THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
CASE NO 170/2005

In the matter between

DATO' SAMSUDIN BIN ABU HASSAN — First Appellant
DATIN MELLENEY VENESSA SAMSUDIN — Second Appellant

and

P DE VILLIERS BERRANGE NO — Respondent

Coram: Mpati DP, Zulman, Farlam, Lewis JJA and Maya AJA
Heard: 16 May 2006
Delivered: 31 May 2006

Summary: Liquidated debt in terms of s 9(1), Acts of Insolvency in terms of ss 8(a) and 8(d) read with s 12(1) of the Insolvency Act 24 of 1936 and the requirements of service of an application for a provisional sequestration order and matters to be disclosed therein.

Neutral citation: This judgment may be referred to as Samsudin v De Villiers Berrange NO [2006] SCA 79 (RSA)

JUDGMENT

ZULMAN JA

[1] This appeal is against the grant of a final order of sequestration by the Pietermaritzburg High Court against the joint estate of the appellants.[1] The essential issue for determination is whether the respondent established on a balance of probabilities the requirements of s 12(1) of the Insolvency Act 24 of 1936 (the Insolvency Act) and was therefore entitled to the final order. The appellants have also raised a number of ancillary issues for determination.

[2] On 17 December 2003 the respondent in his capacity as provisional liquidator of NRB Holdings Limited (in provisional liquidation) (NRBH) launched successful ex parte sequestration proceedings against the appellants for a provisional order of sequestration. The respondent was appointed provisional trustee in the estate of the appellants on 18 December 2003. On 10 March 2004 the second appellant, who it is now common cause is married in community of property to the first appellant, brought a reconsideration application in terms of rule 6(12)(c) of the Rules of Court upon the basis that the provisional sequestration order was granted in her absence in an urgent application. On 4 June 2004 the first appellant launched a similar reconsideration application in regard to the provisional sequestration order. Judgment was delivered by Levinsohn J on 18 January 2004 in terms of which, inter alia, both reconsideration applications were dismissed and the provisional sequestration order confirmed.

[1] The judgment is reported sub nomine *Ex Parte De Villiers Berrange NO v Samsudin & Another* [2005] JOL 13692 (N).

[3] The following factual findings are either common cause or at least not disputed. Most of these facts emanate from the affidavits of the first appellant himself. During 1998 New Republic Bank Limited (New Republic Bank) advanced an amount of R32 658 649,35 to NRBH to enable NRBH to acquire shares in Mitrajaya Holdings Berhad (MITRAJAYA), a public company listed on the Malaysian stock exchange. By June 1998 NRBH had acquired 14 000 000 ordinary shares and 6 666 666 warrants in MITRAJAYA. The acquisition was funded from the proceeds of the aforementioned loan. The shares and warrants were registered in the name of OSK Nominees (Asing) Sdn Bhd (OSK), which is a firm of stock brokers in Malaysia. On 5 February 1999 Mr Jonathan Scott, the chief executive officer of New Republic Bank, addressed a letter to the first appellant recording a discussion in regard to the disposal of NRBH's assets and in particular the investment in MITRAJAYA. In that letter Scott annexed a document from the South African Reserve Bank dated 16 February 1998 and drew the first appellant's attention pertinently to its contents. Scott furthermore recorded that the MITRAJAYA investment had a market value of between R50 million and R60 million. He recommended the realisation of the investment through the market and stated that the realisation of the investment would assist NRBH to settle its inter–company loan to New Republic Bank.

[4] In the draft financial statements of NRBH for the year ending 31 March

1999 the MITRAJAYA shares and warrants were valued at R55 million. As at 5 June 2000 the aforementioned valuation was approved by the board of NRBH. The shares and warrants closed on that date on the Malaysian stock exchange at RM3,84 (Malaysian Ringgits) and RM2,20 respectively. At these prices the investment in MITRAJAYA was recorded as having a market value of R124,9 million. During June 2000 the first appellant engaged in negotiations with L & M Group Investments Limited (L & M) to take over the MITRAJAYA shares. For the purposes of the negotiations the MITRAJAYA shares were valued at RM5 per share. On 18 April 2002 the first appellant procured a resolution from the board of directors of NRBH in terms of which the board authorised any two of the directors to give instructions orally or in writing to OSK regarding the sale of securities.

[5] On 25 July 2002 NRBH addressed a letter to OSK. The letter was signed by Mr Neville Egan, a director of NRBH, and the first appellant authorising OSK to execute a 'married deal' between NRBH and Khidmas Capital (KHIDMAS) of 22 400 000 MITRAJAYA shares at RM1,15 per share. In the letter OSK Securities were instructed to credit the nett proceeds of the sale 'to the buyer's trading account number 056001036407195' as part-payment for their purchase of the shares. 22 400 000 MITRAJAYA shares were sold on 29 July 2002 for RM25 720 960. This appears from OSK's statement of account issued to its ostensible client NRBH of Durban. The statement reflects a

purchase price of RM1,15 per share.

[6] The purchaser of the shares was KHIDMAS. The first appellant is a director of KHIDMAS and holds 99 999 shares out of 100 000 issued shares in that company. In its financial statements for the year ending 30 June 2003 KHIDMAS recorded that it owned marketable securities valued at RM17 388 000. It noted that the aforesaid shares were pledged 'to a financial institution for a revolving credit facility of RM20 000 000 granted to a director Dato Samsudin Bin Haji Abu Hassan [the first appellant]'. The financial statements also reflect that in the year 2002 'a director owed the company RM19,140,820'. In 2003 this indebtedness appears to have been discharged. The indebtedness in question was the indebtedness of the first respondent to KHIDMAS. In the first appellant's replying affidavit he states:

'The treatment in the accounts of Khidmas Capital of offsetting the value of the shares against the shareholders' loan would then be reversed'.

[7] During 2002 KHIDMAS pledged 22 400 000 MITRAJAYA shares to Southern Bank Berhard (Southern Bank), a Malaysian bank. The pledge was as security for a loan of some RM20 000 000 granted by Southern Bank to the first appellant personally. The first appellant utilised the proceeds of the loan to purchase shares in a Malaysian company listed on the Kuala Lumpur stock exchange called Seacera Tiles (SEACERA). The SEACERA shares were

registered in the first appellant's name.

[8] During the period 28 October 2002 to 28 October 2003, 9 500 000 MITRAJAYA shares were sold on the Malaysian stock exchange. In an affidavit attested to on 12 December 2003 one Lam Hor Seng, the financial controller of RC Nominees, affirmed that these shares were sold on the instruction of Southern Bank who held them as a pledge. The proceeds of the sale would be received by Southern Bank.

[9] On 14 May 2003 winding-up proceedings against NRBH were instituted at the instance of the receivers of New Republic Bank Limited (the bank had been placed under receivership some time earlier). On 25 September 2003 the first appellant deposed to an affidavit in opposition to the winding-up of NRBH. Notwithstanding such opposition NRBH was placed under provisional winding-up on 14 November 2003 and the respondent was subsequently appointed as provisional liquidator.

[10] On or about 28 November 2003 the respondent, pursuant to ex parte proceedings in the High Court of Malaysia, obtained an interim injunction against the disposal of 22,400,000 shares in MITRAJAYA. A copy of the Malaysian proceedings was served on the first appellant on 1 December 2003. The first appellant is a Malaysian citizen who immigrated to South Africa in

1994. In August 2002 he returned to Malaysia. He again returned to South Africa during the early part of December 2003 and departed for Malaysia on 9 December 2003. On 5 December 2003 the first appellant applied to his bankers, Nedbank, Johannesburg to transfer US$100 000 from his personal account in South Africa to a Malaysian bank. The intervening provisional sequestration order was granted on 17 December 2003.

[11] Before deciding whether the respondent established the requirements of s 12(1) of the Insolvency Act it is convenient first to consider the points made by appellants on appeal to this court in regard to the reconsideration applications, as well as certain ancillary issues raised by him (essentially points *in limine*).

[12] The appellants contend that the provisional sequestration order should not have been granted, regard being had to the lack of notice to him and the second appellant his wife, to alleged material non-disclosures by the respondent, and to the fact that there were pending proceedings in Malaysia. A recent amendment to the Insolvency Act introduced s 9(4)(A)(a)(iv). The subsection reads as follows:

'When a petition is presented to the court, the petitioner must furnish a copy of the petition -

…

(iv) to the debtor, unless the court, at its discretion, dispenses with the furnishing of a copy where the court is satisfied that it would be in the interest of the debtor or of the

creditors to dispense with it' (the emphasis is mine).

In his application for the provisional sequestration order the respondent stated that the application was urgent and that in all probability the first appellant was disposing of assets which are owned by the joint estate including readily transferable shares in other companies owned by the first appellant. This it was said would prejudice the creditors of the joint estate. The respondent then went on to state:

'If notice is given to him he will certainly do as he did in the face of the liquidation of the Company. In these circumstances, I respectfully submit that this matter is urgent and should be heard *ex parte* without notice to the Respondents.'

The respondent relied on the cumulative effect of a number of factors in support of his application for a provisional sequestration order. These plainly made out a *prima facie* case that the first appellant had been guilty of dishonest conduct in relation to the MITRAJAYA shares. The evidence adduced showed that the first appellant had misappropriated the shares for his own benefit resulting in NRBH suffering a very substantial loss running into millions of rands. I will return to deal with this aspect of the matter later in this judgment.

[13] In my view the court which granted the *ex parte* application for the provisional sequestration of the joint estate (Gyanda J) was perfectly justified in the exercise of its judicial discretion, regard being had to the above factors in

dispensing with notice to the first appellant (cf *Ex Parte Neethling*[2]). As pointed out by Levinsohn J the *ex parte* procedure linked to a rule *nisi* is well entrenched in our High Court practice and received the Constitutional Court's approval in *NDPP v Mohamed NO*.[3]

[14] As regards the alleged material non-disclosures, it is plain from cases such as *Schlesinger v Schlesinger*[4] that in an *ex parte* application all facts must be disclosed by the applicant which might influence the court in coming to a decision and a failure to do so may be visited by a court subsequently setting aside the *ex parte* order. (See also *Phillips v National Director of Public Prosecutions*.[5]) The first appellant contends that there are four matters which the respondent should have disclosed to Gyanda J in his founding affidavit.

[15] First, the resolution of the board of directors of NRBH dated 18 April 2002, referred to above. The first appellant contends that had Gyanda J been apprised of this resolution it may well have caused him to have some misgivings as to whether the order could be granted without notice. In my view Levinsohn J was correct in rejecting this argument on the simple basis that the resolution means no more than that the directors had resolved to change the authorised signatory as far as the NRBH Corporate Account held with OSK in

[2] 1951 (4) SA 331 (A) 335D-E.
[3] 2003 (5) BCLR 476 (CC).
[4] 1979 (4) SA 342 (W) 349.
[5] 2003 (6) SA 447 (SCA) 455 para 29.

Malaysia was concerned. I will return to consider this resolution in more detail later in this judgment.

[16] Second, the letter addressed by NRBH to OSK dated 25 July 2002 which I have referred to in para 2.9 above. The letter reads as follows:

'With reference to the above, we hereby irrevocably authorise and instruct you to execute a married deal between us, NRB HOLDINGS LIMITED ('the Seller') and KHIDMAS CAPITAL SDN BHD ('the Buyer's) of 22 400 000 MITRAJAYA HOLDINGS BHD ordinary shares ('the shares') at RM1.15 per share on 25-7-02. We hereby irrevocably instruct you to credit the nett proceeds from the sale of the shares to the Buyer's trading account number 855460 and CDS account number 056-001-036407195 as part payment for the purchase of the shares.

We hereby undertake to indemnify OSK Securities Bhd and to keep OSK Securities Bhd fully indemnified from and against any expense, loss, damage or liability which OSK Securities Bhd may incur as a consequence of acting pursuant to this instruction.

We agree to abide and be bound by the KLSE rules in respect of this transaction.

Please acknowledge receipt by signing and returning the duplicate copy of this letter.

Thank you.'

In his answering affidavit the first appellant treats this letter as being a logical consequence of the resolution passed on 18 April 2002. I again agree with Levinsohn J that if Gyanda J had been apprised of this letter it would merely have reinforced the respondent's contentions in his founding affidavit that a misappropriation had taken place. The court's attention would have been focused on the statements set out in the letter that OSK were to 'credit the nett

proceeds on the sale of the shares to the Buyers trading account … as part payment for their purchase of the shares' and not to the owner of the shares, NRBH.

[17] Third, the Malaysian proceedings. The first appellant's complaint appears to be that Gyanda J should have been told that in the Malaysian proceedings it was envisaged that the respondent would claim return of certain unsold MITRAJAYA shares as well as an account in respect of the shares already sold. It is contended that this is inconsistent with the debt alleged in the present case, namely a debt based on a misappropriation of shares. The respondent in his founding affidavit referred to the order issued by the Malaysian court. The order makes reference to the 'writ'. It would have been apparent to Gyanda J that the proceedings in Malaysia were of an interim nature designed to freeze the dealing in the MITRAJAYA shares. I do not believe that the court would have been influenced by the form of relief claimed in the writ and I do not believe that a more detailed disclosure was required in the circumstances.

[18] Fourth, the failure to disclose the extent of the first respondent's assets in South Africa and their value. In his founding affidavit in the proceedings before Gyanda J the respondent stated that in view of the urgency of the matter he was loth to place a value on the assets of the appellants as the information that he had been provided with at that date might not be accurate. He submitted,

however, that a provisional trustee would be in a better position to provide the court with an assessment of the financial position but that *prima facie* the liabilities of the 'respondents of R49 million exceed their assets situated in South Africa'. In my view sufficient disclosure was made at that stage. There is no warrant for contending that there was a wilful or negligent non-disclosure of information pertaining to the value of the first appellant's assets. In the nature of things, this was then not possible.

[19] Linked to the alleged non-disclosure of the Malaysian proceedings, the contention by the first appellant is that proceedings in two countries, South Africa and Malaysia, should not have been entertained, in other words the defence of *lis alibi pendens*. This defence was correctly rejected by the court *a quo* on the basis that the relief claimed in the respective proceedings was different. The sequestration proceedings were brought in terms of a South African statute and one of the jurisdictional facts was a liquidated claim. The parties in the Malaysian court were different from those cited in the sequestration proceedings and there were South African debts in the sequestration proceedings which played no part in the Malaysian proceedings. In addition the sequestration proceedings required an act of insolvency, a matter which also played no part in the Malaysian action. Fundamental to the plea of *lis alibi pendens* is the requirement that the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause (see

for example *Wolff NO v Solomon*,[6] *Nestlé (South Africa) (Pty) Ltd v Mars Inc*[7] and *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*[8]). An order of sequestration is not an ordinary judgment of the court, but is rather a species of arrest or execution, affecting not only the rights of the two litigants but also third parties, and involves the distribution of the insolvent's property to various creditors, while restricting those creditors' ordinary remedies and imposing disabilities on the insolvent (*Ex Parte B Z Stegmann*[9]). In any event a court has a discretion in an appropriate case, such as this, in regard to concurrent winding-up orders in more than one territorial jurisdiction (*Sackstein NO v Proudfoot SA (Pty) Ltd*[10]). A foreign court order of sequestration against a debtor does not preclude a creditor in this country from proceeding with an action against the debtor in our courts (*Hymore Agencies Durban (Pty) Ltd v GIN NIH Weaving Factory* [11]).

[20] In argument before this court the first appellant submitted that the entire sequestration application against the appellants was actuated by an ulterior purpose by the respondent, namely to obtain a tactical advantage against the appellants by 'shackling their ability to dispute the alleged claims of the respondent against their estate'. This contention was apparently not raised directly before the court *a quo* and is not dealt with in the judgment of that

[6] (1898) 15 SC 297 at 306.
[7] 2001 (4) SA 542 (SCA) 548J-549A-B.
[8] 2001 (2) SA 232 (SCA) 240B-D.
[9] 1902 TS 40 at 47.
[10] 2003 (4) SA 348 (SCA) 357C-E.
[11] 1959 (1) SA 180 (N) 182G-183B.

court. Plainly the respondent was entitled to pursue proceedings in Malaysia in regard to a substantial asset of the company. Indeed he was obliged in exercising his duties as provisional liquidator to do so.[12]

[21] Relying upon a passage in the judgment in *National Director of Public Prosecutions v Basson*[13] the first appellant's counsel contended that the learned judge *a quo* wrongly restricted his discretion not to set aside the provisional sequestration order by taking into account the fact that the respondent was a representative litigant. Levinsohn J said the following in his judgment in this regard:

'Alternatively, if I am wrong and this document should have been disclosed, I am of the opinion that having regard to all the facts and circumstances which have come to light in this application, and given that the applicant litigates in his representative capacity as the liquidator of NRBH, I ought to exercise a discretion in favour of the applicant and not visit him with any sanction on the basis of non-disclosure' (the emphasis is mine).

In my view this passage does not indicate that the court *a quo* fettered its discretion by relying solely on the fact that the respondent was a representative litigant. Furthermore a reading of the passage in *Basson* (supra) referred to does not support the broad proposition advanced by the appellants' counsel.

[22] In argument before this court the appellants' counsel drew attention to the

[12] *Estate Logie v Priest* 1926 AD 312 at 320.
[13] 2002 (1) SA 419 (SCA) 419A-B.

fact that the respondent was not only the applicant in the sequestration proceedings in his capacity as provisional liquidator of NRBH but also subsequently accepted an appointment as a provisional co-trustee in the estate of the appellants. It was contended that this 'clearly' demonstrated that the respondent was motivated only by the objective of satisfying the alleged liabilities of the appellants to the respondent and not by any concern for the interest of the concursus. In addition it was contended that from 'any ethical and/or legal considerations, such acceptance of a position as co-trustee was manifestly oppressive to the appellants.' I cannot agree with these submissions. As I have already stated the respondent was entitled and obliged to pursue claims against the first appellant which the company had and this was clearly in the interests of the concursus. A complaint was made to the Master who rejected it. The matter was taken no further.

[23] In argument before this court (again a matter not raised before the court *a quo*) it was contended by the appellants' counsel that the transcript of certain interrogation proceedings held under ss 417 and 418 of the Companies Act 61 of 1973 (the Companies Act) as well as correspondence, company documents, memoranda and such like emanating from third parties not party to the litigation, were inadmissible. The only evidence relied upon by the court *a quo* emanating from the interrogation proceedings was certain evidence that Egan gave. However, Egan in an affidavit in the present proceedings confirmed what

he had stated in the interrogation proceedings. Furthermore the various other matters objected to by the appellants were not in dispute. All that the appellants sought to do was to dispute the inferences to be drawn from such documentation, for example the resolution of 18 April 2002 which I have referred to above.

[24] I now turn to consider the essential issue relating to the provisions of s 12(1) read with sections 9(1), 8(a) and 8(d) of the Insolvency Act. The section provides as follows:

'(1) If at the hearing pursuant to the aforesaid rule *nisi* the court is satisfied that –

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in subsection (1) of section nine; and

(b) the debtor has committed an act of insolvency or is insolvent; and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated,

it may sequestrate the estate of the debtor.'

Section 9(1) of the Insolvency Act, in so far as is relevant to this matter, provides that a creditor who has a liquid claim for not less than R50 against a debtor who has committed an act of insolvency or is insolvent may petition the court for the sequestration of the estate of the debtor. It is not disputed that it will be to the advantage of creditors of the joint estate if the estate is sequestrated.

[25] The respondent sought the sequestration of the joint estate of the appellants on the basis that NRBH had a liquidated claim of considerably more than R50 against the first appellant. The liquidated claim was said to fall under two headings. First an amount equal to the value of the MITRAJAYA shares being the sum of 25,7 million Malaysian Ringgits equivalent to R43,7 million, it being alleged that the first appellant misappropriated the shares. Second, the sum of R7,337,020,75 which the respondent described in his founding affidavit as money appropriated by the first appellant from the company's bank account without authority, and not for the company's business, and without giving consideration to paying an undisputed liability of R32,6 million due to New Republic Bank Limited. This amount of R7,337,020,75 was made up as to R2 000 000 paid to a firm of attorneys in respect of legal fees arising from an arbitration, R523 930,46 to the first appellant personally on 12 October 2002 and R1 813 090,29 to a company called Buildmax Industries (Pty) Limited during 2003. It was alleged that the payments aforementioned were unauthorised loans in terms of s 226 of the Companies Act and that the first appellant was liable to indemnify the company for any loss that it sustained resulting from the invalidity of the said loans. The respondent averred that the first appellant was liable to indemnify NRBH in terms of s 226 of the Companies Act in the sum of R3,8 million.

[26] Regarding the issue concerning the MITRAJAYA shares the first

appellant states as follows: During 1998 he proposed to the board of NRBH that NRBH make an investment in Malaysia by acquiring the MITRAJAYA shares. He was of the view that an investment of this nature had the potential for making good returns. Thereafter NRBH acquired 14 000 000 shares and 6 666 666 warrants in MITRAJAYA. New Republic Bank lent some R32 000 000 to NRBH to fund the acquisition. Bonus issues in the year 2000 increased the number of shares held by NRBH to approximately 22 400 000. This was 18,54 per cent of the issued and paid up shares in MITRAJAYA. The shares did not realise the potential that the first appellant believed they would. In 1994 NRBH attempted to dispose of these shares but was unsuccessful as it was unable to find a buyer for the entire block of shares. The first appellant states that to the best of his recollection, in the years 2001 and 2002 he had informal discussions with the directors of NRBH on the best way for NRBH to deal with the shares in question given that it was unable to find a purchaser for the entire block. One such director was a Mr Habib who encouraged the first appellant to take over the shares so that a profit could be made by NRBH. According to the first appellant, after further discussions with members of NRBH's board, it was proposed that he be responsible for dealing with, and managing, the disposal of the MITRAJAYA shares in Malaysia with a view to realising their value at the time and possibly making a profit in addition. According to him if there were to be any profits, these would be divided equally between NRBH and the first appellant. He states that he had to guarantee a

minimum return to NRBH which would be equivalent to its liability to New Republic Bank Limited in respect of the loan taken to purchase the shares. He then goes on to state:

'It was also envisaged that this venture would be undertaken through one of my companies in Malaysia as this would facilitate the obtaining of credit facilities and any dealings with relevant authorities in Malaysia. To this end I used Khidmas Berhad as the vehicle to achieve the end aforesaid.'

[27] The first appellant avers that in the first half of 2000 the board of directors of NRBH agreed that he would be authorised to manage and deal with the MITRAJAYA shares with a view to realising their value and obtaining a profit, and in addition that he was to guarantee NRBH a minimum return equivalent to its liability to New Republic Bank. He would also be given a reasonable time to achieve this venture which was, according to him, to be the end of 2004. The first appellant relies upon a resolution to the board of directors which he says authorised him to deal with the shares in the aforesaid manner. I have previously referred to this resolution which is dated 18 April 2002. The resolution is crucial to the first appellant's defence to the respondent's contention that the first appellant misappropriated the MITRAJAYA shares without authority. The body of the resolution reads as follows:

'At a meeting of the Directors held on 18th April 2002 it was resolved that:-

there is a change in authorised signatories for NRB Holdings Limited Corporate Trading Account maintained with OSK Securities Sdn. Berhad and CDS Account maintained with

OSK Nominees (A) Sdn. Bhd. Any two of the Directors, namely, Dato' A H Samsudin, Jonathan G Scott, Haroon Habib and Neville B Egan are hereby empowered and authorised to give orders or instructions orally or in writing to OSK on behalf of the company for the purchase or sale of securities and shall have the authority to bind the company in all transactions with OSK with effect from 18 April 2002.'

[28] The first appellant emphasises that he did not simply obtain a mandate to sell the MITRAJAYA shares. He says that the shares were not performing well and it was difficult to dispose of the whole block of shares. The idea was that he would use the shares 'with a view to identifying and re-investing, preferably in a different sector of industry, and to manage such re-investments to achieve the agreed goal'. He asserts that the decision of the board of directors to which I have referred authorised him to deal with the shares on the basis set forth above. The first appellant then describes how he carried out the venture. He obtained banking facilities from Southern Bank and KHIDMAS and then pledged the MITRAJAYA shares as security. The proceeds of the facility so obtained were used to purchase, in the first appellant's name, 11 000 080 shares in SEACERA. This shareholding represented 20 per cent of the issued and paid-up share capital of SEACERA. According to the first appellant the core business of SEACERA is the manufacture, distribution and marketing of homogenous tiles and biaxially oriented polypropylene film. The first appellant asserts that the institution by the respondent of this litigation has thwarted his efforts to make a

profit from the sale of the SEACERA shares. He states that he was in negotiations to sell those shares at a handsome profit but is now unable to do so. The first appellant then attempts to deal with the affidavit deposed to by him on 25 September 2003 in opposing the winding-up of NRBH which reflects none of these alleged transactions. In that affidavit, he had stated that NRBH was the owner of the MITRAJAYA shares. He tries to explain this statement as follows:-

'The averment I made in my South African Affidavit was in substance true; namely that NRBH was still the owner of the investment. If I had been allowed to carry out the venture as agreed, NRBH would have been able to obtain the return of its original investment in MITRAJAYA plus profit. I believe that this is still possible.'

[29] The first appellant denies that he had been in breach of any trust or that he committed a fraud or wrongful act. He acknowledges that he could have expressed himself more clearly, but claims that he was in a rush to catch a flight from Johannesburg to Kuala Lumpur and he did not scrutinise the affidavit and did not think it was necessary to set out the complex agreement reached between himself and the board of NRBH. He therefore denies that he misappropriated the MITRAJAYA shares.

[30] The respondent avers that the 'machinations' of the first appellant in Malaysia in regard to the shares resulted in a loss to creditors of NRBH of some

R43,7 million plus interest. He states that even on the most charitable interpretation of what the first appellant had done in Malaysia it is clear that he had taken the shares which belong to NRBH. These shares were capable of being realised on the open market.

[31] It is plain that what the first appellant did, instead of selling the shares on the open market, was to pledge them to Southern Bank to secure a credit facility for himself personally and not for NRBH. He did this without the authority of the board of directors of NRBH. According to the respondent, from the point of view of NRBH, this is 'akin to an act of piracy'. I agree. The respondent points out that from the records of NRBH there is no evidence of an agreement reached with the other board members authorising the first appellant to manage and deal with the disposal of the shares in the manner alleged by the first appellant. There is no resolution where directors or shareholders authorise the first appellant to conduct himself as he alleges. The resolution of 18 April 2002 to which the first appellant refers, as I have previously said, is simply a resolution dealing with the change of authorised signatories. As pointed out by the respondent the resolution, in any event, was not signed by all the directors of NRBH. In the course of making his investigations the respondent had discussions with two of the directors of NRBH, Habib and Scott. Both denied that the first appellant was entitled to 'take over the shares'. Nor did they authorise the first appellant to dispose of the shares in his own name or in the

name of KHIDMAS. Furthermore the directors of NRBH would not have had the power in law to dispose of what was the whole undertaking of NRBH in the absence of a resolution in terms of s 228 of the Companies Act. As at 30 April 2002 NRBH's liability to New Republic Bank was R87,7 million. The first appellant, by misappropriating the MITRAJAYA shares, reduced his liability to KHIDMAS by RM19,1 million, secured an obligation by KHIDMAS to pay his companies RM3,8 million and was able to borrow in his personal capacity as a result of the pledge of the shares. All this enabled him to personally acquire the SEACERA shares in his own name. At no stage did he have written permission from NRBH, the true owners of the shares, to do this. The respondent refers to a letter which the first appellant wrote to attorneys during June 2000, in relation to an attempt to sell the shares to L & M. In the letter enclosing the proposed acquisition announcement it was clearly stated that the disposal of the shares would require both the approval of the shareholders of NRBH at an extraordinary general meeting and also the permission of the South African Exchange Control authorities. When the first appellant dealt with the shares in 2002 he had not obtained any resolution either from the directors or the shareholders and had also not obtained the approval of the South African Exchange Control authorities.

[32] It is well to bear in mind the following remarks of Corbett JA in the

oft-quoted case of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*:[14]

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact … where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers …'.

In this case no attempt was made by the first appellant to 'avail himself of his right to apply' in terms of Rule 6(5)(g) for cross examination of the respondent or to seek to adduce oral evidence to deal with the disputes of fact which had arisen on the papers.

[33] One of the essential disputes was of course whether or not the first appellant could lawfully deal with the MITRAJAYA shares. This issue was succinctly and correctly dealt with by the learned judge *a quo* in these terms:

'The first respondent's version in a nutshell is that he engaged in a 'joint venture' with NRBH to unlock the latter's investment in these shares. He was given a mandate to deal with these shares in Malaysia with a view to realising the investment therein and also making a substantial profit which he would share. He holds out that he had the consent of the directors. The first respondent is at pains to proclaim in his various affidavits that he is an international

[14] 1984 (3) SA 623 (A) 634H-635C.

businessman of high repute and is well-versed in the ways of corporate governance. I am compelled to think that the first respondent knew that NRBH could not simply dispose of the Mitrajaya shares. He certainly knew that both shareholders' and Reserve Bank approval was required for this. He indeed made this clear during the L & H negotiations. When the first respondent dealt with the shares after July 2002 he knew that no such shareholders or Reserve Bank approval had been obtained. That shareholders' approval is a basic requirement admits of no doubt. …'

[34] Section 228 of the Companies Act requires, in essence, the approval of a resolution of a general meeting of the company to dispose of the whole or substantially the whole of the undertaking of the company. It is common cause, as I have already stated, that no such resolution was passed by the shareholders of NRBH to dispose of what at that stage were substantially the whole of NRBH's undertaking, and no resolution was placed before the board of directors of NRBH for their approval. As regards the resolution of 18 April 2002 to which I have repeatedly previously referred, Levinsohn J stated:

'It is in my opinion idle to contend that the April 2002 resolution referred to above can somehow be construed as directors' consent to the first respondent dealing with the Mitrajaya shares. The applicant states that when he and Egan signed the July letter authorising stock brokers to sell the shares in a 'married deal', he, Egan, knew that this was a simulated transaction … No disclosure whatsoever was made to the company through its board of directors to the effect that there was this scheme devised by the first respondent to take the shares into the name of a company under his control in Malaysia, wipe out his indebtedness to that company - which presumably means that there would be a set-off; the company would

pay for the shares by means of this set-off. Furthermore the first respondent would in his personal capacity borrow RM19 million from Southern Bank and he in turn would cause his company to pledge the shares to that bank …'.

After a careful analysis of the first appellant's affidavits the court *a quo* concluded that the respondent had proved on a balance of probabilities that the first appellant had perpetrated a theft of the MITRAJAYA shares. The learned judge *a quo* stated:

'It is simply not possible to accept that what the first respondent did was lawful *vis – a – vis* NRBH. In my view the cumulative effect of all the aforegoing leads to the most probable inference that the first respondent knew that he had taken these shares unlawfully out of the control of NRBH and had dealt with them for his own account. This is reinforced by his untruthful assertions made in the answering affidavits deposed to in the winding-up proceedings. In my view the first respondent is a very experienced financier and businessman who could not have honestly believed that the company had consented or agreed to his actions. This despite his reliance on Egan's conduct which he claims signifies consent by the company. All the background facts which I have set forth above commencing with the requirement of Reserve Bank approval and culminating with obtaining a s 228 resolution demonstrated that these surreptitious actions by the first respondent are to be branded as a blatant misappropriation of NRBH's assets. There can be no doubt, even assuming (which is very doubtful) some of the directors of NRBH were aware of, and consented to the first respondent's machinations with the shares, and that the company itself did not and could not consent to this conduct. See S *v Kritzinger* 1971 (2) SA 57 AD. …'

I can find no fault with this analysis and agree fully with the conclusion.

[35] The misappropriation of the MITRAJAYA shares gave rise to a delictual claim for damages. In *Kleynhans v Van der Westhuizen NO*[15] it was held that a liquidated claim in terms of s 9(1) of the Insolvency Act means a claim where the amount is fixed either by agreement or by an order of court or otherwise. What the legislature intended was that there should be certainty in connection with the amount of the claim which was not affected by the legal basis and nature thereof. In the instant case the shares in question are marketable securities which at the relevant date traded freely on the Kuala Lumpur Stock Exchange. Their market value was accordingly readily available on any given day and it could easily be determined at any given time. There is evidence on the papers regarding the price of the shares on the Kuala Lumpur exchange on 25 July 2002 and daily valuations of the MITRAJAYA shares from 1 January 2002 to 30 July 2002 are set forth. The first appellant in his replying affidavit acknowledged and accepted the correctness of the information. According to this the shares as at 25 July 2002 traded on the Kuala Lumpur stock exchange at a closing price of RM1.11. The shares were accordingly worth RM24 864 000. As a consequence of the misappropriation of the 22 400 000 shares the first appellant was indebted to NRBH in an amount of RM24 864 000. At a conversion rate of RM1 to R1.7 this equates to R42 268 000, an amount well in excess of the R50 set out in s 9(1) of the Insolvency Act. This being so it is unnecessary to go into the question of whether the respondent established the

[15] 1970 (2) SA 742 (A) at 749E and 750A-B.

other debts relied upon.

[36] The respondent relies on the two acts of insolvency set out in subsections 8(a) and 8(d) of the Insolvency Act. In addition to the aforegoing the allegation was made by the respondent that the first appellant was in fact insolvent given that his liabilities exceeded the value of his assets.

[37] Both subsections 8(a) and 8(d), in setting out acts of insolvency, refer to an intent on the part of the debtor. In the case of section 8(a) the intent is one to evade or delay the payment of debts, while in section 8(d) the intent on the part of the debtor is to prejudice his creditors or to prefer one creditor above another. The test of intention on the part of the debtor is a subjective one (cf *De Villiers NO v Maursen Properties (Pty) Ltd*[16]). Intention is established by a process of inferential reasoning and is not dependent upon the mere *ipse dixit* of the debtor who may well deny that he has any such intention. A court, in considering whether there was such an intention is required to weigh up all the relevant facts and circumstances in order to determine what, on the probabilities, was the 'dominant, operative or effectual intention in substance and in truth' of the debtor.[17]

[16] 1983 (4) SA 670 (T) at 676A.
[17] *Cooper NNO v Merchant Trade Finance Limited 2000 (3) SA 1009* (SCA) para [10], Tomlin LJ in *Peat v Gresham Trust Limited* [1934] AC 252 at 262 and *Gore NO v Shell South Africa (Pty) Ltd* [2003] 4 All SA 370 (C) 376.

[38] Section 8(a) provides that a debtor commits an act of insolvency –

'if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;'

In support of the inference that the first appellant had the requisite intent in terms of s 8(a) the respondent relies upon the cumulative effect of what is described as seven factors. These are:

(a) The first respondent initially returned to Malaysia and had previously stated that he was 'bringing back his skills, expertise and capital'.

(b) He had adopted a systematic approach of denuding NRBH of its assets and had in fact appropriated the MITRAJAYA shares as his own and all the cash in the company for his own benefit.

(c) He had refused to pay the undisputed debt owed by NRBH to New Republic Bank.

(d) In his affidavit opposing the winding-up of NRBH he had stated that NRBH was the owner of the MITRAJAYA shares when in truth and in fact the ownership of these shares had been transferred to KHIDMAS, of which he was a director owning 99 per cent of the issued share capital. KHIDMAS had in turn disposed of some of these shares in the open market and the remainder were pledged to the Southern Bank.

(e) The first appellant acted unlawfully when he disposed of the MITRAJAYA shares because these shares could not be disposed of without the permission of

the South African Reserve Bank, which had not been sought.

(f) In the first two weeks of December 2003 the first appellant removed certain documentation belonging to the company in provisional winding-up without the consent of the respondent in breach of s 142(1) of the Insolvency Act read with s 425 of the Companies Act.

(g) The first appellant also removed R35 million which he indirectly received from the settlement of an arbitration involving Mawenzi Resources. It was alleged that he ought to have paid the group's liabilities, more particularly the undisputed indebtedness of R32,6 million due by NRBH to New Republic Bank Limited.

[39] To these seven factors I would add the following. The MITRAJAYA shares, as I have said, constituted the greater part of the assets of NRBH within the meaning of s 228 of the Companies Act. I have already pointed out that no resolution was passed which authorised the disposal of the shares; none of the directors of NRBH authorised the specific sale of these shares to KHIDMAS; the first appellant was fully aware of the fact that he had no right to dispose of the shares and moreover that he required the authority of the South African Reserve Bank to do so; and he was aware also of the various prices at which the MITRAJAYA shares were sold between 28 October 2002 and 28 October 2003, the total amount thereof converted to South African rands being R15 357 827.65. It is thus apparent from all appellant's conduct referred to

above that it was the first appellant's intention to conceal evidence of his dishonest dealings with the assets of NRBH.

[40] The first appellant states that as he had invested such a large amount in South Africa it is inappropriate and false to suggest that he intended to evade the payment of his debts. He contends that the existence of substantial assets which he has in South Africa belies the allegation that he intended to leave the Republic of South Africa to avoid paying his debts. However, in the light of the cumulative effect of all of the above facts, and despite the first appellant's denial, I believe that it may well have been his dominant intention, when he first left South Africa for Malaysia in 2002 and returned to South African in early December 2003, departing again on 9 December 2003 after only a few days in South Africa and after taking documents of NRBH, without the respondent's knowledge or consent, to 'evade or delay the payment of his debts' within the meaning of s 8(a). It is not necessary to make a finding in this respect, however, given my conclusion that the first appellant committed the act of insolvency set forth in s 8(d).

[41] Section 8(d) provides that a debtor commits an act of insolvency –

'if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another.'

The respondent states that he only became aware of the commission of this act

of insolvency after he had launched these proceedings. It is clear from cases such as *Schlemmer v Mehnert*[18] and *Joosub v Soomar*[19] that an applicant for sequestration is entitled to rely on the commission of an act of insolvency albeit that he only became aware of it after the commencement of the sequestration proceedings. The respondent says that after the grant of the provisional sequestration order he discovered that the first appellant was in the process of seeking to transfer US$100 000 from his personal Nedbank account in South Africa to Malaysia. The respondent alleges that this was the first appellant's only remaining easily transferable asset in South Africa. The first appellant applied to his bankers on 5 December 2003 to transfer the money. However, the intervening provisional order of sequestration prevented the carrying out of this instruction.

[42] The first appellant admits that he gave the instruction in question. He says the following in his reconsideration application:

'As I have explained at some length above the applicant had commenced litigation in Malaysia and I was required to deal with such litigation by instructing solicitors in Malaysia. This obviously put a strain on my finances and it became necessary for me to collate funds which I had in South Africa for the purpose of meeting my expenses in Malaysia. In transferring the sum of US$100 000 I was simply collating available funds to meet my expenses which I envisaged incurring in Malaysia. The funds were not taken out of the

[18] 1908 25 SC 782.
[19] 1930 TPD 773 at 779.

country for the purposes of evading payment of any debt. Indeed when one considers the overall investment I made within South Africa US$100 000 is but a small portion of that investment …'.

However, in a letter dated 5 December 2003 written by the first appellant to his bankers he stated:-

'4.A. The main reason for the repatriation [of the US$100,000-00] is for the partial repayment of advances from my investment remittance from and during the period February, June and July 1996 from Kuala Lumpur, Malaysia.

….

B. The total remittances are as follows:-

	DATE	AMOUNTS (US$)
(i)	4 February, 1996	2,700,000-00
(ii)	17 June, 1996	2,400,960-38
(iii)	12 July, 1996	1,250,000-00
	TOTAL US$	6,350,960-38'

He made no mention of 'meeting his expenses' in Malaysia to deal with litigation in Malaysia. According to the first appellant's bank statement as at 1 April 2004 there was a credit balance of R998 844,87, the transfer of US$ 100 000 having not taken place.

[43] I agree with the court *a quo* that the first appellant's conduct in

attempting to remove these funds must be seen against the full factual background set out above. It is important in this regard to note that the first appellant must have known that he had incurred a very substantial debt to NRBH. At the end of November 2003 he was confronted by the liquidator of NRBH, and Malaysian proceedings were instituted. The first appellant admits that he needed funds to pursue his defence to the Malaysian claims which were essentially and fundamentally based on the misappropriation of the MITRAJAYA shares. I regard these attempts as futile and designed to delay the enforcement of payment by the respondent in South Africa of the large amount owed by him.

[44] In dealing with s 8(d), after stating that the test of intention is subjective Mars[20] states that:

'It is difficult, however, to see how, without in effect making a disposition, a debtor can remove his property with the intention to prefer a creditor, but a removal with intent to prejudice creditors can easily be imagined and may be illustrated by the case, by no means rare in practice, of a debtor sending money or goods to a foreign country so as not to be available for settlement of his creditors' claims.'

[45] Meskin[21] in dealing with s 8(d) states:

'It is submitted that the word 'removes' and the word 'remove' have their ordinary meanings and affect the meaning to be assigned, in this context, to the word 'property'. By the use of

[20] *The Law of Insolvency in South Africa* (8 ed) p 72 para 4.5.
[21] *Meskin Insolvency Law and Its Operation in Winding-up* para 2.1.2.4 pp 2-12/13.

the latter word it is submitted, the intention is to refer only to corporeal movables, ie, property capable of being moved physically from one place to another. The intention is to hit a debtor's physical moving or attempted moving of any of his corporeal movables from one place to another (whether or not such moving constitutes also a disposition (as defined in section 2 of the Insolvency Act) which occurs with the requisite intent. To speak of a 'removable' in the context of immovable property or of an incorporeal right is, it is submitted, giving language its ordinary meaning, notionally unsound.'

The learned author refers for these propositions to *S v Levitt*[22] and the reported judgment of the court *a quo*[23] and to the definition of 'property' in section 2 of the Insolvency Act. This definition defines property as meaning 'movable or immovable property wherever situate within the Republic, …'. It is not necessary to decide in this case whether the learned author is correct in restricting the meaning of the word 'property' in section 8(d) to corporeal property. This is so since the transfer of a balance owing to a debtor by his bank to another bank would be tantamount to a transfer of actual money, a corporeal, represented by the credit, as was the situation in the present matter. In the context of theft of money represented by a credit our courts have accepted that a misappropriation thereof can constitute or amount to theft because such misappropriation is the equivalent of the appropriation of the actual corporeal money.[24]

[22] 1976 (3) SA 476 (A).
[23] Supra [2005] JOL 13692 (N) 66-67.
[24] See the discussion of the theft of money and individual objects set out in *Lawsa* 2 ed Vol 6 paras 299 to301 and the authorities there referred to and in particular the full discussion by Professor M M Loubser in his doctoral thesis, *The Theft of Money in South African Law* (1978).

[46] In my view, proper regard being had not only to all the facts set out above concerning s 8(d) specifically, but also to all of the other facts referred to above, including those relating to the misappropriation of the MITRAJAYA shares and those specifically mentioned in regard to s 8(a) the inescapable inference is that the first appellant's attempt to transfer US$100 000 from South Africa to Malaysia, without the knowledge and consent of the respondent, was made with the intent to prejudice his South African creditors, in particular NRBH or at least to prefer one creditor above another.

[47] In summary therefore I am satisfied that the respondent:

(a) Established a claim as referred to in s 9(1), and

(b) the first appellant committed an act of insolvency in terms of s 8(d), moreover, there is reason to believe that it will be to the advantage of creditors if the first appellant is finally sequestrated.

[48] It is not necessary in the light of the aforegoing to consider whether the respondent established general insolvency in terms of s 9(1) of the Insolvency Act, a matter in dispute on the papers.

[49] The court *a quo* in all the circumstances correctly exercised the wide discretion vested in it in terms of s 12(1) of the Insolvency Act, to grant a final

order.[25]

[50] The second appellant contends, first, that no basis was set out in the founding papers to justify the failure of the respondent to give notice to her of the application for the provisional sequestration order. Secondly, she argues that the allegations concerning the acts of insolvency relied upon by the respondent in terms of section 8(a) and 8(d) of the Insolvency Act have not been established by the respondent. She too contends that there was no proper disclosure of the Malaysian proceedings, and that the court *a quo* incorrectly exercised the discretion that it had to stay the determination of the application for a final sequestration order: thus the provisional order should not have been confirmed.

[51] While initially denying that she was married to the first appellant in community of property she now concedes, and it is common cause, that that it the case. Thus the provisions of the recent amendment of the Insolvency Act regarding the furnishing of notice of an application for a sequestration order which I have set out above concerning notice to the first appellant apply equally to the second appellant. Given all the background facts it is not inconceivable that if the second respondent had been apprised of the application, she might in concert with the first respondent have taken necessary measures to move assets

[25] *De Waard v Andrew and Thienhaus Limited* 1907 TS 727 at 736,737 and *Metje & Ziegler Ltd v Carstens* 1959 (4) SA 434 (SWA) 435A.

under her control overseas. I am satisfied, as was the court *a quo*, that Gyanda J, in his discretion, correctly did not insist on service of the application on the second appellant as such notice would have defeated the rights of creditors which were sought to be enforced in the application. There was no evidence before Gyanda J that the first and second appellants were estranged and not living together as husband and wife. This additional information was before Levinsohn J on the return day. The history of the rule relating to privilege in respect of marital communications is conveniently set out in *S v Johardien*[26] where it is pointed out that by our common law spouses were incompetent to give evidence against or for each other in any civil or criminal case. The rationale for the rule is said to be based on public policy which recognises the intimacy of the relationship between husband and wife. Against this background it would have been absurd for Gyanda J to dispense with notice to the first appellant and yet insist that that notice be given to his wife. The unreported decision in *S Jerrier v P Jerrier*[27] referred to by appellants' counsel is plainly distinguishable on its own peculiar facts.

[52] I have dealt with all of the other matters specifically raised by the second appellant's counsel in argument when considering the position of the first appellant. Such considerations apply equally to the arguments advanced on behalf of the second appellant by counsel for the first appellant who now,

[26] 1990 (1) SA 1026 (C) at 1028F.
[27] Case No A 31220/03 in the Natal Provincial Division.

(although not in the court *a quo*) represent both appellants.

[53] In all of the circumstances the appeal is dismissed with costs, such costs to include costs occasioned by the employment of two counsel by the respondent.

R H ZULMAN
JUDGE OF APPEAL

CONCUR:) MPATI DP
) FARLAM JA
) MAYA AJA

C H LEWIS

[54] I have had the benefit of reading the judgment of my learned colleague Zulman and agree with the conclusion to which he has come. However, I take a different approach to the meaning of 'property' in s 8(d) of the Insolvency Act 24 of 1936. My colleague Zulman does not find it necessary to determine whether the term refers also to incorporeal property. In my view, it does, and the authors of *Meskin Insolvency Law and its operation in winding up*[28] are quite wrong in suggesting that the word 'removes' in s 8(d) indicates that the

[28] Looseleaf, updated 2005.

property removed by the debtor is corporeal alone. I accept that the word 'removes' does in general relate to the moving of a physical, tangible object. But the word must be read in the context of the section, having regard to its purpose.

[55] In *S v Levitt*[29] Wessels JA stated that 'removes' in s 132(d) of the Insolvency Act meant 'conveying or shifting an asset to another place. . . . It appears to be notionally impossible to remove an incorporeal asset, except possibly in the sense of removing the written instrument evidencing the rights constituting the asset in the estate.' Wessels JA did qualify this statement, however, saying that the word 'removes' should be interpreted in the context of the section. Section 132 deals with the offences committed by an insolvent in destroying or concealing books or assets. The section is clearly confined to the concealment or destruction of books of record or corporeal assets.

[56] The words 'property' and 'removes' in s 8(d) must similarly be interpreted by having regard to the section and its purpose. The subsection provides that a debtor commits an act of insolvency 'if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another'. It seems to me that what the section aims to

[29] 1976 (3) SA 48 (A) at 48G-H. The authors of *Meskin* rely on this decision in concluding that 'property' in s 8(d) means corporeal property. Their reliance is misconceived since they do not distinguish between the purposes of s 8 and s 132.

prevent is an act by which the debtor puts beyond the reach of his or her creditors *any* asset in his or her estate, depriving them of the benefit of the proceeds. It is highly unlikely that the legislature would have intended that corporeal property be treated differently from incorporeal property in this respect. Why, for example, distinguish between shares in a company, which are incorporeal, and jewellery or motor cars which are corporeal? It is trite that the word 'property' in general refers to both corporeals and incorporeals.[30] There can be no reason to restrict its meaning in this provision.

[57] Further, the subsection must be read with the other provisions of s 8. Subsection 8(c), for example, provides that a debtor commits an act of insolvency if he makes, or attempts to make, 'any disposition of his property' which has the effect of prejudicing or preferring any creditor. 'Property' in this subsection undoubtedly refers to incorporeals. Thus if a debtor donates shares to his or her children with the intention of prejudicing creditors the act will surely be treated in the same way as if he or she donates furniture or any other asset to his or her children.

[58] The definition of 'remove' in the Concise Oxford English Dictionary,[31] while giving as one meaning 'take off or away from the position occupied',

[30] See P J Badenhorst, Juanita M Pienaar and Hanri Mostert *Silberberg and Schoeman's The Law of Property* 5 ed p1ff and C G van der Merwe 'Things' in *The Law of South Africa* vol 27 First re-issue paras 195 and 204.
[31] 10 ed 2002.

which clearly connotes moving of a corporeal, attributes another meaning too: ‘abolish or get rid of’. This certainly covers the act of the first appellant in attempting to remit funds to Malaysia.

[59] For these reasons I consider that the word ‘removal’ in s 8(d) refers also to the transmission of funds abroad, and that the first appellant’s attempt to remit money to Malasia, done with the intent to prejudice creditors, was an act of insolvency. I thus concur with my colleague Zulman in finding that the court below correctly held that the requirements of s 9 of the Insolvency Act have been met, and that the appeal should be dismissed with costs including those occasioned by the use of two counsel.

C H Lewis
Judge of Appeal