Counsel for the applicant informed the Court that, if successful, he would not ask for costs inasmuch as the proceedings should have been instituted in the magistrate's court. He asked that if the Court should be unable to decide the disputed question of fact on affidavit the parties should be ordered to trial. I am unable to decide the disputed issue of whether the rental was payable in advance or not on the affidavits but, in the circumstances of this case, I do not think that the parties should be ordered to trial before this Court. Should the applicant wish to have this and other issues decided by *viva voce* evidence it seems, on applicant's counsel's own admission, that the magistrate's court is the proper forum for this purpose.

The application is accordingly dismissed with costs. The costs of the two postponements on the 18th February and 4th March, when it was necessary to put respondent on terms as regards the filing and service of his affidavits, are disallowed.

Applicant's Attorneys: *Routledge & Douglas Wilson*; Respondent's Attorney: *S. Miller*.

AMOD v. KHAN.

(NATAL PROVINCIAL DIVISION.)

1947. *April* 10, 22. HATHORN, J.P., and DE WET, J.

Insolvency.—Compulsory sequestration.—Final order refused.—Appeal from.—Nature of.—Opposition to final order by debtor.—What creditor must prove.- Discretion in Court.—"Advantage to creditors".—Whether nulla bona *return factor in deciding advantage to creditors.—Oppressive act by creditor.—Act 24 of* 1936 *sections* 12 (1), 150.

An appeal brought under section 150 of Act 24 of 1936 is a full appeal, i.e. it is a retrial of the case, and the appellate tribunal is in exactly the same position as the Court below was, and the discretion which was imposed in the Judge sitting in the Court below, is now imposed on the appellate tribunal.

Where a debtor opposes a final order of sequestration, and there is evidence on both sides, the case has to be decided on the balance of probabilities:

and unless the applicant can satisfy the Court on the three points mentioned in section 12 (1) of Act 24 of 1936, the Court is bound to dismiss the application. Even where the Court is so satisfied, it still has a discretion to grant or refuse a final order.

The object of the Legislature in amending the Insolvency Law in regard to proof necessary "of advantage to creditors" discussed.

Semble: A *nulla bona* return provides adequate grounds for an inference that a sequestration will be to the advantage of creditors.

Where the facts were more than sufficient to prevent the Court from drawing such an inference in that the debtor had certain claims which could acquire a commercial value, and the application showed that the object by the creditor of obtaining a sequestration order was not to obtain the payment of his debt but for the purpose of preventing the debtor from obtaining payment of his claims against the creditor's son, the Court on appeal upheld the decision of a Lower Court, which had exercised its discretion in dismissing an application for compulsory sequestration.

Amod v. *Khan* (1947 (1), S.A.L.R. 150), affirmed on appeal.

Appeal from a decision of SELKE, J.

The facts appear from the reasons for judgment.

A. Milne, K.C. (with him *A. V. Hoskings*), for the appellant:

This is an appeal as of right under sec. 150 of Act 24 of 1936. The petition was dismissed (*a*) because appellant's conduct was designedly oppressive and (*b*) because the Court was not satisfied that there was reason to believe that sequestration was to the advantage of creditors. As to "reason to believe" see *Paruk* v. *Bacus* (1938, N.P.D. 242, at p. 243); *Patel* v. *Sonday* (1936, C.P.D. at p. 471).

On appeal the Court has the same discretion as the Court *a quo*. See *Malcomess* v. *Town Council Durban and Others* (1917, N.P.D. 275 at p. 285); *Cash Wholesalers Ltd.* v. *Natal Pharmaceutical Society (II)* (1937, N.P.D. 268 at pp. 272, 275); *Jacklin* v. *Maritz* (1946, N.P.D. 291 at p. 296); *Rex* v. *Zackey* (1945, A.D. 505, at p. 509).

The Judge should have been satisfied that there was reason to believe that it would be to the advantage of creditors if respondent's estate were sequestrated. See *Hill & Co. and Others* v. *Ganie* (1925, C.P.D. 242, at p. 245); *Patel* v. *Sonday* (*supra*); *de Beer* v. *Isaacson* (1929, A.D. 345); *Wilkins* v. *Pieterse* (1937, C.P.D. 165, at p. 169); *Ringer* v. *Beckett & Co. Ltd.* (1927, T.P.D. 714, at p. 720); *Gool* v. *Rahim* (1938, C.P.D. 397); *Bullen* v. *Friedman* (1933, C.P.D. 483); *Essock* v. *Dhooma* (1932, N.P.D. 310); *Kathrada Bros.* v. *Amin* (1932, N.P.D. 485).

A *nulla bona* return is presumptive evidence of such a character that the Court will sequestrate unless strong evidence is brought to destroy it. *de Waard* v. *Andrew and Thienhuis Ltd.* (1907, T.S. 727, at p. 733); *Port Shepstone Fresh Meat Co.* v. *Schultz* (1940, N.P.D. 163).

As to advantage of creditors see *Paruk* v. *Bacus* (*supra*, at p. 246); *Estate Omanjee* v. *Nath* (19, P.-H. C 42).

Oppressive conduct is not a ground for refusing an order. See *King* v. *Henderson* (1898, A.C. 720); *Estate Logie* v. *Priest* (1926, A.D. 312); *Kathrada Bros.* v. *Amin* (*supra*, at pp. 484, 495); *Fitzroy* v. *Cave* (74 L.J. K.B. 835). The Judge *a quo* misconceived the legal position under sequestration; the purpose is to take the control of his affairs out of the hands of the debtor for the benefit of creditors.

As to costs these should have been awarded against respondent. See *Michaelson* v. *Lowenstein* (1906, T.S. 12).

No appearance for respondent.

Cur. adv. vult..

Postea (April 22nd).

HATHORN, J.P.: This is an appeal from an order made by Mr. Justice SELKE dismissing the appellant's petition for the compulsory sequestration of the respondent's estate, and setting aside the provisional order for sequestration. The debt owing by the respondent is £73 13s. 9d., representing the taxed costs of an action in the magistrate's court, Durban, instituted by the respondent against the appellant, and the taxed costs of the same case on appeal to this Court. The appellant issued a writ of execution in respect of each set of costs, and in both cases there was a *nulla bona* return. It is clear, therefore, that the respondent committed an act of insolvency in terms of sec. 8 (*b*) of Act 24 of 1936. The appellant obtained the provisional order on the 14th January, 1947, and the order appealed against was granted on the 5th February, 1947.

The appeal is brought under sec. 150 of the Act. There can be no doubt that it is a full appeal, that is, a retrial of the case, and that this Court is in exactly the same position as was the Court below, and that the discretion, to which I will make reference in a moment, which was imposed in the learned Judge, is now imposed in this Court.

Sec. 11 of the Act provides:

"If the Court sequestrates the estate of a debtor provisionally, it shall simultaneously grant a rule *nisi* calling upon the debtor upon a day mentioned in the rule to appear and to show cause why his estate should not be sequestrated finally";

and sec. 12 is 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 sub-sec. (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.

(2) If at such hearing the Court is not so satisfied, it shall dismiss the petition for the sequestration of the estate of the debtor and set aside the order of provisional sequestration or require further proof of the matters set forth in the petition and postpone the hearing for any reasonable period but not *sine die*."

I do not think there can be any doubt in a case such as this, where the debtor opposes the final order and there is evidence on both sides before the Court, that the case has to be decided on the balance of probabilities, and unless the Court is satisfied upon the three points mentioned in sec. 12 (1), it is bound to dismiss the petition and to set aside the provisional order in any case in which further proof and postponement are not matters for consideration. This means, in my judgment, that the *onus* of satisfying the Court upon the three points is upon the petitioner, and Mr. *Milne*, for the appellant, accepted that position.

It is equally clear, in my opinion, that even if the Court is satisfied upon the three points, it still has a discretion to grant or refuse the final order. I say that because the section enacts that if the Court is satisfied "it may sequestrate the estate of the debtor", and in my judgment "may" in that phrase does not mean "must". The word "may" is frequently used by the legislature when it gives the power of decision to the Court, and it is natural that ordinarily the legislature should not intend to bind the Court to a particular course when it decides a case. If it does so intend, it uses appropriate words as it has done in sub-sec. (2) in the phrase "it shall dismiss". I understood Mr. *Milne* to concede the correctness of this proposition.

The facts, as stated by the learned Judge, are as follows:

"The respondent in his opposing affidavit sets out that he was employed by the appellant as a shop assistant in applicant's tea room at Rossburgh from

February, 1943, to 25th January, 1945, and that when that employment ceased, the applicant owed him £271 10s. 0d. in respect of wages, in settlement of which he received a postdated cheque for £100 and ten promissory notes for £10 each; that he sued the applicant upon this claim, limiting it to £200; that the magistrate granted abolution from the instance with costs; that he appealed the decision to this Court, and that the appeal was dismissed with costs, and that the costs of these proceedings gave rise to the indebtedness which is the basis of the present application. He says further that the cheque and the promissory notes were actually executed by one Cassim Ismail, who is the applicant's son, and who acted for the applicant in the running of the tea room business. He says also, that in December, 1945, he sued the said Cassim Ismail for £190 and interest, basing his action upon the cheque and nine of the promissory notes executed by Cassim Ismail, the remaining promissory note not then having become due, and that he obtained judgment against the said Cassim Ismail with costs, in the magistrate's court; that Cassim Ismail appealed the decision to this Court, and that the appeal was dismissed with costs; that the taxed costs in the magistrate's court were £53 19s. 3d., but that the costs of the appeal have not yet been taxed, and that Cassim Ismail has, so far, paid nothing of the costs. The judgment in the appeal was given on the 10th of October, 1946, and on the same day, this Court granted Cassim Ismail leave to appeal to the Appellate Division, but up to now, the respondent says, no copy of the record has been filed, so that Cassim Ismail's right to proceed lapsed in the ordinary way on the 9th or 10th of January, 1947. It is alleged on respondent's behalf that during the time that Cassim Ismail had a right to appeal under this Court's leave of the 10th of October, the respondent's right to enforce his judgment was suspended, with the result that until January the 10th respondent's right to enforce the judgment was in abeyance. On January the 14th, the present applicant obtained the order provisionally sequestrating the respondent's estate, and the affidavit upon which the application was based, bears to be dated 24th December, 1946. As usual, that application was *ex parte*, and the applicant's affidavit does not disclose or refer to the fact—now admitted by the applicant—that the respondent is a creditor of the applicant's son, by judgment and otherwise, for an amount which, according to the respondent, very considerably exceeds respondent's indebtedness to the applicant, and includes a judgment against Cassim Ismail for £190."

It is perhaps as well to add to these facts the statement made in the affidavit of the respondent regarding his assets and liabilities. It is as follows:

"I deny that I am insolvent, in that I have the following claims owing to me by petitioner's son:

(*a*) Judgment for £190 0s. 0d.

(*b*) Interest thereon at 6 per cent. per annum '*a tempore mora*' limited to £25 0s. 0d.

(*c*) Dishonoured promissory note £10 0s. 0d.

(*d*) £53 19s. 3d. costs on case No. 7238/1945.

(*e*) Costs of appeal to Natal Provincial Division not yet taxed but which

I estimate will be approximately £40 0s. 0d.,
which claims have not yet been satisfied in part or in whole.
The only other debts I owe amount to approximately £15 0s. 0d. and these are in respect of small household accounts."

Upon these facts the learned Judge came to the conclusion that the appellant's conduct was designedly oppressive, and he intended to take an unfair advantage of the respondent, and on that account alone he would be justified, in the exercise of his discretion, in refusing a final order. But he went on to say that he was precluded from granting it because he was not satisfied that there was reason to believe that it would be to the advantage of the creditors if the estate were sequestrated.

I am so heartily in agreement with the conclusions of the learned Judge, and the reasons upon which they are based that, if it were not my duty to express my opinion in my own words, I would adopt, as my own, both the conclusions and the reasons.

We heard a very elaborate argument from Mr. *Milne* in support of the appeal, but it has not convinced me, notwithstanding the fact that, the respondent being in default, no argument was presented on the other side.

Mr. *Milne* contended strenuously that where the petitioning creditor has issued a writ of execution, and there is a *nulla bona* return, that fact creates a presumption that it is to the advantage of the creditors that the debtor's estate should be sequestrated, and he relied on a long series of cases to support his contention. It is only necessary to refer to a few of them. *Hill & Co.* v. *Ganie* (1925, C.P.D. 242), is fairly typical. This is what WATERMEYER, J., said upon the subject:—

". . . *prima facie* if there is a substantial estate to sequestrate and if the creditors cannot get their debts paid in the ordinary way it is to the advantage of creditors that the debtor's estate should be sequestrated. In most cases therefore the mere proof of an act of insolvency or of the fact that the debtor's estate is insolvent together with proof that the debtor has assets, would be enough to discharge the *onus*. If there are special circumstances which make sequestration disadvantageous to the creditors then the *onus* would lie upon those who set up this contention to establish it."

That case was decided under the Insolvency Act, 1916, which required, by sec. 10, that the Court should be satisfied that sequestration would be to the advantage of the creditors before making an order of sequestration. The present Act has altered the position in favour of the petitioning creditor because the Court has only to be satisfied that there is a reason to believe that it will

be to the advantage of the creditors. I notice that in *Paruk* v. *Bacus*, (1938, N.P.D. 242), FEETHAM, J.P., pointed out the difference between sec. 6, which refers to a debtor's petition and requires the Court to be satisfied that sequestration will be to the advantage of the creditors, and sec. 12, and said that it was rather difficult to know exactly what the difference in language involved. I suggest that the explanation is this. A debtor knows all about his own affairs and can easily prove the advantage of the creditors. On the other hand, the creditor has normally little knowledge of the exact position of the debtor; he probably does not know what creditors he has, nor the amounts he owes, nor the assets he possesses. Consequently, it is difficult for him to provide satisfactory proof that the sequestration of the debtor's estate will be to the advantage of the creditors. Yet that is what the Insolvency Act, 1916, demanded. The various Courts in South Africa, recognising the creditor's difficulty—and here I speak in a very general way—were inclined to accept, as proof, very little evidence that sequestration would be to the advantage of the creditors. The legislature knowing this, and knowing also that the advantage of the creditors is, and always has been, a consideration of great importance in relation to the question whether a debtor's estate should be sequestrated, altered the position in 1936, and made it much easier than it had been for the creditor to make a case in relation to the benefit of the creditors.

All this has some importance here because it means that cases decided before the present Act are not necessarily safe guides now. Indeed there is some indication of a difference of judicial opinion upon the question whether, under the present Act, a *nulla bona* return provides adequate ground for an inference that sequestration will be for the benefit of the creditors. In *Wilkins* v. *Pieterse* (1937, C.P.D. 165), DAVIS, J., held that it does "in the absence of anything sufficient to the contrary"; so did SUTTON, J., in *Gool* v. *Rahim* (1938, C.P.D. 397), in which he followed *Wilkins* v. *Pieterse*. On the other hand, SCHREINER, J., in *Leadenhall Meat Market* v. *Hartman* (1938, W.L.D. 99), expressed the view that an act of insolvency based upon a *nulla bona* return does not fall within the category of those acts of insolvency which provide any reinforcement for the contention that sequestration would be for the benefit of the creditors. There is no need for this Court to express an opinion either way, because here there is more than sufficient to prevent the Court from drawing the inference.

When the *nulla bona* returns were made, the respondent's assets had no commercial value whatever, for, except for the promissory note, they consisted of the judgment for £190 and the two judgments for costs, which were under appeal. The promissory note was virtually in like case because its efficacy also depended upon the decision of the Court of Appeal. I cannot imagine that anyone would buy or lend money upon such assets. But when the appeal lapsed the position changed, and the assets immediately acquired a commercial value, the respondent was free to realise them or borrow money on them. No doubt the actual value depended upon the financial position of the appellant's son, but the face value was over £300. This position continued for only about four days. It ceased when the appellant obtained the provisional order for sequestration and thereby prevented the respondent from recovering his claims from the respondent's son. The appellant's proper course was to re-issue the writs and attach the claims. He would have been better off if he had done so because then there would have been less delay and less expense in realising the assets of the respondent by means of a sale in execution than by means of a sequestration. This shows that the sequestration was not for the benefit of the creditors, and consequently the Court has no reason to believe the contrary, and is debarred from granting the final order. But, in any case, even if the appellant had satisfied the Court upon the three points mentioned in sec. 12 (1), this is clearly a case in which the Court should decline to exercise its discretion in favour of the appellant. I ask myself the question: "Why did the appellant obtain an order of provisional sequestration instead of re-issuing the writs?" Notwithstanding Mr. *Milne's* contentions to the contrary, the answer, in my judgment, is that he was determined to sequestrate the respondent's estate, not for the purpose of obtaining payment of his debt, but for the purpose of preventing the respondent from obtaining payment of his claims against the appellant's son. Thus the appellant deliberately abused the process of the Court, for I have no doubt whatever that he must have known all about the position between his son and the respondent, and he must have been aware that the provisional order of sequestration would prevent the respondent from recovering his claims from his son, and that a final order would put him, as the largest creditor, in a dominating position in the sequestration, and that he would be in a good position to obtain the appointment of a friendly trustee, and that

he might be able to arrange in the end that the son would not have to pay the debts he owed to the respondent's estate. The appeal is dismissed.

DE WET, J., concurred.

Appellant's Attorneys: *Messrs. Cowley & Cowley*, Durban.

VAN DER MERWE v. SUID-AFRIKAANSE NASIONALE TRUST EN ASSURANSIE MAATSKAPPY, BPK., AND ANOTHER.

(CAPE PROVINCIAL DIVISION.)

1947. *April* 14, 24. STEYN, J., and HERBSTEIN, A.J.

Negligence.—Damages.—Claim against insurers of cars involved in collision.—Necessary allegation.—Act 29 of 1942.

In an action for damages against the defendants jointly and severally arising from personal injuries sustained by the plaintiff's daughter in a collision between two cars, plaintiff averred that the defendants were the respective insurers of the cars involved in the collision; that his daughter had been a passenger of the motor car of which the first defendant was the insurer; that this motor car had come into collision with a motor car of which the second defendant was the insurer; that as a result of the collision his daughter had sustained serious injuries for which £2,000 was claimed, and that the collision had been caused by the negligence of the respective drivers of the cars or by their joint negligence. The first defendant filed a plea, but the second defendant excepted to the declaration on the ground that it was vague and embarrassing, bad in law and disclosed no cause of action for the reasons (*a*) that it disclosed no legal ground on which the second defendant could in law be held liable in any damage suffered by the plaintiff's daughter; (*b*) that, in any event, even if the second defendant's liability was deemed to be by virtue of Act 29 of 1942, there was no averment that the policy or agreement of insurance was in writing as required by the Act, or that the second defendant was a registered company under the Act; (*c*) that, in any event, it was not alleged that the second defendant was the insurer of the motor car at the time of the alleged collision.

Held, ex facie, that the averments contained in the declaration did not disclose