IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 14732/10

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

DATE: _____ **SIGNATURE**

In the matter between:

MULLER, ERIC ANDRE Applicant

and

KAPLAN, HARRY N.O. First Respondent
DE WET, CHRISTIAAN FREDERIK N.O. Second Respondent
KRUGER, PAUL DANEEL N.O. Third Respondent

THE MASTER OF THE NORTH GAUTENG HIGH COURT Fourth Respondent
THE MASTER OF THE SOUTH GAUTENG HIGH COURT Fifth Respondent
NEDBANK LIMITED Sixth Respondent
TOTAL SOUTH AFRICA (PTY) LTD Seventh Respondent
THE REGISTRAR OF DEEDS, PRETORIA Eighth Respondent

JUDGMENT

INTRODUCTION

[1] This case presents a most unusual set of facts. The Applicant was finally sequestrated nearly 14 years ago on 18 August 1997. He was rehabilitated by effluxion of time pursuant to the provisions of Section 127A of the Insolvency Act 24 of 1936 ("the Act") on 1 July 2007. Despite the passing of more than a decade since his insolvency, his trustees have not yet filed any liquidation and distribution account, whether preliminary or otherwise.

[2] In this application, the Applicant seeks relief primarily against his trustees, the First to Third Respondents (collectively "the Trustees"). He also seeks the expungement of the claim of the petitioning creditor, Total South Africa (Pty) Ltd ("Total"), the Seventh Respondent. In addition, he seeks relief against a pre-sequestration creditor, Nedbank Limited ("Nedbank"), the Sixth Respondent.

[3] The Applicant has also joined the Master of the North Gauteng High Court and the Master of the South Gauteng High Court (collectively "the Master") and the Registrar of Deeds, Pretoria ("the Registrar"), as they have an interest in these proceedings.

[4] In the light of the facts of this case as more fully explained in this judgment, it is a matter for comment that the Master has not seen fit to provide the Court with a comprehensive report stating his attitude towards the relief sought in this application.

[5] At the time of the Applicant's sequestration, Nedbank, as the successor-in-interest to Boland Bank and then BOE Bank, held extensive securities over the assets of the Applicant, including various mortgage bonds over immovable property and notarial bonds. Since sequestration, Nedbank has failed to successfully prove a claim against the Applicant or to affirm its claim through litigation. The Applicant maintains that all of Nedbank's claims against the Applicant have been discharged and that, accordingly, Nedbank's securities should be cancelled.

[6] In addition, the Applicant seeks to compel the Trustees to take action against Nedbank to force Nedbank to return various deeds of title to immovable property, as well as various mortgages and notarial bonds, to the Trustees. The issues relating to Nedbank form a major part of the present application.

[7] The Applicant also seeks to compel the Trustees (who have so far failed to submit any liquidation and distribution account at all) to submit a final liquidation and distribution account.

[8] The application is opposed by the Trustees (who oppose all of the relief sought), Nedbank and Total.

SUMMARY OF THE FACTS

A. THE NEDBANK SECURITIES AND THE RELIEF SOUGHT AGAINST NEDBANK

[9] At the time of his sequestration the Applicant ran a large trucking business.

[10] Commencing in the 1980's, the Applicant had a banking relationship with Boland Bank Limited ("Boland"). BOE Bank Limited ("BOE") succeeded to the rights and obligations of Boland. Pursuant to a further bank merger, Nedbank succeeded to the rights and obligations of BOE.

[11] The Applicant's indebtedness to Boland/BOE/Nedbank (collectively "the Banks") was secured by various notarial bonds, mortgages over two immovable properties ("the properties"), sureties, pledges of incorporeals, and cessions of claims and book debts (collectively "the Nedbank securities").

[12] After the sequestration of the Applicant, Boland proved a claim at a meeting of creditors. That claim was subsequently expunged.

[13] After these claims were expunged, Nedbank caused two summonses to be issued against the Trustees out of the Transvaal Provincial Division attempting to assert Boland's claims. This action was withdrawn on 16 July 2007, after the Applicant intervened in the litigation.

[14] Nedbank has made no further attempt to prove a claim against the Estate. Nor does Nedbank attempt to reassert the expunged claims in its answering affidavit.

[15] On 29 June 1998, after his sequestration, the Applicant issued summons primarily against BOE in the Western Cape High Court under case number 8723/98 ("the BOE action"). Judgment was delivered in the matter by Binns-Ward J some 12 years later on 25 May 2010 ("the BOE judgment").[1]

[1] With the consent of all parties, a copy of the BOE judgment was handed up to me during the course of the hearing of this matter. The BOE judgment is in any event partially reported as *Muller v BOE Bank Ltd & Others* **2011 (1) SA 252 (WCC)**.

[16] In the BOE action, the Applicant asserted four claims against BOE, claiming amounts in the tens of millions of rands.

[17] In the BOE action the Applicant attempted to establish that the Banks had become indebted to the Applicant as a consequence of various actions related to the conclusion of the original loan agreement between the Applicant and Boland. The Applicant maintained that the indebtedness of the Banks had arisen prior to his sequestration. Accordingly, the Trustees and Nedbank maintain that, in asserting his claims, the Applicant was effectively suing *"derivatively"* for the benefit of his estate. The Applicant joined the Trustees as nominal Defendants in the BOE action.

[18] The Applicant asserted four claims against BOE, Claims A, B, C and D. Pursuant to Rule 33(4), Claims, A, B and C were separated from Claim D. Only Claims A, B and C have so far been tried. Claim D has been stayed.

[19] Claims A, B and C were all dismissed with costs. The Applicant applied for leave to appeal, which was refused, both by the Trial Judge and by the Supreme Court of Appeal.

[20] In connection with the costs award against the Applicant, Nedbank has prepared a *pro forma* bill of costs (which includes the costs of two counsel) in an amount of R3 251 461.57 ("the Nedbank costs claim").

[21] It is not clear what portion of those costs the Taxing Master will allow when the *pro forma* bill is taxed. However, given the duration of the trial, it is likely that the bill of costs will be substantial.

[22] The relief sought by the Applicant in this application, insofar as it affects Nedbank, has two components:

22.1 Prayer 1, **which seeks relief against the Trustees only**, that they *"be ordered and directed to take all steps necessary to secure and obtain the return of all securities and/or title deeds held by Sixth Respondent in respect of and/or relevant to the Applicant and/or the relevant properties as referred to below and to return same to Applicant within a period of 30 ... days from the granting of the order."* ("Prayer 1").

22.2 Prayer 2, pursuant to which the Applicant seeks an order against Nedbank itself, alternatively the Trustees, that they *"be ordered and directed to, within 30 ... days of the granting of this order, take all steps necessary to have all bonds registered in favour of Sixth Respondent or its predecessors in title, over the properties referred to under paragraph 1.12 above, cancelled."* ("Prayer 2").

[23] Nedbank opposes the relief sought in both Prayers 1 and 2. Its principal grounds of opposition are as follows:

23.1 The Applicant has no *locus standi* to seek the relief claimed in Prayers 1 and 2.

23.2 Nedbank's securities are all general covering bonds that entitle Nedbank to refuse to release its securities until its claim for costs in the BOE action has been satisfied.

[24] During the course of argument, the Applicant indicated that it was not proceeding with its claim under Prayer 1 insofar as it would require the Trustees, after recovering the securities from Nedbank, *"to return same to Applicant within a period of 30 ... days"*. Based on that concession, Nedbank did not to press its substantive defences too vigorously.

[25] Instead Nedbank contended that, had Prayer 1 not sought the ultimate delivery of the Nedbank securities to the Applicant, Nedbank might not have opposed the relief sought. Nedbank therefore argued that it was entitled to the costs of the application, whatever the outcome.

B. TOTAL'S CLAIM

[26] Total's claim is analysed in more detail in the section of this judgment that deals with the relief sought with respect to Total's claim.

C. THE ABSA CLAIM

[27] Absa proved a claim against the estate totalling R2 634 183.13 ("the Absa claim"). That claim was at least partially secured.

[28] It appears that Absa subsequently ceded its claim to a certain Michelle Airey ("Airey").

[29] The Applicant maintains that Absa had substantial securities for its claim and that the Trustees should have brought proceedings in order to recover those securities. As a consequence, the Applicant has issued summons for damages and various other relief against the Trustees relating to the ABSA claim.

[30] According to the Trustees it was their intention to investigate the Absa claim at the adjourned second meeting of creditors ("the second meeting") of the Applicant's estate, which was postponed in the circumstances more fully described below.

D. THE SECOND MEETING OF CREDITORS

[31] A first meeting of the creditors ("the first meeting") of the Applicant's estate ("the Estate") was held in accordance with the provisions of the Insolvency Act.

[32] A second meeting of creditors was subsequently convened. At the second meeting of creditors, after the Applicant had initiated litigation against BOE, an attempt was made to interrogate witnesses from BOE.

[33] BOE then sought a ruling from the Master in Pretoria halting the inquiry on the basis that the enquiry was an abuse of process in light of the fact that litigation concerning the matters sought to be inquired into had already commenced.

[34] On 8 February 2000, the presiding officer at the second meeting of creditors, Assistant Master Von Geyso, concluded that the enquiry was an abuse. He then made the following ruling:

> "Op bovermelde redes verskaf word die aansoek van Advokaat Du Plessis toegestaan en word die aansoek om voort te gaan met die ondersoek gestaak tot dat die hangende hooggeregshof geding beslis is. Daarna sal ek kan besluit of die ondervraaging van die vermelde getuies kan voortgaan in die voortgesette uitgestelde tweede vergaardering van skuldeisers."

[35] Frankly, I find the Master's decision difficult to understand. If the enquiry was an abuse, the Master should have quashed it rather than postponing it.

[36] What is of much greater concern is that the Master chose not to only to postpone the enquiry. He also postponed the second meeting of creditors pending the outcome of litigation which could foreseeably (and did in fact) take years to complete.

[37] The Trustees maintain that their inability to complete the second meeting of creditors is a fundamental impediment to the winding up of this Estate and the filing of a final liquidation distribution account.

[38] I find the conduct of the Master in postponing the meeting of creditors for a protracted and indefinite period to be unusual and inappropriate. I am concerned by the Master's failure to revisit this decision in an estate that has made no progress in 11 years. This, and other conduct of the Master, more fully described below, speaks to a systemic lack of coherence in the Master's office and a failure by the Master to carry out his statutory obligation to supervise the administration of this Estate in an orderly manner. The Master's neglect is exacerbated by the Master's failure to file any report with this Court in this matter.

E. THE TRUSTEES' FAILURE TO FILE A LIQUIDATION AND DISTRIBUTION ACCOUNT

[39] So far the Trustees have failed to file any liquidation and distribution account at all. They maintain that they are prevented from doing so, *inter alia,* by the fact that the second meeting of creditors has not concluded.

[40] The Trustees also contend that they obtained an extension of time from the Master to file a liquidation and distribution account until 30 June 2011. As proof of this fact they attach a barely legible, handwritten document signed by an unidentified representative of the Master's Office to that effect.

[41] I find it strange that the extension is relied upon by the Trustees without the Trustees also attaching documentation that demonstrates that the Trustees extensions of time were sought in the proper manner in accordance with Section 109 of the Insolvency Act. There is no allegation that this section was properly complied with when the extension was granted. However, there is also no evidence from the Applicant that it was not.

[42] The Trustees also maintain that there has been delay in winding up the Estate as a consequence of the obstructive and litigious behaviour of the Applicant. In support of this, they refer to the litigation relating, *inter alia*, to the Absa claim. They point to the fact (which is undisputed by the Applicant) that the Applicant has in the past successfully interdicted them from disposing of property of the estate. I do not know upon what basis these interdicts were granted.

[43] As noted above, on 6 March 2008, the Applicant's present attorneys of record addressed a letter to the Trustees on behalf of the Applicant and the cessionary of the ABSA claim, Michelle Airey. In that letter the Applicant's attorney, Marais, confirmed that the Applicant had become rehabilitated by effluxion of time and confirmed that:

> "3.1 I was handed a '*konsep eerste en finale likwidasie, distribusie en kontribusierekenning'* attached and marked 'A'. no liquidation and distribution/ contribution account has been lodged or approved to date."

[44] This letter falls short of a demand that the Trustees submit an account to the Master in terms of section 116bis of the Act.

[45] It is common cause the draft first and final liquidation account contains errors. It is not clear to me from the draft how the Trustees proposed to deal with the immovable properties of the Estate that were previously encumbered to Nedbank.

[46] During the course of argument it appeared to be common cause between the Applicant and the Trustees that, even if Nedbank's claim for costs arising out of the BOE action and the Total and Absa claims are taken into account, the Estate now has a substantial surplus of assets over liabilities. However, nobody specified what that surplus might be.

DEMANDS MADE BY THE APPLICANT AND THE TRUSTEES FOR NEDBANK TO SURRENDER ITS SECURITIES

[47] Prior to launching this application, both the Applicant and the Trustees made demand upon Nedbank to surrender the securities that form the subject matter of this application. These efforts are summarised below.

[48] On 2 September 2008, the Applicant's attorney, Marais, addressed a letter to the Trustees in which he stated, *inter alia*, as follows:

> "As their claim has now been expunged and as there are no pending claims against the insolvent estate they [Nedbank] are required to return the security which they perfected in terms of the Order of Court handed to you."

[49] On 21 October 2008, Marais, acting on behalf of the Applicant, addressed a letter to Nedbank's attorneys. In that letter, Marais noted that Nedbank's claim had been expunged and that the two actions that Nedbank had instituted in the Transvaal Provincial Division to assert its alleged claims had been withdrawn. Marais then stated:

> "7. Your client has no claims against my client's insolvent estate.
>
> 8. I attach hereto a list of securities held by your client against the insolvent estate of my client marked 'A'.
>
> My client demands that the securities held by your client be returned to the Trustees of the insolvent estate.

> In addition to the securities set out in annexure 'A' your client holds the Title Deeds to the property described in paragraph 2 of annexure 'A' and the property situate at 43 Moore Street, Wadeville, Germiston and demand is also made that your client returns such title deeds to the Trustees of the insolvent estate."

[50] On 30 October 2008, Marais addressed a further letter to the Trustees, enclosing his letter to Nedbank's attorneys dated 21 October 2008. Marais stated:

> "If regard is had to the forth (sic) last paragraph on page two of such letter, certain demands, per return, assets of the insolvent to the trustees of the insolvent estate has (sic) been made.
> This letter is addressed to you with the request that such demands be made of Boland/Nedbank."

[51] On 5 November 2008, in response to that letter, the Trustees addressed a letter to Nedbank's attorneys as follows:

> "We refer to the above matter as well as the correspondence between yourselves and Eugene Marais Attorneys and more specific (sic) his last letter to you dated 21 October 2008, the contents of which you have no doubt noted.
> **We as trustees accordingly support the instructions and demands as per the aforesaid letter of Eugene Marais Attorney and would appreciate to receive your urgent reply thereto**."
>
> [emphasis added].

[52] On 28 November 2008, the Trustees addressed a further letter to Nedbank's attorneys referring to prior correspondence and noting that *'we have not received any response thereto and await same as a matter of urgency'*.

[53] By letter dated 11 December 2008, the Trustees again called upon Nedbank's attorneys for an *"urgent response"*.

[54] It does not appear that Nedbank's attorneys responded to any of these demands. In the light of Nedbank's opposition to the present application, I interpret Nedbank's failure to respond to the demand as a deliberate decision not to comply with the demand.

THE APPLICATION TO PROCURE THE EXPUNGEMENT OF THE TOTAL CLAIM

A. THE TOTAL CLAIM

[55] Total was the successful petitioning creditor in the Applicant's sequestration. Total's initial claim against the Applicant allegedly arose out of the supply of fuel for the Applicant's trucking business.

[56] During the 1990's, Total instituted sequestration proceedings against the Applicant in the then Witwatersrand Local Division under case number 95/07496 ("the Total sequestration application"). Total's claim was for moneys owing for the supply of fuel to the Applicant.

[57] Thereafter, in the Total sequestration application, the parties entered into an agreement of settlement pursuant to which the Applicant undertook to pay Total an amount of R3 786 908.23 in instalments. The agreement further provided that in the event of any one payment not being made on due date, the full amount would immediately become due and payable.

[58] The document concerned is styled a *"settlement"*. Among other things, it contains the following terms:

> "B. The parties are desirous of recording **the terms of settlement which they have recorded.**
> ...
> 1. Subject to the consent of the above Honourable Court being had and obtained, **this settlement shall be made an Order of the above Honourable Court**.
>
> ...
>
> 7.1 This document constitutes the sole record of the agreement between the parties.
>
> ...
>
> 7.5 The application for sequestration herein shall be withdrawn by the Applicant."
>
> [emphasis added].

[59] Consequent upon the settlement, the then Witwatersrand Local Division granted an order in the first sequestration application as follows:

> "1. THAT the **agreement of settlement** between the parties is hereby made an Order of this Court.
> 2. It is also noted that the sequestration application is withdrawn."
>
> [emphasis added].

[60] It is apparent from the language of the settlement agreement and

the order granting it that the parties intended the agreement to be in full and final settlement of the dispute between them.[2]

[61] It is common cause that the Applicant made payments pursuant to the settlement agreement and reduced the amount owing thereunder to an amount of R2 417 417.72. The Applicant then defaulted in his obligations under the settlement agreement. Total then brought successful sequestration proceedings based upon the settlement agreement.

[62] Total thereafter proved a claim against the Estate based upon the settlement agreement.

[63] The affidavit in support of the proof of claim contains the following allegations:

> "4. That the said debt arose in the manner and at the time set forth in the account hereunto annexed.
> 5. That no other person besides the said insolvent is liable (**otherwise than a surety**) for the said debt or any part thereof.

[2] *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* **1978 (1) SA 914 (A)**.

> 6. That the said Creditor has not, nor has any other person, to my knowledge on the said Creditor's behalf **received any security for the said debt or any part thereof**."

[64] A detailed statement of account was also attached to the proof of claim reflecting payment received on account of the settlement together with accrued interest.

B. THE APPLICANT'S CONTENTIONS REGARDING THE TOTAL CLAIM

[65] The Applicant seeks an order compelling the Trustees to take all steps necessary within a period of 30 days to have Total's claim expunged by the Master. In essence, the Applicant seeks an order compelling the Trustees to take steps under Section 45 of the Act to obtain the expungement of Total's claim.

[66] The procedure followed by the Applicant to bring about the expungement of the claim is inappropriate. The Applicant should have brought an application under Section 151 of the Act to review the decision of the officer presiding at the meeting of creditors at which Total's claim was admitted to proof. As the

Applicant has a reversionary interest in the estate, he would have been entitled to bring such a review.[3]

[67] The requirement that the Applicant proceed under Section 151 of the Act is not a mere matter of form. Review proceedings arising out of a claim being admitted to proof should be brought timeously. If they are not brought timeously, there is a serious risk of prejudice to the claimant if the claim is subsequently expunged in that the claimant may be met with a plea of prescription when it attempts to enforce its claim by way of action.

[68] However, for purposes of determining the present application, I will assume in the Applicant's favour, that his remedies are not confined to review under Section 151 and that he can bring an application to compel the Trustees to take steps under Section 45 of the Act at this late stage.

[3] *Yudelowitz v Johannesburg Hospital* **1924 WLD 206**; *Mars: The Law of Insolvency in South Africa:* **9th Ed: p413**.

[69] I shall assume that, for the Applicant to succeed in such an application, the Applicant will at least have to make out a *prima facie* case that Total's claim is defective.

[70] The sum total of the case made out by the Applicant in his **founding papers** with respect to the Total claim appears at paragraph 25 of the Founding Affidavit, as follows:

> "25. In my attorney of record's aforesaid letter (annexure "EM3")[4], Second Respondent was *inter alia* informed that:
>
> ...
>
> 25.2 with regard to the claim by Seventh Respondent, Second Respondent was informed (with supporting documentation provided) that despite the Seventh Respondent in documentation utilised to prove its claim having stated that it had not nor had any person to its knowledge received any security for his debt, same had in fact been incorrect and was indeed false, in that Seventh Respondent held security through a mortgage bond registered in its favour over a fixed property owned by an entity known as Orange Grove 13th Street (Pty) Ltd, of which I was sole shareholder and sole director. The said company had in fact subsequently been liquidated by Seventh Respondent and the security so held by it realised, same having rendered proceeds to the Seventh Respondent in an amount of approximately R1.9 million."

[4] The contents of this annexure was allegedly *"incorporated by reference"* in the Founding Affidavit (Founding Affidavit para 23).

[71] In essence, the sole attack on the claim in the founding affidavit was technical – Total had alleged that it had no security when in fact it had security. This proposition is based upon a faulty premise.

[72] *Mr Van Reenen*, who appeared for Total, argued that the statement that Total *"held no security"* for its claim was factually correct, having regard to the language of the Act. In Section 2 of the Act, *"security"* is defined as:

> "in relation to the claim of a creditor of an insolvent estate, **means property of that estate** over which the creditor has a preferent right by virtue of any special mortgage, landlord's hypothec, pledge or right of retention."
>
> [emphasis added].

[73] *Mr Van Reenen* further contended that Total's claim was secured by a suretyship and a mortgage bond over the fixed property of **another entity**, Orange Grove 13th Street (Pty) Ltd ("Orange Grove"), not the property of the insolvent or his Estate. Accordingly, as Total held no security over assets of the Estate, as contemplated by the Act, Total was not obliged to identify the security it held from a surety such as Orange Grove. I agree with *Mr Van Reenen*.

[74] As this technical objection is the sole basis for expungement contended for in the Founding Affidavit, the Applicant's application must fail insofar as it appertains to Total.

[75] Even if Mr Van Reenen is wrong in this contention, it appears from clause 4.3 of the settlement agreement itself (which was attached to the proof of claim), that the claim arising out of the settlement agreement was to be secured by a mortgage bond over the property of Orange Grove. A reasonable person reading the claim would have concluded that Total held security in the form of a mortgage over the property of Orange Grove, or at least have been put on inquiry to that effect.

[76] In reply, the Applicant impermissibly attempted to supplement his case against Total by relying upon an additional ground. There is no reason to permit the Applicant to rely upon this additional ground in reply and I am entitled to ignore it. In any event, the additional ground is similarly without merit for the following reasons.

[77] At paragraph 6.3 of the replying affidavit, the Applicant states:

> "16.3 In addition thereto, the agreement of settlement referred to in annexure "EM3" and relied upon by Seventh Respondent in proving its claim, was entered by me and the Seventh Respondent in the *bona fide* but mistaken belief that I might have owed money to Seventh Respondent and under threat of a sequestration application. These facts were specifically brought to the attention of my trustees (First, Second and Third Respondents). My trustees, at my instance, instructed a forensic auditor to investigate the situation. This forensic investigation revealed that **during or about the time of entering into the agreement, I was in fact not indebted to the Seventh Respondent in any amount** and that I had, in fact, overpaid the Seventh Respondent in the amount of R1 577 279.86."
>
> [emphasis added].

[78] The facts of this case are analogous to those that arose in *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd & Others* **1978 (1) SA 915 (A)**. In that case, after action had been instituted against the appellant, the appellant undertook to pay the respondent an amount of R10 000 *"in full and final settlement of all claims howsoever arising"*. Thereafter, the appellant contended that it had mistakenly undertaken to pay the amount in question because it had not taken account of certain duplicated credits in its books. The Court dismissed the appeal on the basis that the compromise precluded the appellant from reopening the matter.

[79] At **p923D**, Miller JA held:

> "Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in the very concept of compromise. This is a circumstance which the Court must bear in mind when it considers a complaint by a dissatisfied party that, had he not laboured under an erroneous belief or been ignorant of certain facts, he would not have entered into the settlement agreement."

[80] The allegations contained in the replying affidavit are insufficient to warrant the reopening of the dispute. This is especially so in

view of the fact that the settlement agreement has been made an order of Court.[5]

[81] In the result, the Applicant's claims for relief against Total as set out in Prayer 3 must fail.

C. THE REDUCTION OF TOTAL'S CLAIM

[82] However, there is a further matter that has to be dealt with in relation to Total's claim. It is common cause that Orange Grove was liquidated in November 1997 and that, as a result, Total received payments totalling R1 836 600.70, thereby reducing Total's claim to an amount of R553 817.02. Total has consented to the reduction of its claim accordingly.

[83] As a result, on 1 June 2010, the Trustees addressed a letter to the Master of the North Gauteng High Court requesting that the claim be reduced in terms of Section 45(3) of the Act to the agreed amount of R553 816.99. As far as I can make out, nearly **a year later**, the Master has not yet responded to this request.

[5] *Swadif (Pty) Ltd v Dyke* **1978 (1) SA 928 (A) 938H-939C**.

[84] Once again, the Master's lack of diligence in this case is a matter for comment. It verges on the incredible that the Master could not respond in a ten month period to a simple request to reduce a claim by agreement between the Trustees and the creditor. If there was some excuse for this type of neglect, the Master should have explained it in a report to the Court.

[85] As the Trustees and Total are amenable to the reduction of Total's claim and the Master is a party to these proceedings, I propose to issue an order declaring that the claim should be reduced and compelling the Master to effect any required reduction.

THE RELIEF SOUGHT AGAINST NEDBANK

A. THE APPLICANT'S REHABILITATION

[86] The Applicant was rehabilitated by effluxion of time pursuant to the provisions of Section 127A of the Act. This section provides that an insolvent who has not been rehabilitated within a period of 10 days from date of sequestration of his estate *"shall be deemed to be rehabilitated after the expiry of that period unless a court upon application by an interested person after notice to the insolvent orders otherwise prior to the expiration of the period of 10 years."*

[87] Section 129 of the Act provides:

> "129. **Effect of rehabilitation**
>
> (1) Subject to the provisions of subsection (3) and subject to the such conditions as the court may have imposed in granting a rehabilitation, the rehabilitation of an insolvent shall have the effect –
>
> (a) of putting an end to the sequestration;
>
> (b) of discharging all debts of the insolvent, which were due, or the cause of which had arisen, before the sequestration, and which did not arise out of any fraud on his part;
>
> (c) of relieving the insolvent of every disability from the sequestration.

> (2) Rehabilitation granted on an application made in circumstances described in subsection (3) of section one hundred and twenty-four shall have the effect of reinvesting the insolvent with his estate.
>
> (3) A rehabilitation shall not effect ...
>
> (d) the right of the trustee or creditors to any part of the insolvent's estate which is vested in but has not yet been distributed by the trustee, but subject to the provisions of subsection (2)."

[88] It follows that the effect of a rehabilitation under Section 127A is to discharge the insolvent from pre-sequestration liabilities. At the same time, the assets of the estate which have not yet been distributed by the Trustees remain vested in the Trustees until they are distributed.

[89] In effect, after a rehabilitation of this nature, two estates come into being. The one estate consists of the free residue of the insolvent's pre-sequestration estate which remains vested in the trustee. The other estate is a new estate consisting of assets of the insolvent acquired after sequestration or rehabilitation that do not form part of his insolvent estate.

[90] Section 116 of the Act provides:

> "116. **Surplus to be paid into Guardian's Fund until rehabilitation of insolvent**
>
> (1) If after the confirmation of a final plan of distribution there is any surplus in an insolvent estate which is not required for the payment of claims, costs, charges or interest, the trustee shall, immediately after the confirmation of the account, pay that surplus over to the Master, who shall deposit it in the Guardian's Fund and after the rehabilitation of the insolvent shall pay out to him at his request."

[91] It is clear that, if a final liquidation and distribution account has been filed, the Applicant, as a now rehabilitated insolvent, would be entitled to be paid the proceeds of any surplus assets. However, no final (or even preliminary) plan of distribution has so far been confirmed. Until this occurs, the Applicant is not entitled to distribution of the surplus. Accordingly, in order to facilitate distribution of the surplus to the Applicant, the Applicant has brought the present application.

[92] *Mr Harms*, who appeared for the Trustees, indicated that, after creditors' claims had been paid, the Trustees were considering distributing any remaining unencumbered assets to the Applicant directly as something akin to a dividend *in specie*. This appears to me to be a creative way to solve the problem and I see no reason why a distribution cannot be effected in that manner. However, I have not been asked to make a finding that such a procedure is competent and nothing in this judgment should be interpreted as amounting to such a binding finding.

[93] What is clear on a mere reading of the relevant sections of the Act, is that the Applicant has a residual interest in the assets of the Estate sufficient to enable him to, *inter alia*, bring proceedings seeking the relief sought against the Trustees and Nedbank in Prayers 1 and 2 of the notice of motion.

[94] *Mr Zidel SC*, who appeared for the Applicant, also drew my attention to case law that supports this interpretation of the provisions of the Insolvency Act.

[95] In *Nieuwoudt v The Master & Others NNO* **1988 (4) SA 513 (A) 524**, Van Heerden JA held:

> "Reeds sedert die vorige eeu word hier te lande sonder teenspraak aanvaar dat 'n insolvent 'n resterende belang in sy insolvente boedel het. Daarom kan hy stappe neem ter inwinning van 'n bate, bestryding van 'n vordering, ensomeer indien die kurator dit nie wil doen nie. Gewoonlik word egter vereis dat die kurator as party gevoeg moet word. Ook kan die insolvent die kurator aanspreek op grond van wanadministrasie van die boedel. Sien Mars *The Law of Insolvency in South Africa* 7de uitg para 15.2. Die *locus classicus* in hierdie verband is die volgende *dictum* van Innes HR in *Mears v Rissik, MacKenzie NO and Mears' Trustee* 1905 TS 303 op 305:

> 'Now, no doubt the general rule is that an unrehabilitated insolvent cannot, over the head of his trustee, bring actions connected with his estate ... The reason of the rule is that his estate has been taken out of him and vested in his trustee; and that therefore the person to deal with that estate, to administer it, to sue in respect of it, and to defend actions concerning it, is the trustee, and not the insolvent. But from the fact that the insolvent is under this disability, it does not follow that he has no rights whatever regarding the estate. The law provides that if there is any residue after paying the debts it is to be handed to the insolvent. Not only so, but it is to his interest that as many assets as possible shall be brought into the estate, and the debts reduced to their proper limits. He has an interest in seeing that that is done. An asset may suddenly become valuable which has been considered worthless, or he may have a legacy left to him which may enable him to clear off all his liabilities. Apart from that it is to the interests of the insolvent that his assets should be increased and his liabilities reduced, because in that way the stigma of insolvency rests less heavily upon him; and when he applies for his rehabilitation he is in a better position than if he had a very large margin of unpaid debts. Therefore from whatever standpoint we regard it the insolvent has a very real interest in the administration of his estate.
>
> As I have said, generally the trustee is the person to take action in matters connected with the estate; but if the trustee will not do so, or whether *bona fide* or *mala fide* does not see his way to take action, is the insolvent on that ground to be without remedy? I should say upon general principles he ought not to be; the law should provide some remedy.'

Dit is eienaardig dat hierdie Hof, sover ek kan nagaan, hom nog nooit pertinent oor die al of nie juistheid van hierdie opvatting uitgespreek het nie. In *Dean v Estate Dean* 1938 AD 577 op 580-1, was die bevoegdheid van 'n insolvent om sy kurator op grond van wanadministrasie van die boedel aan te spreek, weliswaar indirek ter sprake, maar uiteindelik is slegs veronderstel dat hy dit wel kon doen.

> Na my mening is daar egter geen fout te vind met die aanvaarde opvatting dat 'n insolvent 'n resterende belang in die bereddering van sy insolvente boedel het nie. Dit kom my dan ook voor dat die bestaan van hierdie belang deur die Wetgewer erken is, want art 111(1) van die Insolvensiewet bepaal dat onder andere die insolvent 'n beswaar teen bekragting van 'n kuratorsrekening kan voorle. En reeds voordat hierdie artikel of sy voorganger op die Wetboek geplaas is, is belis dat afgesien van statutere magtiging 'n insolvent vanwee sy resterende belang wel *locus standi* het om so 'n beswaar te maak. Sien *In re Insolvent Estate W Storm and Sons* (1909) 30 NLR 98 op 100-2."

[96] The decision of the Appellate Division in Nieuwoudt is dispositive of Nedbank's contention that the Applicant lacks standing to seek the relief sought in Prayers 1 and 2 of the notice of motion. Nedbank's argument cannot be sustained in the face of that decision.

B. NEDBANK'S RIGHT TO RETAIN THE TITLE DEEDS TO THE IMMOVABLE PROPERTY AND TO RESIST CANCELLATION OF THE BONDS

[97] Nedbank's second contention is that it cannot be compelled to deliver up its security because its claim for the costs awarded to it in the BOE action is secured by the various mortgages and notarial bonds.

[98] In *Kilburn v Estate Kilburn* **1931 AD 500, 505-506**, Wessels ACJ held:

> "The settlement of a security divorced from an obligation which it secures seems to me meaningless. It is true that you can secure any obligation whether it be present or future, whether it be actually claimable or contingent. The security may be suspended until the obligation arises, but there must always be some obligation even if it be only a natural one to which the security obligation is accessory. ...
> It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is necessary. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim. Now the Court below has found as a fact that there was no serious promise of £500 and no intention to pay the wife that sum, but that that the whole intention of the spouses was that the wife should claim £500 if and when the husband became insolvent. There was therefore no obligation secured by this bond, and therefore in a *concursus creditorum* the Appellant cannot claim on the bond."

[99] In *Thinenhaus NO v Metje & Ziegler Limited & Another* **1965 (3) SA 25 (A) 32F-G** Williamson JA, cited to *Kilburn* and held:

> "It is clear that a mortgage bond as a deed of hypothecation must relate to some obligation ... If on a *concursus creditorum* a mortgagee, or a pledgee, fails to establish an enforceable claim which it was intended should be secured by the hypothecation, the bond or the pledge, as the case may be, falls away."

[100] In the present case, Nedbank has not asserted that the securities currently secure any debt other than the Applicant's indebtedness to Nedbank arising out of the costs award made in the BOE action. Nevertheless, Nedbank maintains that it is entitled to retain its securities against payment of its claim for costs. In analysing the correctness of this latter proposition, it is important to distinguish between the mortgages or notarial bonds themselves (i.e. the accessory pledge documents), and the principal claim for costs.

[101] The mortgages were granted pre-sequestration in order to secure **pre-sequestration debts**. In comparison, the claim for costs arises out of litigation that the Applicant institutes against Nedbank's predecessor, BOE, **post sequestration** and is a post-sequestration debt.[6]

[102] A century ago, Innes J (as he then was) held in *Walker v Syfret NO* **1911 AD 141, 166** that:

[6] *Schoeman v Thompson* **1927 WLD 298.**

> "The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order. Now, to deprive the estate of a valid defence to a claim against it is as prejudicial to the creditors as to take from it the most tangible asset of corresponding amount. And a transaction of that nature would have no validity against the trustee."

[103] In the present case, the position is this. As at the date of sequestration, the Banks held various securities by way of general covering bonds for any indebtedness of the Applicant/insolvent as it existed as at the date of sequestration. It is now clear that, as at the date of sequestration, there was no longer any principal obligation owed by the Applicant/insolvent to the Banks. The *"security"* was simply security in the abstract. It was not related to any valid principal obligation. Accordingly, the Bank's security fell away on sequestration.

[104] When the Applicant thereafter instituted action against BOE without the authority of the Trustees, he could not thereby have prejudiced the *concursus creditorum* by binding the estate to a new post-sequestration obligation – i.e. the obligation to pay an adverse costs order in the BOE action. To allow Nedbank's contention would be to undermine the most fundamental principal of our insolvency law as stated in *Walker v Syfret NO*.

[105] Counsel for the Trustees contended that Nedbank's claim for costs was an administrative priority claim because it had accrued to Nedbank in the process of defending an action instituted by the insolvent for the ultimate benefit of the *concursus creditorum*. This contention is unsustainable in the light of the basic principle enunciated in *Walker v Syfret NO*. It is simply not competent for the insolvent to incur liability to the detriment of the *concursus creditorum* by initiating litigation that the Trustees may have decided not to undertake because the prospects of success were doubtful.

[106] This proposition of the Trustees is also belied by the decision of Barry J in *Schoeman v Thompson* **1927 WLD 298**. In that case, litigation was initiated unsuccessfully against an unrehabilitated insolvent. The Court held that the costs awarded in his favour did not fall into his estate. The Court held that the costs *"seem to me to belong peculiarly to him"*. Conversely, had the insolvent been ordered to pay costs in that action, the liability to pay those costs would have fallen on his shoulders and would not have been the responsibility of the general body of creditors.

[107] In any event, even if the Trustees' proposition were correct, it would not have the effect of converting Nedbank's claim into a secured claim.

[108] It follows that Nedbank's securities fall to be cancelled and all of the pledged property should be returned to the Trustees.

[109] In this respect, section 69 of the Act provides:

"69. **Trustee must take charge of property of estate**

> (1) A trustee shall, as soon as possible after his appointment ... take into his possession or under his control all movable property, books and documents belonging to the estate of which he is trustee and shall furnish the Master with a valuation of such movable property by an appraiser appointed under any law relating to the administration of estates of deceased persons or by a person approved of by the Master for that purpose.
>
> (2) If the trustee has reason to believe that any such 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 subsection (3).

[110] Accordingly, the Trustees should have brought proceedings many years earlier against Nedbank to cancel Nedbank's securities and recover the pledge property for Nedbank as the principal obligation had ceased to exist. The Trustees effectively recognised this, when, at the Applicant's instance, they made demand upon Nedbank to cancel the securities and return the properties.

[111] I have already found that the Applicant had authority to act in the Trustees' stead once they failed to act. It follows that, subject to the deletion of the words *"and to return same to Applicant within a period of 30 days"* contained in the preamble to Prayer 1, the Applicant is entitled to the relief sought in Prayer 1 (excluding Prayer 1.6 for reasons set forth below).

[112] The Trustees and Nedbank argued that, because Prayer 1 sought to compel the Trustees to obtain cancellation of securities and return of the property so that they might be returned to the Applicant within a period of 30 days, the entire relief sought by the Applicant in Prayer 1 was not competent and that the application should be dismissed with costs. I cannot accept this argument. It is too formalistic. Prayer 1 is a *plus petitio*. The claim for the greater includes the claim for the lesser. It would be an exercise in the most extreme formalism to deny the Applicant relief on that ground.

[113] I also do not understand why the Trustees have made common cause with Nedbank on this issue. They should welcome the fact that the Applicant is taking action in this regard at this stage.

[114] Had the Trustees felt that the Applicant was asking for too much, they could merely have indicated that they were not opposing the relief sought, except insofar as the Applicant was demanding that the securities be returned to him within 30 days.

[115] The relief sought in paragraph 1.6 stands on a different footing. According to Nedbank, it has not succeeded to the rights and obligations of Boland Bank Beleggingsgenomineerdes (Pty) Ltd ("Beleggingsgenomineerdes") as recorded in the participation bond in question. Nor has the Applicant produced any evidence that that bond is now held by Nedbank. Accordingly, the relief sought in Prayer 1.6 cannot be granted in this application.

[116] However, although I can give no formal relief in this regard, it should be apparent to the Trustees and any affiliate entity of Nedbank upon a perusal of this judgment that they are obliged to take proceedings against the appropriate entity to recover the bond in question.

[117] It is common cause between the parties and on the papers that the documents sought in Prayers 1.1, 1.2, 1.4, 1.5, 1.7, 1.8, 1.9, 1.10 and 1.11 of the notice of motion have been returned to the Trustees. This is a further indication to me that Nedbank should have returned these securities after sequestration.

[118] It was argued somewhat faintly by counsel for the Trustees that it was not necessary for the Trustees to recover the title deeds to the immovable properties listed in paragraph 1.12 of the notice of motion, because Nedbank, at this stage, held those title deeds as agent for the Trustees. Nedbank's counsel also contended that the title deeds were held by Nedbank as agent for the Trustees.

[119] I cannot accept this argument. As Nedbank's security falls to be cancelled, it is necessary for Nedbank to return the title deeds to the Trustees. It is also necessary for the Trustees to take steps to recover those title deeds from Nedbank.

[120] In any event, the contention that Nedbank holds his securities and the title deeds as the Trustees' agent is at variance with the conduct of both the Trustees and Nedbank. It is apparent from the papers that the Trustees have on more than one occasion demanded return of these deeds from Nedbank without success. Nedbank's conduct is not that of an agent.

[121] In relation to the relief sought in Prayer 2, the Trustees argued that cancellation of the bonds was not necessary because of the provisions of Section 56 of the Deeds Registries Act 47 of 1937 ("the Deeds Act"). Section 56 provides:

> "56. **Transfer of hypothecated immovable property**
>
> (1) No transfer of mortgaged land shall be attested or executed by the Registrar, and no cession of a mortgaged lease of immovable property, or of any mortgaged real right in land, shall be registered until the bond has been cancelled or the land, lease, or right has been released from the operation of the bond with the consent in writing of the holder thereof or unless, in the case of any such mortgage bond which has been lost or destroyed, the registrar has on application by the registered holder thereof, cancelled the registry duplicate of such bond: Provided that no such cancellation or release shall be necessary if transfer or cession is made –
>
> ...
>
> (b) by the trustee of an insolvent estate ..."

[122] While Section 56 may permit **the Trustees** to transfer the property to third parties without prior cancellation of the bonds, in the present case it is nevertheless necessary that the Trustees obtain cancellation of the bond for the following reasons:

122.1 It is not clear that the Trustees will in fact be transferring the properties to any third parties. To the extent that these properties constitute residue of the estate not necessary to discharge the claims of creditors, they may already have vested in the Applicant. For the Applicant to acquire and pass free title to the land it is necessary for the Applicant to obtain cancellation of the bonds.

122.2 In the unusual circumstances of this case, it would be imprudent for the Trustees to rely on the provisions of Section 86 of the Deeds Act.

122.3 Even if the Trustees intend, and will be in a position, to transfer the properties, they are entitled, as a matter of law, to cancellation of the bonds because the principal obligation that those bonds secured has fallen away. It is therefore inappropriate in these circumstances not to order cancellation of the bonds.

THE APPLICATION TO COMPEL THE TRUSTEES TO SUBMIT A FINAL LIQUIDATION AND DISTRIBUTION ACCOUNT

[123] In Prayer 4 of the notice of motion, the Applicant has applied for an order compelling the Trustees to submit a final liquidation and distribution account to the Fourth or Fifth Respondents within 60 days of the granting of an order in this application.

[124] In their answering affidavit, the Trustees raised two defences to this claim:

124.1 They maintained that they could not file a final liquidation and distribution account because the second meeting of creditors had not concluded as a consequence of the Master's decision to postpone it indefinitely ("the first defence").

124.2 They contended that the Master has granted the Trustees an extension of time to file a liquidation and distribution account until 30 June 2011 ("the second defence").

[125] In his heads of argument, *Mr Harms*, who appeared on behalf of the Trustees, raised a further argument, which is essentially a point *in limine*. He contended that, pursuant to the provisions of Section 119bis of the Act, the Applicant was obliged to give the Trustees 14 days' written notice before bringing an application to compel them to submit an account.

A. THE FIRST DEFENCE

[126] For reasons which are more fully set forth below, it is my opinion that the first defence is without merit.

[127] Section 91 of the Act provides:

> "91. **Liquidation account and claim of distribution or contribution**
> Subject to the provisions of section one hundred and nine and one hundred and ten, **a trustee shall within a period of six months as from the date of appointment**, submit to the Master a liquidation account and a plan of distribution of the proceeds of the property in the estate available for payment to creditors ..."
>
> [emphasis added].

[128] The obligation to submit a liquidation and distribution account (subject to the provisions of sections 109 and 110) appears to be peremptory, regardless of whether the second meeting of creditors is complete.

[129] Second, the only reason that the Trustee's inability to complete the second meeting of creditors might serve as a defence to the failure to submit a liquidation and distribution account, would be that creditors at the second meeting failed to give the Trustees directions in connection with the administration of the Estate. In particular, a failure to authorise the Trustees to dispose of the assets of the Estate would be relevant.

[130] In fact, as appears from **paragraphs 30 – 31** of the Trustees' answering affidavit, the usual authorities given by creditors to the Trustees were in fact granted at a meeting of creditors conducted during February 1998. Resolutions 1 – 17, as proposed to the creditors, were in fact passed. These resolutions include authority to dispose of the assets of the estate. On the face of the resolutions, the Trustees had all the authority they needed to realise the assets of the estate. It is therefore inappropriate for the Trustees to hide behind the fact that the second meeting of creditors was postponed as an excuse for not winding up the Estate and submitting liquidation and distribution accounts.

[131] Although the failure to close the second meeting of creditors does not serve as an excuse for the Trustees' failure to submit liquidation and distribution accounts, it is undesirable that a second meeting of creditors should remain open for 11 years. During the course of argument, I discussed this matter with counsel for the Applicant and the Trustees and both agreed that they would have no objection to my issuing an order compelling the resumption of the second meeting of creditors.

[132] As the Masters of the High Court in both Pretoria and Johannesburg are parties to this proceeding, and as they have taken no interest in this proceeding, they cannot be heard to complain if I make such an order.

[133] The Trustees indicated to me that would not be in a position to close the second meeting of creditors immediately because they wished to conduct an interrogation with respect to the claim of Absa. At this stage, I do not know whether such an enquiry is necessary or justified. However, I caution all of the parties involved (and especially the Master and the Trustees) against conducting further enquiries that may have the effect of delaying the finalisation of this Estate any further unless they are absolutely necessary.

[134] I also note, from the papers before me, that it appears that the Absa claim may be the subject matter of litigation that has been initiated by the Applicant. If that is so, it is questionable whether that claim can, at this stage, form the subject matter of an inquiry, particularly in the light of the Master's prior ruling that no interrogation of Nedbank could be conducted because litigation had been initiated against Nedbank. However, I make no finding in this regard.

B. THE SECOND DEFENCE AND THE POINT *IN LIMINE*

[135] Section 109 of the Act provides:

> "109(1) If a trustee is unable to submit an account to the Master within the period prescribed therefore by section 91, he shall before the expiration of such period or within the further period as the Master may allow –
>
> (a) submit to the Master an affidavit in which he shall state –
>
> (i) the reasons for his inability so to submit the account concerned;
>
> (ii) those affairs, transactions or matters of importance relating to the insolvent or the estate as the Master may require;

> (iii) the amount of money available for payment to creditors or, if there is no free residue or the free residue is insufficient to meet all the costs referred to in section 97, the deficiency the creditors are liable to make good;
>
> (b) send to each creditor of the estate who proved the claim against the estate, by registered post a copy of the affidavit referred to in paragraph (a),
>
> and the Master may thereupon extend such period to a date determined by him."

[136] The Trustees maintain that the Master has given them an extension of time to file a liquidation and distribution account until 30 June 2011. As the Applicant points out, they have not explained how the request for an extension was motivated. There is also no evidence that the procedure required by Section 109 was followed. In the light of the manner in which the Master has supervised this estate, I have reservations about whether the proper procedures were followed. However, there is no evidence from the Applicant that they were not followed. As far as I am concerned for the purposes of this application, I must accept that the Master has properly granted an extension of time.

[137] As the Master has granted an extension of time, the application to compel the Trustees to submit a liquidation distribution account is premature and must fail.

[138] It is possible that the Trustees will seek further extensions after 30 June 2011. If they do so, they must comply with the provisions of Section 109 of the Insolvency Act. In addition, because the principal party-in-interest at this stage is the insolvent himself, and not simply the creditors, I will direct that any future application for an extension of time must be delivered to the Applicant along with creditors of the Estate who have proved a claim against the Estate.

[139] The Trustees' point *in limine* is based upon the provisions of section 116bis of the Act which provides:

> "116bis **Failure by trustee to submit account or to perform duties**

(1) If any trustee fails to submit any account to the Master as and when required by or under this Act, or to submit any vouchers in support of such account or to perform any other duty imposed upon him by this Act or to comply with any reasonable demand of the Master for information or proof required by him in connection with the liquidation or distribution of an estate, the Master **or any person having an interest in the liquidation and distribution of the estate may, after giving the trustee not less than 14 days' notice, apply to the Court for an order** directing the trustee to submit such account or any vouchers in support thereof or to perform such duty or to comply with such demand.

(2) The costs adjudged to the Master or to such person shall, unless otherwise ordered by the Court, be payable by the trustee *de bonis propriis*."

[emphasis added].

[140] On the face of section 116bis, an application to Court to compel a trustee to deliver accounts must be proceeded by a 14 day notice as contemplated in section 116bis. There is no indication in section 116bis that the application can be launched without the prior 14 days' notice.

[141] <u>*Meskin, Insolvency Law*</u> **p11-3** states:

> "It is submitted ... that it is, indeed, only once the course of serving such notice has been followed without success, that the Master, or such person, may seek the intervention of the Court, i.e. for an order directing the trustee to lodge the account. The application in this regard may be brought only after fourteen days' notice to the trustee **and there is thus opportunity to bring to the potential Applicant's attention facts rendering his application unnecessary**, e.g., that in response to another person's notice the Trustee has sought an extension of time."
>
> [emphasis added].

[142] In this case, that is indeed the Trustees' answer. In any event, the fact that the Trustees have obtained an extension of time until 30 June 2011 is dispositive of the issue of whether the application is premature.

[143] I therefore cannot grant an order at this stage requiring the Trustees to lodge a final liquidation and distribution account. If the Trustees fail to lodge an account by 30 June 2011 and the Applicant wishes to compel the Trustees to deliver an account, the Applicant should follow the procedure set out in section 116bis.

[144] Accordingly on the papers before me, I cannot grant an order in terms of Prayer 4 of the notice of motion.

GENERAL COMMENT ON THE RELATIONSHIP OF THE PARTIES AND THE CONDUCT OF THE MASTER

[145] It is apparent to me that there is an acrimonious litigious relationship between the Applicant on the one hand, and Nedbank, the Trustees, and Total on the other. This relationship has resulted in the parties taking obdurate positions that in the end are not really advantageous to any of them. It has also resulted in a shotgun-style application that traverses too many issues simultaneously without providing a durable legal solution to the problems that have dogged this Estate for the past 14 years.

[146] This is a matter that cries out for a commercial settlement. Two of the principal issues facing this estate (the claim against Nedbank and the validity of the Total claim) have now been resolved. Given the anticipated surplus in this estate, I can only express the hope that the parties (particularly the Applicant, the Trustees and Nedbank) will now sit down at the table and hammer out a commercial settlement. More litigation will only reduce the free reside that will ultimately be paid to the Applicant. If he continues to litigate, he will simply be depleting his own interest in the residual estate.

[147] The problems in this Estate have been exacerbated by the Master's neglect in failing to exercise any meaningful supervision over the Trustees and the parties in this estate. The delays that have been experienced in this case in the Master's office are only a slightly more graphic illustration of difficulties that legal practitioners practising in the insolvency arena experience every day. They are unacceptable.

[148] As noted above, even more unacceptable is the fact that both Masters have not deigned to provide the Court with a report in this most unusual matter. This is not what one expects from a functionary such as the Master in a case like this.

[149] Accordingly, I request all of the parties to deliver a copy of this judgment to the Fourth and Fifth Respondents themselves and to specifically draw their attention the criticisms set forth herein. In addition, I am going to order both Masters to submit written reports to the Court and the parties within 50 days of the date of the order in this case. It is imperative that the Master now brings this sequestration to a close.

COSTS

[150] The Applicant has been unsuccessful in his claim for relief against Total as set forth in Prayer 3 of his notice of motion. There is no reason why costs should not follow the outcome with regard to this claim. It follows that the Applicant should pay Total's costs.

[151] The Applicant had been substantially successful in his claim for relief under Prayers 1 and 2. There is no reason why some costs award in favour of the Applicant should not follow this outcome.

[152] Nedbank and the Trustees argued that, even if relief was granted under Prayers 1 and 2, the Applicant should pay the costs because the preamble to Prayer 1 contained the words: *"to return same to Applicant within a period of 30 ... days"*. I cannot agree with this, for the following reasons:

152.1 Prayer 1 is a *plus petitio*. If Nedbank and the Trustees felt that the Applicant was overclaiming, they should have tendered to agree to lesser relief.

152.2 It is of no concern to **Nedbank** whether the Trustees ultimately return the securities and the title deeds to the Applicant. Nedbank is not a creditor of this estate.

152.3 The relief that affects Nedbank directly, Prayer 2, has been granted to the Applicant without qualification.

152.4 The Trustees have demanded return of the securities and the title deeds from Nedbank on more than one occasion in the past and Nedbank has chosen to ignore the demands.

152.5 The Trustees should have taken action to enforce the rights of the Estate against Nedbank some time ago.

[153] In determining appropriate costs award, I take into account the following factors in favour of Nedbank and the Trustees:

153.1 Both parties have been joined in unsuccessful proceedings against Total. While there was no reason for Nedbank to incur any costs in connection with the application against Total, the Trustees were required to explain their position with regard to Total.

153.2 The Trustees have been successful in defeating the claim for relief under Prayer 4. However, their success is based on a technical point. In reality, they should have started submitting liquidation and distribution accounts years ago. Their delay in finalising this estate is unacceptable. If relief had been sought only under Prayer 4 and then been refused on the grounds set forth in this judgment, it might in itself been an appropriate case for departing from the usual rule that costs should be paid by the losing party.

153.3 The Applicant sought costs *de bonis propriis* against the Trustees. As appears from what is more fully set forth below, that request is overly aggressive and was not justified. At the very least, the Trustees were entitled to defend the application because costs *de bonis propriis* were inappropriately sought against them.

153.4 Given the nature of the application, it was in any event necessary for the Trustees, as official functionaries, to file an answering affidavit explaining the status of the matter. However, it was inappropriate for the Trustees to make common cause with Nedbank and oppose the application for relief under Prayers 1 and 2 in its entirety.

[154] In determining how to award costs, I also take into account the fact that ultimately any costs award made against the Trustees in their official capacity will in any event come out of the Applicant's residual interest in the estate. The Trustees will therefore suffer very little harm if a costs award is made against them in their **official capacities**.

[155] The Applicant has asked for costs *de bonis propriis* against the Trustees. Had the Applicant followed the procedures set forth in Section 116bis and then obtained an order compelling the Trustees to submit accounts, I would have been required to award costs *de bonis propriis* unless the Trustees had provided grounds for exercising my discretion against granting costs *de bonis propriis*. However, the proper procedure was not followed and the Applicant is therefore not entitled to an award of costs *de bonis propriis* as of right.

[156] While I am concerned about the failure of the Trustees to finalise this Estate, I do not believe that their conduct warrants an award of costs *de bonis propriis*. They have plainly be overwhelmed by the litigious behaviour of the other parties-in-interest in this Estate, especially the Applicant who is also the insolvent. Had the Applicant been less obdurate and more willing to make concessions, this Estate might have been wound up long ago.

[157] The application for relief under Prayers 1 and 2 took up more than 50% of the parties' time in this application. It was also the major reason for bringing the application. However, in view of the multiple issues and parties involved in this application, it is difficult to allocate exact percentages to each issue.

[158] In all the circumstances, I consider it appropriate to exercise my discretion in relation to the award of costs as follows:

158.1 Nedbank is to pay 25% of all of the Applicant's costs in this matter.

158.2 The Trustees, in their official capacities, are to pay 25% of all of the Applicant's costs in this matter.

[159] Both the Applicant and Nedbank were represented by Senior Counsel in this application. Although exact numbers were not mentioned, it appears to be common cause between the parties that there are substantial amounts of money at stake. The issues are plainly complicated. In the circumstances, I consider it appropriate to award the Applicant the costs of two counsel.

[160] Finally, I want to thank all counsel involved in this matter for their very able, stimulating and informative arguments. The matter is extremely complex and all of them assisted me in reaching a resolution. I commend all of them for their efforts.

CONCLUSION

[161] Accordingly, I make the following order:

161.1 The First, Second and Third Respondents are hereby ordered and directed to take all steps necessary to secure and obtain the return of all securities and/or title deeds held by Sixth Respondent in respect of and/or relevant to the Applicant and/or the relevant properties ("the relevant properties") as referred to below (but only to the extent that the said securities and/or title deeds have not previously been delivered by the Sixth Respondent to the Trustees) within a period of 60 days from the date of this order. The said securities and title deeds are the following:

161.1.1 Notarial Covering Bond number BN 49665/85;

161.1.2 Covering Bond number B 20495/89 over Remaining Extent of Portion 43 of the farm Klippoortjie 110 and Portion 60 (a portion of Portion 43) of the farm Kippoortjie 110;

161.1.3 Bond number B77750/91 in respect of the properties referred to under paragraph 1.2 above;

161.1.4 Covering Bond number B49071/85 over Portion 60 (a portion of Portion 43) of the farm Kippoortjie 110;

161.1.5 Covering Bond number B12781/84 over Portion 60 (a portion of Portion 43) of the farm Klippoortjie 110;

161.1.6 Deed of Suretyship by E A Muller in respect of Propmania 69 (Pty) Ltd dated 10 November 1994;

161.1.7 Deed of Suretyship by E A Muller in respect of Truck King CC and/or SA Yankee Spares (Pty) Ltd and/or SA Trucking Plant Hire & Rental (Pty) Ltd and/or Two Way Trucking (Pty) Ltd and/or Orange Grove 13th Street (Pty) Ltd and/or Heavy Transport (Bop) (Pty) Ltd and/or West Trucking (Botswana) (Pty) Ltd, dated 19 December 1991;

161.1.8 Deed of pledge by A E Muller of right, title and interest in all shares in SA Yankee Spares (Pty) Ltd, SA Trucking Plant Hire & Rental (Pty) Ltd, Two Way Trucking (Pty) Ltd, Orange Grove 13th Street (Pty) Ltd, West Trucking Botswana (Pty) Ltd, Heavy Transport (Bop) (Pty) Ltd, Heavy Transport & Plant Hire (Natal) (Pty) Ltd, Heavy Transport & Plant Hire (Namibia) (Pty) Ltd, dated 19 December 1991;

161.1.9 Cession by E A Muller of all claims in SA Yankee Spares (Pty) Ltd and/or SA Trucking Plant Hire & Rental (Pty) Ltd and/or Two Way Trucking (Pty) Ltd and/or Orange Grove 13th Street (Pty) Ltd and/or West Trucking Botswana (Pty) Ltd and/or Heavy Transport (Bop) (Pty) Ltd and/or Heavy Transport & Plant Hire (Natal) (Pty) Ltd and/or Heavy Transport & Plant Hire (Namibia) (Pty) Ltd;

161.1.10 Reversionary Cession of book debts by E A Muller dated 19 December 1991;

161.1.11 The Title Deeds to (collectively "the properties"):

161.1.11.1 Remaining Extent of Portion 43 of the farm Klippoortjie 110; and

161.1.11.2 Portion 60 (a portion of Portion 43) of the farm Klippoortjie.

161.2 The First, Second, Third, Fourth, Sixth and Eighth Respondents are ordered and directed to, within 60 days from the date of this order, take all steps necessary to have all bonds registered in favour of Sixth Respondent or its predecessors in title, over the properties cancelled and the Applicant shall pay the reasonable costs incurred with respect to such cancellation.

161.3 In the event that the First, Second, Third, Sixth and Eighth Respondents fail to take all necessary steps to have the said bonds cancelled within 60 days from date of this order, the Sheriff or his lawful Deputy is hereby duly authorised, directed and empowered to take all necessary steps and to sign all necessary documents to have all bonds in favour of Sixth Respondent (or its predecessors-in-interest) so registered against the Properties cancelled and the Applicant shall pay all reasonable costs incidental to such cancellation.

161.4 The relief sought by the Applicant in Prayers 3, 4 and 5 of the notice of motion is refused.

161.5 It is hereby declared that the proved claim of the Seventh Respondent against the Estate of the Applicant ("the Estate") should be reduced to an amount of R553 817.02.

161.6 The Fourth and Fifth Respondents are hereby ordered to take all steps necessary to reduce the Seventh Respondent's claim accordingly within 30 days from the date of this order.

161.7 The Applicant is to pay the costs incurred by the Seventh Respondent in opposing this application.

161.8 The First, Second, Third, Fourth and Fifth Respondents are ordered to take all steps necessary:

161.8.1 to reconvene the second meeting of creditors of the Estate within 30 days from the date of this order;

161.8.2 to obtain any additional directions from creditors at the meeting as may be necessary in order to enable the First, Second and Third Respondents to finalise the administration of the Estate as soon as practicable;

161.9 The First, Second, Third, Fourth and Fifth Respondents are required to take all reasonably practical steps that they can to conclude the second meeting of creditors of the Estate as soon as possible;

161.10 The Applicant is to serve a copy of this judgment on the Fourth and Fifth Respondents within 10 days of the date of this order;

161.11 Within 50 days after the date of this order, the Fourth and Fifth Respondents shall serve on all of the parties in this proceeding, file with the Court, and deliver to the presiding Judge in this proceeding a full report which shall, *inter alia*, deal with the following:

161.11.1.1 the status of the administration of the Estate and the date upon which it is anticipated that a final liquidation and distribution account will be filed;

161.11.1.2 an explanation for the delays in finalising the Estate;

161.11.1.3 an account of any events that subsequently take place at the adjourned second meeting of creditors and the status of such meeting.

161.12 Should the First, Second and Third Respondent seek any further extensions of the period for submission of accounts in terms of section 109 of the Insolvency Act 24 of 1936, in addition to notifying the parties referenced in the said section 109 as required by the provisions of that section, the First, Second and Third Respondents shall notify the Applicant and deliver to the Applicant a copy of the affidavit referenced in section 109(1) before the Master rules on the request for an extension of time.

161.13 The Sixth Respondent is to pay 25% of all of the costs incurred by the Applicant in bringing this application, including the costs of two counsel.

161.14 The First, Second and Third Respondents, in their official capacities, are required to pay 25% of all of the taxed costs incurred by the Applicant in connection with this application, including the costs of two counsel.

_____

P.N. LEVENBERG, AJ
Acting Judge of the High Court

Counsel for the Applicant: IJ Zidel SC and CJ Uys

Attorney for the Applicant: Eugene Marais Attorneys

Counsel for the First, Second and Third Respondents: C. Harms

Attorney for the First, Second and Third Respondents: FJ Cohen Attorneys

Counsel for the Sixth Respondent:	JG Wasserman SC GW Amm
Attorney for the Sixth Respondent:	Van der Spuy Cape Town
Counsel for the Seventh Respondent:	WHJ Van Reenen
Attorney for the Seventh Respondent:	Postma Attorneys