CASES DECIDED

IN THE

WITWATERSRAND LOCAL DIVISION.

S.A. LAW REPORTS (1914).

W.L.D. PART III.

STEINWEISS v. AARON'S TRUSTEE.

1914. *May* 28, 29; *July* 14. MASON, J.

Insolvency.—Bonded property.—Duty of Trustee.—Law 13 *of* 1895, *sec.* 62.—*Removal of Trustee.—Grounds for.—Law* 13 *of* 1895, *sec.* 77.—*Commission under sec.* 163.—Mandamus *on Trustee.—Costs.*

A bondholder in an insolvent estate valued his security at £9,000. Applicant, a concurrent creditor, called upon the trustee at the third meeting to abandon the security to the bondholder at that valuation. The trustee, who was also acting as agent for the bondholder, declined. Thereafter the bondholder reduced his valuation to £4,000, and proved as a concurrent creditor for the balance. In an application for the trustee's removal for misconduct in refusing to abandon the secured property, *Held*, that as no valuation upon oath, under sec. 62 of Law 13 of 1895, consequent upon dispute had yet been made, the trustee's option to take over or abandon had not yet arisen, and that, therefore, there was no breach of duty.

After the trustee had reported that the whole of the insolvent's assets were bonded, and that there was nothing for concurrent creditors, he was empowered by X & Y, both concurrent creditors, to act for them. The applicant moved resolutions calling upon the trustee to enquire into certain dealings by the insolvent's widow, and to ask for a commission under sec. 163. No advantage could accrue to X & Y unless applicant's resolutions were accepted and successful action taken thereon. The rejection of the resolutions meant the risk of a contribution account to X & Y. The trustee by the use of X & Y's votes, but in the *bona fide* belief that further investigation would be useless, secured their rejection. *Held*, he had committed a breach of duty to X & Y even though they might thereafter have acquiesced in his action, but that his action though injudicious and improper did not justify his removal under sec. 77.

The insolvent's widow (married to him out of community of property) was alleged to have had no property of her own at the marriage, and could not, it was said, have derived any apart from the late insolvent; the books, however, showed the insolvent to be in *her debt* at his death, and that whilst he had invested a large sum in shares in and loans to a certain company, he appeared to have died without interest of any sort in that company, whilst his widow was found to be a large creditor and shareholder.

Held, that, there being no other remedy, an application for an order compelling the trustee to apply for a commission under sec. 163 (the estate being indemnified against costs), should be granted. *Sansinena Distributing Syndicate* v. *Bell's Trustee* (1907 T.H. 177); *Trustees S.A. Bank* v *Wilson* (4 S.C. 172) applied.

Held, further, that applicant, having succeeded substantially, should have his costs out of the estate, but that there should be no order as to the trustee's own costs, by reason of his improper identification with a secured creditor.

Application for removal of respondent as trustee in the insolvent estate of Aaron, or alternatively for an order directing him to apply for a commission under sec. 163 of Law 13 of 1895.

C. F. Stallard, K.C. (with him *J. Stratford, K.C.* and *P. Millin*), for the applicant.

M. Nathan (with him *J. P. van Hoytema*) for the respondent.

The facts and arguments appear from the judgment.

Cur. adv. vult.

Postea (July 14).

MASON, J.: The respondent is the trustee of the insolvent estate of the late Bension Aaron. The applicant has proved as a concurrent creditor in the estate. He claims in his petition that the respondent should be removed from his office as trustee, on the ground of misconduct, or, alternatively, that he should apply for the appointment of a commission under sec. 163 of the Insolvency Law for the examination of the insolvent's widow and certain other persons in connection with the estate, and that the conduct of the examination should be entrusted to the applicant's solicitors. Counsel, in moving the application, reversed the order of these prayers, and asked in the first instance for the issue of the commission, and only alternatively for the removal of the trustee. The applicant offers to bear all the costs of the commission. The following are the circumstances out of which this matter arose: The applicant and Bension Aaron had been in partnership for a considerable period. There is a dispute as to when the partnership terminated. The applicant states that at any rate for certain purposes it continued up to the date

of Aaron's death. There is no question that the affairs of the two men are somewhat closely connected. Bension Aaron died on the 18th of October, 1912, leaving a will by which he appointed his widow and Mr. Manfred Nathan as executrix and executor. The executrix only took up the appointment in May, 1913. The estate was much embarrassed financially, and after vain efforts to arrange with the creditors it was surrendered as insolvent on the 20th January, 1914. The first meeting of creditors was held on the 3rd of February, and the second meeting on the 10th of February of this year. The National Bank of South Africa, Limited, proved a preferent claim for £13,590 9s., with interest at 8 per cent. from the 20th January, 1914, and a supplementary claim for interest at 8 per cent. from the 23rd of April, 1913, to the 31st December, 1913, on £2,500. The Nederlandsche Zuid-Afrikaansche Hypotheek Bank proved a preferent claim for £9,343 15s. 2d., with interest at 7 per cent on £7,500, from the 15th December, 1913. Both these claims were secured by bonds hypothecating various landed properties, and containing the general clause. Under the bond to the Netherlands Bank is included property owned by some other person who is liable for half the bond. It is not stated who this person is. The banks valued their securities at the full amount of their claims. The applicant proved as a concurrent creditor for £419 17s. 5d. There were no other proofs of debt. The respondent was elected trustee at the second meeting. The third meeting of creditors was held on the 19th March, 1914, and the trustee presented his report setting forth the position of the estate, which showed preferent claims amounting to £22,934 4s. 2d., which were secured by bonds, including the whole assets, amounting to £17,017; the only concurrent claim was that of the applicant for £419 17s. 5d. The gross rentals for the properties hypothecated somewhat exceeded, in the case of the National Bank, the current interest, but were considerably less in the case of the Netherlands Bank. The report showed clearly that, as the estate stood, there would be absolutely nothing for concurrent creditors. The trustee also asked for instructions from the creditors. The applicant's solicitors handed in at this meeting some six resolutions which they desired to propose. The representative of the National Bank intimated that he would vote against them, and a discussion arose as to his right to do so. Thereupon the meeting was adjourned until the 26th of March. No. 3 of the resolutions proposed that the trustee should enquire into the value of the estate's interest in the

firm of Aaron and Steinweiss; No. 4 that the trustee should apply for the appointment of a commission under the Insolvency Law, to examine Mrs. Aaron and other persons, and should instruct the applicant's solicitors to do all the legal work in connection therewith; and No. 5 that the trustee should abandon to the Netherlands Bank the property hypothecated to it for the amount at which it was valued in satisfaction of their claim. At the adjourned meeting on the 26th of March the trustee produced a letter from the Netherlands Bank reducing the value put upon their security to £4,000, and thus making the Bank also a concurrent creditor for £5,343 15s. 2d. The respondent had all through the proceedings represented the Netherlands Bank under a power of attorney, and when Mr. Marks, a member of the firm of solicitors acting for the applicant, moved resolution No. 3, the respondent moved an amendment. Mr. Marks challenged his right to vote, on the ground that the reduction of valuation should have been made on oath, and not by letter. The presiding officer reserved his judgment upon the objection, and adjourned the meeting to the 31st March. On that date he overruled the objection. The National Bank then reduced its valuation of securities by £500, so as to become a concurrent creditor for that amount. Mr. Marks thereupon tendered a further proof of debt by the applicant for £5,500. The presiding officer admitted it, in spite of objections by the solicitor of the National Bank and the solicitor of the trustee. The result was, therefore, that the applicant was a concurrent creditor, with proved claims amounting to £5,919 17s. 5d., whilst the bank's concurrent claims came to £5,843 15s. 2d. It was patent that the applicant could carry the resolutions, except in respect of matters concerning property hypothecated to the banks. Thereupon the trustee tendered for proof two claims, one by Mrs. Adler for £55 4s. 10d. in respect of certain fencing which the respondent erroneously believed to be preferent on the ground that, before any transfer of the farm in connection with which the claim arose could be registered, Mrs. Adler's claim would have to be satisfied; the other by Mr. George Parkes for £61 5s. 5d. The claims were admitted. When resolution No. 3 was put to the vote the National Bank, represented by Mr. Wentzel, and the Netherlands Bank and Mrs. Adler and Mr. Parkes, represented by the respondent, voted against it. As their votes totalled in value £5,960 5s. 5d., against the applicant's concurrent claims amounting to £5,919 17s. 5d., the resolution was rejected. Mr. Marks thereupon withdrew the other

resolutions, and the meeting resolved to adopt the trustee's report, and directed him to realise the assets subject to the directions of the bondholders. On the same date, March 31, the applicant's solicitors wrote to the trustee, asking him to apply for the appointment of a commission to examine witnesses, and offering to pay all the costs in connection therewith, and to give the trustee any indemnity which he might reasonably require to protect the estate against the payment of any costs. They enclosed a power of attorney authorising them to procure the commission upon these terms. On the 2nd April the applicant's solicitors wrote a further letter, placing on record their view of the trustee's action, and complaining that he failed to do his duty in not abandoning to the Netherlands Bank the property hypothecated at the value which they had placed upon it, thus imposing upon the estate unnecessarily a concurrent claim of over £5,000. They also complained very strongly of his opposition to the commission, and suggested as a reason that he might have been concerned for the loss of his commission in case of abandonment, and might have desired to prevent enquiry into the transactions of Mrs. Aaron, for whom at one time he had acted. The trustee replied on the 6th April to the first letter to the effect that he did not consider an application necessary or desirable in the interests of creditors, but, if information were furnished to him that such an application was likely to be beneficial, he would in that case require the proceedings to be taken by the solicitors of the estate. He replied on April 16 to the second letter by denying the charges and suggestions which it contained, and stating that he was prepared to justify his action at the proper time. Thereupon this application was made to the Court.

It will be convenient to deal first with the grounds upon which the application for the trustee's removal is founded. He is first charged with misconduct in failing to abandon to the Netherlands Bank the properties hypothecated to them at the amount of the valuation, notwithstanding that his attention had been drawn to the question by the resolutions submitted on behalf of the applicant prior to the Bank reducing its claim. Now, if it were clear that the trustee could at any time abandon the security to the preferent creditor, and that upon such abandonment the creditor had no option but to accept it, and had thus lost his right to reduce the valuation, the trustee would have committed a serious breach of duty in the present case, more especially as he at this very time was

acting as the agent of the bank. But a consideration of the terms of section 62 of the Insolvency Law does not justify this conclusion. The section clearly provides for subsequent amendment of any valuation, and it is only if after a dispute the creditor has been called upon to value his security on oath, that the trustee has the option of taking it over or abandoning it. It was not, I think, contemplated that the creditor should be subject to an abandonment by surprise, and thus lose his right to reduce the valuation. This is, I believe, the right construction to put upon the section, and it is apparently the construction which the trustee *bona fide* adopted. In these circumstances there was no breach of duty on his part, either in communicating the resolution to the Netherlands Bank, or in awaiting their action before proposing the abandonment of the security to them. I have used the word "abandon," but the words of the section were interpreted in *Collison Limited* v. *Castle Wine & Brandy Company* (1907, T.S., p. 599), and that case sets forth the position of the secured creditor and the trustee. This disposes of the charges under sub-sections (*a*) and (*b*) of paragraph 21 of the petition. The next charge against the respondent, which is contained in sub-sections (*c*) and (*d*), is in connection with the action of the respondent in filing the claims of Adler and Parkes, which, it is alleged, was done without their authority, and only with the object of preventing enquiry. The respondent wrote on the 15th December to Mr. Adler, soliciting his vote for the trusteeship in the estate of Bension Aaron, then about to be surrendered, and stated that he had up to then been acting for Mrs. Aaron, co-executrix. On the 7th February Mrs. Adler signed a power in favour of the respondent as manager of the Johannesburg Board of Executors and Trust Company Limited, to prove her claim, to vote for the election of a trustee, and to represent her in all matters relating to the estate. A similar power from Mr. Parkes, dated the 10th December, was given to the respondent, in answer apparently to a verbal request. The use of these powers was left to the discretion of the respondent. There is no foundation for the suggestion of the applicant's solicitors that the respondent guaranteed the grantors of the powers against any liability for contribution. So far as Parkes is concerned, he has stated on affidavit that the respondent has made no wrongful use of his power of attorney, and any complaint Mrs. Adler might make as to the misuse of her power is a matter which concerns her and not the applicant. But it is important to examine the circumstances

under which these powers were used, so as to determine the attitude and position of the respondent. As trustee he had just reported that all the assets of the estate were bonded to the banks, leaving a deficiency exceeding £6,000; so that there would be no dividend for concurrent creditors, unless action were taken on the line suggested by the applicant, and that action were successful. It is therefore patent that no possible advantage could accrue to either Mr. Parkes or Mrs. Adler from proving their claims if the applicant's resolutions were rejected, but they ran serious risks of being involved in contribution, as these proceedings exemplify. The trustee's use of these powers of attorney was, therefore, at the the time a breach of duty towards his principals, even though they may have afterwards acquiesced in his action. The truth is, he identified himself with the bank, and forgot that he was also trustee in the insolvent estate.

Do these acts constitute in the circumstances misconduct under section 77 of the Insolvency Law? There is no doubt that it has been quite common for trustees to represent creditors even after election, at any rate in the Transvaal. Mr. *Nathan*, on behalf of the respondent, attempted to justify this practice by reference to the case of *Pretoria Estate & Market Company Limited* v. *Rood's Trustee* (1910, T.P. 1085), where an application was made to remove the trustee, who was the manager of the Natal Bank, a creditor in the estate, on the ground that the bank's interests were opposed to those of the general body of creditors.

WESSELS, J., in refusing the application, stated that the provisions of section 75 (*g*) only apply where the interests of the trustee are opposed to those of the whole body of creditors, and not of a particular class of creditors, and that after election he is no longer regarded as the nominee of the electing creditors, but as a person under the jurisdiction of the Court, from whom the Court expects proper liquidation and honest action, and, while he was not prepared to lay down that in no case would a Court remove a trustee merely because he did not fall under section 76 or 77, it would require an extremely strong case to justify the interposition of the Court in such circumstances. Now, in the present instance, whilst the action of the trustee in connection with these resolutions and this voting was injudicious, and, in my opinion, as I shall more fully explain, improper, it does not seem to me misconduct of such a nature as would justify his removal under section 77. He followed what has been a common course of practice; he did not

know that he was doing wrong. I am not, therefore, prepared to visit this impropriety with the stigma and the severe penalty of removal from office. His removal from office is also demanded on the ground that he has obstructed, as far as he possibly could, any enquiry into the dealings of Mrs. Aaron with the assets of the estate, that he has refused to have a commission, although the applicant offered to pay the costs thereof, that he failed to disclose to the creditors that he had acted as Mrs. Aaron's agent, and that this was done with the object of preventing an enquiry into the dealings of himself and Mrs. Aaron. It is also alleged that he is disqualified from office on the ground that his interest is opposed to the general interest of the estate, because he acted as agent for Mrs. Aaron, and may be personally liable for assets which it is alleged Mrs. Aaron wrongfully alienated. An enquiry into these complaints requires a brief history of the relations which existed, or are alleged to have existed between the applicant, Bension Aaron, and Mrs. Aaron. Aaron and the applicant were in partnership for a considerable period, and in 1906 received the sum of £100,000 as compensation from the Johannesburg Municipality. A deed of dissolution was signed at about that time, but, according to the applicant, it was not acted upon, and the partnership continued. A considerable amount of the partnership property appears to have been included in the bond to the National Bank. Aaron was engaged in considerable transactions relating to the Pniel Diamond Mining Company Limited, for a period of some years. He apparently had large dealings in shares, as, according to the trustee's account, there is a debit of £5,509 10s. 1d. on the 23rd June, 1911, to the Pniel Diamond Mining Company Limited, share account in Aaron's books, and of £5,959 11s. 6d. to a loan account for the same company as at September, 1911. No explanation is contained in the books, so it is said, as to what happened to the shares or the loan. In August, 1911, Mrs. Aaron pledged to the National Bank, as security for debts due by Bension Aaron and the firm of Aaron and Steinweiss, a mortgage bond passed in her favour by the Pniel Diamond Mining Company and also 65,000 shares in the company. The applicant alleges that the Pniel transactions were partnership transactions, and that £11,000 was raised by the mortgage of the partnership properties, and invested in these enterprises. According to the affidavit of the secretary of the company, Aaron never had more than 190 shares registered in his name, but Mrs. Aaron was the holder of large numbers of shares

transferred to her by numerous transferors, and not in any case by her husband.

It appears that efforts were made to float the Pniel Company in London, that these were unsuccessful, and that the company was in a precarious financial position. Mrs. Aaron, who resides in Kimberley, arranged shortly after the death of the insolvent for the disposal of all her interests in the company to certain purchasers, whose names have not been disclosed. The arrangement was made with the sanction of the National Bank, but the manager of the Johannesburg branch states that the negotiations were conducted by Mrs. Aaron direct. The mortgage bond, the 65,000 shares above referred to, and a further 65,000 shares appear to have been sold by Mrs. Aaron on this occasion for £13,000, of which £8,000 went to the National Bank, and the balance apparently to Mrs. Aaron. The respondent denies that he had anything to do with the transaction. There is nothing to cast doubt upon his denial. It was alleged on behalf of the applicant that the respondent acted for Mrs. Aaron in the matter, but the sale appears to have taken place prior to April, 1913, the month in which the applicant himself brought Mrs. Aaron to the respondent, who then only acted for her in her capacity as executrix, and continued to act until the date of the surrender of the estate. The respondent states that he informed all the creditors that he had been acting for Mrs. Aaron, and this statement is borne out by other evidence. During the period of his so acting there do not appear to have been any dealings with the estate, and therefore there is no foundation for the suggestion contained in paragraph 18 of the petition, that the respondent's position as agent for Mrs. Aaron disqualified him in any way for the office of trustee. If further enquiries should result in the disclosure of any disqualification, that can be dealt with at the proper time. It is charged that the respondent endeavoured to prevent an enquiry being held, and this is true. The Netherlands Bank, for whom he acted, desired to have the estate wound up, and was opposed to an enquiry. The National Bank adopted the same attitude, and these creditors, combined with Mrs. Adler and Parkes, were able to outvote the applicant. The respondent asserts that he has made every necessary enquiry, and that in his opinion further investigation will not be of any benefit to the estate, nor is any action upon the lines suggested by the applicant likely to produce any benefit to the concurrent creditors, whilst the preferent creditors are

opposed to the institution of any proceedings. There is no evidence of any actual fact justifying the accusation that this is not the honest belief of the respondent. The matter is one of very considerable complexity, and probably involves difficult questions of law, as well as difficult questions of fact. It is impossible, therefore, in my judgment, to consider that the applicant has proved that the respondent's refusal to apply for a commission under section 163, or his conduct in representing the Netherlands Bank and voting as he did, were dictated by improper motives. The application for his removal from the office of trustee must therefore fail, but the question whether he should be directed upon proper terms to apply for a commission under section 163 still remains for decision, and for the purposes of that decision it is necessary to enquire: (1) Do the facts on record show that Mrs. Aaron's relations to her husband's estate are such as to render an examination proper? (2) Is action against Mrs. Aaron, if determined upon, likely to produce any benefit to the concurrent creditors? And (3) has the Court the power—and if it has the power, ought it to direct the trustee to proceed for the appointment of a commission under section 163? The facts necessary for the determination of the first question appear partly in the affidavits of the applicant, and partly in the affidavits filed by the respondent. Mr. and Mrs. Aaron were married out of community of property. The applicant states that he was acquainted with her both before and after marriage, and that he knows positively that she had no money, and could not have had any property apart from her husband. This statement is not denied. Now, on the 25th June, 1908, Aaron purported to sell to his wife the property called Muckleneuk, in Pretoria, for £5,216 9s. 3d., and to have received payment of the purchase price by setting off the same amount in which he was indebted to his wife. Then we find that, though Aaron's books show that apparently he spent some £11,000 for shares and in loans to the Pniel Diamond Mining Company Limited, his estate has no interest of any sort in connection with that company, but his wife is possessed of 130,000 shares in the company and a mortgage bond from the company of £10,000. The fact that the transactions in shares were recorded in the company's books substantially only in her name, and not his, does not constitute any substantial argument against enquiry, having regard to the sums of money which Aaron himself apparently invested in the company. I gather, also, that there is other property of which Mrs. Aaron is, or was, possessed at the time of her husband's death.

It is not desirable to examine in detail Mrs. Aaron's relations to her husband's estate, as they may become the subject of litigation, but the facts to which I have referred make a very strong *prima facie* case for enquiry, and, if the other creditors are properly safeguarded against risk of loss, there seems no valid reason why the enquiry should not take place as desired by the applicant, unless it is clear that none of the concurrent creditors can benefit thereby. The applicant also alleges that he was in partnership with the deceased insolvent, and that many of the assets now possessed by his widow are partnership property. He is bringing an action against Mrs. Aaron on his own behalf for an investigation and liquidation of the partnership affairs, and there can be no doubt that a commission such as he desires will be of very considerable benefit to him as a litigant, but that does not seem to me a sufficient reason for declining to grant a commission under section 163, if he is entitled to it as a concurrent creditor in this estate. His statements, of course, require the more careful scrutiny on account of his having this additional interest. One of the transactions into which the applicant desires enquiry is the sale of the Pniel assets by Mrs. Aaron to the unknown purchasers. It is alleged by him, or on his behalf, that she, Mrs. Aaron, knew she had no proper title to these assets, and that those who purchased them were equally aware of the position. The applicant also alleges that these assets were worth very much more than the sum for which they were sold; that they were indeed of sufficient value to discharge all the liabilities of the estate. The allegation of knowledge in these purchasers of Mrs. Aaron's faulty title is not supported by any fact, but the whole of Mrs. Aaron's dealings with this property do seem to me a fitting subject for investigation. If, however, the only benefit which concurrent creditors could obtain from the enquiry depended upon the results of a successful action against these unknown purchasers, it would be unnecessary to consider whether the refusal of the trustee should be overruled. The argument that no benefit can accrue from such an enquiry as the applicant desires is founded upon the fact that the two banks are entitled under the general clause to a preference over all the assets of the estate, and, as their claims exceed the value of those assets by some £7,600, it rests on the applicant to show that a sum exceeding that amount is likely to be recovered by a successful action as the result of the enquiry. Now the respondent contends that nothing more than £5,000, the balance of the Pniel assets, and

half the unencumbered value of Muckleneuk, £1,107, could be recovered from Mrs. Aaron. These two together make only £6,107. Half the value of Muckleneuk is taken because Mrs. Aaron, after negotations with the applicant, agreed that he was entitled to a half-share in it after payment of the mortgages—by letter dated April 18, 1913. Now assets may be recovered from Mrs. Aaron, on the ground, firstly, that she is in possession of property which really belongs to the estate; secondly, that she is in possession of property which was donated to her by her husband, and which the trustee is entitled to recover by revoking the donation; and, thirdly, that the alienations of her husband's property to her are void under the Insolvency Law. Property coming under the first head would clearly be covered by the general clause. If property is recoverable under the second head notwithstanding the death of Aaron, it may come under the general clause. But I have very considerable doubts whether property coming under the third head is covered by the general clause, seeing that it is only the insolvency which brings it into the estate, and that up to the time of successful action the title would be in Mrs. Aaron. Then the figures upon which Mr. *Nathan* for the respondent relied in argument do not take into consideration the fact that, whilst the whole claim of the two banks is charged against the estate, only half of some of the assets which are included in the bond is reckoned in the total value of £17,017. If the whole of the assets bonded to the two banks were sold at the value placed upon them in the trustee's report, the banks would be paid in full or substantially in full. It is not stated who is the co-owner with Aaron of the property bonded to the Netherlands Bank, but the applicant is the registered co-owner with Aaron of the Jeppe Street property, which is covered by a bond for £15,000, passed by Aaron and Steinweiss in favour of Aaron and ceded by the latter to the National Bank for a debt of £11,000. If the whole property is sold at the municipal valuation, the claim of the National Bank would be reduced by £4,722 10s., apart from the value taken into account in arriving at the deficiency of £7,600. It would also appear from paragraph 33 of the respondent's affidavit as if Mrs. Aaron had other private property, the bonds on which were paid off by the proceeds of certain life policies on the life of her husband, so that it is impossible to say from the material which has been brought forward what Mrs. Aaron's financial position is.

Taking all these circumstances into consideration, it seems to me that a successful action against Mrs. Aaron might well result in

some substantial benefit to the concurrent creditors. Ought the Court then to overrule the decision of the trustee not to apply for a commission under section 163? The respondent's counsel rely upon the case of *Sansinena Distributing Syndicate* v. *Bell's Trustee* (1907, T.H., p. 177), where Sir WILLIAM SMITH held, in an application for an order directing the trustee to apply for a commission under section 163, that it was a matter within the discretion of the trustee, and that the Court would not interfere with that discretion unless in exceptional circumstances. It is true that later on in his judgment he refers to the matter as being one entirely in the discretion of the trustee, but that, I think, was an expression of opinion with reference to the merits of that particular case, in which the applicant clearly had another effectual remedy. In the present case the applicant as a concurrent creditor in the estate will have no remedy unless the Court directs an application to be made, and the circumstances are in my opinion exceptional. It is not contended that the resolution of creditors would prevent the granting of this application. In the case above cited that was the opinion expressed by the judge, so that the only question is as to the position of the trustee. Now here it seems to me that the trustee by his course of action had disabled himself from giving an independent judgment in the matter. He was the agent of the Netherlands Bank, and, as such, endeavoured by all means in his power to defeat the resolution for an enquiry, even to the extent of misusing the discretion entrusted to him by Mrs. Adler and Mr. Parkes. Take, for example, the question as to his action under section 62 of the Insolvency Law. It was desired to abandon property to the bank; yet he was the bank's agent at the same time, and says that he would have voted against such a proposal. One can quite understand his anger at the charges which have been made against him, and that, combined with the other circumstances of the case, may be the reason why, in face of what seems to my mind a plain case for enquiry, he sees no ground for an examination of Mrs. Aaron and her relations with her husband's estate. The question what order in these circumstances the Court should make has been referred to in several cases. In the *Trustees of the South African Bank* v. *Wilson & Another* (4 S.C. 172), one of the creditors sued to set aside an undue preference. The defendant excepted to the declaration on the ground that the trustee alone could bring the action, and the exception was upheld. The CHIEF JUSTICE in giving judgment, whilst laying down that it was the

trustee who should sue, said that, if the trustee failed to do his duty, there was a way of compelling him to do it, referring apparently to the argument of counsel that the Court could be moved to compel the trustee, upon a proper indemnity being given, to allow their names to appear on the record. The JUDGE-PRESIDENT, in *Goldschmidt & Co.* v. *Page* (2 H.C.G. 108), expressed the opinion that a creditor might apply for a *mandamus* on the trustee to come to the Court for a commission to examine witnesses. The general proposition that, where the circumstances affecting, or the conduct of, a person in whom is vested the legal right to take proceedings at law, are such as to present a substantial impediment to his action, those who are directly interested in such proceedings may themselves undertake their prosecution, has been affirmed in several English cases which have been approved of in South African judgments. In *Travis* v. *Milne* (22 L.J. Ch., p. 665), this principle was accepted in relation to a suitor beneficially interested in the estate of a deceased partner, where the acts of the executor himself were in question. Most of the cases were examined in *Yeatman* v. *Yeatman* (7 C.D., p. 210). It is quite clear that it is not necessary that there should be *mala fides* or collusion in the person holding the position of trustee before those beneficially interested may be authorised to take proceedings. In *Baxter* v. *Beningfield* (12 A.C. 167), the principle is thus expressed: "When an executor cannot sue because his own acts and conduct with reference to the testator's estate are impeached; relief, which as against a stranger could be sought by the executor alone, may be obtained at the suit of a party beneficially interested in the proper performance of his duty." This question was also discussed in *Mears* v. *Rissik & Others* (1905, T.S., p. 303). There the Court expressed the opinion that, where the trustee declined, whether *bona fide* or *mala fide* to take action, the insolvent as being beneficially interested in the estate would be entitled upon proper conditions to maintain the suit.

These authorities seem to me to show that the Court could, if necessary, direct the issue of the commission without further reference to the trustee; but, in the circumstances of this case, such a commission ought not to be issued except under a proper indemnity to the trustee against liability for any costs being thrown either upon him or upon the estate. There is no reason to think that the trustee will not loyally abide by the judgment of the Court, if the proceedings are conducted in his name, and I shall therefore

make an order directing him to apply for the issue of a commission under section 163, upon the applicant furnishing a proper indemnity against costs. I have found it somewhat difficult to determine whether the conduct of the proceedings should be committed to the solicitors of the trustee or the solicitors of the applicant, and this difficulty has been caused mainly by the somewhat reckless charges made by the applicant's solicitors against the trustee personally; but, having regard to the fact that the applicant is to pay all the costs of the application for a commission, and of the conduct of that commission for the examination of witnesses, it seems to me equitable that his attorney should have charge of the matter. The last question for decision is that of costs. The applicant has succeeded in obtaining substantially what he desires—namely, a commission for the examination of witnesses under section 163; he has failed in securing the removal of the trustee, he has failed in proving some of the charges he made, but he has established to the satisfaction of the Court that the trustee had put himself in such a position as to be unable fairly to exercise an independent judgment —a position which the Court has found to be improper, and which has probably caused the present difficulty. The applicant is therefore entitled generally to the costs of the proceedings; but if the charges of *mala fides* against the trustee involved a substantial and separable increase of the costs, any such increase should be disallowed. It is impossible to make any accurate estimate on this point, but such an increase, so far as I can judge, would not be of any considerable amount. Any such increased costs would not include the argument in Court, but would only refer to the affidavits and correspondence. I shall, as the nearest approximation at which I can arrive, direct the deduction from the applicant's costs of any charges in connection with his solicitors' letter of the 2nd April, 1914, and the trustee's reply of the 16th April, and of one-twentieth of the costs of drawing affidavits on behalf of the applicant, and of copying the same. Subject to this qualification, the applicant is entitled to his costs. Are they to be paid by the respondent personally, or by the estate? The result of making an order for costs against the estate will probably be that the applicant will have to pay one-half of them himself. That seems to be a defect of the Insolvency Law. It would be equitable, undoubtedly, that a creditor who is opposed by the trustee on behalf of the other creditors should not be liable to contribution for the costs of a successful application; but, if he is so liable under the law, that

does not seem to me a reason for giving costs against the trustee personally, which otherwise would be given against the estate. After weighing all the circumstances carefully, I have come to the conclusion, with some hesitation, that the costs of the applicant should be given against the estate, and not against the trustee *de bonis propriis*.

With reference to the costs of the trustee himself, I shall make no order. It is quite true that, in opposing the application, he was very likely carrying out the wish of the creditors, but he had no specific authority from them to oppose the application for a commission, of which the applicant was prepared to bear the costs. The situation has arisen mainly through his own improper act in identifying himself with the banks against the unsecured creditor, and acting as the agent of the Netherlands Bank whilst he was trustee. I do not think, therefore, that he ought to receive his costs out of the estate.

I shall therefore make the following order: (1) That the trustee do apply, under section 163 of Law No. 13, 1895, for a commission to examine upon oath the executor of the estate of the late Bension Aaron, Mrs. Amelia Aaron, the secretary of the Pniel Diamond Mining Company Limited, William Fitzgerald, the manager of the Commissioner Street branch of the National Bank of South Africa Limited, and such other persons as he may consider able to give information as to any property transactions between the late Bension Aaron and his wife, Mrs. Amelia Aaron, or any dealings by Mrs. Aaron with any property of her said husband or of his estate, or as to property of the partnership estate of Aaron and Steinweiss; provided, however, that the trustee shall not make such application until he has received from the applicant a satisfactory indemnity against any liability being imposed upon himself or upon the insolvent estate of Bension Aaron for costs in respect of the said application or the said examination, and that, in case of dispute as to the sufficiency of such indemnity, the matter shall be referred for decision to the Registrar of the Witwatersrand Local Division. (2) That the conduct of such application and examination shall be committed by the said trustee to the applicant's solicitors, subject to the right of the trustee to be consulted as to any steps being taken, and to give such reasonable directions in respect thereof as may be proper. (3) That leave is reserved to the applicant to apply to the Court in the case of the trustee refusing to apply for the examination of persons whose testimony the

applicant may consider desirable in the premises. (4) That the said trustee may require the inclusion of the name of the applicant amongst those to be examined, and may himself attend such examination for the purpose of questioning the applicant. (5) That the applicant shall be entitled to his costs against the estate, subject to the following deductions: (*a*) Any charges in respect of the letter of the applicant's solicitors of the 2nd April, 1914, and the respondent's reply of the 16th April. (*b*) One-twentieth of the charges for drawing and copying affidavits used by the applicant in respect of his application. (6) No order is made as to the costs of the respondent.

Applicant's Attorneys: *Marks & Holland;* Respondent's Attorney: *Edward Nathan.*

[G. H.]

EX PARTE DELOUCHE.

1914. *July* 28. CURLEWIS, J.

Married woman.—Public trader.—Immovable property.—Leave to alienate.

A married woman, who is a public trader, and who has lived apart from her husband for twenty years, *Held*, entitled in a case of urgency, to the assistance of the Court in alienating immovable property purchased by her in the course of her trade.

Application for an order authorising the applicant, a married woman, to accept transfer from the Municipal Council of Johannesburg into the joint names of herself and William John Bekkers, of certain six freehold lots in Johannesburg, and to give transfer of all her right, title and interest in respect of the lots to certain persons to whom she had sold them.

The petition alleged that the applicant was married to a certain Jean Baptiste Delouche at Ostend in Belgium, on September 15th, 1883. That she was uncertain whether the marriage was in or out of community of property. That since 1893 she had carried on business entirely on her own account, and without any monetary