IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 03/05/2007

CASE NO: 32335/2004
UNREPORTABLE

In the matter between:

PIETER BERNADUS VAN ROOYEN N.O. ..... Plaintiff

And

RORICH WOLMARANS & LUDERITZ INC. ..... Defendant

JUDGEMENT

LEDWABA, J

INTRODUCTION:

[1] The plaintiff in this matter, Pieter Bernardus Van Rooyen N.O., an adult insolvency practitioner acting in his capacity as the sole trustee in the insolvent estate of Johanes Jacobus Smit under the masters reference number T4795/1994 issued summons against the defendant, a firm of attorneys which has been incorporated under the Company's Act, claiming an amount of R819 806, 00 plus interest of 15,5% per annum from the 2nd August 1996 to date of payment.

[2] The defendant in addition to the defences set out in its plea raised a special plea of prescription. The defendant's defence and special plea will be dealt with in detail later hereunder.

[3] Having regard to the pleadings, pre-trial minutes and the evidence of all the witnesses it is common cause between the parties that:

3.1 On the 7th February 1995 the Master of the High Court appointed the plaintiff and Adolf Herman Wilhelm Ruderitz (Luderitz) as co-trustess in the insolvent estate of Johannes Jacobus Smith.

3.2 The two trustees agreed that Ruderitz, who died in 2002, would be responsible for the "day-to-day" administration of the insolvent estate. The administration of the insolvent estate was administered by De Mist Trust Incorporated Services (Pty) Ltd, (hereinafter referred to as De Mist), of which the defendant was the holding company. It is of importance to state at this stage that the practice of trustees administering the insolvent estate through registered companies or corporate companies is not unusual to insolvency practitioners who have been appointed as trustees. The master recognised such practices and even communicated with the appointed trustees through their registered companies or close corporations.

3.3 In May 1996 De Mist instructed the defendant to transfer

properties of the insolvent estate namely Portion 29 of the farm Witfontein and Portion 1 of the farm Vleiland to one E van Niekerk and Portion 16 (a portion of Portion 3) of the farm Vaalbank to K N & M M Grobbelaar.

3.4 After the transfer of the aforesaid properties took place and the properties were registered in the names of the purchasers, the net proceeds of the sales, after the fees and commissions were deducted, were the amounts of R512 380,00 and R307 428,00 in respect of the 'Van Niekerk transaction' and 'the Grobbelaar transaction' respectively.

3.5 On the 31st of July 1996 and 1st August 1996 the defendant issued two cheques in respect of payment of the aforesaid proceeds of the sales, both in favour of De Mist. The said cheques were received and deposited into the banking account of De Mist.

3.6 Luderitz was a director at the defendant's company and also at De Mist. De Mist was wound-up by a special resolution of the defendant.

THE ISSUE

[4] The issue to be decided herein is whether the defendant in issuing the aforesaid two cheques to De Mist acted improperly and should, in law, be liable for the loss suffered by the insolvent estate of Johannes Jacobus Smit.

PLAINTIFF'S EVIDENCE

[5] Concerning plaintiff's background, he testified that, he worked at the Master's office for twenty-eight years and he further had the necessary experience of working as an insolvency practitioner.

[6] It is clear from the bundle of documents that were handed in as exhibit A that De Mist communicated with the master and responded to the queries raised by the master concerning Smit's insolvent estate. It is further clear that the necessary documents that had to be signed by the two curators were brought to the attention of the plaintiff and the plaintiff signed them, for example, the plaintiff did sign the power of attorney and other relevant documents before the transfer of the two properties could be effective and he further signed the Second and Final Liquidation and Distribution Account on the 21st July 1999.

[7] It is significant to state that in the bank 'reconciliation account' of the Second and Final Liquidation and Distribution Account on page 89 of the bundle, under the item dealing with the balance in the bank as at the 31st May 1999, there is an item which reads as follows: 'Plus: *uitstaande deposito R 898 159,52'.* testified that the said item reflects the proceeds of the sale of the properties in the Van Niekerk and Grobbelaar's transactions. Plaintif further testified that he understood the phrase '*uitstaande deposito'*

mean that these were the monies which had not yet been deposited into Smit's Insolvent estate's account. He further said that he knew that the aforesaid monies were received from the defendant.

[8] Plaintiff confirmed that a firm of attorneys, Gerard Coetzee attorneys, acting for Kynoch Kunsmis Beperk did write to him in July 2000 and he confirmed that he undertook to investigate the issue of the missing file contents with the Master, see page 120 of the bundle.

[9] It is further common cause that in July 2000 the plaintiff wrote to Luderitz and wanted an explanation regarding the issue that was raised by Gerard Coetzee attorneys which issue was connected with the administration of the Smit's insolvent estate. In September 2000 the plaintiff informed Gerard Coetzee attorneys that Luderitz was refusing to contact him and he was going to report the Matter to the Master.

[10] The plaintiff in his letter dated 22 September 2000 (item 27 of the bundle) addressed to the defendant concerning the insolvent estate of J. J. Smith follows that:

"Aangesien skuldeiesers nou my verantwoordelik hou, en aangesien ek nie tevrede is dat die administrasie behoorlik geskied nie, word u versoek om u volle leer, kasboek en bankstate met betaalde tjeks binne 10 dae aan my beskikbaar te stel.

Ek het die Meester hieromtrent ingelig en aanvaar ek dat u sondermeer aan my versoek sal voldoen."

[11] He testified in court concerning the missing file of Smit's insolvent estate that he spoke to one Mr Lategaan, the Deputy Master in Pretoria, and suggested to him that a dummy file should be opened. He further testified that in the year 2000 there was a rumour that some monies were missing in the files handled by Luderitz.

[12] He further testified about item 128 of the bundle, being a letter from De Mist trust addressed to P. B. Vam Rooyen Trustees Bk dated 9th 2000 wherein it was stated that the auditors, Messrs Coetzee Johnson, were requested to reconcile Smit's insolvent estate books. He specifically stated in his evidence that according to his experience, the books could be reconciled without the assistance of an auditor if there was proper recording of transactions of the insolvent estate by Luderitz.

[13] He further said the issue of the missing file raised in the aforesaid letter from De Mist dated 9thOctober 2000 did not make any sense to him because Luderitz was suppose to keep copies of the correspondence that he sent to the master.

[14] He confirmed in his evidence that in June 2001 he wrote to the Deputy Master, Mr L. Lategaan and he, *inter alia,* him that he suspected that the Smit's insolvent estate was not properly administrated and that there was a rumour that some monies in the estate were missing.

[15] He further confirmed in his evidence that he wrote the letter filed as in the bundle as Item 138 wherein it is stated that:

"Ons plaas verder op record dat na vele versoeke aan Meneer Luderitz om die bank-besonderhede van die boedel bankrekening en die boedel kasboek aan ons beskikbaar te stel geen sodanige besonderhede en records aan ons gelewer is nie. Ons versoek u dus nou graag, met respek, om Meneer Luderitz in terme van Artikel 70 (2) van die Insolvensiewet, no. 24 van 1936, soos gewysig, te verplig om die kasboek en meer spesifiek die besonderhede van boedel bankrekening aan u te lewer ten eiende ons in staat te stel om ons eie ondersoek na die administrasie van bovermelde insolvente boedel te kan loods."

[16] In November of 2002 plaintiff wrote to the Master and requested that he should be appointed as the sole trustee, since Luderitz was now deceased, in the matter so that he could be in a position to handle the administration of the insolvent estate.

[17] In January 2003 the plaintiff, through Xirimele Trustees CC wrote to the defendant and requested the particulars of the auditors of De Mist and the defendant's auditors urgently so that he could investigate the issue of the missing funds in the insolvent state.

[18] In the beginning of the year 2003, Xirimele CC further wrote to First National Bank and to Moore Rowland Auditors requesting bank statements and information regarding the insolvent estate.

[19] After Luderitz death, the plaintiff instituted an application against the estates of the late Luderitz. On the 1st June 2004 the High Court under case number 2127/2004 made an order as follows:

"1. Die volgemde eise word teen die boedel van wyle ADOLF HERMAN WILHELM LUDERITZ, Meestersverwysing 20618/02 erken en toegelaat;

1.1. R 819 808.00. (AGT HONDERD EN NEGENTIEN DUISEND EN AGT HONDERD EN AGT RAND) tesame met rente bereken teen 15.5% per jaar bereken vanaf 4 Augustus 1996 tot en met opstel van die Likwidasie en Distribusierekening in die bestowe boedel.

1.2. R 819 808 (AGT HONDERD EN NEGENTIEN DUISEND EN AGT HONDERD EN AGT RAND) ooreenkomstig die bepallings van artikel 72(1)

van die Insolvensiewet, Wet 24 van 1936.

1.3. ḥ Bedrag gelykaan 15.5% per jaar bereken op die bedrag van R 250 000 vanaf 3 Januarie 1996 tot 14 Maart 1997 ooreenkomstig die bepalings van artikel 72 (1) van die Insolvensiewet, Wet 24 van 1936.

1.4. Koste van die aansoek as administrasiekoste uit bestorwe boedel, op die skaal soos tussen prokureur en kliënt, uitgesluit die koste veroorsaak vanweë die duplisering van die bankstate van die insolvent JJ SMITH, aanhangsel C1-C 98 (p348-444) van die stukke."

[20] The plaintiff further confirmed the contents of the letter that was addressed to the Master by his representative Mr Quinn dated the 6th March 2003 (see item 156 of the bundle). The contents of this letter will be dealt with hereunder later.

[21] Plaintiff testified that he only knew for the fist time on 11 June 2003 that the defendant wrongly issued two cheques in respect of the Van Niekerk and Grobbelaar sale transactions to De Mist. He submitted that the issuing of the cheques in the name of De Mist caused the loss to the insolvent estate of Smit.

[22] When Plaintiff was cross-examined the following information came to

light:

22.1 The plaintiff confirmed that the trustees had a duty to deposit the monies received on behalf of the insolvent estate into the insolvent's estate bank account. He further confirmed that it was one of the important duties of the trustees to look after the interest of the insolvent estate and to protect the insolvent estate.

22.2 When he was asked about what did he understand the transaction of R 898 195, 52 reflected in the Second and Final Liquidation and Distribution Account which he signed on the 21st July 1999 reflected as *"uitstaande deposito"* meant to him, his response was that he thought the money was still to be deposited into the estate account and according to him the money could also have been invested on behalf of the insolvent estate in an investment account.

22.3 Plaintiff was cross-examined in detail concerning the correspondence exchanged between him and Gerard Coetzee attorneys which correspondence was exchanged between the 11th July 2000 - 17th January 2001. He, *inter alia,* by stating that his co-curator, Luderitz, was not co-operating so that the queries could be addressed and he, plaintiff, intended reporting the matter to the Master.

22.4 According to item 127 of the bundle, a letter dated 22 September 2000, the plaintiff's close corporation wrote to Luderitz and informed him that since the creditors were holding plaintiff liable and since plaintiff was not satisfied with the manner in which the administration of the insolvent estate was handled, he needed some documents to be delivered to him within ten days. In the letter Luderitz was further informed that plaintiff had informed the Master about the situation. Plaintiff in his evidence further testified that when he wrote the letter dated the 22nd September 2000 (Item 127) he suspected that some monies were stolen from the insolvent estate. He further said that after receiving a response from Luderitz, (see: Item 128 of the bundle), his suspicion became stronger and he was under the impression that Luderitz was misleading him regarding the administration of the insolvent estate.

22.5 Plaintiff was further referred to item 156 of the bundle, being a letter dated 6th March 2003 addressed to the Master by H. J Quinn who was acting on his behalf. He was specifically referred to paragraphs 9 and 10 of the letter which read as follows:

"*9. Ten eiende laaste die aangeleentheid te probeer oplos het Meneer P B van Rooyen op 22 September 2000 ŉ formele aansoek gerig aan Meneer A H W Luderitz om sy volle lêer, kasboek en bankstate en betaalde tjeks aan Meneer van Rooyen te oorhandig. ŉ Afskrif van die vermelde skrywe word hierby aangeheg as Aanhangsel "D".*

10. Gedurende hierdie tydperk het Meneer van Rooyen ook met ŉ ene Mientjie Smal gepraat, wat voorheen werksaam was by Meneer Luderitz, waarop sy aan Meneer van Rooyen meegedeel het dat daar sowat R800 000,00 na R900 00,00 se boedelfondse verlore is, wat Meneer van Rooyen selfs nog meer agterdogtig gemaak het van die doen en late van De Mist Trust."

22.6 Plaintiff stated that during the period September 2000 to about 2002 he did not ask which attorney , on behalf of the defendant, dealt with the proceeds of the sale of the aforesaid properties. When it was put to him that he did not take reasonable steps as to enquire about the proceeds of the sales of immovable properties, plaintiff vehemently denied that he did not take any reasonable steps.

22.7 When he was confronted with the questions as to why did he

not report to immediately the Master when Gerard Coetzee attorneys raised certain issues with him, his vague response was that he did not deem it necessary to report to the Master because the issue that was raised in the letters by Gerard Coetzee attorneys dealt with the Knynoch matter.

22.8 Plaintiff further said that since June 2001 he investigated the matter and it was difficult for him to receive a response from Luderitz. He further said he investigated the matter with the banks and could not trace the insolvent estates bank accounts.

22.9 When he was asked about why he did not investigate if the amount R 898 159, 52 was deposited into the insolvent estate's bank account, his response was that he did not think Luderitz would take the money for himself.

[23] Plaintiff further called two witnesses, Mr Johannes Klopper and Miss Samantha Paget. Mr Klopper testified that he is also an insolvency practitioner and he has been a practitioner for about twenty-five years. He testified that in matters where two curators have been appointed, the administration, by both trustees is practically difficult. In practice, it is one trustee who is administrating the estate and the other curator is riding on the back seat.

[24] He said despite the fact that the power of attorney, in item 45 of the bundle, was signed by the two trustees who in essence are the trust creditors to the attorneys who were given instructions, when a cheque for the proceeds of the sale was issued by the attorneys, the cheque should be issued in the name of the insolvent estate. He further said in his experience it is not a normal practice for the transferring attorneys to issue a cheque in the name of the trustees when the proceeds of the sales of an insolvent estate were paid out. When he was requested to comment about the phrase '*uitstaandedeposito'*, on item 89 of the bundle, he said, it was normal to reflect in the Bank Reconciliation Statement that there were outstanding deposits and outstanding cheques. According to him outstanding deposit, *'uitstaande deposito',*meant that monies have been received and were deposited in the banking account but such monies are not reflected in the bank statements when the Second and Final Liquidation and Distribution Account was prepared.

[25] He further confirmed in his evidence that if a co-trustee does not co-operate and refuses to respond to letters, such conduct should be reported to the Master. Actually, he said the other trustee has a duty to report such conduct to the Master.

[26] When he was referred to paragraphs 9 and 10 of item 158 in the bundle, which deals with allegations that there was a rumour that some

monies amounting to R 800 000, 00 to

R 9000 00, 00 were missing, he said he would investigate the matter and check the bank statements.

[27] Miss Paget testified that she is an admitted attorney and conveyancer since 1997 and is conducting his practice in Johannesburg. She said the general conveyancing practice is that monies received in trust should be disbursed according to client's instructions. In transactions involving the selling of immovable property the seller is regarded as the trust creditor. She further said that in her practice she would not take instructions from one curator if two trustees were appointed in an insolvent estate. She further said that she would not even go to the extent of taking oral instructions from the trustees unless those instructions were in writing, her reason for doing that would be to safeguard herself and to avoid any doubts and misunderstandings.

[28] She further said in matters involving an insolvent estates after receiving instructions to do the transfer of an immovable property she would issue a cheque in the name in the insolvent estate unless she received written instructions from the trustees that monies should be paid into a separate account. Plaintiff closed his case.

[29] Mr Christian Endres gave evidence on behalf of the defendant. He

said he was admitted as an attorney and conveyancer in 1992. In 1993 he worked at the conveyancing department of the defendant's firm of attorneys. There were other three conveyancers who were working in that department. Luderitz was a senior director at the defendant's firm of attorneys and he was also a director at De Mist.

[30] He said it was the practice of the firm when it was instructed by De Mist to account to De Mist and it was also a standard practice at the firm to issue cheques in the name of De mist and actually it was Luderitz who instructed the firm to issue cheques in the name of De Mist.

[31] He further said, when he issued cheques in the name of De Mist because he did not see anything wrong in that.

[32] He further stated that, item 118 of the bundle, and was printed after Luderitz requested a memorandum regarding the transactions in the J. J. Smith insolvent estate. He specifically said Luderitz did not instruct him directly to issue cheques to De Mist but it was just a standard practice at the defendant's firm and he had no reason to question the propriety of such practice.

[33] He confirmed that plaintiff did not contact him regarding how the cheques of the proceeds of the sale in Smit's insolvent estate were issued.

He further said if plaintiff had contacted him, he would explain to him what transpired and he would also make available to him the documents that he needed.

ISSUES AND EVALUATION OF THE EVIDENCE

[34] The issue raised by the plaintiff's counsel, Advocate N. Davis SC, is whether the attorney Mr. Endres who was working for the defendant as a conveyancer properly accounted to the trust creditor(s) and furthermore, as the plaintiff's counsel puts it in his heads of argument, whether the attorney acted in such a fashion so as to facilitate the theft or misappropriation of funds. It is common cause that when Mr. Endres transferred the two proceeds of the immovable properties belonging to the insolvent estate was acting within the cause and scope of his duties with the defendant.

[35] Another issue raised by the defendant in a form of a special plea is that the plaintiff's claim against the defendant has become prescribed because the plaintiff did not institute the action against the defendant within a period of three years after he, had knowledge of the identity of the debtor, defendant, and of the facts from which the debt arose or, by exercising reasonable care, he could have knowledge of the debtor's identity and of the facts from which the debt arose.

[36] The plaintiff in paragraphs 4.3 and 4.4 of his particulars of claim

alleged that the defendant was supposed to regard the joint trustees as his trust creditors. He further alleges that the defendant had statutory and other obligations to handle trust creditors and trust monies properly and carefully.

[37] The plaintiff , in the particulars of claim, further alleged that:

37.1 The defendant contrary to its mandate and obligations as conveyancers, failed to account to the plaintiff and his co-curator.

37.2 The defendant acted negligently in failing to see to it that the proceeds of the sale of the aforesaid properties were to be payable to the insolvent estate and it therefore, negligently and wrongfully issued the cheques to De Mist.

37.3 The plaintiff in paragraph 6.4 of the particulars of claim further makes the following allegation:

"Op die tydstip toe die mandate vermeld in paragraaf 3 ***supra*** *aan die VERWEERDER verskaf is, was dit in die vooruitsig gestel deur die partye dat die EISER in die insolvente boedel J. J. Smith, skade soul y indien die opbrengste van die transaksie nie na behore en volgens algemene aktes en prokureurspraktyke aan die trustkrediteur van die VERWEERDER verreken en oorbetaal sou word nie."*

[38] The plaintiff filed an alternative claim based on the fact that Luderitz

was a director at the defendant's firm and he therefore represented the defendant when he gave instructions and signed cheques to De Mist. It is therefore the conduct of Luderitz which caused the loss to the insolvent estate.

[39] In paragraph 4 of the defendant's plea, defendant stated that it executed the mandate properly after the properties were registered in the name of the purchasers. Mr. Endres as a conveyancer, on behalf of the defendant, properly and on instructions of Luderitz who represented the trustees accounted to De Mist. The defendant referred to the accounts that were attached in its opposing affidavit to the application of summary judgement. The defendant in paragraph 4.2 of the plea further alleges that the accounting and payment was made on instructions of the trustees to the representative being De Mist.

[40] Plaintiff filed a replication wherein he, *inter alia,*stated that he denies that De Mist was acting on behalf of the trustees when it received the proceeds of the sale.

[41] I think it would be convenient at this stage to refer to the opposing affidavit deposed to by Mr. Endres in the summary judgement proceedings and to what he said when he was questioned during the enquiry proceedings relating to the liquidation of De Mist.

41.1 In paragraph 11 of item 105 of the bundle of the pleadings he

said the following:

"Ek ontken voorts dat gemelde Luderitz as Prokureur namens Verweerder, enige opdrag gegee het of toegesien het dat betaling aan De Mist geskied. Die aangeleenthede is deur my namens Verweerder hanteer en ek het toegesien dat betaling aan De Mist geskied in opdrag van die Kurators, soos verteenwoordig deur Mnr Luderitz." (own underlining).

41.2 On item 233 from lines 6 of the bundle the enquiry went as follows:

"Wie was die transportgewer? --- Die transportgewer? Wel, dit sou die curator wees.

Ja. --- In die insolvente boedel.

So dit is insolvente bedoel J. J. Smith? --- Korrek.

En u trustkrediteur aan wie moet u afreken dan? --- Wel, ek, ek kan af.., ek doen dit gereeld en ek weet dit is ook algemene praktyk, jy kan afreken aan die trustmaatskappy en dit is dan ook wat ek gedoen het.

Ekskuus? --- Aan die trustmaatskappy.

Was dit die persoon …(tussenbei)? --- Dit is wat ek in hierdie … (tussenbei).

Aan wie u moes afreken? --- Ekskuus tog?

Was dit die trustkrediteur? --- Nee, die trustkrediteur is die insolvente boedel.

Ja. --- Ja.

So is dit nie die persoon aan wie u moet afreken nie? --- Uhm, ja, ek neem so aan."

41.3 On page 234 of the bundle from line 14 to 21 the questioning went as follows:

"Daardie koopprys aan wie moet dit betaal? – Dit moet aan die boedel betaal word, alternatiewelik aan die trustmaatskappy en … (onvoltooid).(own underlining).

Hoekom alternatiewelik? --- Ek doen gereeld transporte en ek kan vir u werklikwaar sê ek kry somtyds instruksies om die uitbetalling te maak aan die trustmaatskappy. So ek neem aan hulle neem dit in hulle trustrekening op en moet dan ń oorbetaling doen in die

boedelrekening toe." (own underlining).

[42] Now having regard to the evidence of Mr. Endres, what he deposed to in the opposing affidavit to the summary judgement application and to what he said at the enquiry and comparing it with his evidence when he said it was the practice of the defendant's firm after transferring property of an insolvent estate to issue a cheque in the name of a juristic person representing the trustee, and when he said he was instructed by Luderitz to issue cheques in the name of De Mist. In my view, Mr. Endres evidence does not materially contradict with what is stated in the opposing affidavit and what was said during the enquiry. My understanding of what he said, is that it was the practice of the defendant's firm to issue cheques in the name the company doing the administration for the trustees and he further said he was instructed by the trustees to do so. When he issued the cheques the instructions were from Luderitz in his capacity as a trustee representing the insolvent estate.

[43] In terms of the **Attorneys Act 53 of 1979** the rules of the Law Society of the Northern Provinces **a**attorney must be very careful and diligent in handling and managing the trust creditors' monies.

See: **Incorporated Law Society, Transvaal v Meyer and Another 1981 (3) SA 962 (T) and, Law Society v Matthews 1989 (4) 389 TPD at 394 B**

IN THE HIGH COURT OF SOUTH AFRICA

Sections 70 (1) – (2) of the Insolvency Act 24 of 1936read as follows:

"***Section 70 - Banking accounts and investments***

(1) *The trustee of an insolvent estate-*

a. shall open an account from which amounts are withdrawable by cheque in the name of the estate with a banking institution within the Republic, and shall deposit therein to the credit of the estate from time to time all sums received by him on behalf of the estate, (own).

b. may open a savings account in the name of the estate with a banking institution or a building society within the Republic, and may transfer thereto moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against the estate;

c. may place moneys deposited in the account referred to in paragraph (a) and not immediately required for the payment of any claim against the estate, on interest-bearing deposit with a banking institution or building society within the Republic.

(2) *Whenever required by the Master to do so, the trustee shall in writing notify the Master of the banking institution or building society and the office, branch office or agency thereof with which he has opened an account referred to in subsection (1) and furnish the Master with a bank statement or other sufficient evidence of the state of the account.*

[45] In my view, the words 'sums received by him on behalf of the estate', is an indication that a trustee in administering an estate may sometimes receive money on behalf of the estate. In other words, receiving money on behalf of the estate is not prohibited provided the monies would be deposited into the insolvent's estate banking account.

[46] The power of attorney to transfer the properties was correctly signed by the co-trustees as required in law and it is, in my view, important to refer to the last paragraph of the power of attorney which reads as follows:

"…en om die genoemde eiendom in volle en vrye eiendom te transporteer aan KEVIN NICO BROBBELAAR en MARGARETHA MARIA GROBBELAAR en afstand te doen van al die reg, title en aanspraak wat ek vroeër in en tot genoemde eiendom gehad het en alles te doen ewe en kragtiglik in alle opsigte, as wat ek self kon doen indien persoonlik teenwoordig en beloof ek hiermee om te bekragtig en goed te keur alles wat

my gemelde prokureur hieromtrent wettiglik doen uit krag van hierdie akte."

(my emphasis).

[47] Since the property was sold by the co-trustees on behalf of the insolvent estate and was not directly sold by the insolvent estate the co-trustees should be regarded as the trust creditors. According to item 48 of the bundle, a letter from De Mist to the defendant, it is clear that the co-trustees communicated with the defendant concerning the transfer of the properties through De Mist. De Mist, in my view on behalf of the co-trustees, also communicated with the Master regarding the progress in the insolvent estate. (see item 54).

[48] The onus is on the plaintiff to prove that the defendant breached its mandate after the registration and transfer of the properties, by issuing cheques to De Mist, see **Kriegler v Minitzer 1949 (4) SA 821 (AD)**. The next question to be decided is whether the plaintiff has discharged its onus to prove that defendant acted negligently in issuing the cheques in the name of to De Mist.

[49] The test is obviously an objective test. Having regard to our legal principles and to the provisions of the statutes referred to above, it can be said that a reasonable attorney in the position of Mr. Endres acted negligently?

[50] Mr. Endres testified that it was the practice at the defendant's office to issue cheques in the names of the companies owned by the trustees. He did not regard that practice as an unlawful practice and the power of attorney authorised him to act lawfully.

[51] Ms. Paget in her evidence stated that as a conveyancer she would insist on getting instructions from both trustees before she can issue a cheque in the name of a third party. It is indeed so that in getting written instructions can safeguard an attorney but there is no provision in the **Attorneys Act** that such instructions should be in writing.

[52] I have alluded to the evidence of Mr. Endres regarding the alleged mandate that he received to issue the cheques in the name of De Mist.It is clear that, in *casu,* trust creditors are the co-trustees. Advocate Davis SC has not referred me to any authority which states that if co-trustees instructed a conveyancer the cheque for the proceeds of the sale must be issued in the name of the insolvent estate. A distinction should be drawn between reasonable conduct of an attorney and conduct which would safeguard and is in writing to remove any doubt concerning a mandate given to an attorney.

[53] It is common practice of the insolvency practitioners to operate through their registered companies or close corporations and the Master of

the High Court has no objection thereto because it is clear on the documents before me that even if there was a query by the Master, such query was addressed to De Mist and not to the co-trustees personally.

[54] The other important aspect that was canvassed during the trial was that there is nothing prohibiting a trustee or the company through which he or she operates to receive the monies on behalf of the insolvent estate and thereafter to deposit into the insolvent estate banking account. In my view, **section 70(1)(a) of the Insolvency Act** not prohibit the trustee, to receive money, it makes it an obligation for the trustee, to deposit such monies into the insolvent's estate account.

CAUSATION

[55] It is common cause that the cheques issued by the defendant were received by De Mist. The cheques were deposited into the banking account of De Mist because the cheques were marked 'not transferable'.

[56] Item 62 of the bundle is a bank statement of De Mist reflecting that an amount of R 819 808, 00, which the parties agree represents the amount of the two cheques, was deposited on 2nd August 1996 and that there was a credit balance of R 9730, 32 in the account. The statement further reflected other five deposits. At the end of August 1996 there was a credit balance of R 905 011, 31 in the account. The statement further describes De Mist's

account as a 'Trust Account'. I do not know of any statute prescribing that a trustee or the company through which it operates should have a trust account. However, because of the words 'Trust Account' in the statement of De Mist's bank account and the fact that there were other deposits made into the account, it is possible that the account was used by De Mist to receive monies on behalf of other insolvent's estates it administered.

[57] After scrutinising the evidence of the plaintiff and the bundles before me, there is no evidence explaining what happened to the monies after the cheques were deposited into the De Mist banking account. In other words, there is no evidence showing that the money was misappropriated when it was in the account of De Mist or in the insolvent's estate bank account.

[58] The Second and Final Liquidation and Distribution Account which was signed by both trustees on 21st August 1999 reflects the monies in issue as *'uitstaande deposito'*, in the amount of R898 159, 52. Plaintiff testified that he understood the phrase '*uitstaande deposito'* mean money deposited but no deposit slip was available. He further said he trusted Luderitz and believed that money received would be deposited. At one stage he said he thought the monies were invested even though there was nothing on the account to confirm that there were some estate monies invested.

[59] Plaintiff's witnesses, Mr. Klopper, also said *'uitstaande deposito'* means the deposited money is in the account but not reflected on

the bank statement.

[60] If the monies were deposited into the insolvent's estate account the fact that the cheques were drawn in favour of De Mist will not, in my view, render the defendant liable because the monies would have been misappropriated from the estate's banking account, which means that even if the defendant issued a cheque in the name of the insolvent estate the monies would still disappear.

[61] If the monies were misappropriated from the De Mist account, in my view, the defendant should not be held liable unless it can be shown that this was a planned fraudulent scheme between defendant and De Mist to prejudice the insolvent estate. Defendant can only be held to have facilitated the theft if there is evidence proving that the defendant knew the money would be misappropriated. In my view, Luderitz in giving instructions to defendant to issue a cheque in the name of De Mist, he was acting in his capacity as curator.

[62] In the absence of clear and cogent evidence concerning from which account the insolvent estate monies were is appropriated the plaintiff has a real problem in proving that the conduct of the defendant in issuing the cheques in the name of De Mist, caused the loss of the insolvent estate.

PRESCRIPTION

[63] From the papers, it can be reasonably assumed that plaintiff knew that the money was received in 1996 from defendant. In July 1999 he signed the Second Liquidation and Distribution Account and thought that the term *'uitstaande deposito'* monies not reflected in the bank account.

[64] Plaintiff testified that he trusted Luderitz and did not think that he would misappropriate the insolvent estates monies.

[65] He further testified that after receiving queries concerning the estate Luderitz's failure to respond to letters timeously and the weird responses of Luderitz he made some enquiries with the bank, auditors and to the defendant about the matter.

[66] In 2004 he pursued the claim against Luderitz estate and obtained the court order.

[67] The plaintiff testified that he only knew in June 2003 that the defendant wrongly issued the two cheques in the name of the De Mist.

[68] Summons was issued in December 2004, about two years after he was appointed as a sole trustee.

[69] Considering the exchange of the correspondence between the plaintiff, the defendant, the bank, the auditor and the Master, plaintiff, in my view, took reasonable steps to investigate the matter. The basis upon which plaintiff has based the claim is legally technical and it could not have been obvious to a reasonable person that a claim could arise on the basis of a cheque which was 'wrongly' issued to a third party.

[70] Plaintiff pursued the claim within three years after he knew that the defendant issued the cheque in the name of De Mist.

[71] Now considering the steps taken by the plaintiff in investigating the matter and the fact that he had to liaise with the Master to be authorised to take legal action, I cannot find that he delayed unreasonably and that the claim has prescribed.

[72] I therefore make the following order:

(i) The defendant's special pleas is dismissed;

(ii) Plaintiff's claim is dismissed;

(iii) Plaintiff is ordered to pay the costs to include costs occasioned by employment of two counsel.

IN THE HIGH COURT OF SOUTH AFRICA

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A. P. LEDWABA

JUDGE OF THE HIGH COURT