of the witness during his examination-in-chief, there can be no doubt that the magistrate was entitled to hold that he was incapable of giving evidence, owing to intoxication, while under cross-examination. It was, however, further argued in this Court that the magistrate did not arrive at his decision as to Ransala's mental state of "imbecility" in due form of law. Now the decision of all questions as to "the competency of any witness to give evidence" is by sec. 261 of the Act entrusted to the Court, i.e., in the present case, to the magistrate. I quite agree, however, that that decision must as a rule be arrived at in the ordinary manner in which other questions of fact are decided, for instance, by allowing each party to question the witness whose mental state is being enquired into, by allowing each party to bring evidence bearing on the question of the witness's mental state, if he tenders to do so, and by hearing any argument which either party desires to address to the Court, etc. (see Taylor on *Evidence*, sec. 23). The difficulty which I feel, however, is that there is nothing to show that the magistrate did not give all due opportunity to the prosecution and to the defence to do all those things. According to the record the case was adjourned on the 25th February, as the witness was under the influence of liquor, and on the 26th the entry is made that the witness was "obviously under the influence of liquor during the latter stages of the evidence yesterday." I am bound to take it therefore that when the Court adjourned on the 25th it was patent to the attorney for the accused as well as to everyone else in the Court that the witness was drunk, and that the attorney for the accused neither desired nor tendered to produce any evidence or arguments as to the witness's condition or to ask the witness any questions as to his condition. It is not stated on the record that the magistrate formally offered the parties the opportunity of being heard on the question of Ransala's sobriety. Perhaps the matter was so patent that it was not thought necessary to make a formal offer. Perhaps the doctrine *omnia praesumuntur rite esse acta* should here be applied. At any rate in the absence of any mention to the contrary either by way of affidavit or in the appellant's statement of his grounds of appeal, I take it that the parties had due opportunity to be heard on the 25th February with regard to the mental state of the witness Ransala, and that the magistrate's decision as to the incompetency of the witness can therefore not be challenged on the ground of irregularity. This ground of appeal therefore fails. I will add, on this

part of the case, that, even if there were some irregularity, the matter would clearly be covered by sec. 100 of the Magistrate's Courts Act, for it certainly seems beyond doubt that, if there was any irregularity, no failure of justice has in fact resulted therefrom, and no prejudice has been caused to the accused thereby. (The rest of the judgment is not material for the purpose of this report.)

McGREGOR, J., concurred:

Appellant's Attorneys: *Goodrick & Franklin.*

EX PARTE GELDENHUYS.

(Civil Record No. 236 of 1926.)

1926. *April* 15 and *May* 20. DE VILLIERS, J.P.

Servitude.—What rights are registrable.—Personal and real rights.

If an obligation is a burden upon land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person, the corresponding right is a personal right, and it cannot, as a rule, be registered.

A mutual will provided that "as soon as our first child reaches his or her majority the survivor of the testators shall be bound to divide the said land in equal portions and distribute it among the children, such distribution to be made by the survivor and such major child by drawing lots, and we declare and direct that the child who by such lot obtains the portion comprising the homestead of the farm 'Jakhalskop,' shall pay the sum of £200 to our other children" within a specified time.

Held, on application, that the direction in regard to the time of the partition and as to the drawing of lots were real burdens on each undivided share and not merely an obligation on the person of each child, as the time and mode of partition so directly affected and adhered to the ownership of the undivided shares that they must almost necessarily be regarded as forming a real burden or encumbrance on that ownership, and that these directions were registrable against the title of the undivided shares.

Held, further, that the direction in regard to the payment of £200, though a *jus in personam* and not *per se* registrable was so intimately connected with the registrable directions that the entire clause of the will should be registered against the title deeds.

Application for an order instructing the Registrar of Deeds to register the transfer of certain undivided shares bequeathed under a mutual will to the testators' children subject to the following conditions contained in the will:—

"As soon as our first child reaches his or her majority, the survivor of the testators shall be bound to subdivide the said land in equal portions and distribute it among the children, such distributions to be made by the survivor and such major child by drawing lots . . . and we declare and direct that the child who by such lot obtains the portion comprising the homestead of the farm Jakhalskop shall pay the sum of £200 to our other children" within a specified time.

Applicant, the survivor, applied for an order (*a*) instructing the Registrar of Deeds to register transfer of certain farms in favour of the children of the late Gesina Elizabeth Geldenhuys (the testatrix) and applicant, her surviving spouse, subject to the conditions of the will; (*b*) allowing the applicant, in his capacity as executor testamentary of the estate of the testatrix, to have the farms surveyed into equal portions, and asking the Court to appoint some responsible person to act in the place of the eldest child of the testatrix and of the applicant, and to divide the farms by way of lots, and also to allow the applicant, in his capacity as father and natural guardian, to pass a bond on the portion accruing to such minor child who may obtain the homestead of the farm with the usual conditions of preference to the extent of £100: (*c*) costs of the application to be paid by the minor children.

The report of the Registrar of Deeds reads as follows:—

1. I have read the above petition, annexure and prayer.

2. Gesina Elizabeth Maria Geldenhuys (born Cronje), married in community of property to petitioner, died on the 18th December, 1923, leaving five minor children surviving her.

3. In terms of the joint will of the spouses dated the 13th August, 1923:

(a) The survivor, together with the child or children born in wedlock, were appointed sole and universal heirs.

(b) To the testator (petitioner) was bequeathed the farm Davidsvallei, No. 178 District Vrede, Erf No. 558, and further, everything belonging to and found in the joint estate on the death of the executrix.

(c) On their children devolve the farms Eendrach No. 588, Mooileegte No. 645, Driehoek No. 840, Erfstuk No. 839, Kleinplaats No. 950, Jackhalskop No. 381, and Harmonie No. 663, District Vrede, in equal shares, subject to the life usufruct in favour of the petitioner of half share, and further, to the stipulation referred to on pages 2 and 3 of the said will.

4. With regard to the stipulation that on the attainment of majority of the eldest child the survivor shall be obliged to subdivide the farms in the manner stated, I see no reason why the death of this child should not be anticipated, or why, in view of the wording of the will and the fact that the vesting in the children has actually taken place, effect should not immediately be given thereto.

5. I must oppose prayer (a) in the strongest terms, as I do not see my way clear to allow the stipulation contained in the will to be embodied in the transfer. In the first place, it creates mere personal rights (*jura in personam*), not real rights to the land, and hence, in view of *Hollins* v. *Registrar of Deeds* (1904, T.S. 603) and other cases on the point, is not registerable against title. It differs from a right of pre-emption by reason of the fact that any one of the joint owners can transfer his share without reference to the others. It is the necessity of getting the consent of the other parties that makes a pre-emptive right a real one. The pre-emptive right is in essence a restraint on alienation, but there is no restraint on alienation in respect of the condition under discussion, and that seems to me to make all the difference.

In the second place, from a different point of view, but arising out of the personal nature of the condition, it may be pointed out that the inclusion of the condition in the transfer tends to mislead the transferees as well as third parties into the belief that their rights to the defined portions are secured. But, as a matter of fact, they are only secured so long as all the transferees agree to respect one another's rights, and so long as they all remain owners of the undivided shares. As soon as one of them disposes of his share, the condition becomes inoperative, as the person acquiring it is not bound by its terms, nor does he acquire the rights of the legatee thereunder. The rights, being personal, do not go with the land, and thus lapse on transfer. Yet the condition would still remain in the transfers of the other legatees, and on the face of the deeds these legatees would regard themselves, and be

39. OPD. 97.

regarded by others, as the possessors of rights guaranteed by registered transfer, but in fact non-existent.

Sec. 7 of Act 13 of 1918 does not directly apply to this case, but its provisions indicate the necessity for clearly distinguishing between undivided shares on the one hand, defined portions on the other, and not allowing any sort of intermediate position.

**Ex parte Mulder*, dealt with by WATERMEYER, J. on 6th August, 1924, has no real bearing on this case, and the report which I have seen is liable to misconstruction. It is the practice in the various Deeds Registries, when bequests of what seem to be defined portions are made in a will, but the legatees desire to take transfer of the whole property in undivided shares, to permit this to be done, in exceptional cases, provided that the legatees disclaim any right to defined portions, that they are majors and competent, and that no question of transfer duty is involved.

The Registrar of Deeds, Cape Town, whom I consulted on the *Mulder* case, reported as follows:—

"In the *Mulder* case the legatees were minors, and hence the Court's authority was necessary to allow transfer in undivided shares. There was never any question of transfer being given of the undivided shares subject to the conditions *re* ultimate division, and I should strenuously oppose any such proposal. Transfer has been passed in pursuance of the order of undivided shares pure and simple, subject to other conditions of the will, but not to the condition *re* ultimate division. Hence the case is no authority for passing of transfer subject to a condition of the kind proposed."

* The judgment of WATERMEYER, J. in *Ex parte Mulder* delivered in the Cape Provincial Division on the 8th August, 1924 reads as follows:—I think that under the circumstances of this case the applicant is entitled to his order. The position is that by this will of the late Mr. Mulder and his wife certain property was left to the children jointly, subject to a condition that when it was divided that portion which one son had to receive had to include the homestead and certain land around it. At the present time the testator is dead and the children are minors. There are some very real difficulties in the way of effecting an equitable division of this property among the four minors owing to the fact that the land is included in the Kamanassie Irrigation district and there is a question outstanding of what the rates on different classes of land are going to be. That had not been decided by the Board and the values of the land will very largely be influenced by what the rates are to be; so it is difficult to make an equitable division of the property. The Master is anxious that the estate should be wound up, and the applicant now applies for leave to transfer this land to the four minors in undivided shares, subject to the condition of the will. The Registrar of Deeds does not really oppose the matter, but he says it is contrary to the practice in the Deeds Office to transfer property in undivided shares when definite shares have been left to the heirs. In the present case it can hardly be said that a defined share has been left to each heir. All that the will stipulates is that when the property is divided one son's portion has to include the homestead and the land around it. In any event, there is no legal impediment here which cannot be overcome, and, although it may be contrary to the procedure of the Deeds Office, it seems to me that the only way to close off the estate, which is fair and equitable to the minors, is to allow transfer in undivided shares subject to the terms of the will. No injustice can be done if such an order is granted.

The order as prayed will be granted and costs to be paid out of the estate.

6. I have no reason to alter my views as set out in para. 8† of the petition, which I consider equitable under the circumstances, and I would support prayer (b) subject to the provisions of sec. 53 of the Administration of Estates Act, 1913.

The Master reported as follows:—

The petition, together with the report by the Registrar of Deeds, has been passed to me for my report.

The applicant seems to be between the upper and the nether millstones of the Master's Office and that of the Registrar. The former has called upon him to complete the liquidation of the estate by transferring the immovables to the legatees, and so divesting the estate of its ownership therein, and thereby placing it out of his power as executor to deal with the property in any other manner. From the Registrar's report I gather that he declines to register a transfer to the heirs jointly in undivided shares, but subject to the terms of the will governing the eventual subdivision, on the grounds that, those conditions being *personal* to the legatees, cannot be embodied in the deed of transfer. It would seem, also, from his report that he is prepared to register transfer to the legatees in equal undivided shares, provided the said conditions are excluded from the deed. In other words, the legatees may obtain transfer if they are agreeable to a brushing aside of the express directions of the testators, and will agree to forego the protection of their rights which registration *coram lege loci* is supposed to provide. If the legatees were majors, they could decide for themselves, but they are minors, and to safeguard

†Para. 8 of the petition reads as follows:—

"That your petitioner is approaching the Registrar of Deeds . . . . to ascertain from him whether he will consent to the registration of the deed or deeds transfer of the farms afore-mentioned subject to the condition of the will in regard to a subsequent partition and the said Registrar of Deeds states that he will not allow a transfer such as this to be passed, and that the only method in which transfer can be passed is that a division of the farms should now take place between the various children. The said Registrar of Deeds suggested to your petitioner that the coming of age of the eldest child of the late Gesina Elizabeth Maria Geldenhuys, born Cronje, and your petitioner can be anticipated, and that some responsible and reliable person be appointed by your lordships to now act in the place of the eldest child, and enter into a division with your petitioner by way of lots, dividing the said farms equally between them, but your petitioner is not in favour of the suggestion of the Registrar of Deeds."

their interests I have called for transfer in terms of the will. That it is the duty of an executor to divest the estate of its assets and to place them in possession of the heirs has been decided over and over again by the Courts, and, I submit, I am fully justified in my demand in this case.

Application was made for authority for endorsement of the titles in terms of sec. 58, but this I refused, as the provisions of the section do not apply. The persons on whom the property devolves are not uncertain. On the contrary, the property has been specifically bequeathed, and now vests in a class of legatees subject to the conditions set out in the will.

Sec. 4 of the Deeds Registry Act, 1918, permits of transfer in one deed from one person (the executor) to more than one person (the legatees) in equal undivided shares. Regulation 19 of the Deeds Office Regulations directs that, when transfer in terms of a will is sought, a certified copy of the will shall be lodged with the deeds. Sec. 7 of the Deeds Act would preclude any possibility of a separate title being taken of any undivided share by any legatee, or any other person, after registration of the property jointly in the name of the legatees if the conditions of the will are embodied in the title.

Regulation 19 clearly seems to contemplate the incorporation of the terms of the will, else there would be no sense in it. The point at issue, therefore, is: Can any lawful condition which attaches to the acquisition of immovable property be withheld from a title deed on the grounds that such condition is *personal* to the purchaser, legatee, seller, or any other person? I cannot find anything in the case *Hollins* v. *Registrar of Deeds* cited by the Registrar, or in the common law, to support the contention that it may. It is unquestionable that a personal right may not be transferred in a title deed *ad hoc*, nor may such a right be registered against a title deed already of record. But, as far as I know, there is nothing to prevent a condition created on a change of ownership of immovables being embodied in the titles effecting such a change of ownership. For instance, a usufruct of immovables is a purely personal right. It may not be transferred in a separate title, nor may it be registered against a title already registered, but it may be embodied in the transfer to the *dominus* when the latter receives title. The usufructuary is then protected, and any person dealing with the dominion is warned. Again, A has given B an option for, say, twenty years to purchase a property

registered in A's name. That right cannot be transferred in a title, nor may it be registered against A's title, but, on the other hand, if A sells his property to B reserving to himself a pre-emptive right for 20 years, that condition may be embodied in the title to B, and must, so long as A holds the right, be embodied in any transfer to a third party. The condition embodied in the transfer deed governs all further dealings with the property, though the right held by A is purely personal. In the matter under report, the conditions of the will apply to the property, and, if embodied in the title, will govern the property until the eventual subdivision takes place.

Any intending purchaser will be put on his guard, and will know that he cannot get transfer until the subdivision has been effected.

Just as on the lapse of the usufruct, or of the pre-emptive right, the conditions attached to the property concerned fall away and further transfers are free from the restrictions, so in this case will those conditions of the will which are furfilled on subdivision fall away and be excluded from the subdivisional transfers.

As the applicant desires to respect the wishes of the deceased spouse, I do not think he should be forced to effect subdivision now, and, as the Registrar's other alternative of giving transfer in undivided shares, with elimination of the conditions of the will, will probably deprive several minors of protection in respect of the £200 to be paid by the legatee who receives the "Opstal," I feel constrained to enter a protest. It is not desired that immovable property devolving on persons under disability should be left in the air. So long as such property remains registered in the name of the deceased, his executor has control.

On exhibition of a clear title of his authority as executor, it is possible for him to dispose of the property and misappropriate the proceeds. The legatee, presumably, would have no recourse against a purchaser in good faith.

P. U. Fischer, K.C., for the applicant.

Cur. adv. vult.

Postea (May 20th).

DE VILLIERS, J.P.: Interesting questions are raised by the reports of the Registrar of Deeds and of the Master. By the mutual will of Adriaan Geldenhuys and his wife, certain land is

bequeathed to the children of the marriage in equal shares subject to the usufruct of the surviving testator or testatrix.

[The condition of the bequest, as stated above, was here set out.]

The testatrix died in 1923, and the applicant, who is the surviving testator and the executor of the deceased's testatrix's estate, now asks the Court for an order instructing the Registrar of Deeds to register the said lands in undivided shares in the names of the children of the marriage subject to the conditions of the mutual will aforementioned. The Master reports favourably to the petitioner's prayer, but the Registrar of Deeds opposes the prayer. Now it is common cause that the bequeathed land has vested in the children in undivided shares, and that therefore transfer should and could be passed to the children in undivided shares. The Registrar of Deeds has no objection to a mere transfer to the children in undivided shares; his objection is to the proposal to embody in the transfer the conditions as to the subdivision, viz., as to the drawing of lots and as to the payment of £200 by the child who obtains the homestead on Jakhalskop. The grounds of his objection are, firstly, that the conditions referred to create merely "*personal rights*," and, secondly, that the conditions, even if registered, would only be binding on the legatees, and not on any transferees to whom the legatees might transfer their undefined shares before partition.

Now it seems to me to be first of all necessary to consider what is a "*personal right*." In the case of *Hollins* v. *Registrar of Deeds* (1904, T.S. 603), it is pointed out by INNES, C.J., that only real rights can be registered against the title deed of land, *i.e.*, such rights as constitute a burden upon the servient land, and are a deduction from the *dominium*. That statement seems to me to be still correct to-day, for the Deeds Registries Act of 1918 seems to make no appreciable change in regard to the nature of rights registrable. The argument in the present case, however, proceeds largely upon the proposition that the usufructs are not registrable unless created by means of a reservation of usufruct upon a transfer of the land, and that therefore the rights in the present case are not registrable either. On principle, however, I do not see why a usufruct should not be registrable though possibly it may be excluded from registration by an inveterate practice amounting to a law. A usufruct is a "*personal servitude*," it is true, but it is a burden upon the land none the less, and it "may be enforced against any and every possessor of the

56 (2) SA. 112.
57 (4) SA. 82.
59 (4) SA. 202.

land" (see Maasdorp's *Institutes of Cape Law*, book 2, ch. 16, para. 5). Some servitudes are "*personal*" because they are constituted in favour of a particular individual without reference to his being the owner of any particular land, and other servitudes are "*praedial*" because they are constituted in favour of a particular piece of land; but *all* servitudes are real rights and burdens upon the land which is subject to them. That being so, I cannot understand on what principle it can be said that a usufruct cannot be registered against the title save in the exceptional case above-mentioned. One of the methods of constituting a usufruct is by agreement accompanied by *quasi-traditio* (Voet 7.1.7.). If an owner of land, by agreement with another, grants to that other a usufruct over such land, the usufruct, it is said, cannot be registered. The result is that, if the owner of land subject to an unregistered servitude transfers the land to a *bona fide* purchaser without notice, either the usufructuary can enforce his rights against the purchaser, although not registered against the title, which would be a hardship on the purchaser, or, in the alternative, the usufructuary is deprived of his usufruct by the transfer, which is a hardship on himself, for he was unable, though willing, to register his usufruct against the title. It seems to me, therefore, that on principle any validly constituted usufruct would be entitled to be registered against the land, just as much as any other real right in land is. Indeed, in the case of *van Vuren* v. *Registrar of Deeds* (1907, T.S. 289), INNES, C.J., expresses the view (at page 295) that "personal servitudal rights which are assignable, ought also to be registered against the title of the land which is burdened"; and the rights which were declared registrable in *van Vuren's* case were clearly "personal rights" in the sense that they were constituted in favour of particular individuals without regard to their being the owners of any particular land. The Deeds Registries Act of 1918 also seems to provide for the registration of all usufructs constituted in any legal way whatsoever. Sec. 3 (1) enacts that the Registrar of Deeds shall register usufructs, whether created by deed of grant or transfer, or any notarial deed of usufruct. It seems to me, therefore, that there is no principle to prevent the registration of usufructs, however created, although there may, of course, be, as I have said before, some practice or some decision founded on practice, of which I am not aware. The point, however, which I am attempting to elucidate is that, when it is said that "personal

rights" cannot be registered against the title to land, the reference is not to rights created in favour of a "person," for such rights may be real rights against the land. The reference is to rights which are merely binding on the present owner of the land, and which thus do not bind the land, and do not constitute *jura in re aliena* over the land, and do not bind the successors in title of the present owner. These are the "personal rights" which are not registrable, according to the above cited case of *Hollins* v. *Registrar of Deeds* (1904, T.S. 603) and the case of *Kotze* v. *Civil Commissioner of Namaqualand* (17 C.S.C. 37). One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real and registrable; if it is not such an obligation, but merely an obligation binding on some person or other, the corresponding right is a personal right, or right *in personam*, and it cannot as a rule be registered.

Applying that distinction in the present case, it seems that each of the legatees, while being an owner of an undivided share of the land, is subject to certain conditions or obligations. The one condition (with which I shall deal first) is that the subdivision of the land into defined portions shall take place at a specified time (*i.e.*, as soon as the eldest surviving child reaches his or her majority), and in a certain manner (*i.e.*, by means of a drawing of lots, which is to be performed by the surviving testator and such major child). Now is this a condition or obligation which forms a real burden (*jus in re*) upon the undivided share of each child? By the common law, each owner of an undivided share has the right to claim a partition at any time, and can claim that such partition shall be effected either by agreement or by the Court. The will, therefore, modifies the common law right, or *dominium*, which an owner of an undivided share possesses. That this can validly be done by a will (and presumably also by agreement *inter vivos*) seems to me to be clear on principle, for the rights of an owner of an undivided share are not sacrosanct or unalterable any more than the rights of an owner of a defined share are. Portions of the *dominium* of an owner of an undivided share can be parted with as undoubtedly as portions of the *dominium* of an owner of a defined share can be parted with. There is, in fact, the express authority of *Grotius*, if authority were needed, that an owner of an undivided share can by will be deprived for a specified time of his right to claim a partition

(*Grotius* 3.28.6, Maasdorp's *Institutes of Cape Law*, bk. 2, ch. 14).

The rights of a joint owner in regard to partition can therefore be validly limited by last will at any rate, and the limitations now under discussion (*i.e.*, as to the time of partition and as to the drawing of lots) are therefore valid. These limitations moreover, in my opinion form a real burden, *jus in re*, on each undivided share, and not merely an obligation on the person of each child. I base that opinion on the consideration that those limitations as to the time and mode of partition so directly affect and adhere to the ownership of the undivided shares, that they must almost necessarily be regarded as forming a real burden or encumbrance on that ownership. I am therefore of opinion that this direction of the will as to the time and the mode of partition is registrable against the title deeds of the undivided shares, and in this conclusion I am supported by the similar case of *Ex parte Mulder* (4 *Prentice-Hall* G. 3). In that case the Court ordered that land should be transferred to certain legatees in undivided shares subject to the condition (imposed by the will) that upon partition a certain one of those legatees should receive the homestead and certain land round it.

There is however another difficulty in the present case, viz., that the will imposes a further condition, which must now be dealt with. The will directs that upon partition in the manner above described the child who gets the homestead on Jakhalskop must pay £200 to the remaining children within five years after reaching majority. Is this a *jus in personam* or a *jus in re* forming a burden on the undivided shares? I am of opinion that it is a *jus in personam* for the obligation to pay money cannot easily be held to form a *jus in re*, unless it takes the form of a duly constituted hypothec; moreover the obligation is altogether uncertain and conditional, for it is impossible to foretell what the drawing of lots will decide. This direction of the will therefore does not constitute a real right and is not *per se* registrable. And yet it is intimately connected with a direction which is registrable, as already decided. If the direction as to the time of the partition and the drawing of lots were registered, without the direction as to the payment of the £200, the result would be an incorrect representation, and an imperfect picture of the testamentary direction, which would be most misleading to strangers who may purchase undivided shares from the children before the partition takes place. It seems to me therefore that in the special circumstances of the case the

difficulty can only be solved by registering the entire clause of the will. The Registrar of Deeds in his able report suggests that the difficulty may be overcome in another way, *i.e.*, by allowing the partition and drawing of lots to take place at once thus anticipating the time prescribed by the will, but that does not seem to be possible, for it is not yet possible to determine which of the children will first reach majority and take part in the drawing of the lots, as the now eldest child may die before majority.

An order is therefore granted in terms of prayers (*a*) and (*c*). I wish to add that I do not intend to lay down any general rule, or to lay down that in a future case resembling the present case the Registrar of Deeds should necessarily allow registration without an order of Court, for I realise that as said by INNES, C.J., in *Hollins* v. *Registrar of Deeds*, " the Court should be very careful in dealing with the Registry of Deeds." I say nothing about sec. 7 of Act 13 of 1918 for in this case the undivided shares are not " calculated to represent defined portions." The fact that an undefined portion is subject to some direction as to time and mode of partition does not necessarily transform it into a defined portion.

Applicant's Attorneys: *Marais & de Villiers.*

36. AD. 501.
43. N.P. 350.

THE MASTER v. SOMERS-VINE.

(*Civil Record* 168 *of* 1926.)

1926. *May* 15 and 25. DE VILLIERS J.P. AND BLAINE, J.

Appeal.—Superior court.—Application for leave to appeal.—Act 1 *of* 1911 *section* 3 (*b*).

Leave to appeal to the Appellate Division under section 3 (*b*) of Act 1 of 1911 was granted on the following grounds: (1) That an arguable case might be presented on appeal. (2) That any question dealing with the position of administrative officials as to costs must be of some importance. (3) that it was to be presumed that the Master desired a ruling to guide the practice in his office. (4) That there was no hardship on respondent nor withholding nor postponing of any benefit which he would have obtained if no appeal were permitted. (5) That the administration of the insolvent estate, of which the respondent was trustee, would in no wise be impeded by the prosecution of the appeal.

Application for leave to appeal under sec. 3 (*b*) of Act 1 of 1911 against an order made by the Court ordering the respondent to file a liquidation account within a month, " no order as to costs."

E. M. de Beer, for applicant, cited *Oudaille* v. *Lewis and Others* (1914, A.D. 174) and *Mashamba* v. *Chief Pass Officer* (1917, A.D. 549).

P. U. Fischer, K.C., for the respondent: The Court will not grant leave to appeal unless the case is clearly arguable. Decisions as to costs will only be reversed when the successful litigant is required to pay the costs of the other side. See *Fripp* v. *Gobbon* (1913, A.D. 354) and Beck on *Practice of the Appellate Division* dealing with sec. 105 of the South Africa Act. The same principle is applicable under sec. 3 (*b*) of Act 1 of 1911.

This is not a civil suit or action. See sec. 16 of Ordinance 13 of 1904. A civil suit or action implies a contest between two parties, one claiming a right. See *Gillingham* v. *Transvaalsche Koel-Kamers* (1908, T.S. 964); *Collier* v. *Ridler* (1923, A.D. 640) and *The Master* v. *van Aardt* (*Prentice-Hall*, vol. VI, F. 49.)

de Beer, replied.

Cur. adv. vult.

Postea (May 25th).

DE VILLIERS, J.P.: This is an application for leave to appeal under sec. 3 (*b*) of Act 1 of 1911 against an order made by the Provincial Division ordering the respondent herein to file a liquidation account within a month, " no order as to costs." Both parties agree that the applicant requires the leave of the Court under sec. 3 (*b*), on the ground that this is a " judgment as to costs only " against which the applicant is appealing. I shall therefore not go into the question which is said to be concluded by a decision of the Appellate Division. On the merits of the application I feel considerable doubt whether this is a case in which leave to appeal should be granted. We were not referred by counsel to any authorities dealing with the principles on which a Court of first instance should proceed in deciding whether to grant or to refuse leave to appeal under sec. 3 (*b*); there are however several reported cases decided in courts of first instance under that section. In the case of *Vassen* v. *Cape Town Council* (1918, C.P.D. 135), an application for leave to appeal under the section was refused on the ground that there must be some special circumstance shown to exist