IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No: 645/97

In the matter between:

THE DAVID TRUST	First Appellant
THE MEYEROWITZ TRUST	Second Appellant
THE EVA TRUST	Third Appellant
THE MYRO CHARITABLE TRUST	Fourth Appellant
THE BORCHERDS QUARRY PROPERTY HOLDINGS TRUST	Fifth Appellant
THE BOQUINAR PROPERTY HOLDINGS TRUST	Sixth Appellant
THE TAXPAYER PARTNERSHIP	Seventh Appellant
THE 2BQ HOLDINGS TRUST	Eighth Appellant

and

AEGIS INSURANCE COMPANY LIMITED	First Respondent
THE GENERAL REPRESENTATIVES OF LLOYDS OF LONDON IN SOUTH AFRICA	Second Respondent

CORAM : HEFER, SMALBERGER, NIENABER, MARAIS JJA, MTHIYANE AJA
HEARD : 3 MARCH 2000

DELIVERED : 31 MARCH 2000

JUDGMENT

Insurance - professional indemnity policy - accountants accepting mandate to administer and invest funds of clients in a money market - theft by partner - firm sequestrated - liability of the insurers to clients in terms of s 156 of the Insolvency Act - *mora* interest - unliquidated claims - Act 55 of 1975

NIENABER JA/

NIENABER JA :

[1] Section 156 of the Insolvency Act 24 of 1936 provides as follows:

> "Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's liability towards a third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured."

This section was invoked by the appellants in an action instituted by them as plaintiffs in the Witwatersrand Local Division of the High Court of South Africa against the defendants, now the respondents. The "third parties" for the purpose of the section were the plaintiffs; the "insured" was a partnership of chartered accountants, Katz Salber & Company (henceforth referred to simply as "Katz Salber"); and the "insurers" were the two defendants. The plaintiffs' claims were for the indemnification of losses alleged to have been suffered by them when

one of Katz Salber's partners, one Lombard, embezzled funds, including those entrusted to and administered by Katz Salber on behalf of the plaintiffs.

[2] In order to bring themselves within the four corners of the section the plaintiffs had to satisfy four requirements identified by the court *a quo* and accepted as correct by the parties, viz:

1. that Katz Salber had incurred a liability to the plaintiffs;

2. the quantum of that liability;

3. that the defendants were obliged in terms of the policy to indemnify Katz Salber in respect of that liability; and

4. the amount which the defendants would have been obliged to pay Katz Salber.

[3] The court *a quo* held that the plaintiffs succeeded in establishing the first but not the third of these requirements and that the plaintiffs' claims accordingly had to be dismissed with costs. This is an appeal, with leave of the court below, against

that order.

[4] The plaintiffs are seven trusts and one partnership, all of them represented both in their dealings with Katz Salber and in these proceedings by Mr D Meyerowitz. All were clients of Katz Salber of long standing. The association between Meyerowitz and Katz Salber dates back to 1961 when he entrusted the business affairs of a company, The Taxpayer (Pty) Limited, to Katz Salber. Katz Salber, according to Meyerowitz, was

> "mandated to run that company completely in every respect as my accountant, except for the fact that we would be producing the magazine and liaising with the printer."

Katz Salber, for an agreed fee, sent out invoices to subscribers, collected and banked the income in a bank account in the name of the client, paid all accounts, made all the necessary disbursements, prepared draft financial statements, completed and submitted income tax returns and paid them - in short, Katz Salber to all intents and purposes administered the funds of the company. The company

was eventually succeeded by the partnership which now figures as the seventh appellant. From time to time during the succeeding years other trusts, not all of them trading entities, but in all of which Meyerowitz happened to have some or other interest, joined the Katz Salber stable on the same footing. The overall arrangement, according to the evidence, remained the same in all cases. Surplus funds were retained in separate banking accounts held in the name of the various plaintiffs and at the determination of their trustees.

[5] At some stage, probably during 1988, Katz Salber began placing surplus monies of all their clients, not only those in which Meyerowitz had an interest, in a "money market" operation. This involved the pooling of the funds of different clients into a single account, held in Katz Salber's name, at a bank which, during the later stages of the operation, happened to be Investec Bank. A second account, at Trust Bank, was used as a convenient vehicle for paying out monies, when required, to clients of Katz Salber, including the plaintiffs. This was an

arrangement not only more convenient to Katz Salber but it also enabled it to negotiate more favourable rates of interest for its clients by means of a "wholesale investment" of all the funds at its disposal. Katz Salber's remuneration no longer consisted of an agreed fee, as before, but of a commission of 6% on the interest thus earned in the money market. All of this happened with the knowledge and approval of Meyerowitz and his various co-trustees. In all other respects Katz Salber continued to perform the same service for all the plaintiffs as before. It was not part of Katz Salber's function to advise the various plaintiffs on their investments. The funds remained at their disposal and were paid over to them by Katz Salber whenever requested to do so.

[6] Unbeknown to the other partners of Katz Salber, Lombard, over a period of about five years, systematically siphoned off these funds and used the proceeds for his own speculative purposes. During the entire period of embezzlement Lombard nevertheless continued meticulously to prepare fictional separate monthly financial

statements for each individual client, calculating and allocating interest (less the 6% commission) as if these funds remained physically present in the bank - a charade that was not exposed until 1994 when Meyerowitz called for a cheque for R150 000 from the funds of one of the trusts. Only then was it discovered that, far from standing at over five million rand, the account at Investec contained a paltry R9 000. The deceit was not discovered earlier since no-one at Katz Salber had thought it fit to verify the phantom statements by instituting appropriate inquiries at the bank. Katz Salber was unable to make good the shortfall. It was duly sequestrated. So were the estates of each of the three partners. Lombard was convicted of theft and sentenced to a period of imprisonment.

[7] Katz Salber had taken out professional indemnity insurance. The policy which was in force at the relevant time was underwritten to a proportion of 80% by the first and 20% by the second defendant.

[8] The policy provides that the insurers

> "are bound (each for their own proportion as indicated) to indemnify the Insured in terms of the attached Schedule and the Annexures thereto up to the Limits of Indemnity stated in the schedule."

The limit of indemnity was R1 500 000

> "in the aggregate for all claims made during the Period of Insurance (including Underwriters' costs and expenses)"

with a deductible of R5 200 in respect of each claim.

[9] Four clauses, relating to the indemnification as such, are of relevance to the third of the requirements of s 156 of the Insolvency Act, referred to in par [2]. The enquiry is, stated with reference to the terms of the policy, whether Katz Salber would have been liable to each of the plaintiffs in respect of claims falling within the meaning of any of the four clauses; if yes, the defendants, by the same token, would have been liable to Katz Salber and would thus be liable to the plaintiffs. The issue then is whether any of the four clauses relied on by the plaintiffs are wide enough in their terms to cover such claims and the liability, if any,

which Katz Salber, as a result of Lombard's malfeasance, would have incurred to each of the plaintiffs. The court *a quo* resolved that issue in favour of the defendants.

[10] The relevant clauses are the following:

> "SECTION 1
> Against any claims first made on the Insured during the Period of Insurance for any alleged or actual:
> 1.1 negligent act, error or omission;
> 1.2 breach of contract amounting to breach of duty in the practice of the profession by the Insured ...;
> 1.3 ...
> 1.4 ...
> 1.5 ...
> 1.6 failure unintentionally and in good faith to account for monies had and received;
> 1.7 ...
> wherever or whenever committed or alleged to have been committed in the conduct of the Profession by or on behalf of the Insured...
> SECTION 2
> Against any legal liability in connection with any claim first made on the Insured during the Period of Insurance by reason of any dishonest or fraudulent act or omission of any past or present partner, director or employee of the Insured."

The policy contains a comprehensive definition of the "Profession " to which I shall refer in greater detail later in this judgment.

[11] The plaintiffs' case is pleaded as follows:

> "5. 5.1 At all material times the insured in the conduct of their profession and in terms of oral, alternatively tacit, agreements with the Plaintiffs, for reward:
>
> (a) kept the accounts of the trusts and partnership aforesaid;
>
> (b) collected and banked the income received by the said trusts and partnership;
>
> (c) disbursed amounts payable by the said trusts and partnership;
>
> (d) invested surplus funds of the said trusts and partnership.
>
> 5.2 It was an implied, alternatively a tacit, term of the agreements between Plaintiffs and the insured that the insured would carry out the abovementioned obligations honestly and with reasonable diligence, care and skill.
>
> 6. 6.1 One Brian Lombard, a partner of the insured, acting within the scope of his authority as partner, dishonestly, fraudulently and unlawfully misappropriated funds administered and/or invested by the insured for and on behalf of the said trusts and partnership in the conduct of its profession.

6.2 The monies so misappropriated by the said Lombard had been entrusted to, or received by, the insured as part of the work undertaken and services performed by the partners in the course of their profession as accountants.

7. As a result of the aforesaid misappropriations the said trusts and partnership suffered losses in the following amounts:

7.1	The David Trust	R 48 182,31
7.2	The Meyerowitz Trust	R 5 164,59
7.3	The Eva Trust	R101 774,68
7.4	The Myro Charitable Trust	R 17 227,67
7.5	The Borchards Quarry Property Holdings Trust	R 13 009,20
7.6	The Boquinar Property Holdings Trust	R 47 567,87
7.7	The Taxpayer Partnership	R214 180,29
7.8	The 2BQ Holdings Trust	R 33 198,29

8. In the premises, the insured became liable in law to the relevant trustees and partners to make good the losses set out in paragraph 7 above.

9. That the said Lombard was able to misappropriate the said funds and did so misappropriate them, was made possible by the fact that:

9.1 the insured was negligent by failing to institute proper controls and checking procedures in regard to the handling of money; alternatively

9.2 the insured was negligent in controlling and safeguarding

the monies; alternatively

9.3 the insured was in breach of contract with the Plaintiffs amounting to breach of duty in the practice of the profession by failing to account and pay over the monies entrusted to them or received by them in the course of their profession; alternatively

9.4 the insured was in breach of trust in that the partner entrusted to the Plaintiffs' funds as aforesaid, failed to exercise the due care and diligence required in order to safeguard the funds; alternatively

9.5 the insured failed, albeit unintentionally and in good faith, to account for such monies entrusted to it by the Plaintiffs.

10. 10.1 In about October 1994 the aforesaid misappropriations were discovered and the Plaintiffs have claimed repayment of the aforesaid amounts from the insured.

10.2 The insured failed to repay the aforesaid amounts to the Plaintiffs and on 30 November 1994 the insured was finally sequestrated by order of the Supreme Court of South Africa (Cape of Good Hope Provincial Division).

11. 11.1 The insured has complied with all its obligations in terms of the Insurance Agreement.

11.2 By reason of the aforegoing, First and Second Defendants are liable to indemnify the insured in respect of the amounts claimed by the Plaintiffs.

11.3 In the premises, and in terms of the provisions of

> Section 156 of the Insolvency Act No. 24 of 1936, the Plaintiffs are entitled to recover their aforesaid losses directly from the Defendants, up to the amount of the limit of Defendants' indemnity."

[12] The claims are cast primarily in the form of breach of contract, but the contentions of counsel for the defendant notwithstanding, I believe that the language of the pleadings is broad enough to encompass delictual claims as well. In their plea the defendants deny knowledge of the factual allegations made and deny the legal conclusions.

[13] Meyerowitz, Katz and Lombard all testified to the facts pleaded. In the absence of cross-examination or testimony by the defendants to the contrary their evidence was accepted by the trial court.

[14] The question, then, is whether the facts so found served to render Katz Salber liable to the plaintiffs in the respects set out in one or more of the clauses quoted above. The answer, according to the plaintiffs, is in the affirmative in

respect of all four clauses; according to the defendants none of the clauses fits the facts.

[15] I commence with s 2 since it highlights loss due to the dishonesty of a partner. It indemnifies Katz Salber against "any legal liability ... in connection with any claim ... by reason of any dishonest or fraudulent act ... of any ... present partner ...". According to the plaintiffs Katz Salber incurred "legal liability" "by reason of" the "dishonest ... acts" of Lombard, one of its partners. Counsel for the defendants, in response, advanced two arguments of principle why s 2 was said not to assist the plaintiffs.

[16] The first ground is that the "legal liability" for purposes of s 2 must be directly, and not only indirectly, related to the "dishonesty" on the part of the partner concerned; or, to phrase it differently, the dishonesty must be an element in the plaintiffs' cause of action. In the instant case Lombard's dishonesty, in the absence of an allegation of a "duty of care" existing independently of contract, is

not an essential averment in the plaintiffs' cause of action; that cause of action, according to counsel, was Katz Salber's failure to refund the plaintiffs' investments; the cause of action would have remained exactly the same even if Katz Salber's inability to repay was due not to Lombard's defalcations but, say, to a general maladministration on Katz Salber's part, or to the collapse of some of its other investments, or because of suretyships to which it had committed itself, or to some other comparable extraneous factor.

[17] The second ground, not unrelated to the first, is that the loss the plaintiffs suffered was incurred not so much “by reason of” Lombard's dishonesty as it was incurred by reason of Katz Salber's insolvency. If the thefts, for instance, had been discovered earlier, when Katz Salber was still able to meet the plaintiffs' claim for repayment from its own funds, the plaintiffs would not have suffered their losses; even if Katz Salber refused to pay on demand the plaintiffs would have been able to obtain and execute judgments against it. That demonstrates, so it was

contended, that the real cause of the plaintiffs' loss was not Lombard's dishonesty but Katz Salber's insolvency. The point is also made by the trial court, that it would be absurd to conclude that "the cover would activate only when the theft was large enough to cause insolvency". The defendants did not insure Katz Salber against its own insolvency. Hence, so it was reasoned, the plaintiffs cannot visit Katz Salber's insolvency on them.

[18] There may be merit in the argument that s 2 cannot be invoked without identifying the *causa* of the "legal liability" but it is not necessary for my purpose to investigate whether it does so in a delictual sense for in the circumstances of this case s 1.2 of the policy, I believe, adequately caters for the plaintiffs' circumstances. Admittedly the plaintiffs' complaint against Katz Salber is founded on Lombard's dishonesty; s 2 of the policy identifies a partner's dishonesty in express terms and s 1.2 does not. But that does not mean, because dishonesty is mentioned in the one section in a delictual context, that it is necessarily excluded

from the other in a contractual context. I accordingly turn to s 1.2.

[19] It was not disputed that Katz Salber committed a breach of its contractual arrangements with each of the plaintiffs. The debate centred on the nature of Katz Salber's obligations to each plaintiff and hence on the nature of its breach. It is on that issue that I find myself in respectful disagreement with the reasoning and the conclusions reached by the court *a quo.*

[20] The contract is one of mandate. The mandate given by each plaintiff to Katz Salber was to invest and administer funds entrusted to it by the plaintiff concerned and collected by it from the plaintiff's debtors. These funds were to be invested in a bank, in this case Investec and Trust Bank respectively. It is one of the *naturalia* of each such contract, as it is of contracts of mandate in general, that the mandatory is obliged, first, to perform his functions faithfully, honestly, and with care and diligence and, secondly, to account to his principals for his actions (cf De Wet and Van Wyk, *Die Suid-Afrikaanse Kontraktereg en Handelsreg*, 5th ed.

Vol 1 386; 17 LAWSA (first reissue) par 11, and the common law authorities quoted therein).

[21] In paragraph 5.2 of the particulars of claim, quoted in par [11] above, the plaintiffs pleaded that it was an implied alternatively a tacit term of the agreements that Katz Salber would carry out its duties "honestly and with reasonable diligence, care and skill". Counsel for the defendant disputed the existence of such a term on the basis that it lacked business efficacy. The criticism misses the point that the term arises by operation of law (cf *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 531D-H), but even if the matter were to be approached on the footing of a tacit term properly so called its implication is in my opinion so self-evident as to go without saying. Whatever the true basis, the reality of such a term cannot be denied.

[22] Katz Salber committed breaches of its mandate. It did so, in the first place, by its failure to perform its duties honestly (by the misappropriation of money

entrusted to it by the plaintiffs) or diligently (by its failure in either not preventing such misappropriation or at the very least in not discovering it sooner). One does not know from Lombard's evidence whether he intercepted the money before, or withdrew it after, investing it in Investec. Most of it appears to have been advanced by him to his own clients for financing highly speculative ventures, such as a pop concert. That this constituted a breach of Katz Salber's agreement with each of the plaintiffs admits of no doubt. The breach consisted in the dishonest manner in which Lombard dealt with the funds as well as in Katz Salber's lack of diligence and consequent inability to requisition payment from Investec for an accounting and repayment to the plaintiffs. The plaintiffs did not agree to invest their funds in Katz Salber. They invested them in Investec through the good offices of Katz Salber. Consequently it would be an inaccurate oversimplification to characterise Katz Salber's breach simply as the failure to repay on demand deposits made to Katz Salber by the plaintiffs. The breach was not exclusively the failure to refund. If the

bank, for instance, had failed there would also have been a failure to refund but no breach of mandate - for Katz Salber would then have done what it was supposed to do: invest the money in a bank approved by the plaintiffs. The breach here consisted of Katz Salber's deviation from the terms of its mandate, ultimately resulting in its failure to refund to the plaintiffs the investments made through it.

[23] Katz Salber's inability to requisition payment from Investec was a direct consequence of its failure to perform its mandate honestly and diligently. If Lombard had not stolen the money there would have been no shortfall and Katz Salber would have been able to obtain the funds from Investec to repay the plaintiffs; if the thefts had been discovered earlier, before the shortfall reached a point where Katz Salber was no longer able to absorb it, the plaintiffs would also have been repaid. In neither situation, in the absence of a claim from the plaintiffs against Katz Salber, could there have been a claim by Katz Salber against the defendants under the policy. But once the stage was reached where Katz Salber

was faced by claims which, as a result of theft, it was no longer able to meet, it is idle to suggest, as was done, that the plaintiffs' loss was due to Katz Salber's insolvency and not to Lombard's dishonesty. This is the same point counsel sought to make (referred to in par [17] above) apropos of s 2 of the policy. There the loss was attributed to "legal liability" in general, unrelated to any particular cause of action whereas the loss here is directly related to a particularised cause of action, duly pleaded and established. There may well have been a claim by Katz Salber under the policy even if it had not been driven to insolvency. But it is not necessary to express a firm view on the point because the insolvency did result from Lombard's dishonesty. While it is true that both before and after the thefts the plaintiffs had the same claim for an accounting by Katz Salber, it was the thefts (and its non-discovery at an earlier stage) that rendered the plaintiffs' claims against Katz Salber factually irrecoverable.

[24] It is this breach of contract by Katz Salber, founded on the failure of its duty

to administer its mandate honestly and diligently, that brings the matter *prima facie* within the compass of s 1.2 of the policy. As such it would be comparable to some or other loss suffered by a client of an accountant by reason of a vital error made by the accountant in compiling his client's financial statements.

[25] Three reasons (all of them interrelated) were, however, advanced, as I read the judgment of the court *a quo* and understood the submissions on behalf of the defendants, why s 1.2 was said not to assist the plaintiffs in those circumstances. These are:

1) The relationship between Katz Salber and each of the plaintiffs was purely that of debtor and creditor "rather like that between a bank and a customer"; the funds were not held in trust as separate funds in respect of which Katz Salber acted as mere agents; Katz Salber's obligations towards the plaintiffs were merely to pay on demand the equivalent sum, with interest, invested with it; the policy being a professional indemnity and not a fidelity policy, Lombard's defalcations

were wholly irrelevant to the plaintiffs' causes of action; Katz Salber's breach (the failure to effect payment on demand) is accordingly not the kind of breach of contract contemplated by the clause; hence it is not covered by the policy.

2) Katz Salber's breach of contract, having regard to the definition of the "profession" in the policy, did not amount to a "breach of duty in the practice of the profession" and "in the conduct of the profession" as accountants; the clause accordingly did not apply.

3) Because Katz Salber's actions "amounted to banking" in terms of the definition of "the business of a bank" in s 1 of the Banks Act 94 of 1990 ("the acceptance of deposits from the general public ... as a regular feature of the business in question;"), "[p]rima facie the action of Katz Salber contravened s 11 of the Banks Act"; and because it is against public policy to allow anyone to insure himself against his own criminal conduct, so it was reasoned by the court *a quo*, the breach of contract in question was not one contemplated by s 1.2 of the policy.

(Counsel for the defendants put the argument on a different footing: because Katz Salber's "money market activities" were "arguably" a contravention of the Banks Act, such conduct could not qualify as being "in the conduct of the profession" within the meaning of the policy.)

[26] The entire line of reasoning seems to me to be based on a single postulate: that Katz Salber functioned *vis-à-vis* the plaintiffs as a deposit-taking institution. If that postulate is wrong, as I believe it is, the conclusion can likewise not be correct. The postulate is wrong because the plaintiffs did not invest their monies with or in Katz Salber; they entrusted their funds to Katz Salber to invest in certain pre-approved institutions. Katz Salber acted merely as the medium or agency through which the investments were effected elsewhere, admittedly in Katz Salber's own name. Katz Salber had no licence to invest the monies in speculative ventures, as Lombard sought to do. When asking for repayment the plaintiffs were accordingly not asking for a repayment of a deposit made with Katz Salber, but for

an accounting by Katz Salber in terms of its mandate with each of the plaintiffs. This situation differs completely from that described in *Fuhri v Geyser NO and Another* 1979 (1) SA 747 (N), a case much relied on by the court *a quo*, where money was held by an attorney in his trust account.

[27] The contention that this was not what is commonly known as a fidelity policy can likewise not be sustained. What risks the policy covers remain a matter of interpretation and it cannot be labelled in advance of its interpretation. What it covers depends upon the terms. In any event, the word "liability" is actually used in Miscellaneous Provision 2 of the policy. The provision reads:

> "All claims regardless of their number or the identity of the claimants, arising from the same act, error, omission or breach *or arising from or contributed to by the dishonesty or infidelity of any one person,* or any number of persons acting in collusion, shall be regarded as one claim under this Certificate." (My emphasis.)

[28] What the court *a quo* did, to the exclusion of all else, was to tug at a single strand from the entire fabric of the relationship between the plaintiffs and Katz

Salber. One facet of that relationship was Katz Salber's agreement to accept and collect money from the plaintiffs and their debtors for investment not in Katz Salber itself, but in institutions approved by the plaintiffs. Katz Salber's service, however, went far beyond that point: it was not simply to invest their money in the money market. Historically and factually Katz Salber offered them a conspectus of accounting services of which the payment of surplus funds into the money market pending their own decision to withdraw it, was but a single aspect. That service, broadly speaking, consisted of administering the funds of all the plaintiffs, keeping accounts, collecting and banking income, making disbursements, investing surplus funds in the money market with Investec, preparing draft annual financial statements, preparing and submitting income tax returns, paying the Receiver of Revenue, and so forth. Katz Salber did not simply act as the plaintiffs' debtor and their relationship was not simply that of debtor and depositor. Their relationship was one of mandate into which the plaintiffs entered with Katz Salber *qua*

accountants.

[29] Next there is the issue whether Katz Salber's breach of contract amounted to “a breach of duty in the practice of the profession” and “in the conduct of the profession” as accountants within the definition of the “profession” in the policy.

[30] The policy contains a comprehensive definition of the profession of accountants. It commences with the words: “'PROFESSION' shall mean all work undertaken or services performed or advice given by the Insured in the course of their profession as Accountants in connection with ... ” and then follows a wide-ranging catalogue of professional activities. These include accounting, auditing, bookkeeping, taxation, secretarial services, management accounting, administration of trusts, administration of companies, collection of money on behalf of clients, signing of cheques for effecting payments on behalf of clients, accounting and audit requirements of statutes, “and any other service which would normally be undertaken in the course of their professional capacity as accountant”.

[31] According to the court *a quo* this definition, save perhaps for the phrase "collection of money on behalf of clients", cannot be said to "include the taking of deposits against the obligation to pay on demand and the payment of interest". But with respect that is again singling out one activity (inaccurately described as the taking of deposits, as if the investments were made in Katz Salber) out of an interlocking series of services rendered to the plaintiffs by Katz Salber. In my view the services rendered by Katz Salber can properly be described as "work undertaken or services performed ... in the course of their profession as Accountants ... in connection with" the activities listed. The phrase "in connection with" is a wide one. It is not, in my opinion, essential that every aspect of their work, such as the acceptance of a mandate to invest surplus funds with an approved financial institution, should be separately listed if, as in this case, it is incidental to or connected with activities which are so listed. Moreover, both Katz and Lombard testified that the services performed by Katz Salber for the plaintiffs

were services normally undertaken by Katz Salber for their clients in their professional capacity as accountants. This evidence was not challenged or countered on behalf of the defendants on the basis that it would be unprecedented or even uncommon for an accountant to accommodate his clients in this manner.

[32] The theft by a partner of Katz Salber of funds ultimately destined for the plaintiffs, and the failure by Katz Salber to detect and avoid such thefts, were breaches of contract committed by Katz Salber in its capacity, and in the course of its business, as accountants. These were breaches amounting, in the words of the court *a quo*, to "professional failures" or, in the wording of the clause, to breaches "of duty in the practice of the profession ... committed in the conduct of the Profession by or on behalf of the Insured ..."

[33] Once it is appreciated that the plaintiffs were not investing in Katz Salber and that Katz Salber was not receiving deposits from the plaintiffs but was executing its mandate to invest surplus funds in Investec, it controverts the *"prima facie"*

conclusion of the court *a quo* that Katz Salber was in effect operating a banking service by accepting deposits from the general public in contravention of banking legislation. Katz Salber was not acting as a banker; it was acting as an accountant offering its clients a comprehensive service which included investing surplus funds for them. In any event on the evidence the plaintiffs, as a select group, did not qualify "as members of the general public" for purposes of the Banks Act, 1990. There was, in my opinion, nothing illegal or improper in the service which Katz Salber offered its clients. The point that Katz Salber sought to insure itself against its own criminal conduct is misconceived.

[34] Cases such as *Goddard & Smith v Frew* [1939] 4 All ER 358 (CA), cited by the court *a quo*, and *West Wake Price & Co v Ching* [1956] 3 All ER 821 (QB), and *Walton v National Employers' Mutual General Insurance Association Ltd* [1974] 2 Lloyds LR 385, cited by counsel for the defendants, may well be relevant to a consideration of clauses such as s 1.1 and 1.6 of the policy but are of

little guidance where the terms of the mandate are different and the policy concerned does not contain a clause resembling s 1.2.

[35] I conclude, therefore, that Lombard's embezzlement of funds invested by the plaintiffs through the intercession of Katz Salber, which in turn led to Katz Salber's inability to refund these investments when called upon to do so, brought the matter squarely within the four corners of s 1.2 of the policy. The plaintiffs would have had a claim for their losses against Katz Salber; Katz Salber in turn would have had a claim on the policy against the defendants; and by virtue of s 156 of the Insolvency Act the plaintiffs now have a claim against the defendants.

[36] Because of the conclusion I have reached on s 1.2 of the policy it is not necessary to consider the pertinence of s 1.1 and 1.6 thereof.

[37] That then leaves for decision the quantum of the plaintiffs' respective claims on which the court *a quo,* because of the line it took, expressed no views. The losses suffered by the plaintiffs as a result of Katz Salber's breaches of mandate are

particularised in the pleadings. The accuracy and computation of the amounts so detailed, which included capitalised interest, have not been disputed by or on behalf of the defendants. Nor is it disputed that a pro rata deduction of R650 per plaintiff in respect of “deductibles” is to be made in terms of the policy.

[38] From the analysis above it is apparent that the plaintiffs' claims against Katz Salber are not for performance in terms of the mandate but for damages for the breach thereof. Since damages are calculated to compensate the plaintiffs fully for their losses any dividend allocated to them by virtue of the liquidation of Katz Salber would, to that extent, amount to a duplication in compensation. Counsel for the plaintiffs confirmed that any dividends paid to them would be refunded to the liquidator for distribution to the general body of Katz Salber's creditors.

[39] The plaintiffs' claims against Katz Salber, being for damages, are unliquidated. And since the plaintiffs' claims against the defendants in terms of s 156 of the Insolvency Act are of a like quality to their claims against the defendants,

these too are unliquidated. Prior to 1997 the plaintiffs would have been entitled to claim *mora* interest only from the date of judgment (*Administrateur, Transvaal v J D van Niekerk en Genote BK* 1995 (2) SA 241 (A) 245H-J). With effect from 11 April 1997 the Prescribed Rate of Interest Amendment Act 7 of 1997 (which amended the Prescribed Rate of Interest Act 55 of 1975), sanctioned, inter alia, the recovery of *mora* interest on amounts awarded by a court which, but for such award, were unliquidated. Once judgment is granted such interest "shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier" (s 2A(2)(a); and see *The MV Sea Joy* 1998 (1) SA 487 (C) 505F-507H; *Adel Builders (Pty) Ltd v Thompson* 1999 (1) SA 680 (SE) 688G-691C). The word "demand" in s 2A(2)(a) is defined to mean a written demand setting out the creditor's claim in such a manner as to enable the debtor reasonably to assess the quantum thereof (s 4 of the principal Act). Demand was made on the defendants on 14 November 1994. It was not

suggested in argument that such demand did not comply with the requirements of the sub-section. Nor was it suggested that it would be inequitable if the defendants were to be held liable for the payment of *mora* interest from the date of demand. In terms of sub-section 2A(5) of the Act, as amended, a court is granted the power to "make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run". The section is doubtless intended, amongst other things, to ameliorate instances of inequity which may occur where a debtor is required to pay *mora* interest on, for instance, damages for breach of contract at a rate in excess of what his contract provided or from a date before the amending Act came into operation when "he did not know and could not ascertain the amount which he had to pay" (*Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 32). In this case the amounts of the plaintiffs' various investments were readily ascertainable and these investments earned no real interest

for the respective plaintiffs from a date well in advance of their letter of demand. In the circumstances it seems to me to be just that *mora* interest at the appropriate legal rate of interest should be awarded from that date.

[40] The plaintiffs have asked that Meyerowitz, Katz and Lombard be declared necessary witnesses. No reason has been advanced why the request, now that the plaintiffs are to succeed, should not be granted.

[41] The following order is made:

1. The appeal against the order of the court *a quo* is allowed with costs, including the costs of two counsel.

2. The following order is substituted for the order made by the court *a quo*:

> "1) Judgment is granted against the first defendant as to 80% and against the second defendant as to 20% in the amounts set out hereunder:

A) In favour of the first plaintiff: R47 532,31;

B) In favour of the second plaintiff: R4 514,59;

C) In favour of the third plaintiff: R101 124,68;

D) In favour of the fourth plaintiff: R16 577,67;

E) In favour of the fifth plaintiff: R12 359,20;

F) In favour of the sixth plaintiff: R46 917,87;

G) In favour of the seventh plaintiff: R213 530,29;

H) In favour of the eighth plaintiff: R32 548,29.

2) Interest *a tempore morae* on the respective amounts calculated at the appropriate legal rate of interest as from 14 November 1994 to date of payment.

3) The witnesses Meyerowitz, Katz and Lombard are declared to be necessary witnesses.

4) Costs, including the costs of two counsel, against both defendants

jointly and severally."

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P M NIENABER
JUDGE OF APPEAL

Concur :
Hefer JA
Smalberger JA
Marais JA
Mthiyane AJA