.

Before I leave this aspect I should point out that it was not contended by the appellant that in failing to serve a copy of the security certificate with the application on her prior to the hearing, Standard Bank acted in breach of the Uniform Rules of Court Although the Act does not require that notice of an application for

a provisional order of sequestration be given to the debtor or that the papers in such application be served on the debtor prior to the hearing, each Provincial Division has followed its own practice with regard to these aspects. I have already referred to the practice in Natal and the Cape Provincial Divisions that no notice need be given to a debtor when the creditor relies upon certain specified grounds, for example upon a nulla bona return. The practice would appear to be the same in the Transvaal. See Simross Vintners (Pty) Ltd v Vermeulen; VRG Africa (Pty) Ltd v Walters t/a Trend Litho; Consolidated Credit Corporation (Pty) Ltd v Van der Westhuizen 1978 (1) SA 779 (T) at 783 E-G. For the practice in the other Divisions see Gouws v Scholtz 1989 (4) SA 315 (NC). The question will

then arise as to whether, if service of the papers prior to the hearing is required in terms of the practice of a particular court, service of the security certificate in terms of the Uniform Rules is not also then required at some stage prior to the hearing. The point, as I have said, was not taken and in any event service of the application in the present case was not necessary insofar as an act of insolvency in terms of sec 8(g) of the act was relied upon and the final order of sequestration was granted on that basis.

This brings me to the merits of the appeal against the final order granted by Scott J. On 11 July 1991 when the sequestration proceedings were launched the appellant was indebted to Standard Bank in an amount of not less than R559 537,18, for

which it held no security. By the time of the first hearing the debt had increased to R713 032,77 and by the time of the second hearing to R796 240,67. On 24 March 1992 Syfrets Bank obtained judgment against the appellant in a capital amount of Rl,5 m plus interest in respect of a loan agreement concluded on 3 June 1990. The loan was secured by a mortgage bond over the appellant's immovable properties. By the time of the first hearing this debt had increased to Rl,8 m and by the time of the second hearing to more than R2 m by reason of the non-payment of interest. Other liabilities conceded by the appellant at the first hearing were the amounts of R70 800,00 owing in legal fees to a firm of attorneys, R125 000,00 owing to a certain trust and R85 000,00 owing on lease and instalment sale agreements. Her

total undisputed debts as at the first hearing therefore amounted to approximately R2,7 m.

The appellant's only assets of note are the farm Goedeverwachting near Sir Lowry's Pass in the district of Somerset West ("the farm") and an industrial property known as Broadlands Industrial Park, Strand. The farm has been subdivided into seven portions and the industrial property into three. I shall refer to the three latter portions together as the industrial property. One of these, the remainder of erf 5089, was sold in October 1991 to one Doggett for R2 245 000,00. Doggett thereafter sought to avoid the sale on various grounds and protracted litigation followed which was still unresolved at the time of the second hearing. There are six industrial buildings, subdivided into twelve lettable components,

on the remainder of erf 5089. The other two subdivided portions of the industrial property are erven 18859 and 12857.

At the first hearing Standard Bank sought the sequestration order on the grounds that the appellant had committed acts of insolvency in terms of sections 8(c) and 8(g) of the Act and that she was in fact insolvent as contemplated by section 10(b) of the Act. Scott J held, (at 294 E-F and 295 F-G of the first judgment) that both acts of insolvency had been established. With regard to the question of the appellant's actual insolvency Scott J correctly pointed out (at 295 I) that this depended upon the value placed on her immovable properties. At the time Standard Bank's valuer, Carroll, valued the farm at Rl 300 000,00 and the industrial property at Rl 529 220,00 for a total of R2 829 220,00,

while the appellant's valuers placed a substantially higher value on the properties. Scott J said in the first judgment (at 296 B) that the mere fact that Doggett was initially prepared to pay R2 245 000,00 for the remainder of erf 5089 indicated that Carroll's valuation may be over-conservative. The learned Judge accordingly held that it had not been established that the appellant was in fact insolvent. In the second judgment Scott J confirmed his previous finding that the appellant had committed an act of insolvency in terms of sec 8(g) of the Act. He accordingly did not find it necessary to reconsider his finding that an act of insolvency in terms of sec 8(c) (prejudicing or preferring creditors) had been established or whether, in the light of new facts placed before him at the second hearing, the appellant was in fact

insolvent.

I proceed to consider the learned Judge's finding that the appellant had committed an act of insolvency in terms of sec 8(g) of the Act in a letter dated 5 June 1991 which she wrote to Standard Bank. The subsection reads :

"8. A debtor commits an act of insolvency -

(g) if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts."

The letter in question is a lengthy one, consisting of some five typed pages. It is addressed to the manager of Standard Bank's Matador Centre branch where the appellant had her account and is headed "Bridging finance : overdraft facilities". It commences by referring to the fact that the appellant has

approached Syfrets Bank to consent to a second mortgage bond being passed to secure her indebtedness to Standard Bank. It proceeds to set out details of the appellant's immovable properties and the steps which have been taken to develop and market the properties. It is pointed out that it will take some time to sell the properties. Then follows the passage relied upon by Standard Bank as constituting written notice of inability to pay. It reads :

> "We are asking you therefore, to allow us a period of grace in which to realise the sale of the above assets and accordingly discharge our obligations to your bank. We note that at present you have an unsecured overdraft and venture to suggest that now that Syfrets has advised the writer of its agreement to the registration of a second mortgage bond in favour of Standard Bank, the Bank extends the bridging finance to the writer, for a maximum period of six (6) months, and secures the bridging loan by means of the registration of the second bond as agreed."

The request for a period of grace is repeated in the penultimate paragraph which reads :

> "In the event that the Bank does not wish to register the second mortgage bond and extend the bridging finance to the writer, it is requested that a period of grace be allowed whilst the writer replaces this finance with bridging from another source."

Sec 8(g) quoted above may mean "unable to pay any single

one of his debts" or it may mean "unable to pay all his debts".

This ambiguity was cleared up by the amendment (by sec 5 of Act

16 of 1943) of the Afrikaans version to read :

> "8(g) as hy aan enigeen van sy skuldeisers skriftelik kennis gee dat hy nie in staat is om een of ander van sy skulde te betaal nie."

Before its amendment the relevant part of the Afrikaans version

read "om sy skulde te betaal nie" which clearly meant all his

debts. As the Afrikaans version was the signed one, the English version until the amendment must be taken to have meant "unable to pay all his debts". The amending provision inserted into the Afrikaans version makes it clear that the proper interpretation of sec 8(g) now is that the notice need relate only to an inability to pay any single one or more of the debtor's debts. (Optima Fertilizers (Pty) Ltd v Turner 1968 (4) SA 29 (D & CLD) 29 at 32 F - 33 A).

Whether a particular notice is such as to constitute an act of insolvency within the meaning of sec 8(g), depends on a construction of its contents, read as a whole. The question when considering the letter is not whether the debtor is in fact unable to pay or whether he is solvent or insolvent. Inability to pay must

be distinguished from unwillingness to pay. If the debtor is merely saying that he is unwilling to pay, the letter does not constitute an act of insolvency. Construing the written notice involves deciding how the reasonable person in the position of the creditor receiving the notice would understand it. To such a reasonable person must be attributed the creditor's knowledge at the time of the relevant circumstances. (Barlow's (Eastern Province) Ltd v Bouwer 1950 (4) SA 385 (EDLD) at 390 E-H; Optima Fertilizers (Pty) Ltd v Turner, supra, at 33 A-D; Du Plessis en 'n Ander v Tzerefos 1979 (4) SA 819(0) at 834 F-H and the first judgment at 291 H - 293 E).

In the present case it is clear that the appellant had received letters of demand from Standard Bank before she wrote the letter of

5 June 1991 and that the debt was then due and payable. The letter of 5 June 1991 does not, of course, expressly say that the appellant cannot pay, and she has submitted that she was merely expressing her unwillingness to pay and that, had she been pressed, she could have raised the money and paid her debt to Standard Bank. I cannot agree with the submission. The tenor of the letter, read as a whole, is clearly to the effect that the appellant cannot pay her debts unless she is given time to pay and is granted "bridging finance" for a period of six months. It is made clear that the immediate realisation of the immovable properties is not possible and will in fact take time, and it is for this reason that Standard Bank is asked for time to pay and to provide additional finance or at least to allow a period of grace so that finance can be

obtained from another source.

It is thus clear from the letter that the appellant was not at the time in a position to realise sufficient assets to pay the debt. At the time Standard Bank's claim was of the order of R550 000,00 and it knew that the appellant's properties were mortgaged in favour of Syfrets Bank to the extent of approximately Rl,5 m. I accordingly agree with the Ending of Scott J (at 294 E-F of the first judgment) that in the circumstances the only inference to be drawn from the letter is that she was unable to pay. The letter thus constitutes an act of insolvency within the meaning of sec 8(g) of the Act.

As I have said, Scott J did not find it necessary on the extended return day of the provisional sequestration order to

reconsider, in the light of new information placed before him, whether the appellant was in fact insolvent. It will be recalled that Carroll valued the farm at Rl,3 m and the industrial property at Rl 529 220,00 for a total of R2 829 222,00 as against admitted debts at the time of the first hearing of approximately R2,7 m. Carroll's valuation was supported by other valuers. Jonathan Smiedt, who was instructed by the appellant's major creditors during March 1992 to sell one of the industrial subdivisions, erf 12857, at a public auction, stated in an affidavit sworn to on 6 July 1992 that not a single bid was received at the auction and that the property market had since become depressed so that erf 12857 would not fetch more than R150 000,00 if then sold at a sale in execution. Smiedt later also valued the farm on

behalf of Syfrets Bank and placed a value on it of Rl,2 m as at 10 February 1993. The second industrial subdivision, erf 18859, was valued on behalf of Syfrets Bank by Israel Jacobs at R250 000,00 as at February 1993. The third industrial site, the remainder of erf 5089, was valued by David Newham on behalf of Syfrets Bank at R905 000,00 as at 30 January 1993. It will be seen, therefore, that Smiedt's valuation of R150 000,00 for erf 12857; Jacobs's valuation of R250 000,00 for erf 18859; Newham's valuation of R905 000,00 for the remainder erf 5089 and Smiedt's valuation of Rl,2 m for the farm all supported Carroll's valuation. The provisional trustees reported in an affidavit filed before the second hearing that the trial against Doggett had started on 1 February 1993 and that after evidence had been led for about

two weeks it had been postponed to 17 May 1993. By the time of the second hearing Syfrets Bank had notified the provisional trustees that it was no longer prepared to support the litigation against Doggett. Apart from the uncertainty surrounding the outcome of this litigation the purchase price of R2,245 m was not a cash price, as Scott J correctly pointed out in his second judgment. In all the circumstances it would seem that Scott J should not have allowed the sale to Doggett to influence him in concluding in his first judgment (at 296 A-C) that Carroll's valuation was too conservative.

Subsequent to the granting of the provisional order of sequestration the provisional trustees on 23 November 1992 addressed a circular to creditors advising that the appellant's total

liabilities had increased to R3 488 000,00. According to information supplied by the appellant herself, claims of concurrent creditors, apart from that of Standard Bank, now amounted to R950 000,00, some R700 000,00 more than the amount previously disclosed by the appellant. By the time of the second hearing the appellant's total debts exceeded R3,6 m. In a further opposing affidavit filed on 1 March 1993 the appellant claimed that she could realize a total amount of R3 235 000,00 from the sale of her immovable properties. This figure included the amount of R2 245 000,00 from the disputed Doggett sale. The other prospective sales were, as one of the trustees pointed out in his affidavit, either subject to unacceptable conditions or made provision for transfer and payment at some future date which would

result in unacceptable delays. Scott J therefore correctly concluded in his second judgment that were the properties to be disposed of immediately on the open market and on the usual terms and conditions, they would inevitably realise very much less than the sum mentioned, namely R3 235 000,00. The appellant had made no payment in reduction of her debt to either of her major creditors since April 1991, despite the fact that Syfrets Bank had, on 24 March 1992, obtained judgment against her in respect of the amount owing to it and had issued a writ of execution against her immovable properties. In my view the appellant was clearly insolvent at the time of the second hearing.

The appellant next submitted that Scott J erred in holding in the second judgment that the sequestration of her estate would be

to the advantage of creditors. There is no merit in this submission. By the time of the second hearing the appellant's financial position had steadily deteriorated over the previous two to three years. Accumulating interest on the bond holder's claim had continued to erode the residue available to concurrent creditors. The appellant had had sufficient time to realise her assets and to pay her creditors. She had not done so and had failed to pay the interest on the capital amounts. There was still a reasonable prospect of a substantial payment being made to the general body of creditors, although such prospect was fast diminishing.

For these reasons the application for condonation must be refused on the ground that there are no prospects of success in an appeal against the final order of sequestration.

I proceed to deal with the appeal in case no 9716/93. For

convenience I repeat the facts which are relevant for a consideration of the issues raised in this appeal. The final order of sequestration was granted on 8 March 1993 and on 31 March 1993 the appellant duly lodged a notice of appeal in terms of AD Rule 5 (1). In terms of AD Rule 5 (4) (c) the appellant was required to lodge with the Registrar of this Court six copies of the record and to deliver the requisite number of copies to Standard Bank within three months of 8 March 1993 or "within such further period as may be agreed in writing" (Rule 5(4) (d)). On 13 May 1993, ie within the three month period, the appellant requested Standard Bank's attorneys to agree that the three month period for the lodging of copies of the record be extended by eight weeks. On 4 June 1993 Standard Bank's attorneys advised the appellant that the

request for an extension was refused. At that time Standard Bank's attorneys were fully aware of the fact that Snellers were having difficulties in preparing the record and that a delay was inevitable. The preparation of the record had not been completed by the time the application for an order declaring the appeal to have lapsed was launched on 10 August 1993. The application was opposed by the appellant and the affidavits and annexures filed in that matter run to 661 pages. The matter came before Brand J who granted an order declaring the appeal in the sequestration proceedings to have lapsed and authorising the trustees to sell the immovable properties vesting in the insolvent estate. The learned Judge also ordered that the attorney and own client costs of the joint trustees, Standard Bank and Syfrets Bank be costs in the administration of the

insolvent estate and that such costs be treated as costs of realisation of the immovable properties in terms of sec 89 of the Act.

Brand J considered that the Court had jurisdiction to entertain the application as the Appeal Court had not yet become seized with the matter. The learned Judge further held that a failure to comply with AD Rule 5(4) (c) causes the appeal to lapse and that AD Rule 5(4A) (b), previously AD Rule 5(4) bis (b), which was relied upon by the appellant, does not apply in the present circumstances. In view of the conclusion which I have reached that Brand J erred in granting the orders which he did it is not necessary to decide whether the Court a quo had jurisdiction to entertain the application.

AD Rules 5(4) and 5(4A), insofar as relevant, provide as

follows:

"5(4) After an appeal has been noted in a civil case the appellant shall -

(a) .....

(b) .....

(c) in all other cases within three months of the date of the judgment or order appealed against or an order granting leave to appeal; or

(d) within such further period as may be agreed to in writing by the respondent,

lodge with the registrar six copies of the record of the proceedings in the court appealed from and deliver such number of copies to the respondent as may be considered necessary.....

(4A) (a) If an appellant who has withdrawn his appeal has failed to lodge the record of the proceedings in the court appealed from, or if an appellant is in terms of paragraph (b) deemed to have withdrawn his appeal, a respondent who has noted a cross-appeal may, within 20 days of the date of receipt by the respondent or his attorney of notice of withdrawal by the appellant or of the date upon which the appellant is so deemed to have withdrawn his appeal, as the case may be,

> notify the registrar in writing that he desires to prosecute the cross-appeal, and such respondent shall thereupon for the purposes of sub-rule (4) be deemed to be the appellant, ...
>
> (b) If an appellant has failed to lodge the record within the period prescribed and has not within that period applied to the respondent or his attorney for consent to an extension thereof and given notice to the registrar that he has so applied, he shall be deemed to have withdrawn his appeal."

AD Rule 5 (4) bis which, as I have said, was the forerunner of the existing Rule 5 (4A), was introduced by way of amendment in 1969. Before this Rule was introduced it was held in two earlier decisions of this Court (Vivier v Winter; Bowkett v Winter 1942 AD 25 and Bezuidenhout v Dippenaar 1943 AD 190) that, even though not expressly so stated in the Rules, an appeal lapses on failure to comply with either of the Rules relating to the lodging

of copies of the record or security for the costs of an appeal. In the former of these decisions the appellant had noted an appeal but failed to furnish security in terms of the then existing Rule 7. The respondents brought an application in this Court for an order that the appeal be discharged with costs. It was held (per De Wet CJ) that even though the Rules did not specifically say that on failure to comply with the provisions of the Rule the appeal would lapse, it was clear that that was implied, so that there was no necessity for the respondents to have brought the application. No order was consequently made on the application. In Bezuidenhout's case, supra, the appellant failed to comply with both former Rules relating to the lodging of copies of the record and security for the costs of the appeal. In refusing an application

for condonation Centlivres JA said (at p 192) that:

> "[I]n view of the fact that the appeal has already lapsed, the Court should not grant the applicant any form of relief if it is satisfied that there is no reasonable prospect of the appeal succeeding."

The introduction of AD Rule 5 (4) bis in 1969 was followed the next year by the decision of this Court in Santam Verseke= ringsmaatskappy Beperk v Pietersen 1970 (4) SA 215 (A). In that case the appellant failed to lodge the record as required by the then AD Rule 5 (4) (c) and applied for condonation for his failure to do so. It was contended on behalf of the respondent that an application for condonation could not be entertained as the appellant was "deemed to have withdrawn his appeal" in terms of Rule 5(4) bis (b). This sub-rule is identical to the present Rule 5(4A) (b).

This Court held that sub-rule (4) bis (b) should be read together with sub-rule (4) bis (a) and should be confined to those cases where the respondent has noted a cross-appeal. It was held (at 217 C-G) that the sole reason for the insertion of sub-rule (4) bis (b) was to fix the commencing date of the period within which the record is to be lodged by the respondent who has noted a cross-appeal in those cases where the appeal has not actually been withdrawn. The operation of the sub-rule was thus confined to those cases where the respondent has noted a cross-appeal.

There is some uncertainty as to the circumstances in which the provisions of the present Rule 5(4A) (b) will apply, more particularly whether it is to be confined to those cases where a cross-appeal has been noted. In United Plant Hire (Pty) Ltd v

Hill and Others 1976 (2) SA 697 (D & CLD) Kumleben J held that the provisions of AD Rule 5(4) bis did not apply in the circumstances of that case. In that case the applicant for relief had been the unsuccessful plaintiff in a trial action against the first three respondents who had obtained a court order compelling the fourth respondent (the taxing master) to tax their bills of costs. The applicant had noted an appeal against this order to this Court but had failed to lodge copies of the record or to furnish security within the prescribed periods. The first three respondents thereafter proceeded to have their bills of costs taxed despite the fact that an application for condonation was served on them the day before the taxation. The applicant thereafter applied for a declaratory order that the taxation of the bills of costs was invalid and of no force

and effect. It was submitted on his behalf that his appeal did not

lapse upon the expiration of the prescribed period and that it only

lapsed when it was removed from the roll. Reliance for this

submission was placed on the following passage of the judgment of

De Villiers JA in the Pietersen case, supra, at 217 F-G:

> "Subreël (4) bis (b) is slegs ingevoeg om in 'n geval waar die appèl nie daadwerklik teruggetrek is nie, die datum te bepaal waarvandaan die periode van 21 dae en die periodes genoem in subreël (4) (a) en (b) bereken moet word. Dit was nooit bedoel om in 'n geval soos die onderhawige van toepassing te wees nie. In so 'n geval, d w s in 'n geval waar 'n appellant nie betyds die stukke ingehandig het nie, loop hy wel die gevaar dat die appèl van die rol geskrap kan word maar hy is altyd geregtig om vir genoegsame redes aansoek om kondonasie van sy versuim te doen in terme van die bepalings van Reël 13."

In rejecting the argument, Kumleben J, held (at 700 F -

701 A) that the statement in the quoted passage that failure to

comply with AD Rule 5(4) created the risk that an appeal may be struck from the roll, did not form part of the ratio decidendi of the decision in the Pietersen case. This was that sub-rule (4) bis (b) did not apply at all to the circumstances of that case and that it related solely to the lodging of the record by a respondent in a cross-appeal and had no bearing upon the right of an appellant to seek condonation in terms of Rule 13. Applying the decisions of this Court in the cases of Vivier, supra, and Bezuidenhout, supra, to the circumstances of that case, Kumleben J held (at 701 C-D) that the appeal had lapsed when the time for the filing of the record had expired and that the bills of costs were consequently validly taxed. The application was dismissed with costs.

In Waikiki Shipping Co Ltd v Thomas Barlow and

Sons (Natal) Ltd 1981 (1) SA 1040 (A) the respondent had granted the appellant an extended period within which to lodge the record. On the last day of the extended period the appellant delivered a record to the Registrar of this Court who refused to accept it as he considered the copies of the record tendered as not complying with the provisions of AD Rule 5. The copies were uplifted and retendered to the Registrar after the expiry of the extended period. The appellant applied for an adjournment of the appeal which was refused. The Court instead granted an application by the respondent striking the appeal off the roll. It was held (per Wessels JA) that the extended period became the "period prescribed" within the meaning of AD Rule 5(4) bis (b) (at

1048 E). After referring with apparent approval to the cases of Vivier and Bezuidenhout the Court found it not necessary to decide whether the appeal had lapsed because of the appellant's failure within the prescribed period to file a complete and acceptable record (at 1049 D-E). It was held that whether or not the appeal had so lapsed the appellant still required condonation for its failure to lodge a proper and complete record before the expiry of the extended period, which condonation the appellant had not applied for (at 1050 A). It would seem from the judgment that the Court considered that AD Rule 5(4) bis (b) might be of wider application than was held in Pietersen's case. (Cf S v Adonis 1982 (4) SA 901 (A) at 907 D-G.) In the Waikiki Shipping case, supra, Wessels JA said (at 1049 D) that the circumstances in which this

sub-rule will apply, more particularly with reference to the dictum in Pietersen's case at 217 D-G, might well be reconsidered by this Court on a more appropriate occasion. After careful consideration I am not persuaded that the decision in the Pietersen case limiting the application of Rule 5(4A) (b) to those cases where a cross-appeal has been noted, is clearly wrong. (Cf Bloemfontein Town Council v Richter 1938 AD 195 at 232 and Catholic Bishops Publishing Co v State President and Another 1990 (1)SA 849 at 866 G-H.)

The principles stated in the Vivier and Bezuidenhout decisions, supra, were re-affirmed by this Court in Moraliswani v Mamili 1989 (4)SA 1(A) where Grosskopf JA said at 8 B-D:

> "[T]here is strong authority for the proposition that failure to comply with Rule 6 causes an appeal to lapse, and that condonation by this Court is needed to revive it."

What is stated in the above passage applies equally to an appellant's failure to lodge the record within the period prescribed. This means that in the present case the appeal lapsed when the appellant had by 7 June 1993 failed to lodge the record as required by AD Rule 5(4) (c) and that an application for condonation was required to revive it. No such application had been brought by the time the proceedings in case no 9716/93 were launched. Once the appeal had lapsed the joint trustees were free to sell the immovable properties vesting in the insolvent estate, unless, of course, the appellant took the initiative and moved for

an interdict against such sale. In the circumstances of the present case, and in the absence of a prior dispute necessitating a declaratory order, there was therefore no necessity for the proceedings before Brand J to have been instituted and the learned Judge should have made no order on the application before him. The statement by De Wet CJ in Vivier's case, supra, at 26, that the applicants in that matter could have taken steps in the Court below to have the action dismissed, is no authority for granting an order declaring the appeal to have lapsed, as Brand J, seemed to think.

With regard to the costs of the application Brand J should have made no order as to costs save to order that the joint trustees' costs be costs in the administration of the insolvent estate, such

costs to be treated as costs of realisation of the immovable properties in terms of sec 89 of the Act.

In the result the following order is made:

1. In case no 9245/91 the application for condonation of the late lodging of the record is refused and the appellant is ordered to pay Standard Bank's costs relating to the application for condonation and the appeal, such costs to include the costs of two counsel.

2. In case no 9716/93 the appeal is upheld with costs. The judgment of the Court a quo is altered to read:

> "No order is made on the application save that the costs of the first and second applicants are ordered to be costs in the administration of the insolvent estate, such costs to be treated as costs of realisation of the immovable properties in terms of sec 89 of the Act."

W VIVIER JA.

JOUBERT JA) EKSTEEN JA)
F H GROSSKOPF JA)
NIENABER JA) Concur.