IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 421/03

In the matter between

B J V DURANDT **APPELLANT**

and

FEDSURE GENERAL INSURANCE LTD **RESPONDENT**

Coram: **HARMS, NUGENT, CONRADIE, HEHER JJA and COMRIE AJA**

Heard: **22 NOVEMBER 2004**

Delivered: **30 NOVEMBER 2004**

Summary: **Insolvency: Theft by co-trustee from estate – liability of innocent trustee – interpretation of surety bond furnished to the Master.**

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JUDGMENT

HEHER JA:

[1] This appeal requires this Court to decide whether one of two joint trustees in insolvency should be held liable for a shortfall in the estate that is solely attributable to the wrongful acts or omissions of the other trustee.

[2] The appellant and Johannes Janse van Rensburg were appointed joint provisional trustees in the insolvent joint estate of Mr D J and Mrs M A C Spies on 20 May 1994.

[3] On the same day the appellant and Van Rensburg executed separate written documents entitled 'Undertaking and Bond of Security'. Each bound himself to administer the estate and distribute the assets properly according to law and to pay on demand an amount up to R220 000 to the Master of the Supreme Court, Cape Provincial Division, as might be claimed by the Master in respect of loss or damage suffered by the estate or any person by reason of a failure to perform his functions properly or because of maladministration on his part. It would appear that the Master required these undertakings in satisfaction of his right to demand that the trustees give security for the proper performance of their duties as contemplated by s 56(2) read with s 57(6) of the Insolvency Act 24 of 1936.

[4] On 23 May 1994 and 7 September 1994 the respondent, an insurance company, bound itself in writing in favour of the Master as surety and co-principal debtor jointly and severally with each of the trustees for the due and proper performance by

them of their duties and functions as joint trustees of the estate for amounts up to R220 000 and a further R30 000 respectively in respect of loss or damage suffered by the estate.

[5] On 15 June 1994 a final order of sequestration was granted and on 24 June 1994 the appellant and Van Rensburg were appointed the joint trustees.

[6] Although the joint appointment did not specify any division of responsibilities between them, the trustees arranged between themselves that Van Rensburg would attend to the day to day administration of the estate, subject to the consent of the appellant when dealing with its assets.

[7] On 12 July 1994 Van Rensburg notified the appellant that he had received an offer to purchase the immovable property of the estate for a price of R220 000. He undertook to keep the appellant informed of further developments after the second meeting of creditors and acceptance of the offer by the bondholders. On 26 July he sent a copy of the bondholders' approval to the appellant. On 9 August he requested the appellant's consent to the sale of the property and informed him that he would apply to the Master in terms of s 18(3) of the Act to sell the property. On the following day the appellant gave his written consent. Transfer of the property to the purchaser was however passed on the strength of a power of attorney signed by Van Rensburg and which bore the forged signature of the appellant. Van Rensburg apparently decamped with the purchase price.

[8] On 2 May 1996 the Master called on the respondent to honour its guarantee to make good the pecuniary loss suffered by the estate 'due to the failure of [the

trustees] to administer the Insolvent Estate as required by law'. The respondent consequently paid an amount of R243 045,52 as it was obliged to do.

[9] In July 1998 the respondent claimed payment of that sum from the trustees jointly and severally citing the terms of the suretyships referred to in para 4. The allegation of a failure of due and proper performance of the trustees' obligations was limited to Van Rensburg's misappropriation of the proceeds of the sale.

[10] The summons could not be served on Van Rensburg and the action proceeded against the appellant alone. The evidence presented by the respondent was that of a former claims superintendent, Mr Saswin, who established that the respondent's intention in paying the Master was to discharge its own liability irrespective of whether one or both of the trustees was involved. The appellant testified on his own behalf. He said that the appointment of Van Rensburg as his co-trustee was the decision of the Master and not of his own choosing. He sketched the arrangements between the trustees to which I have already referred. He agreed with counsel that he was a professional liquidator on the panel kept by the Master, that it was open to him to accept or refuse an appointment and that, as part of his business, he protected himself against claims by taking out insurance cover, as indeed he had done in the present instance.

[11] The submission on the appellant's behalf to Louw J in the Cape High Court was that he, as a joint trustee, could not be held liable for a misappropriation by his co-trustee of which he was entirely innocent, neither negligence in administration nor breach of duty having been raised against him.

[12] The court *a quo* rejected the submission and gave judgment for the respondent with costs. It referred to s 56(4) of the Act which provides as follows:

'(4) When two trustees have been appointed or when the Master has appointed a co-trustee in terms of sub-section (5) of section *fifty-seven*, both or all three trustees shall act jointly in performing their functions as trustees and each of them shall be jointly and severally liable for every act performed by them jointly.'

The learned judge reasoned that, although s 56(4) of the Act makes it clear that trustees must perform their functions jointly and are jointly and severally liable for every act performed by them jointly, the Act is silent on the question of a trustee who acts on his or her own without the knowledge of a co-trustee. Because, so the court found, the Act does not oust relevant rules of the common law that are consistent with its provisions, where such rules exist a resort to the common law is justified (relying on *Millman NO v Twiggs and Another* 1995 (3) SA 674 (A) at 679H-680B). The common law applicable to curators (trustees) in insolvency, as expressed by Voet 42.7.5 and 42.7.12(a) and applied in, *inter alia*, *In re Crause* 3 Menz 257 (and *cf Gross and others v Pentz* 1996 (4) SA 617 (A) at 629H-630D), renders an innocent trustee liable for loss caused to the estate by the acts of a defaulting co-trustee. The court therefore ordered the appellant to pay the respondent's claim. It granted him leave to appeal to this Court.

[13] Section 56(4) consists of two elements-

(i) two or more trustees must act jointly in performing their functions;

(ii) each of them is jointly and severally liable for every act *performed by*

them jointly. (My emphasis)

Given the italicized words I have some doubt as to whether the learned Judge was correct in finding that the common law rule which rendered each co-trustee jointly and severally liable for every act performed in the administration of the estate even where he or she was innocent of that act, survived the coming into operation of the legislation. But, for the reasons which follow, it is unnecessary to decide this question. Nor is it necessary to consider the common law liability of different classes of co-trustees, *cf* Honore's *The South African Law of Trusts*, 5th ed by Cameron *et al* 375-382.

[14] The Master is a creation of statute. While he may enforce the terms of a bond of security furnished under s 56(2), he has no general power to recover money from debtors of an insolvent estate on its behalf. That is the function of the trustees. Accordingly, whatever rights the Master possessed to recover a loss from the appellant suffered by the estate must be sought in the undertaking signed by the appellant on 20 May 1994. Since its terms are decisive I quote it in full:

'UNDERTAKING AND BOND OF SECURITY

by CURATOR(S) BONIS/PROVISIONAL TRUSTEE(S)/TRUSTEE(S)

In the (insolvent) estate of DANIEL JACOBUS SPIES and MARIA ALETTA CATHARINA SPIES

I/we BAREND JOHANNES VORSTER DURANDT

of 41 STRATHBLANE WAY, MELKBOSSTRAND

21 RIEBEECK STREET, CAPE TOWN

(Full residential and business address(es))

do hereby undertake and bind myself/ourselves jointly and severally, should I/we be appointed

by the Master of the Supreme Court (CAPE OF GOOD HOPE PROVINCIAL Division) as CURATOR(S) BONIS, PROVISIONAL TRUSTEE(S) and/or TRUSTEE(S) to administer the above estate and/or liquidate and distribute the assets thereof properly according to Law, and to pay to the Master of the Supreme Court (CAPE OF GOOD HOPE PROVINCIAL Division) on

demand an amount up to R220,000 (TWO HUNDRED AND TWENTY THOUSAND rand) as

the Master may claim from me/us in respect of any loss or damage as may be suffered by the said Estate or by any person by reason of the fact that I/we failed to perform properly my/our functions in the above capacities or because of any maladministration on my/our part.

A certificate under the hand of the Master or his duly authorized representative to the effect that I/we have failed to discharge my/our duties as aforesaid and/or stating the amount of any such loss or damage shall be accepted as prima facie proof of such failure and/or of the extent of such loss or damage.

I/we choose as my/our domicilium citandi et executandi and for the purpose of the service of any notices or for the service of any legal process: SOUTHERN LIFE PLACE, 21 RIEBEECK STREET, CAPE TOWN
(not a post box number)

SIGNED AT CAPE TOWN this 20th day of MAY 1994

AS WITNESSES:

1. SIGNED	1. SIGNED(Appellant)
2. SIGNED	2. (UNSIGNED) SIGNATURE(S)'

The underlined portions of the document were completed by typed insertions save

for the handwritten signatures.

[15] As can be seen, the document which the appellant was required to sign was designed to accommodate various statutory appointments and to cater for one or more signatories. The parts of the document that were inappropriate to the appellant's situation were not deleted. The appellant's was the only name typed on it as the giver of the undertaking, his domicilium alone was inserted, he was the sole signatory. There can be no doubt that a proper reflection of his intention and that of the Master as its recipient required that all use of the plural forms in the document should have been struck out. Counsel for the respondent conceded as much, but she submitted that, reading the document thus amended the appellant was left with a joint and several liability. According to her, that meant 'joint and several with whomsoever the Master shall appoint' and, therefore, it bound the appellant for losses caused by his co-trustee. That is, in my view, a contrived reading of the undertaking. Moreover it necessitates the implying into it of words which are neither businesslike or necessary to give it effect. There is no reason why a co-trustee should not undertake liability for his own loss or default alone. In addition there was no evidence that, at the time he signed the document, the appellant knew that Van Rensburg (or anyone else) had been or was to be appointed as his co-trustee. (A comparison of their respective undertakings shows that although both bear the same date, they were signed at different places before different witnesses.) The approach consistent with the probabilities and with logic is therefore to treat the words 'ourselves jointly and severally' as a single phrase that falls to be deleted because it forms one of the inappropriate plural alternatives.

[16] Thus, on a proper construction of the undertaking, the liability of the appellant is confined to any loss or damage as may be suffered by the estate or by any person by reason of the fact that the appellant himself failed to perform properly his functions as a trustee or because of maladministration on his part. Since it is common cause that the theft of the estate property by Van Rensburg was not due to such a failure by the appellant or to his maladministration, it follows that the Master possessed no claim against him arising from the undertaking. Because that document was, as I have pointed out, the only potential source of liability of the appellant to the Master, there was in existence no principal debt relating to him which the respondent could have been called upon to pay to the Master by reason of the suretyships which it had furnished to him. The respondent made the payment at its own risk and, the basis of the appellant's liability having now proved non-existent, it must bear the loss if it is unable to recover from Van Rensburg.

[17] The appeal succeeds with costs. The order of the Court *a quo* is set aside and for it is substituted an order dismissing the plaintiff's claim with costs.

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J A HEHER
JUDGE OF APPEAL

Concur:
HARMS JA
NUGENT JA
COMRIE AJA

CONRADIE JA:

[18] I regret that I do not agree with the conclusion reached by my brother Heher.

In my view one should adopt a more holistic approach to the interpretation of the Undertaking and Bond of Security signed by each of the trustees and not look so intently at what the appellant failed to delete from his undertaking. I accept for the purpose of this case that the Master's right to recover from the trustees any loss suffered by the estate must be found in the undertaking. The fact is that the undertaking signed by the appellant is ambiguous. In order to extract from it how the appellant intended to be bound, one should therefore look beyond the document at the legislative framework and the surrounding circumstances.

[19] Section 18(1) of the Insolvency Act 24 of 1936 provides for the appointment by the Master of a provisional trustee '…who shall give security to the satisfaction of the Master for the proper performance of his duties as provisional trustee…' A final trustee is by s 56(2) of the Insolvency Act required to provide security to the satisfaction of the Master for the proper performance of his duties as trustee. If the Master decides to appoint a co-trustee it must be someone who has given the security mentioned in ss (2).

[20] In giving effect to these (and other) provisions, the Master devised a standard form, bureaucratically identified by the code J. 312(E). 'E' stands for English. In this form are the (standard) terms the Master requires a prospective trustee (provisional or final) or an aspiring curator bonis to agree to.

[21] The appellant is a professional liquidator and trustee who administers insolvent

estates and bankrupt companies for a living. He is on the Master's panel. He is a director of Aiken and Peate Administrateurs (Edms) Bpk. It is fair to assume that by the time he was about to become a provisional trustee in the insolvent estate of DJ and MA Spies he had signed many forms 312(E) and perhaps quite a few forms 312(A). The point about standard terms is that they are well known in a particular trade and generally well-respected in the sense that they are not lightly departed from. In deciding, therefore, that the appellant, exceptionally, decided to depart from them in this instance, it would be helpful to see if there is anything in the surrounding circumstances that might have prompted him to do so.

[22] The 312 form does not give the prospective curator or trustee a choice of terms. If he signs by himself, obviously only he is liable on the undertaking. If someone else signs with him, the two of them are liable jointly and severally. There is no provision for two people to sign the form and avoid joint and several liability. Since he asks for joint and several liability it is obviously a requirement of the Master and forms an element, and one would think an important element, in satisfying the Master that any claim that he may have against the trustees is secure. Two co-principal debtors, each of whom is (up to the limit of his undertaking) liable for any loss to the estate are obviously better than two debtors each liable for a half share of any loss.

[23] If two prospective trustees both sign the same form 312(E) they would unquestionably thereby undertake joint and several liability. It is not likely that simply because each of them signed a separate identical form their liability was now not joint and several.

[24] Heher JA considers that there is no reason why a co-trustee should not undertake liability for his own default alone. In theory there is not. But we have to do here with a Master who has to be satisfied. There is no reason to think that when the appellant gave his undertaking he meant to give one that was out of the ordinary and would probably not be to the Master's satisfaction. One would therefore have to suppose that he thought that the Master would, in the case of this particular estate, be content to depart from his usual requirements embodied in form 312(E) that joint trustees are to accept joint and several liability. We do not know of any reason that could have made him think this. Moreover, we must suppose that the appellant when he signed this standard undertaking that he had signed many times before intended, this time, not to accept joint and several liability.

[25] There are sound practical reasons why joint trustees should be jointly and severally liable. It might in practice be very difficult to apportion blame between trustees where there has been maladministration. The Master, I am sure, has no wish to become embroiled in disputes about who of several trustees is liable for a particular act of maladministration so as to be able to recover against the wrongdoer among them. As an experienced trustee the appellant could not have thought that an undertaking without joint and several liability of co-trustees would be to the Master's satisfaction.

[26] On the basis that the appellant knew that he was not proposed as the sole trustee it is, in my respectful view, not possible to conclude that he intended (exceptionally) to undertake liability for his own default alone. I think that if he had

wanted to take this unusual step, he would (even if he did not think to debate it with the Master first) have been careful to delete inappropriate matter in the form so as to make it clear that, in this particular instance, he was not content to be jointly and severally liable with his co-trustee.

[27] There was no external impulse that we are aware of that could have moved him not to abide by the Master's ordinary requirements. He said that he knew of nothing adverse to the trustworthiness of Mr Janse van Rensburg, his proposed co-trustee, so that any intention to bind only himself would appear to have been capricious. And, assuming that he knew that Janse van Rensburg was proposed as a co-trustee, it is strange that he did not discuss his intention to bind only himself with the latter who would, after all, be profoundly affected thereby in his own decision on how to bind himself.

[28] It is true that there is no explicit evidence that the appellant knew that it was proposed to appoint him together with Janse van Rensburg. There is, however, circumstantial evidence that he knew he was not alone. The appointment of Janse van Rensburg was not an afterthought. He and the appellant were both appointed on the same day, 20 May 1994, the day after a sequestration order had been granted. In the normal course of these things it is improbable that the Master kept them in the dark about his intentions until after they had each signed an undertaking.

[29] It was not only improbable that they were kept in the dark, it was also unfair. Assuming that each signed the 312 form believing that he was the only provisional trustee, the Master would, by not advising the two trustees of each other's proposed

appointment, obtain two separate undertakings, each for a maximum of R220 000, when the value of the estate was only of the order of R250 000.

[30] At any rate, not more than three days later, by the time that security in the form of a suretyship was furnished to the Master by the respondent, each of the two provisional trustees must have discovered that he was not alone. If the appellant had wanted to remain true to his resolve to be liable only for his share of any loss he would have applied to the respondent for a surety bond of R220 000 to cover his undertaking. Janse van Rensburg would have had to do the same. Together the two would have applied for suretyships covering R440 000. Instead, acting jointly, (as they were under the Insolvency Act obliged to do) they applied for one suretyship covering an amount of R220 000.

[31] Now, if the appellant had three days before (and probably not without some trepidation at the extraordinary step he had taken) intended to bind himself alone, obliging himself to the insurer jointly and severally with the other trustee would have been an illogical thing to do. With the idea of separate liability still uppermost in his mind, one would have expected him to ask the respondent for a surety bond to secure his own undertaking and to either leave Janse van Vuuren to his own devices, or to suggest to him that he takes care of his own affairs in the same way. Or at least to tell Janse van Vuuren that whether he liked it or not he had to take out his own insurance.

[32] I might remark in passing that the appellant's caprice would have cost the estate a good deal. Fidelity insurance is notoriously expensive. The cost of it comes out of the estate. Since each of the provisional trustees would have to cover himself

to the value of the whole estate, the estate would have to finance total fidelity cover of R440 000. One wonders how the Master would have reacted to this if the appellant had debated it with him. More pertinently, one wonders what expected benefit would have prompted the appellant to impose such additional costs on the estate.

[33] There is another improbability connected to the (joint) application for the surety bond. The terms of the suretyship clearly envisage joint and several liability of the two principal debtors to the surety: The respondent bound itself as surety and co-principal debtor in solidum jointly and severally with the two provisional trustees. If the appellant had intended to be only severally liable to the creditor (the Master), I think that by binding himself to the surety in this way (which was the way he always bound himself when he was a joint trustee) he represented to the respondent that his liability to the Master was joint and several. Of course, Janse van Rensburg, who, whatever his intentions were, could not be jointly and severally liable for want of someone to be jointly and severally liable with, must also have represented to the respondent that he was really jointly and severally liable with the appellant. He seems to have been a bit of a bad egg so I suppose he might have done such a thing, but I think that it is inherently unlikely that the appellant would have made a misrepresentation that he must have known to be false.

[34] The misrepresentation had other serious repercussions. The two provisional trustees pretended to be jointly and severally liable and the respondent assessed the risk (and calculated the premiums) on this basis. It is unconscionable for the appellant, now that the respondent is exercising its right of recourse against what it

believed to be two joint and several debtors, to put up the defence that he and Janse van Rensburg were severally liable to the Master and that the respondent has a right of recourse only against Janse van Rensburg.

[35] Unconscionable like fraudulent conduct is not lightly inferred and I consider that one should approach the matter of the interpretation of the undertaking in a way that would resolve these anomalies. An interpretation that the two trustees, by signing separate but identical undertakings, intended to be and were jointly and severally bound to the Master, would resolve every one of the difficulties discussed above. That seems to me, with respect, to be the sensible interpretation.

[36] I should that think the appeal ought to be dismissed.

J H CONRADIE
JUDGE OF APPEAL

COMRIE AJA:

[37] There is, with respect, much to be said in favour of the view expounded by Conradie JA in his persuasive dissenting judgment. My difficulty with his approach, however, is that the matters canvassed by him were not canvassed in evidence *a quo*, even though the appellant (the 'innocent' trustee) gave evidence and was cross-examined. In the court below the appellant's evidence, and cross-examination, were directed: firstly, to his 'innocence'; secondly, to the fact that there had been no

appropriate division of responsibilities in the light of the received common law relating to the joint and several liability of joint curators; and thirdly, to the fact that the respondent, as a professional trustee, had taken out his own insurance and that his insurers were supporting him in the present action.

[38] As seen by counsel in the court *a quo*, and by the learned judge, the issues were whether the Roman Dutch common law relating to the joint and several liability of joint curators was applicable to joint trustees in insolvency and, if so, whether the position had been modified by s 56 of the Insolvency Act. Counsel and the court *a quo* failed to perceive that the principal debt depended solely on the separate but concurrent undertakings given by the appellant and Janse van Rensburg to the Master. Had that issue been perceived, then the appellant might well have been confronted in evidence with the various matters to which Conradie JA so persuasively refers.

[39] Had that course been followed, then perhaps the appellant would have had no acceptable response, in which case the learned trial judge would have brought in an appropriate finding with regard to the proper interpretation of the appellant's undertaking to the Master. But that was not an issue. There was in consequence no enquiry into the proper interpretation of the appellant's undertaking and, in further consequence, no relevant finding by the court *a quo*. I think, with respect, that we should not on appeal impose our own prima facie views on that interpretation – attractive as those views may appear to be – in the absence of a suitable enquiry into the facts by the trial court.

[40] But there is one point that is said to have emerged from the evidence before us

and upon which I respectfully disagree. In para 15 of his judgment Conradie JA contends that the appellant must have represented to the respondent that he was jointly and severally liable with van Rensburg. That contention is based upon the deed of suretyship itself, which is said to reflect that the two principal debtors were jointly and severally liable *inter se*. I do not think that is correct. By binding itself jointly and severally liable with the two trustees the surety rendered itself jointly and severally liable with each of the trustees for whatever liability that trustee might incur. The deed is silent on the question whether each trustee was in turn jointly and severally liable with the other. I do not think that it is correct to say, on that basis alone, that the appellant represented the position to the respondent or that his conduct in defending the action is unconscionable in any way.

[41] I would therefore concur in the judgment of Heher JA and I would allow the appeal with costs.

R G COMRIE
ACTING JUDGE OF APPEAL

CONCUR:
NUGENT JA