**REPORTABLE**

**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NO:24832/2009

Before:

The Hon. Mr Justice Binns-Ward

In the matter between:

**NIALL EVANS** **Applicant**

**and**

**PAUL SMITH** **First Respondent**

**JENINE SMITH** **Second Respondent**

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**JUDGMENT DELIVERED: 19 MAY 2011**

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**BINNS-WARD, J:**

[1] On the much extended return date of a rule *nisi* in respect of the confirmation of a provisional order of sequestration, the applicant seeks an order, in terms of s 12(1) of the Insolvency Act 24 of 1936, finally sequestrating the estate of the first

respondent. To this end the applicant was required to satisfy the court (i) that he had a claim against the first respondent of the nature mentioned in s 9(1) of the Act (viz. a liquidated claim); (ii) that the first respondent had committed an act of insolvency or was in fact insolvent; and (iii) that there is reason to believe that it will be to the advantage of the first respondent's creditors if his estate is sequestrated.

[2] It is not in dispute that during the period January 2009 to May 2009 the applicant advanced to the first respondent various sums of money amounting in total to at least R640 000.[1] The basis for these advances was recorded in writing on each occasion. The discernable purpose of the advances was to put the first respondent in sufficient funds to secure the release from the Moroccan Department of Customs of a quantity of gold and diamonds. It had evidently been represented by the first respondent and accepted by the applicant that the gold and diamonds in question were the property of the first respondent. It was understood for the purpose of the agreements in question that, upon its release by the Moroccan authorities, the gold would be transported to South Africa to be sold to a refinery in Johannesburg. Against the profit the first respondent expected to realise from the disposal of the gold, he undertook to repay the applicant in an amount double that which had been advanced to him.

[3] It was accepted in argument by counsel for both sides, correctly so, that in order to satisfy the first of the aforementioned requirements for relief the applicant's claim would have to be one which was lawful and enforceable and thus if the underlying transaction upon which it was founded was void through illegality the application could not succeed. In this respect the proper characterisation of the contractual basis for the applicant's claim was a critical issue. In particular, if the

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[1] The applicant's allegation that the total amount advanced is R700 000 is disputed.

advances by the applicant to the first respondent were properly characterised as loans, and the agreed consideration payable by the first respondent to the applicant in respect of such advances were amounts falling to be categorised as a 'charge, fee or interest' within the meaning of s 8(4)(f) of the National Credit Act 34 of 2005 ('the NCA'),[2] then it was accepted by the applicant's counsel that the contract(s) upon which the applicant's claim was founded would be affected by the provisions of s 89 of the NCA to the extent that they pertain to the validity of credit agreements concluded by persons who are not registered in terms of the Act as credit providers.

[4] That conclusion is impelled by the considerations that a loan agreement falling within the ambit of s 8(4)(f) of the NCA is a 'credit agreement' as defined in that Act; that the total amount lent exceeded the threshold (R500 000[3]) determined in terms of s 42(1) of the Act; and that the first applicant was therefore required, in terms of s 40(1)(b), to be registered as a credit provider in terms of s 40 of the Act. There is no allegation in the papers that the applicant is registered as a credit provider; and it was accepted by his counsel in arguing the issue that he was not.

[5] Section 40(4) of the NCA provides that a credit agreement entered into by a credit provider who is required in terms of s 40(1) to be registered, but is not so registered is an unlawful agreement and void to the extent provided in s 89 of the Act. Section 89(5) of the NCA confirms that the loan agreement(s) are void if the applicant was required by the statute to have been registered as credit provider

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[2] Section 8(4)(f) of the NCA provides:

> *An agreement, irrespective of its form but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is-*
>
> *(f) any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-*
>
> *(i) the agreement; or*
>
> *(ii) the amount that has been deferred.*

[3] See General Notice 713 published in Government Gazette No. 28893 of 1 June 2006.

when the agreement(s) had been concluded, but had not been so registered.[4] The limited exemption from this effect provided in terms of s 89(4) of the NCA is not applicable on the facts of the current matter.

[6] As mentioned, the advances made by the applicant occurred incrementally over a period of time. It was only when the further advance agreed to on 17 March 2009 occurred that the total amount involved exceeded the R500 000 statutory threshold. Therefore, even if the initially concluded agreements qualified as loans within the meaning of s 8(4)(f) of the NCA, there was no obligation on the applicant to have registered as a credit provider at the times when the total amount advanced remained below the statutory threshold. The validity of the agreements concluded at that stage would not be affected by the provisions described in the preceding paragraph.

[7] A complication arises, however, because the applicant and the first respondent concluded an agreement on 17 March 2009 in terms of which, to use the applicant's language, the preceding agreements were 'novated'. That agreement was in turn also replaced by one concluded on 7 May 2009, which was itself replaced by a further agreement concluded on 14 May 2009. If the characterisation of the aforementioned March and May agreements as novating transactions is correct it means that the earlier agreements ceased to exist and were replaced by the succeeding agreements. The new agreements, each entailing an amount exceeding R500 000, would undoubtedly fall within the reach of the vitiating

[4] It is thankfully unnecessary in this case to address the difficult and troubling question of the effect of the nullification or forfeiture provisions of s 89(5)(c) of the NCA, which were highlighted, but not determined, in the Constitutional Court's recent judgment in *Cherengani Trade & Invest 107 (Pty) Ltd v Mason NO and others* [2011] ZACC 12 (8 April 2011). The claim against the first respondent upon which the applicant relied in the founding papers was not one for 'some kind of restitutionary relief' in the sense posited in para 25 of the judgment in *Cherengani*. It is in any event not self-evident that a claim for restitution of that nature would qualify as a liquidated claim. It is also not necessary for me to consider making any order as contemplated in terms of s 89(5) of the NCA because the enforcement of a void transaction is not directly sought in these proceedings; cf. *Naidoo v Absa Bank Ltd* 2010 (4) SA 597 (SCA).

provisions of the NCA if they were transactions falling within the compass of s 8(4)(f) of that Act. It is therefore appropriate to first determine whether the 17 March agreement did indeed novate the earlier agreements.

[8] The agreement in respect of the first advance was recorded in a document, dated 21 February 2009, which provided as follows:

> This is to certify that Niall Evans [i.e. the applicant] invested R250 000,00 (Two hundred and fifty thousand Rand) with Paul Smith [i.e. the first respondent] on this day 22th January 2009.
>
> The money is to be used to pay part of the relevant taxes at customs in Casablanca Morocco on 47kg's of 22carat gold purchased by Paul Smith.
>
> The gold will be freighted to a Gold Refinery in Johannesburg, South Africa. Upon being refined the refinery will purchase the gold from Paul Smith at the LME market price, less commissions.
>
> Upon the sale of the gold, Paul Smith will return the Capital of R250 000,00 (Two hundred and fifty thousand Rand) along with a share of the profits amounting to a further R250 000,00 (Two Hundred and Fifty Thousand Rand) Totalling an amount of R500 000,00 (Five Hundred Thousand Rand) to Niall Evans.
>
> Signed at Plattekloof this 21st day of February 2009

[9] The agreement subsequently concluded on 28 February 2009 in respect of an additional advance by the applicant to the first respondent in the sum of R105 000 was in similar vein.

[10] The deed of contract thereafter executed on 17 March 2009 provided as follows:

> **MEMORANDUM OF AGREEMENT**
>
> 17 March 2009
>
> This agreement makes all agreements entered into between Paul Smith and Niall Evans prior to this date, 17 March 2009, null and void and constitutes the only agreement between the said parties. This agreement also excludes any future agreements entered into by the said parties after the said date.

> This is to certify that Niall Evans invested a total of R540 000,00 (Five hundred and forty thousand rand) with Paul Smith during the months of February and March 2009.
>
> The money is to be used to pay part of the relevant taxes at customs in Casablanca Morocco on 47 kg's of 22 carat gold purchased by Paul Smith. It will also be used to pay relevant costs relating to the 46 stones.
>
> The gold will be freighted to a Gold Refinery in Johannesburg, South Africa. Upon being refined the refinery will purchase the gold from Paul Smith at the LME market price, less commissions.
>
> Upon the sale of the gold, Paul Smith will return the Capital of R540 000,00 (Five hundred and forty thousand rand) along with a share of the profits amounting to a further R540 000,00 (Five hundred and forty thousand rand). Totalling an amount of R1080 000,00 (One million and eighty thousand rand) to Niall Evans. Failing which, Clarex Pty Ltd will refund the Capital amount of R540 000,00 (Five hundred and forty thousand rand) to the said Niall Evans by the 7th April 2009, after which, interest will be calculated at prime plus 2.
>
> Paul Smith will run the process in Casablanca to safeguard both parties' (Paul Smith and Niall Evans) investments.
>
> Signed at Plattekloof this 17th day of March 2009

[11] There can be no doubt that the expressed intention of the parties in the 17 March 2009 agreement was a voluntary novation of their preceding agreements. It does not necessarily follow, however, that the parties' intention was achieved. In *Swadif (Pty) Ltd v Dyke* 1978 (1) SA 928 (A) at 940G-H, Trengove AJA explained '*Novatio voluntaria*, voluntary novation, has its origin in contract. Novation, in this sense, is essentially a matter of intention and consensus. When parties novate they intend to replace a valid contract by another valid contract (Wessels, *Law of Contract in S.A.*, 2nd ed., vol. 2, paras. 2370 - 2379; Caney, op. cit. [*Novation*], p. 2; *Acacia Mines Ltd. v Boshoff*, 1958 (4) SA 330 (AD) at p. 337; *Trust Bank of Africa Ltd. v Dhooma*, 1970 (3) SA 304 (N) at p. 307)'. Assuming then that the agreements properly fall to be characterised as loans, and the consideration payable in terms thereof as a 'charge' or 'interest' within the meaning of s 8(4)(f) of the NCA, the

intended novation would fail because of the invalidity visited on it in the circumstances by s 89 of the NCA.

[12] An invalid agreement is ineffectual in its object to replace a valid and enforceable agreement; the preceding valid agreements would continue in existence unless it were clear from the conduct of the applicant that he had abandoned his rights under them. Compare *Acacia Mines Ltd*, supra, and consider especially the argument of the appellant's counsel in that case described at 336C-E; see also RH Christie *The Law of Contract in South Africa* 5ed at 451-2 and De Wet en Van Wyk *Kontraktereg en Handelsreg* 5de uitgawe vol.1 at 268. It is equally clear that an invalid agreement cannot be novated. Therefore, the May 2009 agreements, subsequently concluded in respect of yet further advances made by the applicant to the first respondent were also ineffectual to the extent that they purported to novate the earlier agreements if such fell to be regarded as loan agreements for consideration.

[13] The applicant's counsel contended that the agreements were not loan agreements, but rather what he labelled as 'investment agreements'. That, for different reasons, was also the argument of the first respondent. The difficulty with that argument is the label 'investment agreement' does not connote any form of recognised nominate agreement and therefore by itself does not objectively define the legal character of the transactions. One has to look at the substance of the arrangements to characterise the contracts. According to the tenor of the agreements concluded on 21 and 28 February 2009, the money advanced by the applicant was not repayable unless and until the gold had been sold. The ostensibly contingent nature of the debt that the literal meaning of the wording of the agreement documents conveys might indeed detract from the characterisation of the contracts

as loan agreements, but, as I shall expatiate below, construed in a businesslike manner and seen in the context of the overall history of the parties' contractual relationship, I have concluded that they were indeed loan agreements. Certainly, there is no doubting that the deed of agreement executed by the parties on 17 March 2009 recorded a loan agreement. It is apparent from that deed of contract that the parties intended that the advance and the stipulated return thereon were to be paid by the first respondent by 7 April 2009, failing which Clarex (Pty) Ltd, presumably as the first respondent's agent – because the company was not party as a principal to the agreement - would refund the applicant the capital sum of the advance together with interest thereon at 'prime plus 2'. The expression 'invest with Paul Smith' or words to similar effect, read in the context in which it was used by the parties, plainly denotes nothing more than 'advance to Paul Smith'.

[14] That the contractual relationship between the parties was regarded by them as being between lender and borrower is confirmed in the terms of the 6 May 2009 agreement, which was concluded when the total amount advanced by the applicant increased to R600 000, and again in the agreement signed by the parties on 14 May 2009, when the amount advanced was further increased to R640 000. The 6 May agreement expressly refers to the R600 000 advanced up to and including the conclusion of that deed of contract as '*funds lent and advanced*' by the applicant to the first respondent. It describes the stipulated R600 000 return thereon as the 'profit on the capital amount'. In terms of the 14 May agreement, the first respondent became obliged to 'return the capital amount [i.e. R640 000] plus the return on the capital amount as per paragraph 4 [i.e. R640 000] to Niall [the applicant] on or before 31 May 2009. There was nothing in the conduct of either of the protagonists during the relevant period which suggests that their contractual relationship afforded the

applicant any proprietary interest in the gold which was to be released from customs. In context, the last sentence in the deed of contract dated 17 March 2009 connotes nothing more than an undertaking by the first respondent to attend physically in Casablanca to ensure the release of the gold thereby facilitating the timeous repayment of the capital advanced to him by the applicant, together with the promised return. There was also nothing in the succession of deeds of agreement that suggests an intended alteration of the essential character of the parties' contractual relationship. The evolution that is evident goes rather to the consolidation of the multiple transactions in a single contract and to fixing a date for repayment irrespective of the recovery and sale of the first respondent's gold.

[15] In my view the nature of the transaction accords fully with that of a loan for consumption. A loan for consumption is described in Joubert *et al* ed *The Law of South Africa* 2ed at vol.15 (Part 2) para 295 as follows: '*A contract of loan for consumption is concluded when one party called the lender transfers something which can be consumed by use to another, called the borrower, for a certain period of time or to achieve a certain object and the borrower is then bound to return a thing of the same kind, quality and quantity as the one he or she receives.....At common law the contract was for a gratuitous loan. An exception was permitted in the case of a loan of money in which the lender could stipulate that interest, that is a reward, be paid*'.

[16] The terms 'charge', 'fee' and 'interest' are not defined in the NCA. They therefore fall to be construed in accordance with the ordinary meaning of the words as they would be understood in the context in which they have been employed in the statute. In this regard the applicant's counsel drew attention to the provisions of Part C of chap 5 of the Act, entitled '*Consumer's liability, interest and charges*', which

comprises ss 100 – 107 of the statute. A consideration of those provisions shows that only certain fees or charges may lawfully be levied in respect of credit agreements (s 101). It does not follow, however, if a particular consideration stipulated by a credit provider in respect of a credit transaction falls outside the categories of permissibly recoverable costs or considerations in respect of the advance of credit, that the fee, charge or interest in question is thereby excluded from the ambit of those words in s 8(4)(f) of the NCA. Thus, for example, the return stipulated in an agreement in respect of the advance of credit does not fail to be 'interest' within the meaning of s 8(4)(f) of the NCA because it is stated as a predetermined lump sum rather than as an amount calculable in the prescribed manner in terms of a rate expressed in percentage terms as an annual rate as required by s 101(1)(d) of the NCA. If it were otherwise merely stipulating for an impermissible fee, charge or interest would put the agreement beyond the reach of the NCA. That result would be to thwart the achievement of the objects of the Act and cannot have been the intention of the legislature.

[17] In my view, read in context, and with particular regard to the long title of the Act and the provisions of ss 2 and 3, the words '*any charge, fee or interest*' in s 8(4)(f) of the NCA are seen to be intended to be of wide import and to include any consideration payable in respect of any agreement, such as a loan, in terms whereof payment of an amount owed by one person to another is deferred, or in terms of which a consideration is charged by the grantor for the extension of credit to the grantee. The label attached by the parties to the consideration in their agreement is not important. It is its nature as an amount payable as consideration in respect of the agreement or the deferment of the payment of the capital amount owed that is determinant.

[18] In the *Concise Oxford English Dictionary* 10th ed. revised, the word 'interest' is defined as '*money paid for the use of money lent, or for delaying the repayment of a debt*'. In *The Shorter Oxford English Dictionary on Historical Principles* 3rd ed., the definition is '*Money paid for the use of money lent (**the principal**), or for forbearance of a debt, according to a fixed ratio (**rate per cent**)*'. In the *Reader's Digest Oxford Complete Word Finder* the definition of interest in the relevant sense is '*money paid for the use of money lent, or for not requiring the repayment of a debt*'. The *New Webster Encyclopedic Dictionary of the English Language* defines the word as meaning '*The profit per cent derived from money lent or invested*'. The characterisation of the consideration payable by the first respondent to the applicant in respect of the advance to him by the applicant of the amounts in question as interest is entirely consistent with the ordinary meaning of the word in its relevant sense.

[19] The reference to the consideration payable by the first respondent as a profit share does not detract from its true nature as interest on the capital amount lent and advanced. As I have pointed out, there is nothing about the agreements that makes the applicant a partner or joint venturer in the ownership, or disposition of the gold. If one has regard to the content and history of the parties' contractual relationship in its various stages between February and May 2009, it is clear that the purpose of the advance was to enable the applicant to secure the release of the gold for expeditious realisation. It was evidently initially conceived that this would take no more than a matter of a week or two. As soon as it became clear that the initially conceived idea was not being achieved, fixed dates for the repayment of the capital and return were stipulated irrespective of the achievement of the object for which the capital had been advanced to the first respondent by the applicant. In my view, the behaviour of

the parties in respect of the conduct of their contractual relations confirms - to the extent any ambiguity in their written agreements might render necessary - the character of their relationship as that of loan creditor and receiver, respectively.

[20] In the circumstances it seems to me that the agreement concluded on 17 March 2009 failed to novate the two preceding agreements because it was void by reason of the non-registration of the applicant as a credit provider. The validity and enforceability of the preceding agreements executed on 21 and 28 February 2009, respectively, is not in question, however, and is not affected by the evident voidness of the later agreements.

[21] The literal content of the preceding agreements might suggest that the loans advanced in terms thereof were repayable only upon the realisation of the gold. It would, however, produce a distinctly unbusinesslike result to construe the agreements strictly literally, thereby rendering repayment of even the capital advanced contingent on the release and realisation of the gold. It is trite that written agreements should be not be construed with a degree of semantic strictness that would defeat their business efficacy.[5] I think it is clear, having regard to the object for which the money was advanced, that it was a tacit term of the agreements that the object fell to be achieved, and the money thereupon repaid, within a reasonable time; and that failing the achievement within a reasonable time of the object for which the money was advanced at least the capital component of the loan debt would be repayable. Indeed it is clear that the date of 31 May 2009 was later determined by them as the date on which payment would fall due. It is unnecessary for present purposes to determine whether the stipulated return would be exigible if the gold were not released and brought to Johannesburg to be refined and sold. The

[5] Cf. e.g. *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) at para. [5] and *Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) at para. [14].

possibly contingent nature of the reward stipulated for the loan does not detract from its character as interest.

[22] It does seem evident that the stipulated return represents interest in an amount exceeding the prescribed maximum rate of interest.[6] That characteristic does not, however, render the agreement invalid, or prohibit the recovery of interest up to the maximum legally recoverable amount.[7]

[23] The applicant has thus proved that he has a liquidated claim against the first respondent in the amount of the capital sum of the first two advances totalling R355 000. He has thereby satisfied the first of the aforementioned three requirements of s 12(1) of the Insolvency Act.[8]

[24] The applicant alleges that the first respondent has committed an act of insolvency in terms of s 8(g) of the Insolvency Act. Section 8(g) provides that '*A debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts*'. The applicant relies on the content of an exchange of email correspondence with the first respondent in October 2009 to establish the alleged act of insolvency. In that connection it is relevant to consider whether the debt was payable by October 2009. I do so assuming in favour of the first respondent that the invalidity of the agreement in which the date of repayment was fixed as 31 May 2009 also vitiates the determination of that date in respect of the advances that were subject to enforceable agreements, which seems doubtful.

[25] I have already found that upon a proper construction of the deeds of contract executed in February 2009 the debt fell to repaid on the sale of the gold, or, failing

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[6] See reg. 42 in the National Credit Act Regulations, 2006, published in Notice No. R489 dated 31 May 2006.
[7] See e.g. *Van Swieten v Pienaar* 1928 TPD 407 at 412; *Lawson and Kirk v SA Discount and Acceptance Corpn (Pty) Ltd* 1937 CPD 457 and *Hanan v Turner* 1967 (4) SA 368 (R).
[8] See para [1], above.

that, within a reasonable period of time. What constitutes a reasonable time is a question of fact. It is a measure which is meaningless in abstract, and which can be given meaning only within the context of the peculiar circumstances which give rise to the need for its length to be determined. I have already indicated that the nature of the object of the loan and the manner in which the parties conducted themselves in respect of the formulation of their subsequent agreements when the object for making the advances had not been achieved by mid-March 2009 makes it apparent that the parties contemplated that the loan would be repaid within a matter of weeks, not months. I am in no doubt therefore that the capital advanced by the applicant in February 2009 was repayable upon demand by the applicant by October 2009.

[26] During October 2009, the following exchange of correspondence took place between the applicant and the first respondent by email:

> Wednesday 7 October 2009 16:05:05 + 0200
>
> Subject: Money Owed
>
> Dear Paul
>
> The moneys have now been due since 31 May 2009.
>
> Your promises to pay (mostly with reference to the foreign transactions) appear to be empty and my impression is that you simply do not have the ability to pay (you are now more than 4 months overdue).
>
> Please respond
>
> Regards,
>
> Dr Niall Evans
>
> 8 October 2009 11:21 AM
>
> Dear Niall
>
> I am really sorry for the delay. When I arrived I paid demurrage and the next customs phoned us eight times to sign off the docs and collect the refund. Sanna messed up everything since he did not have access to his passport. It was held by the hotel. By the time I released his passport at the hotel, one of the owners of the gold flew in to Casablanca, blocked everything

at customs and met with Sanna. I was present at the meeting and he made it clear to Sanna, that because of the delay they want an advance of at least $25 000 before they release the goods at customs.

I am waiting now for Sanna now to sort things out with them. As yet he only paid them part of the requested amount. He is still in Casablanca. Once sorted I will have to return to collect the refund and stones.

Thursday, 8 October 2009 13:48:17 +0200

Subject: Re: overdue amount

Dear Paul

I don't know if you received my last email, According to our agreement you have owed the money to me since end of May.

Please confirm whether you are now in a position to repay me,

Regards

Dr Niall Evans

8 October 2009 12:34 PM

I will be in a position to settle with you as soon as my goods are released. I am working on it daily.

Thursday, 8 October 2009 14:49:00 + 0200

Dear Paul

Can you please settle at least half the amount you owe me now as I am now four months without the funds that I have transferred to you and urgently now need these funds.

Please outline, apart from the dealings in Morocco, whether you can do this.

Regards,

Dr Niall Evans

Sunday, 11 October 2009 13:36: 59 + 0200

Dear Paul,

I am waiting for your reply to my question when you van pay me I can't wait for your dealings in Morocco anymore and need payment now.

Please respond.

12 October 2009 12:08 PM

Dear Niall

Nothing will please me more that to start paying you. However all my money is tied up in this deal hence my commitment to completing the deal. I am strapped for cash at the moment and can't even assist Sanna. If Sanna completes the money he must give the supplier, the goods can leave immediately. Customs is all paid up.

I will be in a position to settle with you as soon as my goods are released. I am working on it daily.

12 October 2009 11:23 am

Dear Paul,

So if I understand you correctly, you currently have no funds available to make any payment to me as per the agreement between us?

Regards

Dr Niall Evans

12 October 2009 15:16:18 +0200

To: Niall Evans

Subject: Re: overdue amount

For now yes, I am trying my best to sort things out.

[27] The applicant contends that the intimations by the first respondent in the email correspondence that he is unable to repay the capital debt are acts of insolvency within the meaning of s 8(g) of the Insolvency Act. The test is whether a reasonable man of business would have understood the first respondent's emails to mean that that he was notifying the applicant that he was unable to pay his debt. Vivier JA expressed the position thus in *Court v Standard Bank of South Africa Ltd: Court v. Bester N.O. and Others* 1995(3) SA 123 (A) at 134A-C:

> Whether a particular notice is such as to constitute an act of insolvency within the meaning of s 8(g) depends on a construction of its contents, read as a whole. The question when considering the letter is not whether the debtor is in fact unable to pay or whether he is solvent or insolvent. Inability to pay must be distinguished from unwillingness to pay. If the debtor is merely saying that he is unwilling to pay, the letter does not constitute an act of

> insolvency. Construing the written notice involves deciding how the reasonable person in the position of the creditor receiving the notice would understand it. To such a reasonable person must be attributed the creditor's knowledge at the time of the relevant circumstances.

[28] Applying that test, I consider that the first respondent's indication of his inability to pay the debt was unequivocal. It is also significant that he did not take issue in the exchange of emails with the applicant's assertions that payment was due at the end of May. That allegation had its origin in the stipulations in the agreements concluded between the parties in respect of the advances made during May. Those stipulations referred to the repayment by 31 May 2009 of the total of the amounts advanced up to that stage. Even if those stipulations were not applicable to the repayment of the amounts advanced in terms of the agreements concluded in February on account of their incidence in transactions that were void by virtue of their legal invalidity, it is plain that the applicant was demanding repayment of the exigible portion of the debt at a time when he was entitled to do so; and that the first respondent accepted as much.

[29] The first respondent alleges, however, that he was deceived or trapped into making the statements that have been construed as an act of insolvency. In this regard he no doubt had in mind the approach taken in cases like *Provincial Building Society v Du Bois* 1966 (3) SA 76 (W) at 77 and *Du Plessis v Tzerefos* 1979 (4) SA 819 (O) in which it was held that if the notification in question had been obtained under duress or by fraud, the court, exercising its discretion, should not grant a sequestration order unless it was of the opinion that the respondent was in fact insolvent. The facts of the current case are quite distinguishable from either of those matters; in *Du Bois* the respondent satisfied the court that he had signed the letter in question under duress as the consideration required by the applicant to consent to a postponement of the application for the provisional sequestration of his estate; in *Du*

*Plessis v Tzerefos* the majority of the court were not satisfied that the alleged fraud had been established and added that in any event in an application for a final sequestration order the respondent bore an onus to persuade the court why he or she should in the exercise of the court's discretion not bear the ordinary consequences of the applicant establishing the commission of the act of insolvency. In the current case I am not persuaded that there was anything improper in the conduct of the applicant in eliciting the writing that constituted the notification of inability by the first respondent to pay the debt; and even were I wrong in that respect, the first respondent has not persuaded me why the court's discretion should be exercised against the applicant.

[30] I am therefore satisfied that the applicant has satisfied the requirements of s 12(b) of the Insolvency Act.

[31] I am also satisfied that the applicant has established that the sequestration of the first respondent's estate would be to the advantage of creditors. As far as can be determined on the papers the realisation of the assets in the first respondent's estate should be sufficient to settle his debts, or at the least provide a substantial dividend. The first respondent has failed to give a detailed account of his assets and liabilities. It seems evident that the main asset in his estate is an immovable property which he has put into the market.. He also claims to own a number of ice cream machines on which he places a value of R1,5 million. He had offered some of these machines as security at a stage of the various transactions entered into with the applicant, but had not given effect to the arrangement by placing the applicant in possession of them. I have some doubt as to the readiness with which these machines could be realised, or at what value. Certainly correspondence addressed on the first respondent's behalf by his attorney suggests that the machines are in fact the property of a close

corporation in which the respondent has an interest, rather than his own property, and also that they have a realisable value much lower than R1,5 million. No doubt if they were capable of being disposed of easily, the first respondent would have sold them to settle the applicant's demands in October 2009. In all the circumstances it would appear that the first respondent is illiquid and either unable or unwilling to pay his current creditors. As was held in *Estate Logie v Priest* 1926 AD 312, at 319-321, it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt. That the debtor might not in fact be insolvent is immaterial. The creation of a *concursus creditorum* will enable the supervised liquidation of the first respondent's assets for the objectively regulated benefit of all his creditors.

[32] In the circumstances the rule is made final and an order is made in terms of s 12(1) of the Insolvency Act 24 of 1936 sequestrating the estate of the first respondent. It is directed, insofar as might be necessary, that the applicant's costs of suit, as taxed or agreed, shall be included in the costs of the sequestration.

**A.G. BINNS-WARD**
**Judge of the High Court**

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| **Date of hearing :** | **5 May 2011** |
| **Date of judgment:** | **19 May 2011** |
| **Applicant's counsel:** | **P.B. Fourie** |
| **First Respondent's counsel:** | **J. Buurman** |
| **Applicant's attorneys** | **Ward, Ward & Pienaar**<br>**Cape Town** |
| **First respondent's attorneys** | **Potgieter Attorneys**<br>**Bellville** |