Case No 244/92

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

EILEEN MARGARET FEY N.O.	1st Appellant
IAN LOCKHART WHITEFORD N.O.	2nd Appellant

and

JACOBUS COLYN SERFONTEIN	1st Respondent
GIDEON ANDRE SERPONTEIN	2nd Respondent

CORAM: HOEXTER, NESTADT, NIENABER JJA et
NICHOLAS, HARMS, AJJA

HEARD: 9 November 1992

DELIVERED: 26 February 1993

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

This is an appeal with leave of the court below (Thirion J) from an order made in the Natal Provincial Division dismissing with costs an exception to a declaration. The declaration was filed in proceedings in which the excipients were cited as the defendants. The excipients are the appellants in this appeal. The essential facts, the cause of action upon which the plaintiffs sought to rely, and the nature of the exception noted by the defendants are conveniently summarised in the judgment of Thirion J -

> "The estates of the plaintiffs were finally sequestrated as insolvent in April 1991. The defendants were appointed as trustees in the plaintiffs' insolvent estates. Thereafter the plaintiffs launched an application in which they claimed inter alia an order declaring the defendants unfit to act as trustees in their insolvent estates.
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> The application was opposed and eventually the issue of the defendants' fitness as trustees was

> referred to trial and plaintiffs were ordered to file a declaration. The plaintiffs did so. The relief which they pray is an order removing the respondents [the defendants] from the office of trustees in plaintiffs' insolvent estates.
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> The grounds relied upon by plaintiffs for an order removing the defendants from the office of trustees in their insolvent estates are pleaded as follows in paragraph 8 of the declaration:-
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> > [The learned judge then quotes in full the averments set forth in paragraph 8 of the declaration.]
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> The exception to the plaintiffs' declaration is taken on the ground that as a matter of law the Court has no general power to remove the respondents [the defendants] from their positions as trustees and is, furthermore, not entitled to remove the respondents from their positions on the grounds averred in paragraph 8 of the declaration."

Both in the court below and before us the matter was argued on behalf of the plaintiffs by Mr Hartzenberg. He informed us that at the exception stage counsel then appearing for the defendants did not persist in the second limb of the exception (that the complaints against the

defendants listed in paragraph 8 of the declaration were insufficient to warrant removal of trustees at all). In this court the argument on both sides was chiefly confined to the point whether, having regard to the relevant provisions of the Insolvency Act, 24 of 1936, as amended, the Supreme Court possesses what the notice of exception describes as a "general power" to remove from office a trustee in insolvency on the grounds of his misconduct; or, whether such power resides only in the Master of the Supreme Court. We were invited to deal with the appeal on that footing. In these circumstances it is unnecessary, I think, to burden this judgment with details of the discursive and somewhat rambling averments made in paragraph 8 of the declaration. The malfeasance imputed to the defendants by the plaintiffs involves charges of dishonesty, recklessness, and incompetence in the discharge of their duties as trustees. In paragraph 9 of the

declaration the plaintiffs plead that the defendants should be removed from their trusteeships on the ground of their misconduct ("wangedrag").

During the argument on appeal one of the matters raised was whether, assuming the existence of the court's general power to remove a trustee in insolvency for misconduct, the plaintiffs should not have joined the Master as a party to the proceedings. This was a point

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neither raised nor explored in the court below. Since argument, however, there has been filed with the registrar of this court an affidavit by the Master of the Supreme Court (Natal Provincial Division) in which he states, inter alia, that he is aware of the appeal and that he abides the decision of this court.

In 1916 Parliament, by Act 32 of 1916, repealed the existing statute law of insolvency in the various provinces of the then Union of South Africa and substituted

a uniform law of insolvency and assignment. Its structure largely followed the Transvaal Insolventiewet No 13 of 1895, which was essentially an adaptation of the Cape Ordinance 6 of 1843 - likewise adopted by the Natal Legislature as Ordinance 24 of 1846. On 1 July 1936 the Insolvency Act 24 of 1936 ("the Act") came into force. Broadly speaking the Act consolidates the provisions of the previous Union statutes. The Act has often been amended. The most comprehensive of the amending statutes were Act 16 of 1943 and Act 99 of 1965.

In Act 32 of 1916 the power of the court to declare a person disqualified from being a trustee was dealt with in sec 59, whose essential provisions have since remained unaltered. The court's power to remove a trustee was dealt with in Act 32 of 1916 in sec 60. This section underwent considerable modification both in the 1936 and the 1965 Acts. In the 1916 Act sections 59 and

60 read as follows:-

> "59. The Court, on the application of any person interested, may, either before or after the
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> appointment of a trustee, declare that the person appointed or proposed is disqualified from holding the office of trustee, and, if he has been appointed, may remove him from office and if it so thinks fit, may declare him incapable of being elected trustee under this Act during the period of his life or such other period as it may determine, if -
>
> (1) he has accepted or offered or agreed to accept from any auctioneer, agent, or other person, employed on behalf of the estate, any share of the commission or remuneration of or any other benefit whatever from that auctioneer, agent, or other person; or
>
> (2) in order to obtain or in return for the vote of any creditor or in order to exercise any influence upon his election as trustee he has -

(a) procured orbeen privy to the wrongful omission of the name of a creditor from anylist or schedule by this Act required; or

(b) directly or indirectly given or offered or agreed to give to any person any consideration; or

(c) offered or agreed with any person to abstain from investigating any previous transactions of the insolvent; or

(d) been guilty of or privy to the splitting of claims for the purpose of increasing the number of votes.

60. The Court, upon the application of the Master, the trustee himself, or any other person interested may remove any trustee on any of the following grounds:-

(a) His desire to resign his office, subject to the production of the certificate mentioned in section sixty-one, absence from the Union, ill-health, or any fact tending to interfere with the performance of his duties as trustee;

(b) insolvency or other legal disability;

(c) misconduct as trustee, including any failure to satisfy a lawful demand of the Master or a commissioner appointed by the Court, or to perform any of the duties imposed upon him by this Act;

(d) illegality in his election or appointment, or disqualification for any of the reasons mentioned in section fifty-eight.

The Court may remove any provisional trustee on

any ground that it may deem sufficient."

In Act 24 of 1936, prior to its amendment in 1965, sec 60 of the Act reads as follows:-

> "60. Upon the application of the Master or of any other person interested the Court may remove a trustee from his office on the ground -
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> (a) that he was not qualified for election or appointment as trustee or that his election or appointment was for any other reason illegal, or that he has become disqualified from election or appointment as a trustee; or
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> (b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master; or
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> (c) that he is mentally or physically incapable of performing satisfactorily his duties as trustee."

Since the amendment of the Act in 1965, and in its present form, sec 60 reads as follows -

> "60. The Master may remove a trustee from his office on the ground -
>
> (a) that he was not qualified for election

> or appointment as trustee or that his election or appointment was for any other reason illegal, or that he has become disqualified from election or appointment as a trustee or has been authorized, specially or under a general power of attorney, to vote for or on behalf of a creditor at a meeting of creditors of the insolvent estate of which he is the trustee and has acted or purported to act under such special authority or general power of attorney; or

(b) that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master; or

(c) that he is mentally or physically incapable of performing satisfactorily his duties as trustee; or

(d) that the majority (reckoned in number and in value) of creditors entitled to vote at a meeting of creditors has requested him in writing to do so; or

> (e) that, in his opinion, the trustee is no longer suitable to be the trustee of the estate concerned."

In terms of sec 59 of the Act the court still

retains the power of declaring that a person is disqualified

from holding office as a trustee, and the power of removing him on the ground of such disqualification. The provisions of sec 59, however, have no application to the case pleaded by the plaintiffs. As far as sec 60 is concerned, the following appears from its legislative history outlined

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above: (1) In sec 60 of Act 32 of 1916 (see paragraph (c) of the section) "misconduct as trustee" was one of the grounds whereon the court might remove a trustee. The word "including" shows that "misconduct" bears a broader meaning than the mere "failure to satisfy a lawful demand of the Master or a commissioner appointed by the Court, or to perform any of the duties imposed upon him by the Act." (2) After the enactment of Act 24 of 1936 the statutory power of removal was still exercisable by the court, but the grounds of removal prescribed no longer included "misconduct as trustee". (3) After the amendment of sec 60 of Act 24 of 1936 by sec 18 of Act 99 of 1965 the following

position obtained: (i) the statutory power to remove a trustee was assigned to the Master and no longer to the court; (ii) there was still omitted any reference to "misconduct as trustee" but (iii) certain additional grounds for removal were prescribed, more particularly in paragraph (e).

In the court a quo the exception raised two issues: first whether at common law the court had the power to remove from his trusteeship a trustee in insolvency on the ground of misconduct in his office; and second, if so, whether upon a proper construction of the Act such common law power has been extinguished. Having heard argument on the matter Thirion J held (1) that at common law the court possessed the power in question and (2) that such common law power had not been ousted by the Legislature.

Referring to modern authority the learned judge began by pointing out that under our common law the court possessed an inherent power to remove a trustee or

administrator appointed by will on the ground that his continuance in office would prejudicially affect the future welfare of the trust estate committed to him. See for example, The Master v Edgecombe's Executor and Administrators 1910 TS 263; Sackville West v Nourse and Another 1925 AD 516. Turning to the writings of the Dutch jurists Thirion J remarked:

> "Van der Linden in his Institutes of Holland 1, 5, 7 and 8, says that a guardian may be removed from office on account of a breach of trust or on account of his unfitness for the further administration of the guardianship. In section 8 he says that generally the same rules apply to curatorship.
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> Voet deals in 26.10 with the subject of suspect guardians and curators and says at 26.10.3 (Gane's translation):
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> > 'What sort of guardians they are makes moreover little difference so far as concerns the arraignment or removal of a suspect. They can be arraigned as suspect whether they have been assigned by a testator or by the law or by the magistracy.'

Thereafter the learned judge reasoned by analogy. It appears to me, with respect, that his reasoning is instructive and sound. He said:

> "It would seem to me that the position of a trustee in insolvency is analogous to that of a trustee, administrator or executor in a deceased's estate. He occupies a position of trust. Under the insolvency laws it is his function to liquidate the insolvent estate and account to creditors and the insolvent for his administration. In this respect his fiduciary position differs little from that of an executor or administrator of the estate property. In my view the Court has at common law the same power to remove a trustee in an insolvent estate as it has in respect of a trustee, or guardian or administrator in a deceased's estate."

On the second issue before him Thirion J stated his conclusion in the following words:-

> "In my view the grounds for removal of a trustee as set forth in section 60 of the Insolvency Act 24 of 1936, as originally enacted were not intended to be in substitution of the Court's common law powers but were intended to be additional thereto. Madrassa Anjuman Islamia v Johannesburg Municipality 1917 AD 718 at 723 and 727.

> The substitution of section 60 of the Act by section 18 of Act 99 of 1965, therefore, did not in any way affect the Court's common law powers to remove a trustee from office. This conclusion is in accordance with the well recognised rule in the interpretation of statutes that in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the legislature (De Wet v Deetlefs 1928 AD 286 at 290), and in accordance with the rule that statutory provisions which limit or do away with an aggrieved person's right to seek the assistance of the Court have to be strictly interpreted. Benning v Union Government 1914 AD 180 at 185."

The way has now been cleared for a consideration of the arguments advanced on behalf of the defendants in this court. The heads of argument on behalf of the defendants originally lodged with the registrar of this court were prepared by counsel who had appeared in the court below, but who did not argue the appeal. In the original heads it was expressly conceded that -

> "....at common law the Court has power to remove a person from an office of trust, whatever the source of his appointment as such, on the ground that such person is ' suspect' i e, if there were to be any cause which would indicate that 'he

> ought not to be engaged' in the particular office."

In this court Mr Gordon appeared for the defendants. From the bar he handed up very brief amended heads of argument ("the new heads"). These had been signed by counsel on 23 October 1992 but they were not thereafter lodged with the registrar of this court. The latter omission, which has resulted in inconvenience to the court, has been satisfactorily explained in letters subsequently addressed to the registrar by both the defendants' attorneys of record and their Bloemfontein correspondents. No blame for the omission attaches to either firm of attorneys or to counsel.

In the new heads counsel for the defendants withdraws the earlier concession to which I have referred. Thereafter the following is stated:

> "The Appellants [defendants] will submit that the cessio bonorum of the common law is not the equivalent to the modern administration of

> insolvent estates and that the curator appointed under such procedure is not the equivalent of a trustee in insolvency."

The old law, however, cannot thus summarily be brushed aside. Upon a comparison of the ancient law of insolvency with the modern, it appears to me that the resemblances are a good deal more arresting than the differences. Indeed, the similarities have been described (see Prof Smith, The Law of Insolvency, 3rd ed, at 5) as "quite astonishing". The Likeness is to be noticed, moreover, both in voluntary surrender and in compulsory sequestration.

The ancient origins of cessio bonorum are described thus by Boey, Woorden-Tolk (1773) sv "Cessie" -

> "Het beneficie van Cessie was by de Romeinen geintroduceert door de Lex Julia om te matigen de Wet der twaalf Tafelen, wat door de Schuldeisers meester wierden van de vryheit in het leeven van haar Schuldenaaren, die insolvent waaren, maar de Cessien te meenigvulden wordene, oordele men daar aan te moeten hegten een sekere schande en smaadheit, dus noodzaakte men door geheel Italien de Cessionanten te draagen een muts of hoed van een Orange couleur, en te Rome een Groene....."

Upon its introduction to Holland cessio bonorum was there known as "Boedelafstand" (see Weasels, History of the Roman-Dutch Law at 661-667). It involved the granting of a writ freeing the petitioner from future arrest. The effect of its confirmation was to stay execution against his goods, and to place his property in charge of a curator. Van der Linden, Judicieele Practijcq (1794) Book II, chapter XXXI, sec 5, says:

> "De Brieven van Cessie verleend zijnde, word door het Gerecht, met te decerneeren eene Curatele in des Cessionants boedel, voor de bewaaring der goederen gezorgt."

So much for voluntary surrender in the old law. When one considers compulsory sequestration, the parallel is even more striking. Voet (see Gane's translation, vol 6 pp 391-405) deals with "The Assigning of a Curator for Property" in Book XLII, Title 7. Having regard to Voet's treatment of the subject it is not remarkable that the translator's note (at

391) begins with the following comment:

> "Voet in this title takes up the thread of his treatment of the common law of insolvency. His curator bonis is here no one else than he who has now for several generations been called by us a 'trustee' in insolvency."

Of great historical importance is the Insolvency Ordinance of Amsterdam of 1777. It represents the foundation of much of the later South African law of insolvency. It was the source of the insolvency practice at the Cape at the time of annexation; and its main principles were introduced into the various colonial ordinances - see Wessels, op cit 668-671. Suffice it here to say that the Amsterdam Ordinance of 1777 recognised compulsory sequestration, the administration of the insolvent estate by a trustee under the direction of creditors, and rehabilitation of the insolvent. Cape Ordinance No 64 of 1829 recognised both the voluntary surrender of an estate and compulsory sequestration if certain acts of insolvency had been

committed. It was superseded by Ordinance No 24 of 1843 which formed the foundation of insolvency procedure for the whole of South Africa.

In Sackville West v Nourse and Another (supra), this court was concerned with the position of a trustee under a trust created by a deed of transfer. The judgments delivered in that case nevertheless set forth certain principles of general application governing the administration of the property of others by a person in a fiduciary position; and those principles seem to me to be of direct relevance in determining the first issue raised by the exception. In the course of his judgment Solomon ACJ (at 527) said the following:-

> "There is very little authority in our law with respect to the grounds which justify a Court in removing trustees from office, and what is still more strange is that there appears to have been an equal dearth of authority on this subject in England. The matter was, however, carefully considered in the case of Letterstedt v Broers (9 A C 371), which came before the Privy Council on

> appeal from the Cape Supreme Court, and which has laid down the broad principles by which, on this subject, Courts administering the Roman-Dutch law should be guided. In his judgment Lord BLACKBURN says: 'There is very little to be found to guide us in saying what are the cases requiring such a remedy, so little that their Lordships are compelled to have recourse to general principles.' He then quotes a passage from Story's Equitable Jurisprudence (par.1289) as follows: 'But in cases of positive misconduct Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust: it is not indeed every mistake or neglect of duty or inaccuracy of conduct of trustee, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity.' He then proceeds to lay down the broad principle that the Court 'if satisfied that the continuance of the trustee would prevent the trusts being properly executed,' might remove the trustee."

Approaching the matter from the angle of the Roman and the Roman-Dutch law, Kotzé JA (at 533-554) made the following observations:-

> "Now, in dealing with the administration of the property of others by persons in a fiduciary position, our courts have adopted the rule of the

> Roman law, as expounded by the commentators and by the Dutch jurists. They have followed and applied the precept laid down by Paulus in the Digest (18.1.34.7), where we are told that 'the same principles, which apply to a tutor in dealing with the property of his ward, should also be extended to other persons acting under similar circumstances; that is to say, to curators, procurators and all those who administer the affairs of others.' A trustee, therefore, is to be included in this category."

For a discussion of the common law with reference to the removal of tutors and testamentary officials, see further the remarks of Mason J in The Master v Edgecombe's Executors (supra) at 271 - 272. The decision of Mason J was confirmed on appeal (at 275), and the full bench (Innes CJ, Wessels and Bristowe JJ) who sat in appeal on the judgment intimated no dissent from the principles enunciated by Mason J as to the court's powers of removal with reference to administrators.

For the reasons mentioned by Thirion J in his judgment in the court below, it appears to me that

considerations of logic and justice demand that a trustee in an insolvent estate must fall into the category of persons occupying a fiduciary position to which Kotze J referred in the Sackville West case (supra). In my judgment it is clear that at common law the court has the power to remove a trustee in an insolvent estate on the grounds of his misconduct as trustee. In the declaration in the instant case there are averments (which, if the matter proceeds to trial, may or may not be susceptible of proof) which are tantamount to charges of abuse of trust, dishonesty and recklessness which may justifiably be termed "misconduct" on the part of the trustees. In my view Thirion J correctly decided the first issue against the defendants.

I turn to the second issue. Has the power enjoyed by the court under common law been taken away by statute? In Fairlie v Raubenheimer 1935 AD 135 Beyers JA said (at 146):-

> "Die Ordonnansie van Amsterdam, 1777, is in 'n aansienlike mate die grondslag van ons Suid-Afrikaanse wetgewing van tyd tot tyd.
>
> Ons insolvensie wet maak geen inbreuk op die Gemenereg nie insover die Gemenereg bestaanbaar is met die voorsieninge van die insolvensie wet. As dus die statuut oor iets swyg of twyfelagtig is, moet ons ons toevlug na die Gemenereg neem."

The following statement of the position by Holmes JA,

in his minority judgment in Cornelissen v Universal Caravan

Sales (Pty) Ltd 1971(3) SA 158(A) was not, it seems to me,

disavowed in the judgments of the majority -

> "....it has been well recognised for a century that the Insolvency Acts in this country have not ousted the relevant common law unless the latter is inconsistent with the statute; see the Privy Council case of Thurburn and Another v Steward and Another, decided in 1871, and reported in L.R. 3 P.C. 478, in relation to the 1843 Cape Insolvency Ordinance. See also Scharff's Trustee v Scharff, 1915 TPD 463 at p 476..." (at 170B).

See further the remarks of Van den Heever J in Richter NO

v Riverside Estates (Pty) Ltd 1946 OPD 109 at 223; and the

judgment of De Waal J in The Master v Perl 1925 TPD 212 at

216-217.

It is trite law, moreover, that statutes in derogation of the common law are to be strictly construed. The common law will be displaced only where the terms of the statute are irreconcilably opposed to the common law. That approach, in the context of the present exception, harmonises with and follows another cardinal principle of our law: that the jurisdiction of the Supreme Court is not to be ousted unless by the express language of, or an obvious inference from, a statute. The matter was put thus by Ogilvie Thompson AJA in Welkom Village Management Board v Leteno 1958(1) SA 490(A) at 502 G -

> "The rule of Shames' case [1922 AD 22], as interpreted by the majority of this Court in Feldman's case [1942 AD 340], accordingly is that the Court's jurisdiction is excluded only if that conclusion flows by necessary implication from the particular provisions under consideration, and then only to the extent indicated by such necessary implication...."

See further: Lenz Township Co. (Pty) Ltd v Lorentz N O en

Andere 1961(2) SA 450(A) at 455A-B; Local Road Transportation Board and Another v Durban City Council and Another 1965(1) SA 586(A) at 592H; Minister of Law and Order v Hurley and Another 1986(3) 568(A) at 584A.

On behalf of the defendants it was contended that when it enacted Act 24 of 1936 the Legislature intended that the power of removal of a trustee assigned to the court should be exercised only and exclusively on the grounds stated in paragraphs (a), (b) and (c) of sec 60; and that the amendment of sec 60 by sec 18 of Act 99 of 1965 (whereby the power was granted to the Master in place of the court) served to strengthen the inference that Parliament intended to destroy any residual common law jurisdiction of the court. On this construction of the statute, so it was further urged upon us, an aggrieved insolvent was not necessarily completely deprived of his right of recourse to the court: a decision taken by the Master under sec 60

(following representations to him by the insolvent) not to remove the trustee might be brought under review in terms of sec 151 of the Act.

In my view these various arguments cannot prevail. The Act neither says in express terms that the court's common law power is displaced nor, so I consider, does such an interpretation follow as a matter of necessary implication. Moreover, upon the construction for which the defendants contend a somewhat curious situation would seem to arise. When sec 60 of Act 24 of 1936 discarded "misconduct as trustee" as a ground for removal by the court, the power to remove a trustee on the said ground was not simultaneously entrusted to the Master. Now under sec 60 as amended by Act 99 of 1965 the Master' s powers (see paragraph (e)) would no doubt entitle him to remove a trustee on the ground of "misconduct as trustee". But on the defendant's argument one is left to speculate upon the

oddity that from 1 July 1936 and until the enactment of Act 99 of 1965 a trustee guilty of "misconduct as trustee" would not have been liable to removal on that ground by either the court or by the Master unless such misconduct could be accommodated within the narrower concept conveyed by the words "that he has failed to perform satisfactorily any duty imposed upon him by this Act or to comply with a lawful demand of the Master."

It may be that by entrusting the statutory removal of a trustee to the Master the Legislature sought to provide a remedy which is cheaper and more expeditious. In my judgment, however, it is not an exclusive remedy; and the court's common law power of removal remains. The possibility of review proceedings under sec 151 of the Act would represent cold comfort to litigants in the position of the plaintiffs in the present case. All their allegations against the defendants have been strenuously denied by the

latter in their opposing affidavits. The Master's office, from the nature of things, is ill-equipped to determine disputed facts. The recognised procedure for settling disputed facts is by trial action. A court is the obvious tribunal for the determination of such disputed matters. Grave injustice may be done to a litigant who is denied the ordinary procedure adopted in investigating the truth of conflicting allegations.

The appeal is dismissed with costs.

G G HOEXTER, JA

NESTADT, JA)
NIENABER, JA) Concur
NICHOLAS, AJA)

HARMS, WnAR:

Ek het die geleentheid gehad om die uitspraak van

my geagte kollega Hoexter te lees maar, vir die redes

wat volg, kan ek myself ongelukkig nie met sy gevolgtrekking vereenselwig nie.

Die respondente (die eisers) se boedels is finaal gesekwestreer op 23 April 1991. In 'n aansoek gedateer 28 Augustus 1991 bekla hulle hul oor die wyse waarop hulle boedels beredder word en dit is hierdie aansoek wat na verhoor verwys is. Hulle steun nie daarop dat hulle enige residuële belang in die boedels het nie maar, so kom dit my voor, tree as amici creditorum op want, sê hulle, die appellante (die kuratore van hulle insolvente boedels) het nagelaat om die boedels "te beredder tot voordeel van die skuldeisers". Hulle meld twaalf "feite en omstandighede" waaruit dit na bewering sou blyk dat die appellante "ohbevoeg" is om hulle ampte as kuratore te beklee. Hulle konkludeer dan in hulle eisuiteensetting dat as gevolg van die appellante se "wangedrag" is hulle geregtig op 'n bevel tot ontheffing van die appellante uit hulle voormelde ampte. Die

ampte. Die gelykskakeling van 'n "onbevoegdheid" en 'n "wangedrag" word nêrens verduidelik nie. Hoe dit ook al sy, die appellante het verkies om hulle aanval teen die eisuiteensetting tot 'n eng front te beperk en dit is dat die hooggeregshof "(h)as no general power" om die appellante uit hulle ampte te ontset. Wat die eksepiënte skynbaar bedoel het om te beweer, was dat die bevoegdhede van die hooggeregshof om 'n kurator in 'n insolvente boedel te ontset deur art 59 van die Insolvensiewet 24 van 1936 omskryf is en dat die eisoorsaak nie op daardie bepaling gefundeer is nie maar op ' n meer algemene bevoegdheid wat nie in die statuut gemeld word nie.

Soos uit Hoexter AR se uitspraak blyk, is die eksepiënte in dié mate korrek naamlik dat die statuut nie aan die hof nie maar aan die meester die ontsettingsbevoegdheid verleen het op die gronde in die deklarasie beweer. Wat dus vir beslegting voor ons is.

is eerstens of die hof gemeenregtelik 'n afsettingsbevoegdheid besit het en, indien wel, of daardie bevoegdheid statutêre ingrype oorleef het.

Dit kan aanvaar word dat die hof gemeenregtelik wel die bevoegdheid besit het om 'n persoon sy vertrouensamp (insluitende die amp van kurator in 'n insolvente boedel) weens wangedrag te ontneem. Hierdie reël het in 1843 in die Kaap statutêre beslag verkry toe art 52 van Ordonnansie 6 van 1843 die verwyderingsbevoegdheid aan die hof toevertrou het in geval van "any misconduct in the said trust". Die Natalse wetgewer het dit nagepraat in art 57 van Ordonnansie 47 van 1887 terwyl art 77 van die Transvaalse Wet 13 van 1895 dit "wegens wangedrag in zijn beheer" genoem het. Die Unie wetgewer het hierdie bevoegdheid in art 60(c) van die Insolventiewet 32 van 1916 herverorden.

Dit was die posisie tot en met die aanname van

die 1936-Wet. Die Wet het in art 59 die bepalings van art 59 van die 1916-Wet herverorden wat aan die hof die bevoegdheid verleen het om, in gegewe omstandighede, 'n persoon as kurator te diskwalifiseer en, indien hy reeds aangestel was, hom uit sy amp te sit. Art 60 het die bevoegdheid van die hof om 'n kurator uit sy amp te sit, gewysig. Vir huidige doeleindes is dit van belang om aan te dui dat die begrip "wangedrag als kurator" ("misconduct as trustee") vervang is met 'n versuim "om op 'n bevredigende wyse te voldoen aan 'n verpligting wat hierdie Wet aan hom op(ge)lê" het. Terloops mag daarop gewys word dat die hof se verwyderingsbevoegdheid soos uiteengesit in art 60(a) van die 1916-Wet, nie herverorden is in 1936 nie maar dat 'n soortgelyke bevoegdheid aan die meester in art 61 toegeken is.

Aangesien ek my nie 'n "wangedrag als kurator" kan indink wat nie gelyktydig ook 'n versuim is om op 'n

bevredigende wyse te voldoen aan 'n verpligting wat die Insolvensiewet aan 'n kurator oplê nie, is ek van oordeel dat die 1936-Wet slegs woordmatig en nie begripsmatig nie in dié opsig van die 1916-Wet verskil het. Hoewel ek dit dus eens met Thirion R is dat art 60(c) van 1916-Wet "was declaratory of the Court's common law powers", kan ek nie sy verdere stelling onderskryf naamlik dat art 60 van die 1936-Wet "omitted misconduct as a ground for a trustee's removal".

Art 60 van die 1936-Wet is deur art 18 van Wet 99 van 1965 gewysig. Van belang is die volgende: Waar vantevore die ontsettingsbevoegdheid in die hof gesetel was, vestig dit nou in die meester. Die 1936-gronde

vir afsetting is behou, insluitende die versuim om op 'n bevredigende wyse aan 'n verpligting wat die Wet oplê, te voldoen. Wat bygevoeg is, is onder andere dat as die meerderheid van skuldeisers die meester skriftelik versoek om die kurator af te sit of as die kurator na

die mening van die meester nie meer geskik is om kurator van die betrokke boedel te wees nie. Of dit nou art 60 in sy 1936-vorm (soos Thirion R bevind het) of in sy 1965-vorm is wat die hof se bevoegdheid in geval van wangedrag soos bewoord in art 60(c) van die 1916-Wet "weggelaat" het, feit is dat dit nie in die Wet soos dit tans daaruit sien, voorkom nie. Die probleem kan nou na die volgende gereduseer word: As 'n gemeenregtelike reël statutêr herverorden word, en die statuut daarna herroep word, herleef die reël in sy oorspronklike vorm? Ek dra nie kennis van so 'n beginsel of reël van wetsuitleg nie. Inderdaad is daar gesag tot die teendeel. In Cornelissen NO v Universal Caravan Sales (Pty) Ltd 1971(3) SA 158(A) het dit om art 36(4) van die 1936-Wet gegaan. Die eiser se advokaat het (op bl 182H-183C) op 'n gemeenregtelike reël staatgemaak en het betoog dat die reel in ooreenstemming met die bepalings van die Wet was. Kotzé WAR het namens

die meerderheid van die hof daarop gewys dat dié reël in die voor-Unie en ook in die 1916-Wet herverorden is maar uit die 1936-Wet weggelaat is. Dit, het hy (op bl 187A-B) gesê,

> "... strongly indicate[s] an intentional sweeping away from the provisions which preserve or (in the case of the last-mentioned measure) enact a right in favour of the vendor to reclaim on the ground of fraud. The elimination of earlier provisions which re-enact the common law rule is indicative of a clear legislative intention to reverse and repeal the provisions in question."

Wat hier gesê is, is een van die rationes decidendi van daardie uitspraak. Die algemene

benadering wat Holmes AR (op bl 170B-C) namens die minderheid voorgestaan het en wat deur my geagte kollega in sy uitspraak aangehaal is, was dus nie van toepassing op daardie analoë geval nie.

Vervolgens moet oorweeg word of ander oorwegings 'n glos of uitsondering op Kotzé WAR se genoemde algemene benadering regverdig. Dit is natuurlik so dat daar 'n vermoede bestaan dat die wetgewer nie die gemenereg wil wysig of met die bevoegdhede van die hooggeregshof inmeng nie. Hierdie vermoedens moet na my oordeel egter wyk voor die woorde en die geskiedenis van die 1936-Wet en wel om die volgende addisionele redes. Die wetgewer het oor die jare heen meer en meer tot die besef gekom dat die aanstelling en afsetting van 'n kurator 'n saak vir die krediteure in samewerking met die meester is. Dit is 'n administratiefregtelike aangeleentheid. (Vergelyk die benadering, in 'n ander konteks, in Shames v S A Railways and Harbours 1922 AD

228 op 234-5.) Aangesien die krediteure tans die bevoegdheid het om vir die administratiewe afsetting van 'n kurator aan te vra, is die noodsaak vir 'n judisiële beregting daaroor minimaal. Dit is ook na my oordeel verkeerd om die meester se vermoë om geskilpunte van dié aard te besleg té gering te ag. Dit vorm deel van sy daagliks pligte en hy hoor gereeld viva voca getuienis aan. So 'n prosedure het ook die voordeel van minder formaliteit en 'n spoedige resultaat. 'n Ontevrede insolvent is in ieder geval, sou mens vermoed, nie finansieel in staat om die luukse van 'n "rauw aktie" te bekostig nie en die ontevrede krediteur (wat in ieder geval sy geld - ten dele of heeltemal - reeds kwyt is) sal ook ' n goedkoop prosedure verkies. Ook is die meester se beslissing in die verband aan hersiening onderworpe. Wat ek hier so pas gesê het, stem grotendeels saam met die benadering van Coetzee R in Gilbert v Bekker & Another 1984(3) SA 774(W) 781G-785.

Dit is ook opmerklik dat art 151 van die 1936-Wet ook in 1965 gewysig is en dat die hof se hersieningsbevoegdheid ten aansien van die meester se beslissing oor die aanstelling van 'n kurator in terme van art 57 uitdruklik weggeneem is. Dit is dus na my oordeel futiel om te argumenteer dat daar nie 'n bedoeling (ten minste in 1965) was om die hooggeregshof se bevoegdhede in te kort nie. Dit volg dat ek van oordeel is dat die gemeenregtelike reël nie meer van krag is nie en ek sou die appél dus gehandhaaf het.

L T C HARMS WAARNEMENDE

APPèLREGTER