IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 9318/17

In the matter between:

FATIMA ISMAIL PATEL	First Applicant
MUHAMMAD ALI EBRAHIM	Second Applicant
TARIQ ISMAIL PATEL	Third Applicant
TAHIR ISMAIL PATEL	Fourth Applicant
YUSUF ISMAIL	Fifth Applicant
and	
EILEEN MARGARET FEY N.O.	First Respondent
ABDURUMAN MOOLLAJIE N.O.	Second Respondent
THE MASTER OF THE HIGH COURT	Third Respondent

JUDGMENT DELIVERED ON MONDAY 27 NOVEMBER 2017

GAMBLE, J:

[1] Mr Mohamed Ismail Patel (aka Patel Muhamed, aka Mohamed Ismail) was formerly an attorney of this court who earned his keep both as an attorney and as a trustee of insolvent estates under the name and style “Good Hope Trustees”. On 14

December 2016 Mr Patel's estate was provisionally sequestrated by order of this court and on 18 April 2017 that order was made final. In addition to the order of sequestration, and on 24 March 2017, this court ordered that the insolvent's name be struck off the roll of attorneys. For the sake of convenience, and to avoid confusion with the other parties to this litigation, I shall hereinafter refer to Mr Mohamed Patel as "the insolvent".

[2] Pursuant to the provisional order of sequestration the first and second respondents herein, Ms. Fey and Mr. Moollajie, were appointed trustees in the estate of the insolvent on 22 December 2016. Pursuant to that appointment, the trustees immediately set about their work which included the realisation of assets of the insolvent and, later, the interrogation of various parties in terms of s152(2) of the Insolvency Act, 24 of 1936 ("the Act") before the Magistrate sitting at Wynberg.

[3] The first to fifth applicants in this matter are respectively the wife, brother and three sons of the insolvent. On 25 May 2017 they launched the present application for the removal of the first and second respondents as trustees in the estate of the insolvent. The application is specifically based on the provisions of s59(a) of the Act.

[4] In the founding affidavit the first applicant, Ms. Patel, states that her husband, the insolvent, left South Africa during 2016 and is currently in Dubai in the United Arab Emirates where she last saw him in January 2017. He is accordingly beyond the jurisdiction of this court (and the Magistrates Court, for that matter) for purposes of any insolvency interrogation. However, notwithstanding the absence of insolvent from the Republic, the trustees commenced interrogation of the applicants

during February and March 2017 in an attempt to locate assets belonging to the insolvent. It appears from the record that such interrogation proceeded in fits and starts as witnesses were absent for a variety of reasons.

[5] Ms. Patel complains in the founding affidavit of aggressive, abusive and oppressive behaviour on the part of, inter alia, Ms. Fey and her instructing attorney Mr. Kurz, prior to, and during the insolvency interrogation before the Magistrate. However, although such behaviour may otherwise constitute a basis for the removal of a trustee[1] that is not the ground relied upon in the founding affidavit. Rather, the applicants seek to persuade the court on a far narrower basis - that the trustees are in breach of the provisions of s59 (a) of the Act.

> *"s59. On the application of any person interested the court may either before or after the 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 may in either case declare him incapable of being elected or appointed trustee under this Act during the period of his life or such other period as it may determine, if-*
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> *(a) he has accepted or expressed his willingness to accept from any person engaged to perform any work on behalf of the estate in question, any benefit whatsoever in connection with any matter relating to that estate;"*

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[1] Fey NO and Whiteford NO v Serfontein and Another 1993 (3) SA 605 (A) at 614 C-F; James v Magistrate, Wynberg and Others 1995 (1) SA 1 (C) at 12-15.

[6] The gravamen of the complaint by the applicants is that the trustees were receiving improper and unlawful commissions (loosely referred to as “kickbacks”) from certain parties responsible for the auctioneering of assets belonging to the insolvent estate. These allegations are denied by the trustees.

[7] After the respondents had filed their answering affidavits on Wednesday, 5 July 2017 (some 3 court days late) it became apparent that no replying papers were likely to be filed. In those answering papers the respondents sought punitive costs orders against the applicants jointly and severally. In any event, it is common cause that the first, third and fourth applicants also fled South Africa for Dubai in July 2017 and have not taken any steps to advance the application since then. It must therefore be assumed that those applicants have abandoned the application. Such abandonment has obvious costs implications for those applicants and, in the absence of any appearance on their behalf or written submissions having been made at the hearing of the matter it would therefore be appropriate to make an order holding the first, third and fourth applicants jointly and severally liable for the costs of the trustees in this application.

[8] The second applicant (Mr. Ebrahim) and the fifth applicant (Mr. Yusuf Ismail) are said to still be in South Africa but it is only the former who has continued to participate in these proceedings. Although the applicants were no longer actively advancing the matter, it was set down for hearing on the semi-urgent roll before this court on 7 November 2017. The notice of set down issued by the Registrar of this court is dated 7 August 2017 and makes provision for the customary service on the parties by way of registered mail.

[9] On 11 August 2017 the second applicant delivered an affidavit entitled "*Second Applicant's Provisional Answering Affidavit*". It is common cause that this is actually a replying affidavit and I shall henceforth refer to it as such. It is further common cause that the affidavit was prepared for the second applicant by an attorney, Mr. M.R. Khan, who, it seems, had attended the insolvency enquiry from time to time on behalf of certain of the applicants when they were still in the country.

[10] In the second applicant's replying affidavit an allegation is made at the outset that the second applicant no longer wishes to participate in the application.

> *"4. I have decided to withdraw as the Second Applicant in this application by virtue what of what is stated hereunder; hence I decided that it would be unnecessary and a waste of the Court's time to deal with each and every allegation of the First and Second Respondent.*
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> *5. Whilst I still firmly believe that there is merit in the application for the removal of the First and Second Respondents, I nevertheless decided to withdraw by virtue of the recent telephone (sic) of the First Respondent to me, which is set out hereunder."*

The second applicant then goes on to allege threats made to him telephonically by Ms. Fey which he claims had induced him to abandon his participation in the application for removal of the trustees.

[11] Notwithstanding the declared intention not to participate further in the application, the second applicant spends another 32 pages (and some 140

paragraphs) denigrating, and complaining about the conduct of, Ms. Fey, Mr. Kurz and the Magistrate who initially presided over the insolvency enquiry, Mr. Grobbelaar. The affidavit concludes with a prayer that *"the Honourable Court grant the relief set out in the Notice of Motion."* Mr. Ebrahim's affidavit is accompanied by a confirmatory affidavit deposed to by Mr. Khan.

[12] Ms. Fey deposed to a supplementary affidavit on 26 October 2017 in which she deals with a number of issues which need not be considered at this stage. Suffice it to say that her affidavit is intended to inform the court of certain material developments in the matter and, further, to dispute various of the allegations of impropriety made by the second applicant in the replying affidavit. In that supplementary affidavit Ms. Fey refers to a notice of withdrawal filed on the trustees' attorneys on behalf of the second applicant on 14 August 2017 in which the second applicant notified all parties of his withdrawal of the application and tendered to pay the respondents' costs of suit "*on a party and party basis, alternatively by agreement."* *Prima facie* that tender complies with the provisions of Rule 41(1)(a).

[13] The provisions of Rule 41(1)(a) are to the following effect:

> *"41(1)(a) A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs; and the taxing master shall tax such costs on the request of the other party."*

[14] In argument before this court counsel for the trustees, Mr. Rogers, sought to persuade the court that the notice of withdrawal was filed after receipt by the second applicant of the notice of set down dated 7 August 2017 and that therefore the application could only be withdrawn with the consent of the trustees, or the leave of the court. The point is of relevance because the trustees seek dismissal of the application with a costs order on the punitive scale, whereas the tender by the second applicant is for costs on the party and party scale. Mr. Rogers' main argument therefore can only succeed if the trustees are able to establish, on a balance of probabilities, that the second applicant indeed received the notice of set down prior to 14 August 2017.

[15] Having considered the matter, I am not persuaded that the trustees have established that fact with the requisite degree of proof. While the suspicion lingers, in my view it is possible that service of the affidavit and the notice of withdrawal predate receipt of the notice of set down. In the absence of reliable evidence as to when the registered letter was collected (which is readily accessible these days through the *"Track and Trace"* facility available online at the post office) the trustees cannot rely on the proviso to Rule 41(1)(a) which requires the second applicant to now procure their consent (or the leave of the court) to withdraw the application.

[16] But Mr. Rogers had a second string to his bow. He submitted that the replying affidavit created uncertainty in the minds of the trustees as to whether the application was in fact being withdrawn, given the prayer contained in para 152 requesting that the court should grant the relief sought in the notice of motion. That

stance, said counsel, necessitated an appearance in court to resist any attempts by the second applicant to procure such relief. Mr. Rogers was supported in this submission by the fact that Mr. Khan represented the second applicant at the hearing on 7 November 2017, addressed the court in some detail and proceeded to direct stinging criticism at the trustees, their attorney and the Magistrate during that address, while seeking to rely on a valid notice of withdrawal by the second respondent.

[17] I suppose one might say that a fair minded attorney might have directed a letter to his opponent after receipt of the replying affidavit, enquiring about the obvious inconsistencies therein and asking whether the application was indeed being prosecuted by the second applicant, in light of the earlier indication in the affidavit that he was abandoning the application. After all Mr. Kurz had no difficulty in doing so on 7 July 2017 when he wrote to Mr. Khan demanding the production of documents at the resumption of the insolvency interrogation. Furthermore, if the notice of withdrawal did in fact postdate the notice of set down consideration might have been given to setting the notice aside as an irregular step under Rule 30. Or, a letter might have been written to the opposing attorneys pointing this out and alluding to an intention to take such steps.

[18] But no such steps were taken and, given the level of acrimony which apparently exists between the parties and their attorneys in this matter, an expectation of collegiality is perhaps supremely optimistic rather than realistic. It is, however, common cause that on an occasion during August 2017 while the parties were busy with the interrogation at Wynberg, Mr. Kurz informed the second applicant that his notice of withdrawal was not in order, but the second applicant is a lay person

and can hardly be blamed for not understanding the legal niceties suggested to him, particularly from an attorney that he perceived to be unneccesarily hostile to him.

[19] In any event, to the extent that the trustees had asked for the dismissal of the application together with a punitive costs order against all of the applicants from the outset, and given that the tender by the second applicant did not go beyond party and party costs, the trustees were entitled to approach this court under Rule 41(1)(c) for a ruling on the scale of costs to which they were entitled in light of the limited tender by the second applicant.

[20] At the hearing Mr. Khan handed up a formal application by the second applicant for leave to withdraw as a party to these proceedings in the event that the court found that the notice of withdrawal was found to be non-compliant with the Rules. The notice asked for an order directing the second applicant to bear the costs of the application on the party and party scale up to 11 August 2017.

[21] In seeking costs on the punitive scale the trustees complain that the application is *mala fide* and nothing more than a transparent attempt to hinder the trustees in the proper discharge of their functions under the Act. That may be so. However, in my view there is a more fundamental consideration at play here. The applicants jointly initiated proceedings designed to remove the trustees on a specific basis viz. for breach of the provisions of s59(a) of the Act. They have not taken that application to its logical conclusion but have abandoned it mid-stream.

[22] Fairness and equity demand that costs should follow the result in this case where the trustees have been substantially successful in resisting the attack on

their integrity and their office.[2] Were those costs to be limited to the party and party scale it would mean that the attorney-client component of the respondents' costs would have to be borne by the insolvent estate. Such a situation would mean that monies that should be available for creditors are taken up with costs reasonably incurred by the trustees to resist an application which has not succeeded. For that reason I am of the view that the trustees should be fully indemnified for the costs which they have incurred on behalf of the insolvent estate.[3]

[23] In regard to the second applicant's tender to pay costs on the party and party scale, as per his original notice of withdrawal filed on 11 August 2017 and subsequent notice of motion dated 6 November 2017 seeking leave to withdraw, I am of the view that there is no reason to distinguish the scale of his costs from those payable by the other applicants. For the reasons already stated, if the trustees are awarded their costs on the lower scale the insolvent estate will have to make up the difference, to the detriment of the general body of creditors.

[24] As to the costs incurred after the filing of the replying affidavit and notice of withdrawal on 11 August 2017, I am of the view that the trustees were entitled to continue in their opposition to the application for two reasons. Firstly, the replying affidavit was ambivalent in that it suggested persistence in the relief sought while at the same time abandoning same. Secondly, the second applicant's tender of costs did not offer the trustees a complete indemnity for their costs and they were entitled to

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[2] Stander and Others v Schwulst and Others 2008 (1) SA 81 (C) [36]

[3] Katz and Another v Katz and Others [2004] 4 All SA 545 (C) at [125]

persist in their opposition to the application until an appropriate tender had been made.

[25] Thereafter, the second applicant persisted with his allegations of improper conduct against the trustees – he did not withdraw the redundant allegations in the replying affidavit but instructed (or at the very least permitted) his attorney to advance argument in open court on 7 November 2017 which was consistent with the attack on the trustees made in the replying affidavit. That attack was not warranted in light of the second applicant's withdrawal as a party to the application to remove the trustees.

[26] For the sake of good order (and for purposes of taxation) I shall condone the respondent's failure to file their answering papers timeously. The delay of 3 days is negligible in the overall context of the case and did not occasion any prejudice to the applicants. Further, the respondents are granted leave to file the supplementary answering affidavit of Ms. Fey dated 26 October 2017. They were entitled to bring to the attention of the court the material developments that had ensued and they were also entitled to answer the attack on them in the replying affidavit. Finally, the second applicant's formal request on 6 November 2017 for leave to withdraw as a party has become redundant in light of the order I intend making dismissing the application.

ORDER OF COURT

Accordingly it is ordered that:

A. The late filing of the respondents' answering affidavit is condoned.

B. The respondents are granted leave to file their supplementary answering affidavit dated 26 October 2017.

C. The application is dismissed.

D. The costs of the application are to be paid by the first to fifth applicants jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client.

E. No order is made in respect of the second applicant's application dated 6 November 2017 to withdraw as a party from these proceedings.

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GAMBLE, J