REPORTABLE
Case number: 272/98

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

BRIAN ST CLAIR COOPER NO **APPELLANT**

and

FIRST NATIONAL BANK OF SA LTD **RESPONDENT**

CORAM: **SMALBERGER, GROSSKOPF, MARAIS, ZULMAN JJA and MELUNSKY AJA**

DATE OF HEARING: **21 AUGUST 2000**

DELIVERY DATE: **29 SEPTEMBER 2000**

Issue of warrant in terms of sec 69(3) of the Insolvency Act 24 of 1936 - when notice to affected person required.

JUDGMENT

SMALBERGER JA

SMALBERGER JA:

[1] The respondent sought an order in the Witwatersrand Local Division *inter alia* setting aside a search warrant applied for by the appellant and issued by a magistrate in terms of sec 69(3) of the Insolvency Act 24 of 1936 ("the Act"). The order was granted by Roux J who also ordered the appellant to pay the respondent's costs *de bonis propriis* on a scale as between attorney and client. The learned judge subsequently granted the appellant leave to appeal to this Court.

[2] The appellant was appointed as the trustee of the insolvent estate of one Wilfred Rosenberg ("the insolvent") on 3 December 1992. The insolvent had been provisionally sequestrated on 28 July 1992 and a final order had been granted on 18 August 1992.

[3] The insolvent's assets, at the time of sequestration, included an undivided half-share in a property (a flat) situated in Muizenberg, Western Cape. The insolvent's half-share in the property was transferred to him on 4 June 1992 (i.e. prior to his sequestration) and has since remained registered in his name; the remaining half-share is registered in the names of his children or on their behalf. For convenience I shall refer to the insolvent's half-share in the property simply as "the property".

[4] The first and final liquidation and distribution account in the insolvent's estate, dated 22 October 1993 ("the account"), drafted by the appellant, was confirmed by the Master of the Supreme Court ("the Master") on 2 March 1994, after compliance with all the formalities prescribed by law. The property was not reflected in the account as an asset. This was because the appellant considered the property to have little or no commercial value. He had tried to sell it by public auction on 30 July 1993, but no bid was made for it, nor was any interest shown in it prior to the auction. The title deed pertaining to the property was left in the possession of the insolvent.

[5] A supplementary liquidation and distribution account drafted by the appellant was confirmed by the Master on 31 October 1994. Consistent with what had gone before it also contained no reference to the property.

[6] Only ABSA Bank Limited ("ABSA") submitted a claim against the insolvent estate. The claim, which was duly admitted, was in respect of monies lent and advanced by ABSA to the insolvent. No dividend was available for creditors and ABSA was obliged to pay a contribution towards the costs of insolvency.

[7] On 22 October 1996 the insolvent applied for his rehabilitation, which was

granted on 3 December 1996.

[8] Prior to this, during March 1995, the insolvent had become indebted to the respondent in respect of overdraft facilities, suretyships and credit card liabilities in a total amount in excess of R350 000. The respondent was unaware at the time that the insolvent's estate was under sequestration.

[9] On 23 March 1995, with the knowledge and concurrence of the insolvent, the respondent instructed its attorney ("Van Huyssteen") to register a mortgage bond over the property in respect of the insolvent's indebtedness to it. The insolvent had previously handed over the relevant title deed to the respondent.

[10] The papers for the registration of the mortgage bond were lodged with the relevant Deeds Office during October 1995. Included amongst the papers was an affidavit attested to by the insolvent stating that his estate had not been sequestrated. The papers were rejected by the Deeds Office on the basis that the insolvent was an unrehabilitated insolvent at the time. This was the first intimation that the respondent received of that being the case.

[11] Subsequently, still during October 1995, Van Huyssteen ascertained that the appellant was the trustee of the insolvent's estate. He informed the appellant of the preceding events relating to the attempted registration of the mortgage bond over

the property and requested the appellant's consent thereto. During later discussions with Van Huyssteen the appellant made it clear that he was not prepared to give his consent to the registration of the mortgage bond.

[12] In due course the respondent sought and obtained an acknowledgment of debt, dated 30 July 1996, from the insolvent. By this time the total indebtedness of the insolvent to the respondent had grown to more than R500 000.

[13] During 1996 the appellant obtained a valuation of the property in the amount of R70 000. This was apparently the first time that the appellant had had any dealings with the property since he drafted the account in October 1993. He offered the property to the insolvent's children, but they were unable or unwilling to purchase it at that price. He then had it put up for sale at a public auction. The upshot of this and subsequent events was that he received an offer of R40 000 for the property. The insolvent's children were unable to match or improve on this offer. A written sale agreement was accordingly concluded on 4 September 1996 for the sale of the property to a third party for the sum of R40 000.

[14] On 14 May 1997, after the insolvent's rehabilitation, the appellant wrote to the respondent requesting the title deed relating to the property to enable him to pass transfer to the purchaser. Correspondence followed between Van Huyssteen

and the appellant's attorneys. The outcome was that Van Huyssteen, on behalf of the respondent, refused to hand over the title deed to the appellant or his attorneys. The respondent made no secret of the fact that the title deed was in its possession, but sought to justify its refusal to hand it over on various grounds. In the meantime the respondent had obtained a judgment against the insolvent arising out of his acknowledgment of debt in the sum of R560 000.

[15] During later discussions with Van Huyssteen the appellant's attorneys made it clear that the appellant was faced with a threat of cancellation of the agreement if the title deed was not released to enable transfer of the property to be given to the purchaser.

[16] On 10 July 1997 the appellant applied, in the Magistrate's Court, Johannesburg, in terms of sec 69(2) of the Act for the issue of a warrant to search for and take possession of the title deed, ostensibly on the basis that the respondent was unlawfully withholding them as envisaged by sec 69(3). The application was made *ex parte* without notice to the respondent. The grant of the application led to the proceedings referred to in para [1].

[17] The facts set out above are either common cause or not in dispute.

[18] In terms of sec 20(1) of the Act the effect of the sequestration of the

insolvent's estate was to divest him of his estate and eventually to vest such estate in the appellant as his trustee. It was then incumbent upon the appellant to collect the insolvent's assets, realize them and, if there were sufficient realizable assets, to distribute the proceeds amongst the insolvent's creditors. As it happened there were insufficient realizable assets and ABSA, the only creditor who proved a claim, was called upon to make a contribution.

[19] Sec 69(1) of the Act obliged the appellant, as soon as possible after his appointment, to take into his possession or under his control all "movable property, books and documents" belonging to the insolvent's estate. I shall assume, for the purposes of the appeal, that the title deed to the property falls within the enumerated items. In terms of sec 69(2), if a trustee (such as the appellant) has reason to believe that any property, book or document "is concealed or otherwise unlawfully withheld from him, he may apply to the magistrate having jurisdiction for a search warrant mentioned in sub-section (3)".

[20] Sec 69(3) reads as follows:

> "If it appears to a magistrate to whom such application is made, from a statement made upon oath, that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is concealed upon any person, or at any place or upon or in any vehicle or vessel or receptacle of whatever nature, or is otherwise unlawfully withheld from the trustee concerned, within the

> area of the magistrate's jurisdiction, he may issue a warrant to search for and take possession of that property, book or document."

[21] As appears from sec 69(3), before a magistrate may exercise his discretion to issue a warrant in terms of the section, it must appear to him that there are reasonable grounds for suspecting that any property, book or document belonging to an insolvent estate is either:

(1) concealed in any of the ways set out in the section, or is

(2) otherwise unlawfully withheld.

A warrant, when issued, confers authority on the person executing it to search for and take possession of the property, book or document concerned and to "deliver any article seized thereunder to the trustee" (sec 69(3) read with sec 69(4)).

[22] The primary purpose of sec 69(3) is to enable a trustee to collect and take control of assets reasonably believed to belong to an insolvent estate which are being concealed or unlawfully withheld. It does not purport to, nor was it intended to, provide a means for finally determining competing claims to property which is alleged to belong to an insolvent estate - see *Bruwil Konstruksie (Edms) Bpk v Whitson NO and Another* 1980(4) SA 703 (T) at 711 A-B; *Philip Business Services CC v De Villiers and Others NNO* 1991(3) SA 552 (W) at 557 A-B; and the

hitherto unreported judgment of Nugent J in the Witwatersrand Local Division in *Kerbyn 178 (Pty) Ltd v T.W. Van den Heever and Others* at pp 7-8 (Case No 4191/00 delivered on 27 March 2000).

[23] Sec 69(3) was clearly intended to strengthen the hand of a trustee in carrying out the obligation to take charge of all the assets belonging to an insolvent estate. Resorting to its provisions has the potential to infringe the rights of others in relation to both their property (at least to the extent of depriving them of something in their possession) as well as their privacy when it comes to search and seizure. In those circumstances, in my view, as a general principle, a warrant should not be issued without affording the person or persons affected, or likely to be affected (to the extent that their identities are ascertainable or reasonably ascertainable) an opportunity to be heard, unless it can be said that sec 69(3) (the authorising provision) excludes that right either expressly or by necessary implication. An opportunity to be heard would require the giving of appropriate notice to the person or persons concerned.

[24] This approach would be in keeping with what was said by Milne JA in *South African Roads Board v Johannesburg City Council* 1991(4) SA 1 (A) at 10 G-I, namely,

> "[T]his Court has expressed a preference for the view which regards the *audi* principle [the *audi alteram partem* rule] as a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary; as opposed to the view which requires the *audi* principle, if it is to apply, to be impliedly incorporated by the statute in question."

(See also *Du Preez and Another v Truth and Reconciliation Commission* 1997(3) SA 204 (A) at 231 C-E.) This principle would apply equally to a case such as the present where a magistrate is called upon to exercise a discretion to issue a warrant in terms of sec 69(3) of the Act. The approach would also be consonant with the requirements of sec 39(2) of the Constitution of the Republic of South Africa, Act 108 of 1996. According to Baxter, *Administrative Law* at 540 "[t]he principles of natural justice are considered to be so important that they are enforced by the courts as a *matter of policy*, irrespective of the merits of the particular case in question." Baxter's view, however, was not raised or argued before us and no opinion need be expressed as to its correctness having regard to the conclusion to which I ultimately come.

[25] There is no express provision in sec 69(3) requiring the giving of notice to an affected person or affording a right to be heard. Is this dispensed with by

necessary implication? The fact that a magistrate does not finally determine legal entitlement to any property or item envisaged in the section would not *per se* preclude notice, as he is called upon to apply his mind to whether a warrant should be issued and to hear an affected person, in a appropriate case, would, or could, have a bearing on the decision he is required to make.

[26] As pointed out above, sec 69(3) deals with two classes of cases: items (property, books or documents) "concealed" and items "otherwise unlawfully withheld". "Conceal" means: "To keep from the knowledge or observation of others; To put or keep out of sight or notice, to hide" (*The Shorter Oxford English Dictionary*, Vol I, p 388). "Concealed", in the context in which the word is used, connotes items which have been hidden with a view to denying their existence or preventing their recovery. When seeking to recover concealed items suspected of belonging to an insolvent estate, the giving of prior notice and affording a right to be heard would, or at least might, defeat the very object and purpose of the section. From this it must be inferred, by way of necessary inference, that the legislature intended to exclude the giving of notice (and the concomitant right to be heard) in cases involving concealed items.

[27] In my view the position is different, however, where the application for a

warrant relates to items suspected of being “otherwise unlawfully withheld”. These are words of wide import. They could govern situations as widely divergent as where items, though not concealed, are being surreptitiously held, or not disclosed, without any claim of right or for no legitimate reason, to items openly held under a *bona fide* and reasonable claim of right to own or lawfully possess them as against a trustee in his capacity as such. The words also comprehend situations where continued possession of an item could prejudice the insolvent estate, as well as those where there is no danger of loss resulting to the insolvent estate from the possession of such item pending determination of any dispute concerning the rights thereto.

[28] In the situations postulated above one would need to have regard to the facts of each particular case to determine whether the matter was one where the *audi* principle should have application. Where the circumstances are such that the object and purpose of sec 69(3) would be defeated by giving notice, or where the identity of the affected person is not known or cannot reasonably be ascertained, the giving of notice would, by necessary inplication, be dispensed with. But in other instances it would not. What must therefore in every case be asked, and answered, is whether, having regard to the facts which were known, or must be

taken to have been known, when the warrant was applied for, the legislature must necessarily have intended that the *audi* principle be dispensed with. Unless the answer is an unequivocal "yes", the *audi* principle must be complied with by giving notice to the affected person to enable such person to be heard. In each case therefore, the particular circumstances will dictate whether the giving of notice is necessary or may be dispensed with.

[29] To the extent that views expressed in reported cases dealing with sec 69(3) are at variance with the principles enunciated above, they must be taken to have been impliedly overruled.

[30] When applying to the magistrate for a warrant in terms of sec 69(2) on 10 July 1997 the appellant was well aware of the following facts. The (first and final liquidation and distribution) account submitted and signed by the appellant was dated 22 October 1993, more than three years previously. The appellant was aware at that time that the property was registered in the name of the insolvent. An attempt had been made to sell the property by public auction on 30 July 1993. No bid was received and no interest shown by anyone to purchase it. By his own account the appellant considered the property to have little or no commercial value. Had he considered it to constitute realizable property he should not have filed a

final account (see sec 92(4) of the Act). The account purported to deal with all known realizable assets. The property was not reflected therein as an asset nor was any reference made to it. The accompanying affidavit of the appellant specifically records "dat daar na my beste wete en oortuiging geen verdere bates is waarvoor verantwoording gedoen moet word nie" (see sec 107 of the Act). Everything points to the appellant having made a conscious decision to disregard the property as an asset in the insolvent's estate. This conclusion is fortified by the appellant's subsequent conduct.

[31] The account was confirmed on 2 March 1994. From then until October 1995, the appellant, in the absence of anything suggesting the contrary (and nothing appears from the record), must be taken to have shown no interest in the property. He either never took possession of the title deed relating to the property or, having done so, returned it to the insolvent. Whatever the situation, the insolvent was ultimately left in possession of the title deed. The supplementary liquidation and distribution account confirmed by the Master on 31 October 1994 also contained no reference to the property. The above facts justify an inference that the appellant purported to abandon the property as part of the insolvent's estate i.e. he discarded it with the intention of relinquishing any rights to it. Any such

abandonment would have occurred prior to the insolvent agreeing in March 1995 to a mortgage bond being registered against the property in respect of his indebtedness to the respondent. (Whether or not a trustee may lawfully abandon estate property which he considers to be of no value to the estate is not a matter we are required to decide.)

[32] The request by the respondent, through Van Huyssteen, to the appellant in October 1995 for his consent to the registration of a mortgage bond appears to have resurrected any interest he may once have had in the property. Although he refused to give his consent to registration he took no immediate steps to recover the title deed in the respondent's possession. It was only in May 1997, after he had purportedly entered into a written agreement of sale in respect of the property, that he requested the title deed from the respondent. By that time the insolvent had been rehabilitated.

[33] In refusing to hand over the title deed the respondent relied upon the fact that the insolvent had furnished it with the title deed, had instructed it to register a mortgage bond over the property and that the insolvent by then had already been rehabilitated. As most of the insolvent's indebtedness to the respondent arose after his sequestration, the respondent may also have been able to rely on the deeming

provision of sec 24(2) of the Act - a matter on which I express no firm view. The respondent did not raise the issue of abandonment. At that time it was not aware, and could not reasonably have been aware, of all the relevant and material facts now known concerning the manner in which the appellant had dealt with the property. Had it been, it would no doubt have raised abandonment as a defence then, as it seeks to do now.

[34] To sum up, when the appellant applied for a warrant in terms of sec 69(3) on 10 July 1997 the position which existed was as follows:

1. The appellant was aware of all the circumstances pertaining to his trusteeship of the insolvent's estate and his conduct in regard thereto.
2. He knew, since October 1995, that the title deed of the property was in the possession of the respondent and was being openly held by it.
3. He took no active steps between October 1995 and May 1997 to obtain possession of the title deed from the respondent.
4. It was only in May 1997, after he had entered into a written agreement for the sale of the property, that he called upon the respondent to hand over the title deed.
5. *Prima facie* the respondent had *bona fide* and reasonable grounds for

retaining the title deed, even though it may ultimately transpire, once all the relevant facts have been fully canvassed (which has not yet been the case), that the respondent was not legally entitled to withhold it.

6. A caveat had been entered in the deeds registry (presumably in terms of sec 17(3) of the Act) which effectively precluded the property from being encumbered or sold to the prejudice of the insolvent estate.

[35] In all the circumstances the matter was one where notice of the sec 69(3) application should have been given to the respondent and it should have been afforded an opportunity of being heard. The failure to do so vitiated the proceedings and justified the warrant being set aside in the court below. In the result the appeal against the court *a quo*'s decision in this regard must fail.

[36] Not all the facts alluded to in para [30] were brought to the attention of the magistrate by the appellant when he applied for the warrant. Some of the information withheld was in my view material. In *De Jager v Heilbron and Others* 1947(2) SA 415 (W) at 419-420 Roper J stated:

> "It has been laid down, however, in numerous decisions of our Courts that the utmost good faith must be observed by litigants making *ex parte* applications, and that all material facts must be placed before

> the Court. . . . . If an order has been made upon an *ex parte* application, and it appears that material facts have been kept back which *might* have influenced the decision of the Court whether to make the order or not, the Court has a discretion to set aside the order on the ground of the non-disclosure. . . . It is not necessary that the suppression of the material fact shall have been wilful or *mala fide*."

Those words are as valid today as they were then. However, in view of the conclusion to which I have come it is not necessary to decide what the effect of such non-disclosure was in the present matter and whether it would have permitted or justified the warrant being set aside on that ground.

[37] There remains to be considered the appeal against the costs order. The general principle of the common law is that a trustee, who acts in a representative capacity, cannot be ordered to pay costs *de bonis propriis* unless he has been guilty of improper conduct. The judge *a quo* found the appellant's conduct to be "unacceptable". Improper conduct is always unacceptable; but unacceptable conduct is not necessarily improper. While the appellant's conduct may have been ill-considered, and his application lacking in certain essential detail to the extent that it may be said that he did not make a full disclosure of all relevant facts, one cannot in my view go so far as to hold that his conduct was improper. It has not been shown that there was a conscious attempt on his part to mislead the

magistrate or to use sec 69(3) unfairly to his advantage. In the circumstances the special costs order against the appellant was not justified and falls to be set aside. The appeal succeeds *pro tanto*.

[38] It follows that both the appellant and the respondent have enjoyed a measure of success on appeal. While it is arguable that the respondent's success is greater than that of the appellant, it is not so significantly greater as to merit a costs order on appeal in favour of the respondent against the appellant. In my view a fair order in all the circumstances would be that each party should pay its own costs of appeal.

[39] The following order is made:

1. The appeal succeeds, but only to the extent that paragraph 3 of the order of the court *a quo* in relation to costs is set aside and the following substituted:
"The first respondent is ordered to pay the costs of the application including the costs of the A section of the Notice of Motion".

2. Each party is to pay its own costs of appeal.

J W SMALBERGER
JUDGE OF APPEAL

GROSSKOPF JA)Concur
MELUNSKY AJA)

MARAIS JA

MARAIS JA: [1] With respect, I am unable to share in my brother Smalberger's conclusion that the appeal should fail. Had I felt able to share in that conclusion, I would have concurred in his conclusion as to the costs orders which should have been made in the court *a quo* and in this court. However, my conclusion on the procedural propriety and the merits of the application for a warrant necessitates an altogether different order as to costs in both courts.

[2] There are essentially three reasons for my inability to concur with Smalberger JA. First, my reading of s 69 is that it impliedly excludes the giving of notice of intention to seek a warrant in all cases. Secondly, even if it does not, and the view that in some cases notice will be required, but in others not, is correct, I do not think that the failure to give notice in this particular case should result in the setting aside of the warrant. For reasons to be given, I consider it to be manifest that what respondent has said it would have raised to justify denial of the warrant,

if it had been given the opportunity to do so, is devoid of substance. To set aside the warrant in such circumstances would serve only to potentially prejudice creditors and would be to pay undue obeisance to a requirement the fulfilment of which would have had no effect whatsoever upon the issue of the warrant. Thirdly, I do not consider that there was any material non-disclosure by the trustee when seeking the warrant.

[3] **Whether notice of the application should have been given.**

I approach the question conscious of the invasion of privacy inherent in, and the aura of spoliation (juristically inaccurate though the use of the word may be) surrounding, the provisions of s 69. I am also mindful of the admonitions which are to be found in the common law and the Constitution as to the need for legislation to be interpreted, whenever possible, in such a way as to maintain and promote core values such as the right to privacy, to freedom from search and seizure, and to fair administrative and, for that matter, judicial action. However, none of that relieves a court of its primary duty of ascertaining the intention of the legislature by reference to the language of the provision in the context of the statute as a whole and by reference to whatever other legitimate aids to interpretation may be available. If a plain and unambiguous intention to exclude

the giving of notice emerges, there can be no justification for assigning a contrary meaning to the provision. As Lord Diplock observed in *Regina v Inland Revenue Commissioners, Ex parte Rossminster Ltd and Others*[1]

> "The construing court ought, no doubt, to remind itself, if reminder should be necessary, that entering a man's house or office, searching it and seizing his goods against his will are tortious acts against which he is entitled to the protection of the court unless the acts can be justified either at common law or under some statutory authority. So if the statutory words which are relied upon as authorising the acts are ambiguous or obscure, a construction should be placed upon them that is least restrictive of the rights which would otherwise enjoy the protection of the common law. [Or, in South Africa, of the Constitution.] But judges in performing their constitutional function of expounding what words used by Parliament in legislation mean, must not be over-zealous to search for ambiguities or obscurities in words which on the face of them are plain, simply because the members of the court are out of sympathy with the policy to which the Act appears to give effect."

That approach to the matter is, in principle, equally appropriate when considering whether or not the giving of notice has been impliedly excluded by necessary implication in s 69. If the implication is plain, it is entitled to no less deference than that to which plain and unambiguous words are entitled.

[4] Before turning to the interpretive task it would be as well to bear in mind at the threshold of the enquiry two important considerations. The first is that, as has been pointed out in the judgment of Smalberger JA and in other judgments,[2]

[1] [1980] AC 952 (HL) at 1008 C-E

[2] *Philip Business Services CC v De Villiers & Others NNO* 1991 (3) SA 552 (T) at 557 A-E; *Kerbyn 178 (Pty) Ltd v*

the magistrate's decision to issue a warrant is dispositive of nothing. No more than reasonable grounds for suspicion of concealment or unlawful withholding of the asset need to be found to exist. The decision to issue a warrant is in no sense an adjudication of any substantive issue, existing or potential, between the trustee and the third party or between the insolvent and the third party. Success in obtaining a warrant and success in its execution brings the trustee no more than provisional physical possession of the relevant asset. The trustee's continued possession is open to challenge in the courts and the customary gamut of remedies (review proceedings, prohibitory interdicts, vindicatory actions, declarations of right, etc) is available to the third party. A successful challenge will bring an end to the trustee's possession.

[5] The second consideration is that the concept of a warrant in its various manifestations (arrest, attachment, search, seizure, etc) is one of the law's most familiar creations. However one characterises the act of issuing such warrants, whether as judicial, quasi-judicial or administrative[3], the notion that it is subject to

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Van Den Heever & Others, unreported judgment of *Nugent J* , Case No 4191/00, WLD, 27.3.2000.

[3]In Australia it has been held that it is not a judicial act even although the functionary may be a judicial officer and even although it is necessary to bring to bear a judicial mind. See *Love v Attorney-General (N.S.W.)* (1989-1990) 169 CLR 307 (HC of A) at 318-322; *Grollo v Palmer* [1995] 184 CLR 348 (HC of A) at 359-360. In New Zealand the contrary view is favoured. See *Simpson v A-G [Baigent's Case]* [1994] 3 NZLR 667 CA at 674 (20-30), 689 (15-45), 695 (15) - 696 (25). In the latter case, Hardie Boys J encapsulated the approach of the Australian High Court in *Love's* case as drawing a "distinction between a power that is essentially administrative in nature but must be exercised in a judicial manner, and the exercise of judicial power, in the sense of the authority to settle questions

the *audi alteram partem* rule is, as far as I am aware, a relatively novel one. Until the decision in *Putter v Minister of Law and Order and Another NO*[4], I cannot recall ever having seen any authority for the proposition that the giving of notice is a prerequisite to the exercise of a power to issue a warrant of the kind here in question. That does not mean that that there may not be other types of warrant which require notice to be given, but the generalisation that the validity of the issue of warrants of this particular kind is not ordinarily dependent upon the giving of notice to the affected parties remains, as I see it, the premise from which any enquiry into the need for notice must proceed.

[6] That being the case, I am unconvinced that the question is whether the provision impliedly excludes the giving of notice. The very fact that the provision relates to the issue of warrants of search and of seizure is *prima facie* inconsistent with any such requirement and the question, as I see it, is rather whether there is anything in the provision to indicate that, contrary to the position which would normally obtain, warrants issued in terms of this provision must be preceded by the giving of notice and, if required by the third party, the giving of a hearing to the

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of rights and obligations between parties". The distinction had been drawn in England by Lopes LJ in *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431(CA) at 452.

[4]1988 (2) SA 259 (T)

third party. However that may be, even were I to assume that the former question is the correct question to pose, I would conclude that the giving of notice has been impliedly dispensed with by the provision.

[7] I agree with Smalberger JA that the giving of notice in cases of concealment would defeat the very purpose of the provision. That much is clear and the provision therefore plainly excludes at least *pro tanto* the giving of notice. Smalberger JA acknowledges (rightly, in my respectful opinion) that there are at least some cases of unlawful withholding of assets imaginable where no question of concealment is involved, but where the provision would none the less impliedly exclude the giving of notice. However, if one were to accept that there are other cases in which notice would be required, the legislature would have to be taken to have left it to the trustee and/or the magistrate to decide *ad hoc*, and by reference to unspecified criteria, in which cases of unlawful withholding of assets notice should be given. That that is what the legislature intended, strikes me, with respect, as most unlikely.

[8] S 69 cannot be properly interpreted without an appreciation of the mischief which it is designed to combat. A perusal of the Insolvency Act as a whole shows what that mischief is. The Act is designed to protect the financial

interests of the creditors of an insolvent and to sequester his, or her assets in such a way as to eliminate, as far as possible, the risk of them being put irretrievably beyond the reach of the trustee and thus becoming unavailable for realization in whole or partial satisfaction of the claims of creditors. As it has so often been put, the hand of the law is laid upon the estate of the insolvent in the interests of creditors. A multitude of complementary and interlocking provisions have been enacted to achieve that broad purpose.

[9] The insolvent is instantly divested of all his assets. Ownership of them is vested instead initially in the Master and then in his trustee and remains so vested until the trustee transfers ownership to someone else[5]. The rehabilitation of the insolvent does not *per se* bring about a revesting of any of those assets in the insolvent.[6] Even assets acquired by the insolvent after sequestration vest (with some qualifications), not in the insolvent, but in the trustee[7]. An obligation is cast upon any person in possession of assets belonging to the insolvent's estate to deliver them to the trustee[8]. Refusal to do so is an offence.[9]

[10] In the case of immovable property or attached property *caveats* are

[5]S 20 (1)(a)
[6]S 25 (1)
[7]S 23 (1)
[8]S 142 (2)
[9]S 142 (2)

required to be entered by the relevant official functionaries, the effect of which is to render alienation of or the imposition of burdens upon those assets impossible without the concurrence of the trustee.[10]

[11] The thrust of all this is obvious. It is to disable the insolvent and anyone else who may be physically in possession of such assets from alienating or encumbering them to the prejudice of creditors. That purpose is achieved by, *inter alia*, providing for the trustee to have physical possession of them in the case of movables or, in the case of movables under attachment or immovables, by having the relevant functionaries place *caveats* against the assets.

[12] Despite all that, but for s 69, there would remain a window of opportunity for a third party in possession of a movable asset, the ownership of which is vested in the trustee, to alienate it in such a way that it could not be vindicated by the trustee. Section 33 provides that a person who acquires such an asset in good faith and for value from someone other than the insolvent cannot be called upon to deliver it to the trustee. The longer a third party can resist handing over the asset, the more extensive the opportunities of alienating the asset to another for value to the prejudice of creditors of the insolvent may be. That the

[10] S 17 (3) and (3) bis

trustee may have a claim against the third party for disposing of the asset is not a sufficient answer. The third party may not be able to pay and the real security of the asset itself will have been lost by the trustee and the creditors in the insolvent estate. To throw the trustee back upon the ordinary litigatory remedies in such situations would not close this window of opportunity. The giving of notice inherent in the ordinary litigatory process could precipitate the very alienation of the asset which the litigation is aimed at preventing. The trustee might also have difficulty in discharging *onera* of proof attendant upon the litigatory process, particularly if the need for protective action arises soon after his appointment and before he or she has been able to investigate matters fully. Hence the need for a provision such as s 69.

[13] The giving of notice of an application in terms of s 69 would deprive the remedy of its efficacy and serve as a stimulus to the very kind of action which it is designed to prevent. There are broadly five classes of situation which could confront a trustee. The first is where the whereabouts of the assets are thought to be known but the identity of the possessor is not. The second is where the person thought to be in possession of the asset simply denies knowledge of the asset. The third is where the possessor admits possession, sets up no justification for retention

of the asset, but refuses to hand it over or to disclose where it is. The fourth is where the possessor admits possession, sets up what purports to be a justification for retention, and refuses to hand the asset over or disclose where it is. The fifth is where the possessor admits possession, sets up what purports to be a justification for retention, refuses to hand the asset over, but discloses where it is.

[14] Common to all of these situations is the potential risk of the asset being put beyond the trustee's reach even more effectively than it was at the outset once it is known that the trustee lays claim to it and is seeking a warrant. Whether that is achieved by hiding it elsewhere, or by disposing of it hurriedly for value to yet another third party, or by engaging in filibustering techniques designed to stall the issue of a warrant and so keep the window of opportunity open for a less hurried disposal of the asset, they are all ways in which the clear purpose of s 69 could be frustrated. That purpose is the swift taking of possession by the trustee of assets belonging to the estate to ensure that they will be available for realization. In my view, it seems plain that the provision does not envisage a situation where the trustee's possession of the asset would have to be deferred indefinitely while what may prove to be a long drawn out battle rages before the magistrate and/or the courts as to whether or not the third party should be allowed to remain in

possession. Quite the contrary. It envisages that once there are *reasonable grounds for suspicion* that an estate asset is being concealed or otherwise unlawfully withheld from a trustee in insolvency, the trustee is entitled, *ante omnia* as it were, to obtain a warrant and take possession of the asset pending the outcome of whatever subsequent proceedings may be instituted by the third party to recover possession.

[15] The fact that there may be cases in which the prospect of prejudice to the insolvent estate occurring if notice is given is slight or non-existent does not derogate from the fact that the provision is protective and preservatory in character, designed to eliminate or minimise risk, and therefore inherently incompatible with the notion of *audi*. I am therefore unable to share the view that whether or not notice is required is dependent upon such factors as whether or not the third party's possession is "open" or "*bona fide*" or claimed to be justified.

[16] The view taken in *Putter's* case appears, with respect, to have been based upon a misreading of s 69. The learned judge said:

> "Section 69(3) enjoins the magistrate to act after he has made a decision:
> (i) that some person has concealed property belonging to the insolvent estate; or
> (ii) that a person is holding property, belonging to the insolvent estate, unlawfully.

It is the second finding that concerns me. If a magistrate finds that the person is holding the property lawfully he must refuse to issue the warrant. A decision by a magistrate in favour of a trustee would clearly prejudicially affect the property or the rights to such property vesting in an individual. In these circumstances the maxim *audi alteram partem* must be considered. See eg *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 263 (A) at 270B-G.

When a magistrate is called upon to issue a writ because property is being concealed, obviously hearing the other party could frustrate the whole object of the provision. However, when a person is holding property openly and maintaining that such possession is lawful the position must be different. I balk when it is suggested that a magistrate, on the say so of a trustee, may decide a legal issue without hearing both parties and the subsequent seizure of the property leaves the absentee helpless to prevent its removal. I reject the respondent's contention that the Legislature intended to exclude the operation of the maxim when a magistrate is called upon to consider whether or not a person holds property lawfully."[11]

With due respect, the provision does not require the magistrate to make findings of that kind or to decide a legal issue. As has already been said, the magistrate decides no more than that there are *reasonable grounds for suspecting*[12] that an asset is concealed or otherwise unlawfully withheld from the trustee. In no sense does the magistrate pre-empt the determination of any dispute which may exist in regard to the right to possession. In my opinion the learned judge erred in requiring notice to be given. I prefer the contrary conclusion reached by Flemming

[11]1998 (2) SA 259 (T) at 261 B-E

[12]In *George v Rockett* [1990] 170 CLR 104 (HC of A) at 115 it was said: "Suspicion, as Lord Devlin said in *Hussien v Chong Fook Kam* [1970] AC 942 at 948] 'in its ordinary meaning is a state of conjecture or surmise where proof is lacking: "I suspect but I cannot prove'". The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown." The statement by Lord Devlin was adopted by this court in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 819 I-J and *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50 H.

DJP in the case of *Philip Business Services CC* [13]and Nugent J in the case of *Kerbyn 178 (Pty) Ltd.*[14]

[17] In *Life Science (1994) (Pty) Ltd and Another v Powell NO and Another,*[15] too, the view was taken that the s 69 did not require the giving of notice, regardless of whether it was a case of concealment or some other case of unlawful withholding. But it was also suggested that where there was "a clear and open and reasonable dispute between the possessor and the liquidator as to whether the goods were the company's goods, and where there was some adequate safeguard to there being damage, loss or risk involved or where there is no possibility of the removal or concealment of the goods in question" the "correct approach would then be to decide whether in such circumstances the issue of the warrant had been justified" and "whether or not it was proper for the applicant to invoke the search procedure". These statements were approved in *Advance Mining Hydraulics (Pty) Ltd and Others v Powell NO and Another.*[16] *Prima facie* these suggested limitations upon the powers conferred by s 69 seem to me to be unjustified and involve reading into the provision a host of qualifications which are not readily apparent

[13]See note 2
[14]See note 2
[15]Unreported decision of Plewman J, Case no 1882/95, WLD, 24.8.1995
[16]2000 (1) SA 815 (T) at 822 A-C

from either its language or the object which it is intended to achieve. However, in the circumstances of this case, it is unnecessary to take a firm stand one way or the other.

[18] In this case the trustee was being threatened with cancellation of the sale of the share in the flat if he did not deliver the title deed. It was plainly a matter of urgency that he obtain it and his recourse to s 69 cannot be said to be an abuse of the provision.

The need for and sufficiency of disclosure by the trustee.

[19] It is not self-evident to me that the obligations of disclosure attendant upon the making of *ex parte* applications to courts of law are equally applicable to an application for a warrant under s 69. That good faith and truthfulness is required is obvious. But it may be doubted whether omissions in good faith of circumstances which are subsequently thought by a court to be potentially material should vitiate the issue of warrants of this kind unless, perhaps, it is reasonably clear that their disclosure would, or probably would, have led to the refusal of the warrant. Where reasonable grounds for suspicion are what empowers and triggers the issue of the warrant, where a decision as to the merits of the trustee's claim to possession is in no sense pre-empted by the issue of the warrant, and where the

subsequently disclosed circumstances do not, objectively regarded, derogate from the existence of reasonable grounds for suspicion, it might be contrary to sound policy and the interests of innocent creditors to set aside the warrant solely on the ground of the non-disclosure. However, these are no more than superficial ruminations. In the absence of much fuller debate and argument than we have heard, I prefer to leave these questions open. I shall assume in respondent's favour that the duty of disclosure is substantially the same.

[20] In my view, there was no material non-disclosure. The trustee disclosed to the magistrate that respondent was legally represented by an attorney and that a letter had been written claiming that justifications for retaining possession had been set forth in previous correspondence. The identity of the attorney and his address and telephone numbers were disclosed. As a fact, one looks in vain in the previous correspondence for anything resembling, even if only faintly, a justification recognizable in law. There are simply legally unmotivated refusals to hand over the title deeds and an attempt to gain time in the Micawber-like hope that something would turn up which might provide a justification for retention of the title deed. (More about that correspondence anon.) Anyone required to articulate what justification, real or imagined, was being advanced by

respondent would have been hard pressed indeed to do so. That the trustee did not attempt to enlighten the magistrate further as to the nebulous stance taken by respondent cannot, in my opinion, be regarded as a breach of the assumed duty of disclosure.

[21] In so far as non-disclosure of the facts set forth in paragraph 30 of Smalberger JA's judgment is concerned, I do not consider that it was incumbent upon the trustee to disclose those facts. They had not been raised as providing the basis for any defence to the trustee's claim by respondent in the correspondence which passed between the parties prior to the application for the warrant, despite respondent being legally represented and despite those facts being freely accessible to respondent at the Master's office. The bare facts which it is suggested should have been disclosed constitute no defence known to the law. It is the inference of abandonment to be drawn from them that is suggested to be what made them material. The highest the matter can be put is that *if* the trustee was capable in law of abandoning the share in the property, *if* these facts could justify the inference that the trustee did abandon it, and *if* the consequence of that would be that Rosenberg re-acquired ownership of it, it is arguable that they should have been mentioned by the trustee. Why should the trustee have entertained the notion that

such a submission could ever be raised? His state of knowledge at the time was this.

[22] There was a *caveat* against the share in the Deeds Registry which, for as long as it stood, would prevent any transfer or burdening of the share without his consent. He had been trying to sell the share despite the confirmation of the final account. Rosenberg and his daughters were aware of that. Indeed, an opportunity was given to the daughters to match or better the price he had been offered. There was no suggestion from anybody that the share was no longer an asset in the insolvent estate and that Rosenberg or his daughters had acquired ownership of it. Quite the opposite. In applying for his rehabilitation in October 1996 Rosenberg made the following statements on oath:

> "14 At the time of my sequestration the only assets that I had of reasonable value were
>
> (a) the half share in the flat ..... in Muizenberg.
> (b) .....
> (c) .....
> (d) .....
> (e) .....
> (f) ..... .
>
> In regard to these assets I state:-
>
> 14.1 The half share in the flat valued at R200 000,00 has as yet not been disposed of by my trustee. The half share has been valued at approximately R40 000,00.

(After annexing the first and final liquidation account and recording that it had been confirmed on 2 March 1994, he continued.)

18. I have made a complete surrender of my estate and I have not granted or made promises of any benefit whatsoever to any person or entered into any secret arrangement with the intention of dissuading my trustees or creditors from opposing this Application and there are no further assets to be realised in my Estate save for the half share in the flat in Muizenberg which my Trustee is attempting to sell by public auction.

20. Since my sequestration I have not acquired any assets."

[23] In a supplementary affidavit dated 13 November 1996 he said:

> "The half share in the flat valued at R70 000,00 has been sold by my Trustee for R40 000,00 nett and is in the course of being transferred by the Executors of my late wife's estate to my insolvent estate and simultaneously to the Purchasers of the half share. The proceeds of the R40 000,00 will be dealt with in my insolvent estate in terms of the provisions of the Insolvency Act."

He added:

> "The half share in the Muizenberg property has, as aforestated, been sold for R40 000,00, the proceeds whereof will be dealt with in accordance with the Insolvency Act."

[24] Furthermore, the correspondence which had passed between respondent's attorney and the trustee's attorney included a letter from the former in which the trustee was asked to give his consent to various transactions which Rosenberg had purported to enter into. The letter was dated 19 October 1995 and it read:

"Re: WILFRED ROSENBERG

We refer to the telephone discussion between the writer and your Mr Boet du Plessis on even date.

We act for First National Bank of Southern Africa Limited, who have instructed us to register a 5/6th share mortgage Bond in their favour over Sections 46 & 62 Arlington Court, Muizenberg. It is further our instructions that once the said Mortgage Bond has been registered in the Cape Town Deeds Registry, we are to apply to Court for the necessary Order so that the further 1/6th share which is held in Trust on behalf of Dr Rosenberg's son until he attains the age of 25 years may also be Mortgaged.

In terms of an Agreement made and entered into between Dr Wilfred Rosenberg and Nicola Amanda Krost (born Rosenberg) and Andrea Lara Jayes (born Rosenberg), the said Nicola and Andrea transferred their combined 1/3rd share to Dr Rosenberg.

The documents were duly signed by all the parties thereto and lodged for urgent registration in the Cape Town Deeds Registry. Immediately prior to registration we were advised by our Cape Town correspondents that a note had been raised by the Register to the effect that a Dr Wilfred Rosenberg is insolvent. Upon enquiries made by us we were advised that contrary to our previous instructions, Dr Wilfred Rosenberg in this transaction is in fact insolvent.

As you are no doubt aware an Insolvent person is not entitled to deal with any property registered in his name. Accordingly, we require the Trustee's consent to the transactions as set out aforesaid. We would appreciate it if you would also furnish us with a copy of the Trustee's Certificate of Appointment. We enclose herewith the necessary documentation for your information.

Your MOST URGENT attention to this matter would be greatly appreciated, as it is a matter of extreme importance that this situation be resolved as soon as possible. Should you require any further details or assistance from our offices please do not hesitate to contact the writer."

[25] Discussions ensued during which the trustee made it clear that he "could not and would not consent". No further action was taken by respondent to pursue the matter and there it rested until the trustee succeeded in selling the share and

asked for the title deed. I may add that the title deed had been handed to the respondent as early as 23 March 1994. This was prior to the opening of a new account in Rosenberg's name on 6 October 1994. Prior to that he had been operating another bank account with respondent since 15 June 1992. That account was closed after the new one was opened. Rosenberg was of course an unrehabilitated insolvent on 23 March 1994 and had no right whatsoever to hand the title deed to respondent and respondent had no right to retain it as against the trustee. This was not done in the belief that the trustee had abandoned the share in the property. It was done because Rosenberg naively hoped to conceal his insolvent status and respondent was ignorant of his status.

[26] In the light of all this, I ask myself if it could reasonably have been expected of the trustee that he should have anticipated that so inherently improbable and problematic a proposition as abandonment by him of the share in the property might conceivably be advanced by respondent as a justification for retaining possession of the title deed, and that he should accordingly have disclosed the facts set out in paragraph 30 of Smalberger JA's judgment. In my respectful opinion, the answer is no.

[27] Let us recall how it came about that the abandonment "defence" first

saw the light of day. When respondent launched its attack upon the issue of the warrant and set up what purported to be its justification for retaining possession of the title deed nary a word was said about abandonment. Rosenberg was cited by it as second respondent. No costs order was sought against him. After the trustee had filed his answering affidavits Rosenberg came to light with an answering affidavit. In the light of what he had said on oath in his application for rehabilitation, it is an astonishing document. After noting that no relief is claimed against him and saying that he deposes to the affidavit "not with a view to opposing the relief claimed, but with a view to setting out certain salient features" he points to the omission from the first and final liquidation and distribution account of any mention of the share in the Muizenberg flat and claims that this was because "during 1995 my half-share of the flat was abandoned by certain Boet du Plessis, the trustee acting in the matter on behalf of the First Respondent in favour of my daughters, Andrea Jayes and Nicola Krost".

[28] First, the account was submitted on 22 October 1993. The abandonment allegedly took place subsequently in 1995. The failure to mention the half share in the flat in the account could therefore not have been because of any abandonment. Secondly, these allegations are in brazen and totally

unexplained contradiction of the sworn statements made by him when applying for his rehabilitation. Thirdly, he is a deponent whose attitude towards the making of statements on oath is, to say the least, cavalier. One of the allegations with which he felt it necessary to deal (he did not deign to deal with his own flatly contradictory allegations in the rehabilitation application), was his sworn affidavit to his bankers that he had never been sequestrated. This at a time when he was an unrehabilitated insolvent. The explanation was that the bank's attorney had prepared the papers for him to sign and that he signed them without reading them. The attorney filed an affidavit repudiating his version. No less unimpressive was Rosenberg's assertion on oath that he was not aware that, when negotiating overdraft facilities, it was necessary for him to disclose to the bank that he was an insolvent.

[29] Notwithstanding the self-contradictory allegations made by Rosenberg, respondent latched onto the belated allegation of abandonment and sought to make something of it. I am unable to accept that the trustee should have foreseen that all this might happen and therefore should have disclosed the facts set out in paragraph 30. It is too much to expect.

The abandonment defence

[30] I have explained the origin of this defence. The slender foundation upon which it rests is the trustee's failure to reflect the share as an asset in the final account or the supplementary account as he undoubtedly should have done; the acquiescence in Rosenberg remaining in possession of the title deed; and a lengthy period of apparent inactivity before seeking again to realise the asset. The supporting *ipse dixit* of Rosenberg is, in the circumstances, not only worthless to respondent, but positively inimical to its case.

[31] The failure to reflect the asset in the accounts and the assertion that there were no further assets available for realization and distribution are of course consistent with an abandonment. But they are also consistent with a misguided decision to ignore disclosing it for the time being because it had then no realisable value, and because, unlike a movable, there was no risk of it being lost to the estate as long as the *caveat* registered against it in the Deeds Registry remained in place.

[32] Allowing Rosenberg to remain in possession of the title deed was of no significance. He had been allowed to remain in possession of it before the first attempt to sell the share was made and there could have been no suggestion then of that having been indicative of an abandonment of the share. The mere continuance of that situation thereafter is at best a neutral factor.

[33] The lengthy period of apparent inactivity is of little probative value. This was a share in a property in which no interest whatsoever had been shown at the first auction. Putting property up for auction costs money. It entails advertising costs and auctioneer's fees. There was no pressure to realize it sooner rather than later. The only unsecured creditor who proved a claim had had to pay a contribution and a final account had been submitted and approved. The only prospect of achieving anything worthwhile for the share lay at some unspecified future date and just when a further attempt to do so should be made was up to the trustee to decide.

[34] These circumstances, whether viewed singly or cumulatively, provide no firm support for an inference of abandonment. They are far too equivocal. When one adds to that the improbability inherent in the proposition that a trustee would take it upon himself to simply abandon an asset of this nature, and when one takes into account the absence of any credible evidence from anyone of having acquired the share as a consequence of its alleged abandonment, the unreality of the proposition is magnified. I leave aside yet other problems which stand in the way of the proposition, problems such as whether a trustee has the power to abandon property such as this; whether, if he may do so, it may be appropriated by

anyone (and if so, how), or whether ownership passes to the State; whether, if it does not pass to the State and no one has appropriated it in the meantime, the trustee may resume ownership by asserting control over it once more; and whether, if obligations attach to the owner of the property, there can be any effective abandonment of the property. The answers to these questions are far from clear and the arguments addressed to us too perfunctory to permit of confident answers being given. The dimensions of the problems may be gauged by reference to *Minister of Landbou v Sonnendecker*[17], a note on that case by C G van der Merwe[18], and to Carey Miller, *The Acquisition and Protection of Ownership*, (1986).[19]

[35] The other attempts at justification for continued retention of the title deed, in my view, also have no merit. It was not necessary to re-open the final account in order to deal with this asset. The Act contemplates that supplementary accounts may be filed after the final account has been confirmed. Where an asset comes to light after confirmation of the final account nothing prevents the trustee from realizing it and filing a supplementary account. The position is no different where a previously unrealized asset is subsequently realized. In so far as an

[17]1979 (2) SA 944 (A)
[18]1980 Tydskrif vir die Suid-Afrikaanse Reg 183 at 186-188
[19]At pages 6-11.

estoppel is raised by virtue of Rosenberg having allegedly acted to his prejudice, the simple answer is that in the face of Rosenberg's own statements on oath in his rehabilitation application any such contention is quite untenable. As to a waiver by the trustee of the right to this asset, I have already indicated why, in my opinion, the facts do not permit of an inference of waiver.

[36] I have dealt with the merits of the defences only because I consider that, even if notice should have been given, it would serve no purpose to set aside the warrant on the ground of a failure to give notice if it is quite clear, as I think it is, that that which respondent would have sought to raise before the magistrate to justify its possession, is devoid of any merit and could not conceivably have resulted in a refusal to issue the warrant. To make an order which would result in the trustee having to re-apply for a warrant after giving notice to respondent when the outcome of the application is bound to be the same, would serve no useful purpose. I cannot accept that the law requires futile orders to be made which will have no practical effect.

[37] The counter-productive consequences of unyielding adherence, come what may, to the principle of *audi* can be illustrated by an example which is clearer still. After his sequestration an insolvent purports to pledge to a bank as security

for an overdraft a quantity of bearer bonds. The bank refuses to surrender them to the trustee. Without notice to the bank, the trustee obtains a warrant in terms of s 69. The bank seeks from the High Court an order setting aside the warrant on the ground of the failure to give it notice. It discloses to the court what it would have wished to place before the magistrate, namely, that it came into possession of the bonds in good faith while ignorant of the insolvent's sequestration, and that it holds them as a pledge to secure repayment of an overdraft. The court holds that those facts provide no justification in law for retention of the bonds but sets the warrant aside solely because of the breach of the *audi* principle. The trustee applies again for the warrant after giving notice to the bank. The bank appears before the magistrate and raises the same justification for retention of the bonds as was held to be no justification by the court. The trustee replies, first, that the issue of whether that is a justification is *res judicata* as between himself and the bank, secondly and alternatively, that, whether or not the issue is *res judicata*, the justification raised is in law no justification and that it has already been so held by the High Court. The magistrate accepts one or other or both of the trustee's submissions and re-issues the warrant. It is not conceivable that he could have done anything else.

[38] What socially useful purpose was served by the setting aside of the first warrant when, as was plainly foreseeable, it would only result in a renewed application which was bound to succeed? And if, as may have happened after the setting aside of the first warrant, the bank has disposed of the bonds to a third party for value and thus put them irretrievably beyond the reach of the trustee and the insolvent's creditors, what reason is there for the court which set aside the warrant to look with satisfaction upon its handiwork? In my opinion, the answer to both questions is none.

[39] I am alive to the importance of recognising and preserving the distinction between a fair procedure and the merits of a particular case and the need to avoid being seduced by what may seem to be the inevitable result of a rehearing. The danger of assuming that a particular result is inevitable has been pointed out frequently. [20] It has also been said (inaccurately, in my respectful opinion) that in doing so, the court is usurping a function which was entrusted to the functionary whose decision is under attack. But the fact remains that the courts have recognised that where there can be no doubt whatsoever of the inevitability of the decision remaining the same, it would serve no worthwhile purpose to set the

[20]Wade and Forsyth, *Administrative Law*, 7th edition, pages 526-528; De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th edition, page 500; Baxter, *Administrative Law*, 1984, page 538.

decision reached aside. As Brandon L J put the matter in *Cinnamond v British Airports Authority*[21] (summarising the import of what had been said by Lord Reid and Lord Wilberforce in *Mallock v Aberdeen Corporation*[22]): "The effect of what Lord Wilberforce said is that no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."

[40] In this area of the law there are obviously distinctions to be drawn between different types of decision. For example, where the imposition of a discretionary sanction of one kind or another is the question to be decided, a court will very rarely, if ever, feel able to conclude that an opportunity of being heard "would have availed him nothing". But where the decision is not truly discretionary and it is one which the decision maker is obliged to make if the objective requirements of the relevant statute, both factual and legal, are satisfied, there is greater latitude for the adoption of the principle that the "court does not act in vain". (The quoted words are those of Lord Wilberforce in *Mallock's* case[23].) This case falls, in my opinion, within the latter class of case.

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[21][1980] 1 WLR 582 (CA) at 593 F.
[22][1971] 1 WLR 1578 (HL) at p 1582 and p 1595.
[23][1971] 1 WLR 1578 (HL) at p 1595 c.

[41] Professors Wade and Forsyth appear to grant that distinctions of that nature may be legitimate[24]. For my part, I have no doubt that they are. Unswerving fidelity to a revered procedural principle in even palpably hopeless cases is, I venture to suggest, too high a price to pay for the limited value such purely ritualistic demonstrations of loyalty may have in advancing the cause of fair administrative action. In my respectful opinion, the potential damage which the adoption of so rigidly doctrinaire an attitude would do to the image of the courts as sensitive, but sensible, monitors of administrative action outweighs that limited value. The undoubtedly important and worthy cause of fair administrative action can, and should, be advanced in more appropriate and deserving cases.

[42] Despite the contrary view of some eminent writers, I do not see the principle of *audi* in administrative law as an end in itself, but as a means to an end. That end is to preclude decisions adverse to the legitimate interests of a person being taken without that person having had an opportunity of placing before the decision taker facts and/or submissions which are arguably relevant. Where the facts and submissions which would have been raised are *plainly* irrelevant or *patently* untenable a denial of an opportunity to advance them does not infect the

[24] *Administrative Law*, 7th edition, p 528

making of the decision with unfairness in any appreciable sense of the word. As Lord Devlin said, albeit in a somewhat different context, in *In re K (Infants)*:[25]

> "But a principle of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed; otherwise it would become the master instead of the servant of justice."

[43] Nothing that I have said should be interpreted as a denial of the importance of, and the need for, a rigorous insistence upon fulfilment of the *audi* principle in cases in which it is applicable and in which its non-fulfilment could conceivably have resulted in prejudice. All that I am at pains to attempt to show is that, in a case where it is indeed clear beyond any doubt that what the aggrieved party wished to say could not conceivably have averted or altered the decision, the denial of the opportunity to say it cannot sensibly be said to have been unfair. In the nature of things the cases in which it will be so clear that no possible prejudice could have been suffered will be rare. But that they will occur from time to time is certain. This, in my view, is one of them.

[44] There seems to me to be a growing trend in the courts in England towards acceptance of the conceptual validity of this limited exception to what

[25] [1965] AC 201 (HL) at 238.

would otherwise be a purely mechanistic insistence upon compliance with the *audi* principle[26]. Those who view these developments as undesirable and unsound usually call in aid *dicta* such as the following:

> "If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision." (Lord Wright in *General Medical Council v Spackman*[27].)
> "I do not find that the answer put by counsel for the watch committee to your Lordships that the case was as plain as a pikestaff is an answer to the demand for natural justice." (Lord Hodson in *Ridge v Baldwin*[28].)
> "If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is prejudice to any man to be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside." (Lord Denning in *Annamunthodo v Oilfields Workers' Trade Union*[29].)

[45] If the cases in which these *dicta* were uttered are examined, they will all be found to be cases in which there was no doubt that actual or potential prejudice was the result of the particular departure from the requirements of natural justice. In *Spackman's* case 27 the *dictum* followed immediately after Lord Wright had cited a previous case in which a decree of Lord Cottonham LC had been set

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[26]See, in addition to the cases already cited, *Byrne v Kinematograph Reuters Society Ltd* [1958] 2 All ER 579 (ChD); *Glynn v Keele University* [1971] 2 All ER 89 (ChD); *R v Chief Constable of the Thames Valley, Ex parte Cotton* [1990] IRLR 334 (CA).
[27][1943] AC 627 (HL) at 644-5.
[28][1964] AC 40 (HL) at 128.
[29][1961] AC 945 (PC) at 956.

aside because, unknown to the defendant, he had an interest in the plaintiff company. Lord Wright pointed out that, in that case, it was regarded as "immaterial that, as Lord Campbell said, 'no one can suppose that Lord Cottonham could be, in the remotest degree, influenced by the interest that he had in this concern'". The reasons why this particular breach (apparent lack of impartiality) of the principles of natural justice is irremediable are so well known that explanation is unnecessary. I beg leave to doubt whether Lord Wright would have expressed himself as expansively as he did if his mind had been pertinently directed to the issue under discussion in this case. Moreover, the case was one in which what the aggrieved doctor wished to do was to place before the council obviously relevant evidence which might have affected the ultimate decision. A denial of that opportunity was obviously prejudicial.

[46] In *Annamunthodo's* case 29 the prejudice was equally clear. New charges were preferred against him in his absence and sustained. Counsel for the Union contended that he had to show prejudice before the decision became liable to be set aside. This could only mean, so it was argued, that he had to show that he would have been acquitted of the new charges or suffered a different penalty if he had been given notice. It was this contention which the *dictum* quoted was

intended to address. It was clear that counsel for the Union was putting the proposition too high. It was enough that, if he had been given notice he *might* have been able to avert conviction or mitigate the penalty. The denial of that opportunity was accordingly a denial of justice. That, as I see it, is all the *dictum* was intended to convey. Here again the focus was not upon the particular problem under consideration now.

[47] In *Ridge v Baldwin* 28 too, the case was one where it was obvious that there had been prejudice in that it could not be said that the party aggrieved had nothing of consequence which could have been put forward had the opportunity to do so been given him. Here again, there is reason to doubt whether the *dictum* quoted was intended to cover every conceivable situation which might arise.

[48] In my opinion, the state of the case law in England is fairly summarised by De Smith, Woolf and Jowell[30]:

> "But on the whole judges have declined to commit themselves unequivocally to the proposition that intervention will never be withheld when they are satisfied that no amount of procedural propriety would have affected the outcome."

For the reasons I have given, I consider their reluctance to do so to be not only

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[30] *Judicial Review of Administrative Action*, 5th ed, at page 501.

readily understandable but justifiable.

[49] It is perhaps necessary to raise a skittle if only to knock it down. It may be suggested that if notice should have been given and it was not, the decision of the magistrate was void. No such contention was advanced in argument. However, had it been raised, what Lord Denning had to say in the Court of Appeal in *Hoffmann-La Roche v Trade Secretary*[31] would have been apposite:

> "I have always understood the word 'void' to mean that the transaction in question is absolutely void - a nullity incapable of any legal consequences - not only bad but incurably bad - so much so that all the world can ignore it and that nothing can be founded on it: see *MacFoy v United Africa Co Ltd* [1962] AC 152, 160.
>
> If the word 'void' is used in that sense, the report of the Monopolies Commission was certainly not void. A failure to observe the rules of natural justice does not render a decision or order or report absolutely void in the sense that it is a nullity. The legal consequences are best told by recounting the remedies available in respect of it. A person who has been unfairly treated (by reason of the breach of natural justice) can go to the courts and ask for the decision or order or report, or whatever it is, to be quashed, or for a declaration that it is invalid, that it has not and never has had any effect as against him. But it is a personal remedy, personal to him. If he does not choose himself to query it and seek a remedy, no one else can do so: See *Durayappah v Fernando* [1967] 2 AC 337, 353. But it is within the discretion of the court whether to grant him such a remedy or not. He may be debarred from relief it he has acquiesced in the invalidity or has waived it. If he does not come with due diligence and ask for it to be set aside, he may be sent away with nothing: see *Reg. v Aston University Senate, Ex parte Roffey* [1069] 2 QB 538. If his conduct has been disgraceful and he has in fact suffered no injustice, he may be refused

[31][1975] AC 295 (CA) at 319 H - 320 F.

> relief: see *Glynn v Keele University* [1971] 1 WLR 487 and *Ward v Bradford Corpn* (1971) 70 LGR 27. If it is a decision or order or report which affects many other persons besides him, the court may not think it right to declare it invalid at his instance alone: see *Maxwell v Department of Trade and Industry* (unreported), December 20, 1972, a decision of Wien J, of which we were supplied with a transcript. Moreover, pending a decision by the courts as to its validity, other persons may be justified in acting on the footing that it is valid. If the decision or order or report is good on the face of it, and there is no good reason for supposing it to be invalid, other persons can treat it as valid. To it I would apply the words of Lord Radcliffe in *Smith v East Elloe Rural District Council* [1956] AC 736, 769-770:
>
> > 'An order .... is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.'
>
> So here, the report of the Monopolies Commission, even if it was made in breach of the rules of natural justice, is still capable of legal consequence."

[50] While those observations may not command unqualified acceptance in situations where the giving of an opportunity to be heard is a statutorily imposed and peremptory condition precedent to the exercise of a decision making power, they appear to me to be substantially accurate when the need to provide such an opportunity derives, not from any statutory imperative, but from the applicability of the common law principle of *audi*. In the former class of case, a failure to provide the opportunity will ordinarily mean that the decision taken is *ultra vires*.

In the latter class of case, there can be no talk of the decision being *ultra vires*. The decision will only be vitiated if in fact the failure to afford the opportunity did amount to a failure of justice in the circumstances of the particular case in the sense that an opportunity to say something which could conceivably have brought about a different result, was denied. The reason why it will be vitiated will not be because it was *ultra vires*, but because it was given in material breach of the common law principles of natural justice and resulted or may have resulted in actual (as opposed to theoretical) unfairness in the decision making process. At best for respondent the present case would fall within the latter class of case. (I may say that since essaying this analysis, I have found that in some respects it resembles closely the independent analysis of Rose Innes in his *Judicial Review of Administrative Action*[32]. See too the remarks of Lord Devlin in *Ridge v Baldwin*[33].)

[51] For the sake of accuracy I should mention that s 69 does not of course apply to immovable property. The share in the sectional title unit is an immovable. The title deed itself is a movable. It is also a document. It is therefore subject to s 69. On the tacit assumption that an abandonment of the share itself would have to be taken to include an abandonment of the title deed the contentions of the parties

[32]At pages 92-94.
[33][1964] AC 40 (HL) at 138-139 and 141 *in fine* - 142.

focused upon the alleged abandonment of the share. That is why I too have focused upon abandonment of the share rather than the title deed.

[52] I would uphold the appeal with costs and alter the order of the court *a quo* to read:

"The application is dismissed with costs."

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R M MARAIS
JUDGE OF APPEAL

ZULMAN JA: CONCURS