IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 14732/10

In the matter between:

MULLER, ERIC ANDRE Applicant

and

KAPLAN, HARRY N.O. AND OTHERS Respondents

SUMMARY OF REPORTABLE JUDGMENT

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 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.

In addition, the second meeting of creditors was postponed indefinitely by the Master in the year 2000 and has not yet been concluded.

The Applicant brought proceedings to compel Nedbank to cancel its mortgage bonds over immovable property and to deliver the title deeds of those immovable properties to the Trustees. Those mortgage bonds had been granted in order to secure pre-sequestration liabilities of the Applicant. By the time that the sequestration commenced, the Applicant was no longer indebted to Nedbank.

After the sequestration commenced, the Applicant brought proceedings against Nedbank in the Cape High Court which took more than a decade to complete. The Applicant's claim against Nedbank was unsuccessful

and costs were awarded against the Applicant. Nedbank has prepared a *pro forma* bill of costs (which has not yet been taxed) reflecting potential costs running into millions of Rands. Nedbank maintained that it was entitled to avail itself of its pre-sequestration securities in order to pay the post-sequestration debt.

The Applicant also brought a claim against the Trustees to compel them to finalise the account by submitting a final liquidation and distribution account.

The Court made the following findings:

Nedbank's security fell away at the time of sequestration because the insolvent was no longer indebted to it.

Nedbank could not avail itself of its pre-sequestration securities (which belonged to the insolvent's estate) to discharge the post-sequestration debt incurred by the insolvent for costs, which was effectively the responsibility of the insolvent's *"second estate"*.

The Trustees should have brought proceedings to cancel the securities and obtain return of the title deeds from Nedbank.

As the Trustees had failed to take the appropriate action, the insolvent had standing to bring such an application.

The fact that the second meeting of creditors had not yet been concluded did not serve as an impediment to the Trustees' filing a liquidation and distribution account.

However, the application to compel the Trustees to file a liquidation and distribution account was premature because:

The Trustees had obtained an extension of time to file a liquidation and distribution account from the Master until 30 June 2011.

The application to compel the Trustees to submit a liquidation and distribution account was not preceded by a 14 day notice as required by section 116bis of the Insolvency Act.

P.N. LEVENBERG, AJ
ACTING JUDGE OF THE HIGH COURT