IN THE HIGH COURT OF SWAZILAND

Held at Mbabane CIVIL CASES NO.346/07

and 2034/04

In the matters between:

(A) CIVIL CASE NO.346/07

SWAZILAND DEVELOPMENT

AND

SAVINGS BANK APPLICANT

AND

PAUL MHLABA SHILUBANE N.O. 1st RESPONDENT

AND TWELVE OTHERS

(B) CIVIL CASE NO.2034/04

SWAZILAND DEVELOPMENT AND

SAVINGS BANK APPLICANT

ANDMARTHINUS JACOBUS DEWALD

BREYTENBACH N.O. 1st RESPONDENT

AND THIRTEEN OTHERS

IN RE:

MARTHINUS JACOBUS DEWALD

BREYTENBACH N.O. & THREE OTHERS APPLICANTS (ex

parte)

IN RE:

THE INSOLVENT ESTATE OF DUMISA MBUSIDLAMINI ("THE INSOLVENT")

CORAM : JACOBUS P. ANNANDALE J

FOR THE APPLICANT : ADVOCATE K. NAIDOO SC AND

ADVOCATE A.M. STEWART SC

with them ADVOCATE V. NAIDU

(instructed by Maphanga Howe Masuku Nsibandze Attorneys, Mbabane)

FOR THE 1st TO 5th RESPONDENTS : ADVOCATE J.W. STEYN

("The Trustees") (instructed by Currie & Sibandze Attorneys, Mbabane)

FOR THE 6th TO 9th RESPONDENTS (346/07) and : ADVOCATE P. KENNEDY SC, with him ADVOCATE T. MKHWANAZI 8th TO 10th(Instructed by Maphalala & RESPONDENTS (2034/04) Company Attorneys, Manzini

JUDGMENT

18 JULY 2008

[1] This litigation centres around some fixed properties

which used to belong to the erstwhile landbaron, Dumisa Dlamini. As can happen to well off land investors and speculators, he fell from riches and being unable to service his financial commitments, properties worth many millions of Emalangeni and Rand, both in Swaziland and South Africa, were repossessed by his creditors. His insolvent estate was placed under sequestration, in both countries, and various former assets were sold on auctions.

[2] Prior to his sequestration, the Applicant obtained judgment in 1999 against Dumisa Dlamini and six of his companies in the total amount of E64 438 918. For unexplained reasons the total amount reflected in the relevant writs of execution is E64 508 024, some E69 106 extra. No issue was taken with this in the present matter. The judgment referred to was confirmed on appeal in May 2000 and it remains unsatisfied.

[3] It is the subsequent events that gave rise to the current applications and which, according to the Applicant, might have been avoided if the properties that are subject hereto, had been executed in a timeous manner. This much was rightly conceded.

[3] Following the initial judgment and the resultant writs of execution, as well as confirmation of the judgment on appeal, the Applicant caused some of the immoveable properties to be placed under attachments in March 2005. It is not without significance that the attachment of immoveable properties was done in consequence of a judgment obtained much earlier - 19th March 1999 to the 18th March 2005 is a very long period of time to attach properties of a judgment debtor.

[4] During this intervening period, the woes of Mr .Dlamini continued and in August 2003 his estate in South Africa was sequestrated by the High Court in Transvaal. Thereafter, in February 2004, four trustees were jointly appointed in the South African insolvent estate. Later in the same month, at the second meeting of creditors, the Magistrate of Barberton recognized the applicant as a creditor in the insolvent estate. In June 2004, the joint trustees obtained an order in the Transvaal Provincial Division of the South African High Court wherein the Registrar was directed to issue a letter of request to this court to recognize the sequestration order in Swaziland.

[5] It is the resultant recognition order which was made in the High Court of Swaziland on the 23rd July 2004 which gives rise to the first of the present applications. In that order, brought *ex parte,* Matsebula J gave recognition to the order of the South African High Court (T.P.D.), made under case number 1399/03 on the 24th August 2003, in terms of which the estate of Dumisa Dlamini was sequestrated.

[6] The appointment of the four trustees was also recognized -they are the first four respondents in the first and the second to fifth respondents in the second application (case number 346/07). The Swazi recognition order further directed that Sections 5-17 of the Recognition of External Trustees and Liquidators Act of 1932 (Act 51 of 1932) shall apply to the local administration of the insolvent estate.

[7] Finally, Mr. Paul Shilubane, a local legal practitioner, was appointed jointly with the four recognized trustees as

cotrustee of the insolvent estate. Costs were ordered to be costs in the administration of the insolvent estate.

[8] Each aspect of this order comes under attack by the Applicant Bank, which seeks relief in the following terms, under case number 2035/04:

> *"1. That the order granted by His Lordship the Honourable Justice Matsebula on the 23rd of July 2004 under case No.2034/04 be and is hereby rescinded.*
>
> *2. That all acts performed in Swaziland by the 1st, 2nd, 3rd, 4th and 5th Respondents in connection with the Insolvent estate of Dumisa Dlamini, purportedly pursuant to the provisions of Section 5 to 17 of the Recognition of External Trustees and Liquidators Act No. 51 of 1932 be hereby declared to be of no force and effect and therefore void from the date of the said order*
>
> *3. That the 1st, 2Pd, 3rd, 4th and 5th Respondents and such other of the Respondents that may choose to oppose this application be ordered to pay the costs of this application jointly and severally the one paying the other to be absolved, all costs to include the certified costs of two counsel."*

[9] The relief sought in the first matter ties in closely with the second, under case number 346/07, where the same Applicant prays for an order:

> *"1. Setting aside the Notice of upliftment of Interdict No. 62/2005, signed by the Sheriff of Swaziland on the 8th of November, 2006.*
>
> *2. Setting aside the subsequent registration of transfers of the properties described herein below:*
>
> *(a) Remaining extent of Portion 5 of Farm No. 147, situate in the Lubombo district, Swaziland measuring 64,9009 (sixty four comma nine zero zero nine)*

hectares, registered in favour of the 6th Respondent on the 20th November, 2006;

(b) Farm No. 331, situate in the District of Lubombo, Swaziland, measuring 11,4090 (eleven comma four zero nine zero) hectares, registered in favour of the 6th Respondent on the 20th November, 2006;

(c) Portion 7 (a portion of portion 4) of Farm No. 147, situate in the district of Lubombo, Swaziland, measuring 2,4069 (two comma four zero six nine) hectares, registered in favour of the 6th Respondent on the 20th November, 2006;

(d) Portion 6 of the Farm Molemo No.507, situate in the Shiselweni District, Swaziland, measuring 21, 4133 (two one comma four one three three) hectares, registered in favour of the 9th Respondent on the 20th November, 2006;

(e) Remaining extent of Farm Molemo No.507, situate in the Shiselweni District, Swaziland, measuring 21,4133 (two one comma four one three three) hectares, registered in favour of the 9th Respondent on the 20th November, 2006;

(f) Portion 4 (a Portion of Portion 1) of Farm No. 539, situate in the District of Lubombo, Swaziland, measuring 100,0000 (one zero zero comma zero zero zero zero) hectares, registered in favour of the 8th Respondent on the 20th November 2006;

(g) Lot No. 637 situate in the Manzini Township, Extension No. 7, District of Manzini, Swaziland, measuring 1451 (one four five one) square metres, registered in favour of the 7th Respondent on the 20th November, 2006.

3.

3.1. Directing the 11th Respondent to cancel the deed of transfer/deed of title of the properties mentioned in paragraph (2) above.

3.2.. That upon the cancellation of the deeds conferring title to the 6th, 7th, 8th and 9th Respondents revive the deeds under which the properties were held immediately prior to the registration of the deeds to the extent of such cancellation.

3.3. Directing the 11th Respondent to cancel all relevant endorsements thereon evidencing the registration of the cancelled deeds.

4. That the 1st, 2nd, 3rd, 4th and 5th Respondents and such other of the Respondents that may choose to oppose this application to be ordered to pay the costs of this application jointly and severally the one paying the other to be absolved, all such costs to include the certified costs of two counsel."

[10] The relief in the second matter, case 346/07, reflects Attorney Paul Shilubane as the first Respondent, then the four recognized trustees, with the 6th to 9th Respondents being purchasers of the properties, and First National Bank, being the mortgagee in respect of bonds registered over the relevant properties as 10th Respondent. The Registrar of Deeds, Master of the High Court and the Attorney General are the further respondents.

[11] Following various events, some properties of Dumisa Dlamini were sold on public auction to the aforesaid respondents and transferred to them. This was done after a purported interdict was caused to be uplifted by the Sheriff, another contentious issue, and after the

Government failed to stop the auction after Swazibank likewise could not do so.

[12] The second application is thus focused on the consequences that followed the recognition order and in order to obtain such relief, it would by necessity require the first hurdle to be crossed, i.e. to rescind the order itself. An adverse ruling in the rescission application would therefore effectively obviate the second application, which could only be ordered if the recognition order which gave rise to the consequences is set aside.

[13] The main issues to decide in the consolidated matter are thus: Should the recognition order of Matsebula J of the Swazi High Court be rescinded or not, and if so, should the subsequent consequences thereof, insofar as it relates to the work done by the trustees, foreign and local, including the sale and transfer of the fixed properties, likewise be set aside. Otherwise and simply put - should this court in effect turn back the wheels of time, relevant to the matter at hand, to place the Applicant Bank in the position that it was prior to the 23rd July 2004, before the recognition order was made in Swaziland.

[14] A brief chronicle of the events that preceded the recognition order which forms the main obstacle that the Applicant faces and which requires to be rescinded in order to consider the consequent relief, is helpful to understand the rationale that resulted in the *ex parte* application for the order which MatsebulaJ made in July 2004.

[15] On the 19th March 1999, Sapire CJ ordered judgment against Dumisa Dlamini and six companies in favour of

Swazibank (Swaziland Development and Savings Bank). Dlamini had controlling shareholdings in the companies through which he operated and through which he accumulated liabilities, as stated in the judgment. Although counsel in this court seem to have the amount of the judgment to be E56 million, possibly based on the Applicant's founding affidavit which places the amount at E56 089 304.54, my own calculation differs. Judgment against Dumisa M. Dlamini amounted to El3 860 905.23. The first company, Swazi Inn (Pry) Ltd attracted judgment in the amount of El 278 510.21; Dumisa Sugar Corporation (Pty) Ltd at E42 228 399.11; The New George Hotel (Pty) Ltd at E5 186 813.79; Mackay Investments (Pty) Ltd (Smokey Mountain Village) at E766 263.78; Uncle Charlie Hotel (Pty) Ltd (Velebantfu Hotel) at E369 754.79; and the sixth company, The Property Company (Pty) Ltd (Mgenule Hotel) at E748 270.50. In each case, costs and interest was also ordered.

[16] A simple addition of these amounts, as reflected in the judgment itself, totals to E64 438 917.41, some E8 349 612. 87 more than what the Applicant Bank's Managing Director states it to be. He does not say how he calculated the total amount of the judgment but it is of no major consequence to the outcome of the present application which is based on principle and not affected by the exact figures.

[17] This judgment against Dlamini and his companies was subjected to an unsuccessful appeal. The Applicant states that various properties which belonged to Dlamini and his companies were placed under attachment. This followed various writs of execution in respect of Dumisa Dlamini,

issued by the judgment creditor, which is the present applicant. Eight properties are listed in the annexure to the writ of attachment, dated the 18th March 2005 whereas the writs of execution were dated the 15th June 2000, some five years earlier. By any measure of time, it remains an extraordinary long time between the date of judgment and attachment. Also, the Applicant seems to be confused by referring to writs of execution as "attachments orders", annexures SM2 to SM9, as stated in its founding affidavits. In addition, as mentioned above, the total amount of money as reflected in the writs of execution exceeds the total amount of the judgment which it sought to realize.

[18] Meanwhile, long before any fixed property was sought to be placed under judicial attachment, the estate of Dumisa Dlamini was sequestrated in the Transvaal Provincial Division of the High Court in South Africa, where he also ran up significant debts which he was unable to service. On the 14th August 2003, Kruger AJ of that Court confirmed a provisional sequestration order. In turn, it resulted in the appointment four co-trustees in the estate - Messrs. Breytenbach, Janse van Rensburg, St. Clair Cooper and Magardie.

[19] These four then sought and obtained an Order of the Transvaal Court to require that Registrar to issue a Letter of Request. On the 1st June 2004, Smit J ordered accordingly and the Registrar of the High Court of Swaziland was requested to -

(2) Recognize the sequestration of Dumisa Dlamini and the appointment of the four (South African) trustees of his insolvent estate;

(3) To further recognize the rights, powers and title of the trustees to institute such legal proceedings in the High Court of Swaziland (or other competent court in Swaziland) as may be necessary; and

(4) To make such order as the High Court (or other competent court) of Swaziland considers just or appropriate in assisting the High Court of South Africa in achieving the most effective way of winding up of the insolvent estate (of Dlamini) for the benefit of its creditors.

[20] The South African court was made aware that the need to have such a letter of request issued by the Registrar was because both the South African and Swazi legislation was then still ineffective to implement reciprocity of respective foreign sequestrations and therefore to request Swaziland to recognize the South African order and to assist the appointed trustees in the liquidation of the insolvent estate.

[21] Prior to the issue of a "Letter of Request" being sought and authorized, the liquidators attended meetings of creditors in the South African insolvent estate of Dumisa Dlamini, held at the Magistrate's Court of Barberton. Also in attendance was the legal advisor of Swazibank, Mrs. Doris Tshabalala. On behalf of the Bank, she proved a claim of R56 089 304.50. This was at the second meeting, on the 27th February 2004, two

days after she nominated Van's Auctioneers of Swaziland to conduct auctions in the estate.

[22] These events were about five years after Swazibank obtained judgment against Dlamini, in Swaziland, which judgment by then still had not been executed. By then, Swazibank was quite aware of the South African procedures against Dlamini, at minimum manifested by it proving a claim about £56 million in that jurisdiction.

[23] The proceedings which the South African Trustees instituted in the High Court of Swaziland on the 19th July 2004 and which resulted in an order which recognized the South African sequestration order and the trustees, also in the appointment of Mr. Paul Shilubane, a local attorney jointly as co-trustee, forms the crux of the outcome of the present application. It is only in the event that that order be rescinded, as the Applicant seeks to have done in its first application under case number 2034 of 2004, that the consequential relief stands to be considered. The acts of the trustees which is also sought to be nullified, was done on strength of the Swaziland Order of the High Court. The setting aside of the "notice of upliftment of interdict" and to undo the registration of various deeds of transfer relating to properties sold out of the insolvent estate, are also dependant upon the order being rescinded. Logically, the cancellation of transfers which resulted from auctions at the behest of the trustees cannot be ordered unless the *causa causans* first falls away.

[24] Otherwise put, the cart follows the horses and not the other way around. It is only if the court order which initiated and authorized the subsequent events itself falls away that the subsequent events come to be considered, since all of the further consequences are hinged onto the Order of Court complained about. If the Order remains, so do the results thereof.

[25] Before reverting to the Order itself, it is necessary to briefly chronicle the events that came into being as a result thereof.

The Order of Matsebula J was made on the 23rd July 2004 and issued by the Registrar some five days later. The court was approached *ex parte*, without notice to Swazibank or any other creditor or potential creditor. Thus, the Applicant herein cannot be deemed to have known about the intended application or the recognition order itself, until otherwise brought to its attention.

[26] A whiff of brewing trouble came to the attention of Swazibank by way of a letter written by Mr. Shilubane, whose appointment as co-trustee was ordered in the preceding month. On the 12th August 2004 he wrote to the Recoveries Manager of the Bank to request details of assets that Dumisa Dlamini might have listed in credit applications in order for his client "... to trace his assets in Swaziland". He does not state that he was appointed as cotrustee through the recognition order but he does say that he acts for the liquidators in the insolvent estate of Dlamini (annexure SM31, page 496 of the record in the first application).

[27] Again, the Recoveries Manager of the Bank was made aware of impending doom when the auctioneers whom the Bank itself appointed in February that year, notified it that five properties in the insolvent estate of Dlamini were to be auctioned on the 6th April 2005. It also extended an invitation to the Bank to attend the auction. This letter is dated the 22nd February 2005 (annexure SM32, page 497).

[28] The Recoveries Manager states that he construed the letter to be a request for assistance by the foreign trustees, by implication that he was not then aware that they were also locally recognized, in addition to Mr. Shilubane as cotrustee. He goes on to say that he first became aware of the possibility of the recognition order on the 8th March 2005 when he saw an advert of an auction in Swaziland on the instructions of the joint trustees of the insolvent estate. He conveyed this discovery to his Managing Director on the 16th March 2005.

[29] By that time, the Master had already been informed of the recognition order and the details of various properties which formed part of the assets in the insolvent estate (annexure SM33, page 498, dated the 8th December 2004).

[30] The Bank's Managing Director says that he noted the advertisement of the auction on the 16th March 2005. In it, five properties of the insolvent estate of Dlamini were stated to be disposed of on instructions of the joint trustees. The

Bank then instructed its attorneys to investigate the

circumstances surrounding the appointment of the joint trustees and also to apply for a suspension of the sale.

[31] Mr. Matsebula, the Managing Director of the Applicant, swears to the fact that until that stage the Bank had no knowledge of the recognition order issued late in July the previous year. That could be so but he also goes on to boldly state that the trustees "carefully and deliberately avoided the Applicant getting to know of the Recognition Order".

[32] To this, the Trustees answer that there was no need to inform the Bank of anything as it was not a proved creditor of the insolvent estate in Swaziland and that it took no steps for a period of some two years. It is common cause that this is so. By the Applicant's own admission, only the Swaziland Electricity Board (SEB) was a proven local creditor, which was not joined as respondent in either application, as it ought to have been done.

[33] Although submitted that non-joinder should in itself be fatal to the application, I do not think that such an outcome would be just. Even though SEB was not joined as a materially interested and affected parry, its legal services manager wrote a letter on the 8th October *2007* wherein it stated that the SEB will not seek to intervene to be joined in either of the current applications but that it will abide by the decision of the court.

[34] It added the "*sole hope*"*to* benefit by having its debts

settled by Dlamini "*once the reversal of the sequestration order by the South African creditors has been accomplished*[7]". It is scant hope indeed, it is also not part of the pleadings but moreover, it does not justify dismissal of the applications due to non-joinder.

[35] The main point of the trustees is that Swazibank does not have legal standing to bring these applications in the first place as it failed to lodge and prove a claim in the insolvent estate in Swaziland, disenfranchising it of any entitlement to payment of a dividend to it. It did obtain judgment against Dlamini and it had all of the right to execute it but it did not, nor did it thereby automatically become a creditor in the sequestrated estate which followed long afterwards.

[36] I do not deem it necessary to delve into the merits of *locus standi* or an absence thereof, since it is not material to the outcome of the matter.

[37] The same applies to the further issue of *lis pendens,* as well as the fact that the Applicant seeks to rely upon a bond of which it is not the *prima facie* mortgage, with the bond referred to in annexure SMI 1 being in favour of the "*Bank of Credit and Commerce International Swaziland Limited*".

[38] Upon gaining knowledge of the intended auction of assets in the sequestrated insolvent estate of Dlamini, in which the Applicant is not a proved creditor, the Bank sought to suspend the sale. It launched an urgent application for that purpose before the High Court on the 31st March 2005, which application further aimed to set aside the Recognition Order of

the 23rd July 2004 (again now sought in the present application), also to remove the trustees. The supporting papers levied various allegations against the trustees and the legality of the order itself, over and above an attack on the intended auction.

[39] In their reply, the trustees pointed out that well before the time of the application or of the advertisement of the sale, the Bank was appraised of the auction and invited to attend, by letter dated the 22nd February 2005, which has been mentioned above. Numerous other allegations were also dealt with by the trustees.

[40] It is common cause that that application was dismissed for want of urgency and that no judgment on the merits came into being. With no interdict against the sale on the application brought by the Bank, the Attorney General on behalf of the Swaziland Government again came to court in order to seek the sale, scheduled for the 6th April 2005, to be stopped. That application was opposed but resulted in an Order by Consent. In essence, it caused the application itself to be postponed pending full compliance by the trustees of all relevant laws; no offer received at the auction could be accepted until duly approved by the creditors; all monies received at the auction would be kept in the trust account of Currie and Sibandze attorneys, who acted for the auctioneers who were in turn instructed by the trustees; and it was also agreed that the Registrar of Deeds would not effect the transfer of any properties an offer at the auction. I do not know what caused the Government to bring such an application in a matter that did not directly involve it.

[41] On the 27th April 2006, Maphalala J ordered the consent order to be discharged after hearing counsel for the auctioneers. Government was notified of the application to discharge the consent order, which notice stated it to be heard on the 28th April 2006, not the 27th as reflected on the order itself. Seemingly, the application was unopposed.

[42] Meanwhile, Attorney Shilubane, in his capacity as (co~) trustee, advertised the first meeting of creditors in the insolvent estate of Dlamini to be held on the 12th May 2005. A second meeting of creditors was likewise advertised for the 27th October 2005. The Applicant did not prove any claim against the insolvent estate at either of the creditors meetings. Only the Swaziland Electricity Board (SEB) availed itself of the opportunity. It was resolved to confirm the sale of the properties in the estate.

[43] Applicant's counsel argues otherwise, stating that at neither of the two creditors meetings were any resolutions passed which accepted bids for the properties, with the result that the applicant could have been quite secure in its belief that no purchasers could have been prejudiced by it not renewing its attack on the recognition order. I have a difficulty to accept this.

[44] In the Master's report, she states that Mr. Dumsani Mazibuko represented Swazibank at two creditors meetings. She goes on to add that he lodged no claim on behalf of the Bank "*even though requests were made that he does so*". The Master further reports that "*the*

second to last meeting of creditors was postponed and rescheduled for the 16th

November 2005 where Swazibank would state its position with regards to filing its claim and the resolution of creditors to sell the properties belonging to Dumisa Mbusi Dlamini" *and* "*Swaziland Development and Savings Bank did not attend to (sic) this meeting nor made apologies. The meeting took place and resolutions made therein were adopted, to sell the properties*".

[45] From this, it is clear that the Bank did not become a proven creditor when the *concursus*' *creditorum* was established. It had the opportunity to do so and was even encouraged to do so. It furthermore cannot claim to have been unaware of the meetings or of resolutions taken thereat, *inter alia* to confirm the sale of properties which went under the hammer.

[46] The outcome of the creditors meetings required the discharge of the consent order to enable the auction sale to be given effect to, *inter alia* to transfer the properties which were sold. Until the order was discharged, monies realized through the auction sale had to be retained in trust and the Registrar of Deeds could not give effect to transfers. This in turn meant that the insolvent estate of Dlamini could not be wound up and the only proven creditor in the estate, SEB, could not receive the benefits it was entitled to.

[47] The Applicant Bank, which obtained judgment against

Dlamini and some of his companies in 1999, did not obtain writs of attachment of the properties concerned until the 18th March 2005. By that time, the estate of Dlamini was already sequestrated in South Africa and also, the High Court of Swaziland had already by then issued the recognition order. The writ of attachment is devoid of any reference to the fact of sequestration in either South Africa or Swaziland. It merely states to be as result of a return *nulla bona* by the Deputy Sheriff, in pursuance of the judgment six years earlier.

[48] About the same time as the writ of attachment in respect of the eight properties, the Applicant wrote through its attorneys to the attorneys acting for the trustees. In this letter of the 21st March 2005 reference was made to the sequestration order and its recognition, which incorporates the appointment of the foreign trustees as well as the cotrustee. The aim of the letter is to complain about an apparent failure by the trustees to comply with statutory requirements and more especially to call for a stay of the advertised auction, scheduled for the 6th April 2005.

[49] What the letter did not do is to raise any challenge against the recognition order or the appointment of the trustees, nor to even hint at seeking to have the recognition order rescinded. It also did not mention the attachment writ of the very same properties, which the same firm of attorneys effected three days previously.

[50] The writ to attach immoveable properties, pursuant to a High Court judgment of six years earlier and well after the recognition of the local insolvent estate of

Dlamini, was recorded by the Registrar of Deeds by noting an "Interdict" over the properties on the 29th June 2005.

[51] It was during this period of activity that the consent order, referred to above, was issued. That order of the 11th April 2005, required of the trustees to fully comply with all relevant laws and more specifically dealt with the intended auction, requiring any offers received to first be approved by the creditors, not Swazibank *per se, and* to retain all received monies in a trust account.

[52] More significantly, the Registrar of Deeds was interdicted from transferring any of the eight listed properties "*pending the outcome of the application*".

[53] This consent order, obtained by the Government after the Applicant Bank failed to secure an interdict against the intended auction, was discharged about one year later. On the 27th April 2006 the auctioneers obtained an order to discharge the earlier consent order. The trustees and the auctioneers stated that by then they had fully complied with all requirements and that it had become imperative to finalise the insolvent's Swazi estate. This required the discharge of the Consent Order, *inter alia* to enable the Registrar of Deeds to register the transactions realized at the auction sale. Notice of the application was served on

the Attorney General, being the party who sought and obtained the consent order after the Bank failed to stop the auction. The consent order was discharged *in toto,* which translates into the interdict on the Registrar of Deeds to also have fallen away.

[54] This aspect is not needlessly emphasized. The consent order of 11th April 2005 interdicted the Registrar of Deeds from transferring any of the specified properties, pending the outcome of the application. This resulted in the Registrar of Deeds in giving effect to it by imposing interdict number 31 of 2005 over the properties. In his report, the Registrar also says that over and above this interdict, he also imposed a further interdict, number 62 of 2005, to give effect to the writ of attachment which he received on the 29th June 2005.

[55] Thus, the consent order of 11th April 2005 resulted in interdict 31 of 2005, which was to remain in place until finalization of the application, and interdict 62 of 2005 was thereafter imposed, as result of the writ of attachment dated the 18th March 2005 but only served on the Registrar on the 29th June 2005.

[56] The Applicant does not explain how it came about that it served the writ of attachment on the Registrar of Deeds after such a further delay, nor why the interdict which prevented transfer was not *good* enough, or why a second interdict had to be imposed. In any event, it does not seem that the trustees in the insolvent estate were informed of the second interdict or that the writ of attachment was made known to

them, by the Bank. Nor were the purchasers of the properties, who bought them on the auction of 6th April 2005, notified by the Bank. This is the first manifestation by the Bank on how it seeks to obtain an advantage over other creditors in the insolvent estate of Dlamini. It first failed to timeously execute its judgment, then failed to prove its claim which arises from the unsatisfied judgment at meetings of the creditors held at the Master's Offices by the trustees, then it seeks to not only attach the properties, after establishment of the *concursus creditorum,* but also causes its own interdict to be recorded after the court had already made an order which resulted in an interdict.

[57] What the Applicant did, without having proved a claim against the insolvent estate, which it readily could have done but failed to do, was to move outside the ambit of sequestration and sought to bypass the process. It was not competent for it to do so and its complaint about having the interdict uplifted is thereby self defeating.

[58] *InWALKER VSYFRETN.O. 1911 AD 141* at 166 it was held that:

> "*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*" (referring to a sequestration order and the

establishment of a *concursus creditorum).*

Accordingly, with or without an interdict against the properties and with or without its belatedly issued writs of attachment, the Bank was in any event not in a position to execute the properties. It was and still is only the liquidators, acting in accordance with the decisions of the proven creditors, who could decide to accept the bids made at the auction and cause transfer of the properties to them. It is the recognition order which placed the wheels in motion that anteceded this and it is the existence of the order, which the Bank seeks to have rescinded, which prevented the Bank of enriching itself and disregarding the general body of creditors, or *in casu,* Swaziland Electricity Board and thereafter the South African creditors, which includes Swazibank.

[59] The second instance where the Bank seeks to obtain an advantage over other creditors is manifested in the application to set aside the recognition order and have all subsequent related events made undone. I will soon revert to this.

[60] Following discharge of the consent order on the 28th April 2006 on application by trustees and the auctioneer, the interdict preventing the transfer of the properties also fell away but the Registrar of Deeds had no knowledge of it until so informed. This was done on the 20th November 2006 when he was served with a "Notice of Upliftment of Interdict" dated the 8th November 2006.

[61] This Notice is subject to controversy. Therein, the

Registrar of Deeds is notified that the estate of Dlamini has been placed under sequestration and that his properties have been sold to settle the debts due to all his creditors. He is then further notified that the Plaintiff, Swazibank, *qua* execution creditor uplifts the interdicts placed on (sic) (the properties) and he is requested to release the eight described properties from attachment, with specific reference to interdict number 62 or 2005. That interdict came about as result of the writ of attachment issued at request of Swazibank, the judgment creditor.

[62] It is common cause that the notice of upliftment was presented for issue to the Sheriff of the High Court by Attorney Shilubane, the fifth trustee and also that he did not represent Swazibank, who is referred to as the Plaintiff in the Notice. Mr. Shilubane is a trustee in the insolvent estate of Dlamini.

[63] There are various issues surrounding the uplifting of the interdicts over the properties, over and above the aforestated problem. *Inter alia,* questions arise as to whether interdict 62 of 2005 should have been noted in the first place and whether it had any legal effect on properties in the insolvent estate. Also, whether any notice was required to uplift any interdict, including the earlier interdict, number 31 of 2005, whether the Notice justified upliftment of both interdicts, whether the second interdict superceded the first, whether the applicant authorized upliftment, and further issues.

For reason of the subsequent consequences of the

recognition order being dependant upon its continued existence and only requiring to be decided in the event that it be rescinded, it does not now become necessary to decide the propriety or otherwise of the upliftment of the interdicts over the properties which fell in the insolvent estate of Dlamini, but which were also sought to be executed upon by the Applicant in pursuance of its judgment against Dlamini. The matters of upliftment of interdicts and setting aside of transfer of the purchaser's properties would become issues to decide, together with the other acts of the trustees, only in the event that the recognition order on which the subsequent events are hinged upon, falls away. I now turn to the recognition order itself, being the subject of the application to rescind it.

[65] In its Notice of Motion, the Applicant prays that the order granted by Matsebula J on the 23rd July 2004 under case number 2034/04 be rescinded. This notice is dated the 30th January 2007 and it states the date on which the application was to be made as the 14th February 2007. Neither the Notice nor the supporting affidavit states whether it is brought under common law or in accordance with any of the Rules of Court.

[66] It is immediately apparent that the order sought to be rescinded precedes the application to do so by two and a half years, a considerable period of time, but for which delay the Bank endeavours to tender an explanation. The gist of this is that when Mr. Matsebula, the depondent to the founding affidavit and managing director of the Bank took over from his predecessor in December 2000, he found Swazibank in precarious financial difficulties. His task was turn it into a viable bank, with part of that strategy being

better management of its loan accounts. One such particularly bad loan account was that of Dumisa Dlamini and his associated companies. The plan included "*rehabilitation*" of major debtors, such as Dlamini, whose consent and co-operation was required to put the new strategy in place.

[67] Mr. Matsebula goes on to say that the Bank considered that the proceeds from the execution of its judgment against Dlamini and his companies could not sufficiently satisfy the judgment due to neglect and the state of disrepair of the properties. After some meetings with Dlamini, it became clear in late 2004 that Dlamini could not be "*rehabilitated*" and the bank only then reverted to execute its judgment. It sold some properties, recovering E9 million.

[68] Fact remains that judgment against Dlamini and his companies was obtained as long back as March 1999, which judgment was confirmed on appeal in May 2000. It took the Bank over four years to start executing on the judgment and by that time, his South African estate had been sequestrated and by November 2004, the sequestration process had already spilled over to Swaziland, notably by way of the recognition order in July of the same year.

[69] As remarked above, it seems to me that real objective of the Applicant is to turn back the wheels of time and regain its previous position when it had assets of Dlamini in hand to execute. In doing so, it would avoid the consequences of its delay in execution, undo its failure to prove its claim against the insolvent estate in Swaziland and gain an advantage over other

creditors, *in* ca.su SEB with a claim of about El.4 million, a comparative drop in the ocean. If the Bank does not achieve this, it still remains a concurrent creditor in the South African insolvent estate of Dlamini where it did prove a claim. However, the Bank would gain an unfair advantage over the other creditors if it does succeed in its endeavours and undo its failed attempts to "*rehabilitate*" Dlamini instead of executing its judgment when it was in a position to do so but delayed inordinately long.

[70] It is noted that the Applicant did not prosecute an appeal against the recognition order made by Matsebula J. It does not say why it avoided an appeal to the Supreme Court. Instead, it opted to seek rescission in the High Court.

[71] Reverting to the rescission application itself, and as stated above, it is not founded on Rule 31 or the common law. Rule 31 is not applicable and common law requires good cause or sufficient cause to be shown. Instead, Applicant's counsel relies on Rule 42(1) (a) to seek rescission based on an erroneously granted order.

Rule 42 reads that:

> "*42(1) The Court may, in addition to any powers it may have,* mero motu *or upon application of any party affected, rescind or vary:*
>
> *(a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
>
> *(b) ... (ambiguity, patent error, omission)*

(c) ... (mistake)

(5) ... *(application upon notice to all affected parties)*

(6) *...(no rescission/variation unless all affected parties notified)* "

[72] In its application, Swazibank contends that the recognition order made by Matsebula J was erroneously sought and granted as it was not legally competent to do as he did. The Bank's counsel argues that once that has been found, this court is obliged, without further enquiry, to rescind or vary the order and that no good cause need be shown.

[73] For this, counsel *inter alia* relies upon the judgment of van Reenen J in *PROMEDIA DRUKKERS & UITGEWERS (Edms) Bpk. VKAIMOVITZ 1996(4) SA 411 (C)* where he sets out the ambit of Rule 42(1), by which the court has a discretion whether or not to grant an application for rescission, at page 417-1:

> "*Relief will be granted under this Rule if there was an irregularity in the proceedings...; if the court lacked legal competence to have made the order...; and if the court, at the time the order was made, was unaware of facts which, if known to it, would have precluded the granting of the order.... It is not necessary for the applicant to show 'good cause*[7] *for the Rule to apply*" *(good* cause or sufficient cause applies to rescission applications under the common law).

[74] Each of these three circumstances are well established and require no elucidation. The Applicant's counsel argues that in essence, all three positions prevail in respect of the recognition order

and that it therefore requires to be rescinded without further ado.

[75] As an example of rescission under Rule 42(1), Advocate Naidoo refers to *CLEGG VPRIESTLY 1985(3) SA 950 (W)* at 954 where the WLD held that a recognition order brought *ex parte,* without notice to the affected party, was as such an irregular proceeding since it did not comply with Rule 6(2) which requires notice to be given and that it might have been prejudicial to the Applicant who sought it to be rescinded.

[76] That case is distinguished from the present, although the principle is sound, in that it is not Dumisa Dlamini, the affected insolvent party, who seeks rescission. The Bank cannot claim entitlement to have been made a party to the recognition application and now use such omission to have that order rescinded. At the time the recognition order was applied for, Swazibank was a proved creditor in a foreign country and did not require to be cited as interested party.

[77] The Bank's counsel further referred to various manifestations of Rule 42(1) as found in a series of judgments, over and above the main categories referred to by van Reenen J in Promedia *(supra).* Such instances include that a court indeed could have regard to circumstances that are not apparent from the record of proceedings that had been placed before the judge whose judgment or order is sought to be rescinded *(vide PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA V EISENBERG AND ASSOCIA TES 2005 (1) SA 247 (C)* at 264 F-G:

> "*Though the error is not apparent on the record of*

proceedings, the court is not confined to the record of proceedings in deciding whether a judgment was erroneously granted".

[78] He also refers to instances where judgments granted by default were rescinded under Rule 42 where the respondents were not served with summonses, but it does not take the matter any further as it is inapplicable to the present situation.

[79] The main thrust of the attack upon the legality of the recognition order centres around the RECOGNITION OF EXTERNAL TRUSTEES AND LIQUIDATORS ACT, 1932 (Act 51 of 1932).

[80] Section 3 of this Act provides that it shall apply to external trustees and liquidators once the Prime Minister had published in the Government Gazette that due provision for the recognition of their letters of appointment in a foreign country may be granted in Swaziland. No such notice has been gazetted in respect of the Republic of South Africa and hence, so the Applicant argues, it was not legally competent for the High Court of Swaziland to have made the recognition order. This is said to be due to the absence of the jurisdictional fact which otherwise would have made it competent to do so. Because the Prime Minister has not yet, after so many years, gazetted South Africa as a country from which the appointment competently may be recognized, this may not be done. In turn, it is argued that because this is stated to be the legal position, Rule 42(1) comes into play as it was not a legally competent order and therefore, an order granted in error and due

for rescission.

[81] This proposition is sought to be further propounded by arguing that the trustees, who sought to have their appointments recognized in Swaziland, brought the application under the auspices of the Recognition Act. They declared themselves bound by sections 5 to 17, which generally provides for the manner in which external trustees shall conduct the affairs of the insolvent estate in Swaziland. The Applicant's argument thus has the premise that because the recognition order was exclusively sought and granted under the Recognition Act and not under common law, due to the absence of a notice by the Prime Minister that South Africa is a designated country which makes the Act applicable, such order could not have been made without incurring a detrimental error.

[82] Mr. Naidoo therefore wants a fatal blow to be dealt because, he says, it is only because of the undertaking by the South African co-trustees to be bound by Sections 5 to 17 of the Recognition Act, applicable to the administration of the estate in Swaziland, that Matsebula J made the order which must now be rescinded.

[83] I do not know if that is what prompted the learned Judge to order as he did, exclusively so, as argued. No reasons for the granting of the order were given by the Court. It was issued following an *ex parte* application. It remains unknown whether counsel was required to argue the application over and above the papers placed before the court. Routinely, *ex parte*

applications are considered on the papers alone, equally routinely in chambers, and more often than not no oral or written reasons for the order are provided. It thus requires considerable speculation to hold that it is only the undertaking to be bound by provisions of the Recognition Act that caused the order to be made, moreover, to motivate a rescission on such a premise would require this court to rely upon averred reasons by that court, which were not stated, to set aside an order on alleged irregularity.

[84] In *SWAZI PLASTIC INDUSTRIES LTD V PHILIPFOURIENO. AND TWO OTHERS*, unreported COURT OF APPEAL JUDGMENT in CIVIL CASE NO.29/99, van den Heever JA considered the Recognition Act and says (at page 9):

"It is common cause that the Act (31 of 1932) does not automatically apply to the facts of the present case. The prerequisite for that posed in Section 3 is lacking: there has been no notice published on the Gazette by the Prime Minister that the Republic of South Africa recognizes in its own territory proper Swaziland letters of appointment of trustees in insolvency and liquidators (sic). It is trite law... that the court of one independent country cannot purport to authorize one of its officers to intrude within the jurisdiction of another independent country to act, not only in disregard of but in direct conflict with the valid legal proceedings of that other country. The decisions are legion.... The principle is crisply phrased in a quotation in COMMISSIONER OF TAXES, FEDERATION OF RHODESIA V McFARLAND 1965 (2)SALR 470 at 473D-E and more particularly at G~H: 'The first and foremost restriction imposed by international law upon a state is that, failing the existence of a permissive rule to the contrary, it may not exercise its powers in any form in the territory of another State.

In this sense jurisdiction is territorial; it cannot be exercised by a state outside its territory except by virtue of a permissive rule derived from international custom or a convention[7].

The Ward case in the passage referred to also repeats a commonplace: recognition of an external trustee or liquidator does not empower him to bring with him and apply here the law of his own country. His administration consequent upon recognition is subject to local law.

Since there is no automatic reciprocity between Swaziland and South Africa as envisaged by Section 3 of the Act, the respondents were obliged to approach the High Court of Swaziland for recognition. No argument was advanced as to the effect of Section 18 of the Recognition Act so that is necessary to decide whether and when it enables a local court to deprive local citizens of material (as distinct perhaps from procedural) rights available to them in terms of the la w of Swaziland[77].

[85] Her Ladyship thus held an opposite view as that which the applicant wants to prevail. It is not, as was argued, that because the Prime Minister did not gazette South Africa as a designated country, that recognition cannot locally be given to trustees from there. The absence of such notice avoids automatic reciprocity of recognition through operation of statutory law. Thus, when seeking recognition in this country, foreign trustees are obliged to apply to the High Court, under Section 4 of the Act, to be recognized in Swaziland, whereupon the property in Swaziland of the insolvent shall vest in such external

trustee for the purpose of the bankruptcy or insolvency as though such property were the property of an insolvent estate sequestrated by order of a competent court in Swaziland, but subject to the provisions of the Act. These provisions are what Matsebula J ordered to apply to the trustees, and include a local *domicilium,* provision for security, liaison with the Master, the manner of sequestration and so forth.

It is therefore not correct to say, let alone to speculate, that in the event that His Lordship, Justice Matsebula, had been aware of the absence of South Africa being a designated country, that he would not have issued the order he did.

In any event, Section 18 of the Act saves powers of the High
court as follows:

"*Nothing in this Act shall be deemed to deprive the High Court of any jurisdiction which it may have before the commencement of this Act to recognise for the purposes of the administration of any assets within Swaziland any person appointed by a competent authority outside Swaziland to be the trustee of a bankrupt or insolvent estate or the liquidator of a company*'[7].

[87] It does not hold water to argue that in the absence of automatic recognition, as provided for in Section 3 of the Act, that it follows that a recognition order such as the one under consideration was legally incompetent to make. The High Court of Swaziland did consider the application brought by the foreign trustess, as they

were obliged to do, and decided to recognise their foreign appointment which in turn resulted in their local powers to take hold of assets in the insolvent estate of Dlamini.

[88] In *POTGIETER V KLOPPER NO AND OTHERS, 1982-1986(2) SLR 333,* Dunn AJ (as he then was) held at 336-F that:

> "*The court must in my view take a robust approach to the issue raised in this application. The first respondent was entitled to the relief sought under the common law and did not as it were acquire as a result of the error by the court a remedy which it would otherwise have been completely without the jurisdiction of this court The applicant was aware of the provisions of Section 18 of the Act 51 of 1932 which although not in force, were an indicator of the court's common law jurisdiction to recognise and confirm the appointment of external trustees and liquidators*".

I respectfully agree with the approach taken by my late brother to avoid legal niceties and technical argument causing undesirable dismantling of the work that has been done by the co-trustees over a very long period. Properties have been sold to *bona fide* purchasers and they have expended huge amounts of money on it. Bonds were registered and properties were transferred. Creditors have proved claims and the Master has been satisfied in the winding up of the insolvent estate. Apart from the delay in bringing of the present application and the questionable legal standing of Swazibank to do so, an enormous vacuum will be created when the very foundation on which numerous acts, events and expenditures over a number of years has rested, is to suddenly evaporate. It would result

in gross unfairness to all affected parties, with the exception of the Applicant, if this was to be sanctioned by the Court.

[90] Over and above the inevitable prejudice to the *bona fide* third parry purchasers of the properties and the costs of undoing all which followed a *prima facie* valid order, which was not taken on appeal, as well as the established interests of the proven creditor and other acts done in consequence of the recognition order, there are also some statutory provisions that come into play. Also, one of the cornerstones of legal certainty and the rule of law is that court orders remain valid and with consequence, requiring all and sundry to abide by it, obey it and acknowledge its legal consequences unless and until it is set aside.

[91] In *BEZUIDENHOUT V PATENSIE SITRUS BEHEREND Bpk. 2001 (2) SA 224 (E)* at 229B-C, Froneman J stated unequivocally that:

> "*An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even of it may be wrong...*
> (the rationale being that)
>
> > *The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands*[7] *{KOTZE V KOTZE 1953(2) SA 184 (C)*".

[92] Similar consequences apply to administrative acts. Until such time that an invalid administrative action is set aside by the courts, it exists in fact and it has legal consequences that cannot simply be overlooked. Presently, the recognition order is under challenge

and is sought to be rescinded, but at the same time, the co~ trustees performed a variety of tasks in consequence of the court order. Third parties acquired ownership of properties that were sold in the chain of events. In *OUDERKRAAL ESTATES (PTY) LTD V CITY OF CAPE TOWN AND OTHERS 2004 (6) SA 227 (SCA),* it was held on *appeal* that -

> "*The proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependant on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court*" (at paragraph 31 page 243).

[93] And, at paragraph 36 (page 246), the SCA continued:

> "*It is important to bear in mind (and in this regard we respectfully differ from the court* a *quo) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the essential prerequisite for the legal force of the action that follows and* ex hypothesi *the subject may then not be precluded from challenging its validity. On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for a*

voiding or minimizing injustice when legality and certainty collide[77].

I am fully aware that the present application is not concerned with administrative action, but the same principles apply. The recognition order gave rise to consequential acts, which acts are thorns in the Applicant's flesh. They form a barrier against the Applicant's taking of the properties in execution of its own claim and to undo its failure to prove a claim in Swaziland. Intertwined with the consequential acts performed by the co-trustees is the

starting gate from where the race commenced - the recognition order. It is this hurdle which the Bank first needs to have rescinded and set aside before the subsequent actions may be placed under attack. Legal certainty and the rule of law require these acts to remain valid and to be given legal recognition and effect until such time when the recognition falls away and it is only at that time when the consequences of the validity thereof will require to be considered.

[95] In the event that the recognition order was to be rescinded, the Applicant would have sought the consequences to follow suit, as per its second application herein. Aspects that would then have come to the fore are for instance provisions of the Insolvency Act, 1955 (Act 81 of 1955).

[96] Section 85(11) read with subsection (10) of that Act,

provides that where a person (other than a trustee or auctioneer or their spouse, partner, employer or agent) has purchased in good faith from an insolvent estate any property which was sold to him, even in contravention of Section 83, *(mala fides),* the purchase shall nevertheless be valid. No allegation of impropriety or bad faith is levied against any of the purchasers.

[97] Section 156(2) of the same Act provides that no defect or irregularity in the election or appointment of a trustee shall vitiate anything done by him in good faith.

[98] Following the salient principle of legality, as enunciated in *Oudekraal (supra),* the attack is against the validity of the appointment of the trustees as per the recognition order. Even if that order stood to be rescinded, it would require more than a Herculean effort to also undo the auction sale and the resultant transfer of the properties to the purchasers, in order for the Bank to take the benefit of the value of the properties for itself to the exclusion of the proven creditor in the insolvent estate, also, to undo the remainder of the work done by the trustees.

[99] These factors cannot simply be ignored when rescission of the recognition order is considered since it is not merely to be done *in vacuo,* a pure isolated matter with no consequences that are to follow the result.

[100]There are two further prongs to the lance by which the recognition order is challenged by Swazibank. The

first is that the external trustees did not make full disclosure in their application for recognition, the second being the appointment of Mr. Paul Shilubane as a co-trustee.

[101]It is common cause that when Matsebula J considered the recognition order, not all of the papers that were before Smit J of the Transvaal Provincial Division when he authorized the letter of request to be issued wherefrom recognition would be sought in Swaziland, were filed by the Applicants. The contentious omission is the founding affidavit and explanatory heads which supported the Transvaal application.

[102]In the "*explanatory heads*" *ii* was stated that the aim of that application was to "*obtain the assistance of the Swaziland High Court in the liquidation of the estate of the insolvent by the trustees who have already been appointed in South Africa*".

[103] In the founding affidavit before Smit J, the basis for the explanation came about as follows:

> "*I* bona fide *believe that it is essential that the insolvency proceedings be initiated in Swaziland in* (sic)*interest of creditors and to this end require that this Court asks the Swaziland Court to assist by recognizing the locally appointed*

trustees and allow them to institute such proceedings as they deem necessary to carry out their duties in winding up of the insolvent estate[77].

[104] Advocate Naidoo relies on this to argue that the trustees thereby limited their approach to the High Court in Swaziland for recognition of only themselves as trustees in this jurisdiction and thus excluded the involvement of anyone else, in particular Mr. Shilubane. On this premise, he submits that in the event that this was known to Justice Matsebula and not omitted from the papers before him, he by necessary implication would have been aware of such alleged limited ambit of the recognition application and that he either would not have granted the order at all or at least would not have appointed Attorney Shilubane as co-trustee in the local insolvent estate.

[105] With great respect to senior counsel, this argument also cannot be sustained. Firstly, the South African founding affidavit and the explanatory heads as well, were intended for substantiating an application before Smit J of Transvaal to authorize a letter of request to this jurisdiction. Mr. Shilubane was not at that stage a person to be mentioned at all. Also, the argument pre-supposes that the High Court of

Swaziland would have done what counsel now suggests, contrary to what the court in fact did. If only the letter of request was placed before the Swaziland Court, exclusively so, without the supporting papers which caused it to have been issued in the first place, it still would not by necessity have resulted in the proposed result. Furthermore, the High Court of Swaziland did not take the Transvaal decision under review, which in such

an event might have necessitated a full record of all papers placed before that court to also be placed before this court.

[106] What the High Court of Swaziland was enjoyned to do was to consider a separate application altogether - the issue to decide was whether or not the appointment of external trustees was to be recognized in Swaziland. For that, the court placed reliance upon the affidavits placed before it which dealt with recognition and not those which were used to obtain a letter of request. The court then exercised its discretion in the manner it did and decided to recognise the appointment of external trustees, which in turn resulted them to be bound by local laws and to do their duties in respect of the local insolvent estate.

[107] In my view it would be presumptious to evaluate the decision of His Lordship Mr. Justice Matsebula *ex post facto and* to conclude that he erred by not having regard to something which was not before him and then to hold that if there was not such an omission, that he would have and should have decided to the contrary. Just as there was not any mention of Mr. Shilubane before Smit J, he could not have been expected to have forseen that in the foreign jurisdiction there would be such a possibility and have it included in his order to issue the letter of request.

[108] The local appointment of Mr. Shilubane as co-trustee is the last quiver in the bow of the Applicant's motivation for rescission of the recognition order, save that it was granted as final order on application and not as a *rule nisi,* also without notice to Swazibank.

[109]There is no dispute of the fact that the fifth respondent in case number 2034/07 and first respondent in case number 346/07, Paul Mhlaba Shilubane, *nomine officio,* is not and was not an "*external trustee*"*as* he was not "*duly appointed in a country other than Swaziland for the purpose of administering, liquidating and distributing any bankrupt or insolvent estate*" (as defined in Section 2 of the Recognition Act).

[110] Section 4(1) of this Act empowers the High Court to order the recognition within Swaziland of any external trustee who has specified in writing a place in Swaziland as *domicilium citandi* on production to it of the letter of appointment of such external trustee whereupon the property in Swaziland of the insolvent shall vest in such external trustee for the purpose of the insolvency as though such property was the property of an insolvent estate sequestrated by order of a competent court of Swaziland but subject to the provisions of the Recognition Act.

[lll]In their application which resulted in the contentious recognition order, the external trustees firstly sought the foreign sequestration order in respect of the insolvent estate of Dumisa Mbusi Dlamini to be recognized in Swaziland, also that their external appointments likewise be recognized and that Sections 5 to 17 of the Recognition Act shall be applied to the administration of the insolvent estate "*as though the said Act found application*[77].

[112] In the same application, it was prayed that Mr. Shilubane be appointed jointly with the applicants (the external trustees) as a co-trustee in the insolvent estate. In the supporting affidavit such relief is motivated by stating that they deemed it prudent to approach the High Court of Swaziland for an order in terms of which Mr. Shilubane be appointed together with the applicants as trustee of the insolvent estate. The say that Mr. Shilubane is a practicing attorney in Swaziland and also a director of the insolvency practitioners, KVR Trust (Swaziland) (Pty) Limited. They submitted that a local practitioner in Swaziland could be of great assistance in the administration of the estate and attached his acceptance ■ of appointment as trustee in the insolvent estate. They also annexed a copy of the resolution of the external co- trustees wherein the appointment of Mr. Shilubane as co-trustee of the insolvent estate as part of the recognition application, was to be sought.

[113] All of this was ordered by the High Court of Swaziland and challenged by the Bank, aptly described by Advocate Steyn as attempting to snatch for itself a bargain to which it is not entitled and at the expense of other proved creditors, with reliance on *WALKER VSYFRET, supra.*

[114] The Bank has it that the Insolvency Act does not empower the Court to appoint a trustee in an insolvent estate but that it can only remove one. Yet, at the same time, it is so that external trustees who are recognized in Swaziland are in effect appointed by the Court, as was done *in casu,* while at the same time, Mr. Shilubane was appointed as co-trustee, together with the external

trustees. Section 156(2) of the Insolvency Act, referred to above, provides that *"No defect or irregularity in the election or appointment of a trustee shall vitiate anything done by him in good faith".*

[115]Whether or not it was desirable that the High Court should have also appointed Mr. Shilubane as co-trustee in the insolvent estate, the fact remains that it did so. As result, the co-trustees, including Mr. Shilubane, have performed a great deal of tasks since then. If the recognition order is now held to be at fault and varied to the extent that the appointment of attorney Shilubane is deleted from it, it will have no practical effect. Mr. Shilubane did not play a solo performance, he was part of a team, a co-trustee together with the others. To attribute to him alone retrospective invalidity of what he did would be an impossibility, over and above the saving provisions of Section 156(2) of the Insolvency Act as well as the legal position as set out in the applicable authorities referred to above. Legal certainty and validity of acts done in consequence of a court order militate against a variation of the recognition order.

[116]That it is not unusual for the High Court to appoint trustees or liquidators, Advocate Steyn referred to two such orders. In Civil Case No.2980/98, the court appointed Mr. Stephen Hackner, together with Merwyn Israel Swartz, as provisional liquidators of Langa Brickworks (Pty) Ltd in an application brought by Nedband Swaziland Limited, and in Civil Case No.5 77/96, in the matter between David Kuper and Polyplas (Pty) Ltd, the High Court appointed Peter Ronald Cooper as liquidator jointly with Leslie Cohen.

[117]The underlying jurisdictional facts leading to these orders were not also referred to but it lends support to the

contention that it is not unique for the Court to make appointments of liquidators and trustees, *contra,* the argument raised on behalf of the Bank that it cannot be done. In fact, it is a common practice for such appointments to be made by the High Court, on application, *ex parte* or otherwise.

[118]The result which the Applicant wants to follow cannot be sustained. It wants an order which decrees that all acts performed in Swaziland in connexion with the administration of the insolvent estate are of no force and effect and consequently invalid. This simply cannot be acceded to.

[119]The further aspect of contending that the recognition order stands to be rescinded is that it was obtained *ex parte* without notice to the Master, Swazibank and other creditors. This is held forth as a fatal defect which justifies rescission.

[120]It is common cause that Swazibank, the Master and SEB all came to know about the recognition order. The Applicant has it that it was surreptitiously kept out of its knowledge for a long period of time and that it would have opposed granting of a final order, had it then known of such a *rule nisi,* if the appropriate process was adopted.

[121]Indeed, Swazibank came to court with an urgent application to *inter alia* set aside the recognition order of the 28th July 2004. It was struck off the roll for want of urgency in April 2005. The present application to rescind the recognition order came in January 2007, some two and a half years later. Meanwhile, Swazibank knew of creditors meetings and an auction sale. It failed to prove its claim at meetings of the creditors where it was in fact represented and invited to prove a claim, but it did not do so. It now cries

foul of the order because it was not notified of the intention to apply for it.

[122]The Bank relies on *CLEGG VPRIESTLY (supra)* to argue that since it was not notified of the application and as it has a substantial interest in the matter, it justifies rescission. However, as stated above, *CLEGG V PRIESTLY was* decided in respect of the affected person whose assets stood to be subjected to a sequestration order, to his potential detriment. Properly interpreted and applied, it could have been Dumisa M. Dlamini who stood to be affected by the absence of notice, who could have raised such a point. Swazibank was a potential creditor in the insolvent estate. It was at a creditors' meeting that it could have joined as an affected creditor and it could have proved its claim to a share in the insolvent estate. It now seems as if Swazibank does not want only a share - rather, it wants everything for itself. It cannot now, in my view, held to be a fatal defect necessitating rescission just because the applicant was not given notice of the recognition application. If that was to be so, it would require every external trustee to first establish which entities might eventually prove claims, or potentially so, and give notice to each such local party of its intended application. That is not the time to do so, but only later on when the recognized trustees or liquidators, with or without local practitioners, set about their business. It is then when relevant parties are to be informed about the process in which they may participate.

[123]Finally, the Respondents justifiably complain about the delay which accompanies the present applications which in turn impacts on the court's discretion.

[124] In this regard, it is this court itself which has delayed unduly long with handing down of this judgment. The reasons

for this delay does not justify itself and are not ascribable to any of the litigants. Pressure of a continuous daily roll of matters to hear, without spare time apart from working after hours at night and over weekends complicates the ability to expeditiously deal with numerous reserved judgments. In addition, only days after hearing this matter my contract of employment came to an end. The endless waiting for renewal, insecurity in financial and other aspects, thereafter reappointment for a short term coupled with significant reduction and removal of benefits, also did not auger well for a conducive environment to apply myself to this matter as well as various other cases, by now dealt with. For this I tender my apologies but it does not justify the delay.

[125]Equally so, the delay by the Applicant to bring this matter to the point of hearing has been severely criticized by the respondents. Factual allegations and denials have been thrown to and fro, case law by the bundles have been cited, but in the final analysis, without delving into details, the applicant cannot adversely be deprived of a discretion by the court to consider rescission, based on undue delay. The various scenarios based on differing perceptions, explanations and accusations does not alter the outcome of this matter.

[126]Furthermore, the aspect of the court's discretion was extensively argued and again supported by both sides with bundles of decided cases. In this, there are essentially two sides of the coin: On the one hand, there is authority to the effect that once the court finds the recognition order to have been defective or in error *ab initio,* the result should by default be that it is rescinded, without the leeway of discretion. The inverse is equally so justifiable, namely that the court indeed does have discretion to rescind, but which discretion has to

be judicially exercised, especially so with regard to various stated deficiencies in the application to set aside or rescind the order.

[127]In this regard, it is my considered view that this matter does not extend to that point. The recognition order, for the reasons stated above, cannot in my view be faulted to the extent that there is sufficient doubt as to its legality which takes it to the point where a discretion to rescind it or not comes to the fore. The recognition order has not been sufficiently shown by the Applicant to have been erroneously granted to bring it under the auspices of Rule 42 which could otherwise have been the remedy to cure such defect, by rescinding the order, or even to vary it to the extent that it could cure such aspect of it that would otherwise have been incompatible with our law.

[128]It is as consequence of the finding that the recognition order should remain as it is, that the consequent relief does not fall to be decided as well, but as has been shown above, even if it had to be otherwise in the event that I am wrong in the pre~conditional aspect of rescission, the chances would have remained remote to also undo the results which follow upon the recognition order.

[129]*In fine*, and especially in regard to the consequential relief that was sought by the Applicant Bank, an insightful judgment originating from the Solomon Islands has instructive guidance. There, Her Majesty the Queen of England appointed a Governor-General under the local Constitution, to head the Government. It subsequently transpired, after various functions were carried out by the incumbent acting in his official capacity, such as dissolving parliament, proclamation of a general election and after the

election of a new Prime Minister and the appointment of ministers of the Government, that the appointment of the Governor-General could not have validly been done by Her Majesty, the Queen. His appointment was duly set aside and he was relieved from office. (Re Nori's Application, Solomon Islands, [1989] LRC (Const.) at page 10).

[130]It was then held that even though the Governor-General was not validly appointed *ab initio,* the acts that he did perform while in office were nevertheless to remain valid -the rationale being the same as *in casu,* namely that the wheels of time cannot readily be turned back without creating enormous legal uncertainty and chaos. As this matter stands, the recognition order must remain valid and as a result, it does not require the further aspects of what the trustees have done in the time being, to be set aside. Their jurisdictional validity must also remain.

[131]It is for the combined effect of the aforestated reasons that both applications by Swaziland Development and Savings Bank are ordered to be dismissed, with costs. Costs are to include the costs of two senior counsel instructed by the Respondents, with attendant counsel, which is to be taxed and allowed in accordance with the provisions of Rule 68(2).

JACQBUS P. ANNANDALE
Judge of the High Court