GILBEY DISTILLERS & VINTNERS

(PTY) LTD AND OTHERS — APPELLANTS

and

DAVID ALEXANDER MORRIS N O

AND ANOTHER — RESPONDENTS

Judgment by:

NESTADT JA

CASE NO. 193/89

/CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GILBEY DISTILLERS & VINTNERS (PTY) LTD	FIRST APPELLANT
SLIMS (PTY) LTD	SECOND APPELLANT
GILBEY RETAIL HOLDINGS (PTY) LTD	THIRD APPELLANT

and

DAVID ALEXANDER MORRIS N O	FIRST RESPONDENT
MASTER OF THE SUPREME COURT (EASTERN CAPE PROVINCIAL DIVISION)	SECOND RESPONDENT

CORAM: JOUBERT ACJ et SMALBERGER, NESTADT, KUMLEBEN JJA et FRIEDMAN AJA

DATE HEARD: 17 SEPTEMBER 1990

DATE DELIVERED: 16 NOVEMBER 1990

J U D G M E N T

NESTADT, JA:

This appeal arises from a dispute between appellants, as creditors in an insolvent estate, and first respondent, the trustee. It concerns the remuneration claimed by the trustee for his services. Two amounts are involved. They were respectively reflected in first and second liquidation and distribution accounts as owing to him by the estate. The accounts were confirmed by the Master. Appellants applied to the South Eastern Cape Local Division to review and set aside the confirmation of that part of each account allowing the fees in question. An order declaring that the trustee was not entitled to the remuneration claimed was also sought. The Master was cited as second respondent. The matter came before KANNEMEYER JP who dismissed the application. However, the learned judge granted leave to appeal to this Court. Hence this appeal.

The judgment a quo has been reported in 1990(2) SA 217. It details the nature of the dispute between the parties and how it arose. Perhaps these matters can be summarised as follows. The insolvent's business was that of a hotel-keeper. He also sold liquor through what are termed off-sales outlets. Appellants feared that if, consequent upon sequestration, trading ceased, the insolvent's liquor licences in respect of the business might be cancelled. In this event they, as major creditors and (in effect) lessors of the premises, would be prejudiced. So they proposed to the trustee that in order to preserve the liquor licences the business be carried on. The trustee was agreeable to this. Sales of liquor accordingly continued for over two years. These sales are the genesis of the trustee's claim to the contentious remuneration. The claim is based on sec 63(1) of the Insolvency Act, 24 of 1936 ("the Act"). This section entitles a trustee to a

reasonable remuneration for his services "to be taxed by the Master according to tariff B in the Second Schedule to this Act". Item 4 of this tariff provides for remuneration at the rate of 6% "on sales by the trustee in carrying on the business of the insolvent, or any part thereof, under section 80". Sec 80 empowers creditors (or the Master) to authorise the trustee to carry on the insolvent's business. The trustee's attitude was that the sales in question were effected by him whilst carrying on the business of the insolvent (with the consent of creditors) and that he was accordingly entitled to a fee based on item 4. In the first account submitted by him there was therefore included under "Trustee's Remuneration" an amount of R93 615,35 representing the prescribed percentage of the turnover of the business during the period covered by the account. Similarly, the second account contained a claim for remuneration in the sum of R89 105,60 being 6% of subsequent

sales. These accounts, as I have indicated, were confirmed by the Master. This was, of course, after they had (separately) been advertised and lain open for inspection in terms of sec 108. Confirmation took place in terms of sec 112 of the Act. It will be necessary in due course, when considering whether the section has the effect of excluding the court's review jurisdiction, to refer again to its provisions. Suffice it at this stage to say that it enjoins the Master, when a trustee's account has been open to inspection by creditors and no objection has been lodged under sec 111, to confirm the account. There were no objections to either account. Appellants explain their failure to object by saying (in the founding affidavit) that it was only after confirmation of the second account that it was realised that the trustee was claiming the fees in question. When this became known, they voiced their opposition to such claim. It was based

on the contention that it was appellants, and not the trustee, who had continued the insolvent's business and achieved sales; item 4 did not therefore apply; and the trustee was not entitled to the remuneration claimed. The founding affidavit goes on to submit that the Master, in confirming the accounts, was unaware of these facts; they had been concealed or misrepresented by the trustee.

The conflict as to who carried on the insolvent's business (and effected sales in doing so) requires amplification. KANNEMEYER JP refers to the point at 219 I - 220 B. It is obviously central to the dispute between the parties. If, indeed, the trustee did carry on the business, that is an end to the matter. He would be entitled to the remuneration claimed and the review proceedings would have rightly been dismissed. The application did not make out the case that because the trustee was not effecting sales personally or through his

own staff, the Master should in terms of sec 63(1) have taxed his remuneration in a reduced amount. Pursuant to the decision that the business should not be closed, the parties agreed that appellants would "manage [it] on your [the trustee's] behalf". This is what happened. Certain employees of a company engaged by appellants moved in and took over the administration of the business (including the existing staff). They acted under the supervision of appellants. This continued throughout the period in respect of which the trustee claimed remuneration in terms of the tariff. Appellants' affidavits detail what their management involved. In short, it may be said that the day to day running of the business was in their hands. This included the ordering and taking delivery of stock; sales thereof to the public; the receipt and banking of the proceeds of such sales; the drawing up of certain financial statements; giving the staff instructions and paying the

salaries of some of them. Of particular importance is that the resultant profit or loss was for appellants' account. This was specifically agreed to with the trustee. Indeed, at his insistence, appellants indemnified the estate against liability for any trading losses. There is some dispute as to what the trustee's functions were. But adopting the principle of Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634 F, it may be said that he retained what he terms "overall control" of the conduct of the business; he was "ultimately responsible" for its management. This meant that all purchases had to be approved by him; he would then arrange for their payment; appellants were obliged to and did give him daily reports about the income and expenditure of the business; he approved the engagement and dismissal of staff; he paid the salaries of most of the employees as well as the general running expenses of the business (including the cost of stock); he

ensured compliance with the liquor licences which, of course, vested in him; what are referred to as trading accounts, such as the cash book and bank reconciliation statements, were prepared by him; and he conducted and controlled the banking account of the business.

The business was, I consider, carried on in terms of sec 80. Indeed, this proposition was not challenged in the founding affidavit. And, as I have said, creditors approved of this course. The nice point that arises, however, is whether in view of the division of responsibilities referred to, the trustee is rightly to be regarded as having effected sales in carrying on the business within the meaning of this expression as used in item 4. I assume that the tariff does not permit of a joint carrying on of the business. But plainly it does not require a trustee to act personally. He can, and usually will, employ or depute someone to carry on the business for

him (Klatzkin vs Noble NO 1915 AD 713 at 717). Was that the position here? Or did the trustee abdicate the task of carrying on the business in favour of appellants? In arguing for an affirmative answer to the last question, appellants' counsel stressed the fact that it was appellants and not the estate who stood to profit or lose from the carrying on of the business; this was said to be inconsistent with the notion of the trustee carrying on the business; it was appellants as managers who did this (and effected sales); the "overall responsibility" on which the trustee relied was insufficient; it was a residual duty which flowed simply from his representative ownership of the assets of the estate. I am not sure that the argument does not underestimate the trustee's position. It was he who was authorised by creditors to carry on the business. Seeing that on insolvency the liquor licences vested in him (Mars, The Law of Insolvency in South Africa, 8th ed, 180), he was

the only person who could do this (see sec 69(3) of the Liquor Act, 87 of 1977). Appellants' undertaking to the trustee to manage the business "on your behalf" is indicative of a relationship of agency (De Visser vs Fitzpatrick 1907 TS 355 at 363; S vs Moloi and Another 1987(1) SA 196(A) at 215 B). In the trustee's report to the second meeting of creditors it was stated that "the Trustee, with the consent of the major creditors continued to trade. The creditors authorised Messrs Gilbey's to act as the Trustee's agent and to conduct business at the premises of the insolvent". Neither appellants nor any other creditors took issue with this statement. It is not unknown for an agent's remuneration to take the form of profits accruing from the transaction conducted on behalf of the principal (Bamford On the law of Partnership and Voluntary Association in South Africa, 8-9). However, I do not propose to pursue the point. The judge a quo did not

find it necessary to decide it (see 228 A). Neither do I. I shall assume, in favour of appellants, that it was they who carried on the business and effected sales and that the trustee was therefore not entitled to a fee of 6% on the turnover of the business.

How does the matter then stand? As will be seen, the Master was under the impression that the trustee was carrying on the business and that he was therefore entitled to the remuneration claimed. On the assumption made, he was mistaken. He should, had he been aware of the true position, have amended the accounts so as to exclude such remuneration. Sec 111(2) of the Act empowered him to do this. In this event he would not have confirmed them in terms of sec 112 as he did. But confirmation having taken place, did appellants have a remedy? To decide this it is necessary to consider in more detail sec 112 as also sec 151 of the Act. They correspond (though there are important

differences) with secs 408 and 355 of the Companies Act, 61 of 1973. Sec 151 provides:

> "Subject to the provisions of section fifty-seven any person aggrieved by any decision, ruling, order or taxation of the Master or by a decision, ruling or order of an officer presiding at a meeting of creditors may bring it under review by the court and to that end may apply to the court by motion, after notice to the Master or to the presiding officer, as the case may be, and to any person whose interests are affected: Provided that if all or most of the creditors are affected, notice to the trustee shall be deemed to be notice to all such creditors; and provided further that the court shall not re-open any duly confirmed trustee's account otherwise than as is provided in section one hundred and twelve."

In terms of sec 112, when a trustee's account has been open for inspection by creditors and no objection has been lodged or an objection has been lodged and the account amended or an objection has been lodged but withdrawn:

> "the Master shall confirm the account and his confirmation shall be final save as against a person who may have been permitted by the court before any dividend has been paid under the account, to reopen it".

Appellants' review proceedings were obviously

brought in terms of sec 151. The Master's confirmation of the accounts under sec 112 was a decision and, in relation to the trustee's remuneration, a taxation. The argument for appellants that the application to reopen the accounts was soundly based can be briefly summarised. It was (i) that the Master's confirmation of the accounts had been induced by the trustee's fraudulant misrepresentation that he was carrying on the business; (ii) alternatively, that the Master had been misled by conduct of the trustee which was similar to fraud; (iii) confirmation had, in any event, taken place in ignorance of the true facts, viz, that the trustee was not carrying on the business; (iv) on any of these three bases, the accounts had not been duly confirmed in terms of the second proviso to sec 151; sec 112 therefore did not apply and the matter was reviewable under sec 151; such review was in the nature of an appeal which in the premises was bound to succeed; (v) even if the

privative provisions of sec 112 governed, the Master's confirmation of the accounts was liable to and should be set aside on the basis of (i), (ii) or (iii) above.

I think it is logical to deal firstly with the argument that sec 112 does not apply at all and that therefore all that appellants had to show to justify interference with the Master's confirmation of the accounts was that the trustee was not entitled to remuneration in terms of the tariff ((iv) above). It is true that the review conferred by sec 151 has been held to be of the third kind referred to in Johannesburg Consolidated Investment Co vs Johannesburg Town Council 1903 TS 111 at 117 (see, eg, Thorne vs The Master 1964(3) SA 38(N) at 49 B - D; De Hart NO vs Klopper and Botha NNO and Others 1969(2) SA 91(T) at 96 D - E and 96 G - 97 A; Rabinowitz vs De Beer NO and Another 1983(4) SA 410(T) and 414 F - H and also Mars, op cit, paras 2.2 and 17.28, LAWSA Vol 11, para 295 and

Herbstein and van Winsen: The Civil Practice of the Superior Courts in South Africa, 3rd ed, 760 - 1). In Pretorius and Others vs Marais and Others 1981(1) SA 1051(A) at 1061 D it was assumed that this view was correct. This means that the court is not restricted in exercising its powers of review under the section to cases where some irregularity has occurred. The court acts as a court of appeal and is therefore entitled to adjudicate on the matter de novo. But the principle must be confined to the type of decision, ruling or order in issue in these cases. It cannot operate where a "duly confirmed" trustee's account is under attack. In this event the court's power of review is governed by sec 112 and is (as will be seen) limited. What then of the argument that the accounts in casu were not duly confirmed? In my opinion it must be rejected. A reference to Stroud's Judicial Dictionary, 5th ed, vol 2, page 786, sv "duly", shows that where used as an adverb, "duly" is a word which

is capable of various meanings. In particular it may relate to matters of form or of substance (see Black's Law Dictionary, 5th ed, page 450). But its primary meaning would seem to be the former. Thus "duly"is defined by the Shorter Oxford English Dictionary (3rd ed) as "in due manner, order, form or season" (see, too, West's Legal Thesaurus/Dictionary and Wilson vs Cape Town Stevedoring Co 1916 CPD 540 at 545). This, so it seems to me, is the sense in which it is used in sec 151. In other words, a duly confirmed account is one which results from the proper procedure having been followed. The account must have been open for inspection by creditors under sec 108; objections (if any) must have been dealt with in terms of sec 111; and confirmation must have taken place by the Master (consequent upon him honestly applying his mind to the matter) and not say by an imposter. But the fact that the confirmation is flawed by reason of it having been procured by the fraud of

a creditor or the trustee or because the Master was ignorant of facts material to his decision cannot detract from the account having been duly confirmed in the sense envisaged by sec 151. To uphold the argument that it does, would result in the provision for finality in sec 112 being rendered largely inoperative.

There was no dispute that all the requisite formalities regarding confirmation were complied with. It follows that the second proviso to sec 151 applied. The further consequence is that the accounts could only be re-opened in terms of sec 112. This brings me to the argument that this notwithstanding, the confirmation was reviewable and should be set aside ((v) above). As I have indicated, it is based on three grounds. I deal firstly with the one that the Master's decision was arrived at in the absence of material facts, viz, that the business had not been carried on by the trustee ((iii) above). No quarrel can be had

with the factual basis of this submission. In his report to the court, the Master says:

> "At the time of taxing the trustee's fees in both the first and second liquidation accounts I was not aware of the agreement between the trustee and Gilbeys regarding the running of the business. I was under the impression that Gilbeys was acting as agents for the trustee."

On the assumption referred to earlier, this impression was wrong. In support of the legal submission that in these circumstances the confirmation of the accounts was reviewable, Mr Gauntlett, for appellants, cited a number of authorities. They were to the effect that where a functionary exercises a discretion on an incorrect basis of fact, this may constitute a ground for review (see, ia, Sandenbergh vs Mogale NO 1915 TPD 399 at 401 and 404; Ronnies Motors (Pty) Ltd and Others vs Van der Merwe and Another 1960(4) SA 206(E) at 211 A; Northwest Townships (Pty) Ltd vs The Administrator, Transvaal and Another 1975(4) SA 1(T) at 8 G as also the judgment of COOKE J in the New Zealand case of Daganayasi vs Minister of

Immigration [1980] 2 NZLR 130 (CA)). Wade: Administrative Law, 6th ed at 328-9 refers to a number of English decisions in support of the principle. He terms it the "'wrong factual basis' doctrine".

Let us suppose that it does afford a ground of review in our law. The question is whether it has not been excluded by the provision in sec 112 that when a dividend has been paid under the accounts "confirmation shall be final". The papers show that a dividend was paid under both accounts. Even so, Mr Gauntlett argued that the court's power of review had not been excluded. Counsel's submission was that sec 112 merely ousts a tardy challenge of the merits of a decision of the Master to confirm an account; where confirmation takes place in the absence of material facts, he does not properly perform his function; in these circumstances the finality provision does not

operate.

A similar argument was considered by KANNEMEYER JP (see 223D - 225A). Holding that the finality provision of sec 112 was not an ouster but a time bar, the learned judge rejected it. I prefer to approach the matter on the basis that the section does (in effect) contain an ouster clause. Nevertheless, I agree that the argument fails. True, there is a presumption against construing a statute so as to oust the jurisdiction of the courts; clear language is required (Minister of Law and Order and Others vs Hurley and Another 1986(3) SA 568(A) at 584 A). Thus even the use of "final" is not necessarily indicative of an intention to render a decision immune from review. There are a number of English cases which say this (see eg Regina vs Medical Appeal Tribunal. Ex parte Gilmore [1957] 1 QB 574 (CA) at 586 and Tehrani

and Another vs Rostron [1972] 1 QB 182 (CA) at 187). As used in sec 112, however, and for the following reasons, I do not think that "final" ("afdoende" in the Afrikaans version) permits of the accounts being reopened on the ground under consideration.

(a) Amongst the ordinary meanings of "final" is "conclusive", "decisive" or "completed" (Black, op cit, and West, op cit). Funk and Wagnall's Dictionary defines "final" as "that which makes an end".

(b) It was pointed out by OGILVIE THOMPSON JA in Callinicos vs Burman 1963(1) SA 489(A) at 500 H that the Act provides effective machinery enabling the proved creditor, by way of objection, to prevent the confirmation of the account. What such machinery is, is dealt with at 498 C - fin. There is thus

reason to think that the Legislature, by providing for finality after confirmation and payment of a dividend, intended that there could then be no reopening on any ground. This would seem to have been the view of WILLIAMSON JA who, in a separate concurring judgment, said (at 503 B):

> "In particular sec. 112 in providing that the confirmation of an account by the Master 'shall be final' means that the matters dealt with in the account, being purely estate matters, are finally disposed of and cannot be reopened."

(See, too, to the same effect, S A Clay Industries Ltd vs Katzenellenbogen NO and Another 1957(1) SA 220(W) at 224 E - F; Rulten NO vs Herald Industries (Pty) Ltd 1982(3) SA 600(D) at 604 G; Wispeco (Pty) Ltd vs Herrigel NO and Another 1983(2) SA 20(C) at 25 F and 26 E - F; Swift Trailer Co

(Pty) Ltd vs The Master and Others NNO 1983(4) SA 781(T) at 786 A and D and Kilroe-Daley vs Barclays National Bank Ltd 1984(4) SA 609(A) where at 627 G the S A Clay case, supra, is quoted with approval.)

(c) This approach would also promote what has been stated to be the whole purpose of sec 112, namely "to prevent a trustee having to set about recovering amounts which have been actually received by creditors by way of dividend" (per TEBBUTT J in the Wispeco case, supra, at 27 A).

(d) The predecessor of sec 112 was sec 98(1) of Act 32 of 1916. It was in similar terms save that the expression used was that confirmation "shall have the effect of a final sentence". This meant that an account

could be reopened if grounds for restitutio in integrum were established, ie fraud or justus error. Now, of course, it is simply stated that confirmation "shall be final". So the change was a significant one. It signifies that the Legislature intended to make the confirmation of an account more conclusive than it was.

(e) The principle that where the Legislature uses the same word in the same enactment, it may reasonably be supposed that it intends the word to have the same meaning, also applies. Sec 57(10) provides that the decision of the Minister of Justice regarding the appointment of trustees is to be final. It seems clear that such a decision is not ordinarily reviewable unless eg the Minister failed to

give any consideration to the matter (see Henochsberg on The Companies Act, 4th ed, 655 where the equivalent section of the Companies Act, namely sec 371, is dealt with).

(f) Sec 112 obviously curtails the court's power of interfering with the Master's confirmation of an account. The issue is the ambit of such curtailment. Appellants would have it that only what amounts to an appeal against the Master's decision is affected. This is untenable. Even before payment of a dividend, a confirmed account can only be re-opened on the limited grounds of restitutio in integrum (see the S A Clay case, supra, at 224 E - F and the Wispeco case, supra, at 27 F).

This disposes of the argument that the

accounts were reviewable on the ground that in confirming them the Master mistakenly thought that the trustee was carrying on the insolvent's business. But this was not appellants' main point. It was that confirmation of the accounts should be set aside on the ground that the trustee had fraudulantly misrepresented the true position to the Master (argument (i) above). Here, too, the question is whether the privative part of sec 112 does not exclude the jurisdiction of the courts to review the confirmation of the accounts on this ground. KANNEMEYER JP held (at 223 C - D and 225 A) that the accounts had not been rendered unassailable; they could be re-opened on the grounds of dolus (on the part of the trustee) or justus error (on the part of appellants). Justus error was not relied on before us. Appellants were admittedly at fault in not realising, prior to

confirmation of the accounts, that the trustee was claiming a fee on the basis that he was carrying on the business. They failed to properly peruse the accounts. That leaves the question of fraud. No doubt fraud is a special case. In the words of DENNING LJ in Lazarus Estates Ltd vs Beasley [1956]1 QB 702 (CA) at 712 "fraud unravels everything". Prof Baxter, in his Administrative Law at 519, says that dishonesty is the most tenacious ground of review; it survives the strictest ousters of the courts' jurisdiction. The well-known case of Union Government vs Fakir 1923 AD 466 is a good illustration of this. These considerations notwithstanding, I have some doubt as to the correctness of the court a quo's interpretation of sec 112. It may be, having regard to what was said earlier when dealing with the meaning of "final", that the court's power to review the confirmation of an

account where a dividend has been paid, has been ousted, even where there has been fraud on the part of the trustee. However, it is unnecessary to express a firm opinion on the point and I do not do so. It seems to me that the matter can and should be decided on the facts.

I turn to a consideration of those which are relevant. It will be remembered that the trustee, in substance, reported that he continued to trade through the agency of appellant. On the assumption referred to earlier, this was untrue. And the Master was thereby misled (see that part of his report already quoted). On the trustee's version, it was a term of the agreement with appellants that his remuneration, calculated according to the tariff, would form part of the expenses of running the business and would thus be for appellants' account. This, too, was not disclosed

to the Master. Another, and in point of fact the main misrepresentation relied on, arose from a subsequent request by the Master (in relation to the first account) to the trustee to "please justify your fee". The trustee replied in the following terms:

> "The administration of this estate has required the full time attention of an accountant plus two or three clerks as well as that of the trustee and assistant. Also the trustee has made numerous trips to Cape Town in connection with the Liquor Licences and has held many non-statutory meetings with creditors regarding the affairs of the estate."

The portion I have underlined must be left out of account. Appellants, in quoting the trustee's reply in their founding affidavit, in error omitted it. Neither they nor the trustee dealt with it. Nor did the judge a quo. It was raised for the first time in argument before us. Appellants' complaint about that part of the reply which was referred to was that the

trustee's work in connection with the business did not require the full-time services of an accountant and that the trustee's statement that it did was deliberately false. So, too, was the allegation that he was required to travel to Cape Town (from Port Elizabeth).

The court a quo considered these criticisms of the manner in which the trustee reported to the Master. It nevertheless came to the conclusion (at 228 A) that it had not been established that the trustee had been fraudulant. I fully agree. In his answering affidavit the trustee denies that his answer to the Master's request that he justify his fee was false. He explains that he was dealing with his remuneration and work in relation to the estate generally and not only with the conduct of the business; so regarded, what he told the Master, was correct. There is no basis on which this assertion

can be rejected. The Master himself does not dispute it. That leaves for consideration the trustee's (assumed) mis-representation that he was carrying on the business. Having pointed out (at 226 A) that fraud is not lightly inferred, KANNEMEYER JP finds (at 226 I) that the trustee had no intent to mislead either creditors or the Master. There is ample justification for this conclusion. Creditors, and particularly appellants, were at all times kept informed of the trustee's claim to a 6% fee on the turnover of the business. To be sure (this appears from the founding affidavit), he at one stage warned a representative of appellants that "it was pointless continuing the businesses on the basis on which they were being run as he was the only person benefitting thereby". And, of course, he disclosed the fact that appellants were running the business (albeit as agent) to the Master.

It is obvious that the trustee genuinely thought that he was entitled to remuneration in terms of the tariff.

It remains to deal with the argument that the trustee's conduct, if not fraudulant, was akin to fraud and that on this basis the accounts should be reopened ((ii) above). This was not a ground advanced in the court below. The principle relied on was first referred to by this Court in Narainsamy vs Principal Immigration Officer 1923 AD 673 where INNES, CJ, referring to Fakir's case, supra, said (at 675):

> "It was there stated that in spite of the terms of sec 3(1) a case for the interference of a Court might arise where the action taken had been manifestly outside the jurisdiction conferred by the Act, or where fraud or a similar element was found to have been present".

More recently it was considered in Singh vs Umzinto Rural Licensing Board and Others 1963(1) SA 872(D) at 877 E - H and in Winter and Others vs Administrator-

in-Executive Committee and Another 1973(1) SA 873(A) at 887 C. Apparently the scope of the "similar element" has yet to be defined. It may be that the rule is to be confined to cases where the functionary has acted improperly. It was in this context that INNES CJ referred to it. That, of course, is not the case here. But, in any event, the argument cannot be sustained. It is apparent from Narainsamy's case that to satisfy the mental element there must be a want of good faith. Or, as it was put by KOTZE JA in MacDuff and Co Ltd (In Liquidation) vs Johannesburg Consolidated Investment Co Ltd 1924 AD 573 at 610, what was done must have been "with the consciousness that one is acting contrary to the law or good faith". The learned judge was dealing with dolus in relation to the fictional fulfilment of contractual conditions, but I think the same applies here (see

Desai vs Assignee Estate Desai and Another 1935 CPD 503 at 511-2). In my opinion appellants have failed to show that the trustee had this state of mind. He might have been mistaken in what he told the Master, but I remain unpersuaded that it was anything other than an innocent mistake.

Appellants might have successfully been able to object to the confirmation of the accounts and in this way frustrate the trustee's claim to remuneration in terms of item 4 of the tariff. They did not do so, however. Their attempt to achieve the same result by way of a review was, for the aforegoing reasons, correctly found by the judge a quo to be ill-founded.

The appeal is dismissed with costs. Costs are to include the fees of two counsel.

NESTADT, JA

JOUBERT, ACJ)
SMALBERGER, JA) CONCUR
KUMLEBEN, JA)
FRIEDMAN, AJA)