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

(Coram: Holderness, AJ)

[Not Reportable]

Case number: 21851/2016

In the matter between:

ABSA BANK LIMITED	Applicant
and	
MOHAMED ISMAIL PATEL N.O.	First Respondent
MOHAMED ISMAIL PATEL	Second Respondent
ZITULELE CLAUDIA TWALA N.O.	Third Respondent
THE STANDARD BANK OF SOUTH AFRICA LIMITED	Fourth Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN	Fifth Respondent

REASONS FOR THE ORDER MADE ON 17 NOVEMBER 2016

DELIVERED ON 13 DECEMBER 2016

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[1] These are the reasons for the order granted in default of appearance of the respondents, in particular the first and second respondents, on 17 November 2016, pursuant to an application for reasons in terms of Rule 49(1)(C) delivered by the first respondent on 23 November 2016.

[2] On 17 November 2016 the application came before me as an urgent application, brought on notice to the respondents, in terms of which *inter alia* the following relief was sought:

2.1 That the first respondent be removed as a joint trustee to the insolvent estate of the Coe Family Trust (Master's reference number C20032/14) ("the Trust");

2.2 That the fifth respondent be directed forthwith to appoint a joint trustee to the insolvent estate of the trust in terms of section 57(5) of the Insolvency Act No. 24 of 1936 ("the Act");

2.3 That the first respondent and the second respondent deliver to the third respondent all books and documents (including bank statements) relating to the insolvent estate of the Trust within three days of the service of this order on the first and second respondents;

2.4 That, in the event that the first respondent and the second respondent fail to deliver to the third respondent, the books and documents referred to in paragraph 5 above, that the Deputy Sheriff of the relevant jurisdictions be authorised to attend at the premises of the first and second respondents and to seize and remove the books and documents referred to above and to deliver same to the third respondent;

2.5 That the fourth respondent be directed to furnish to the applicant, the third respondent and to the fifth respondent copies of all documents relating to the insolvent estate of the Trust and the dealings between the insolvent estate of the Trust and Good Hope Trustees (Pty) Ltd ("GHT") within 5 days of service of this order on the fourth respondent; and

2.6 That the costs of the application be borne by the first and second respondents *de bonis propriis* on the attorney and client scale.

[3] Prior to the hearing on 17 November 2016, the applicant caused an amended notice of motion to be filed, in terms of which it no longer included the prayer for an order directing the fifth respondent to appoint a joint trustee to the insolvent estate of the Trust in terms of section 57(5) of the Insolvency Act No. 24 of 1936.

[4] At the hearing of the matter on 17 November 2016 the first and second respondents were represented by Mr. Zimmerman.

[5] When the matter was called in open court and Mr. Zimmerman placed on record that the first and second respondents consented to an order incorporating paragraphs 2, 3 and 4 of the notice of motion, but that his client required further time to file an answering affidavit opposing the application for his removal as a trustee of the joint insolvent estate of the Trust.

[6] I informed Mr. Zimmerman that, in light of the serious allegations of misconduct levelled against Patel, and the fact that it appeared that a significant sum of trust monies had possibly been misappropriated, I required independent confirmation of where the monies were being held, and an undertaking that the monies would be held in a separate trust account or some other safeguard would be put in place to ensure that the funds were preserved until Patel had an opportunity to file papers and the matter could be finally determined.

[7] The matter stood down for Patel's counsel to obtain instructions regarding the whereabouts of the funds, the safeguards to be put in place pending the finalisation of the matter, and for the parties to attempt to agree to the terms of a draft order regarding the further conduct.

[8] When the hearing of the matter resumed in open court, Patel's counsel informed me that he had spoken to Patel who had instructed him to withdraw the agreement concluded earlier that day. Patel dis not disclose the whereabouts of the funds of give any undertaking regarding the funds pending the further hearing of the matter. Patel's counsel then informed the court that he had been instructed to withdraw from the matter.

[9] Mr Zimmerman duly withdrew and excused himself. After hearing argument by Mr. Woodland SC, who appeared for the applicant, an order was granted in terms of prayers 2,4,5,6 and 7 of the notice of motion.

[10] As I was not prepared to grant costs *de bonis propriis* against Patel without affording him a further opportunity to address me in this regard, the first and second respondents were directed to show cause, on Thursday, 1 December 2016, why the costs of the application should not be borne by them *de bonis propriis* on the attorney and client scale.

[11] After receiving the request for reasons and the application by Patel, now acting in person, I advised Mr Woodland that there would be little point hearing the costs argument on 1 December 2016 and dealing with the matter on a piecemeal basis and that I would deliver reasons by no later than 12 December 2016, and the application for leave to appeal could be heard on 15 December 2016.

[12] Mr. Woodland assured me that Patel would be given proper notice of the date of hearing of the application for leave to appeal, and I will ensure that these reasons are transmitted to Patel by email to the email address as stipulated in the Rule 49 (1) (c) application.

FACTUAL BACKGROUND

[13] The first respondent is cited in his capacity as the joint trustee of the insolvent estate of the Trust.

[14] Patel is a director of GHT which carries on or carried on business as insolvency practitioners.

[15] GHT previously carried on business from 22nd Floor, Golden Acre Office Towers, Adderley Street, Cape Town ("the Adderley premises"). It appears that they have ceased trading from these premises, and their office telephone number appears to be out of order.

[16] The second respondent is **MOHAMED ISMAIL PATEL (also known as PATEL MUHAMED).**

[17] The third respondent is **ZITULELE CLAUDIA TWALA** ("Twala") in his capacity as the joint trustee of the Trust. Twala is an attorney with Dentons, South Africa.

[18] It appears that Patel attended to the administration of the insolvent estate of the Trust on his own.

[19] The Trust was provisionally sequestrated on 15 April 2014, and finally sequestrated on 15 May 2014.

[20] On 26 June 2014, the Master appointed Patel and the third respondent as joint trustees.

[21] The applicant is a proved creditor of the trust in the amount of R17 371 143.45, plus interest from the date of sequestration.

[22] The applicant held securities in the form of mortgage finance registered ever certain properties owned by the Trust.

[23] These securities were realised in 2014 and 2015. The proceeds of the realisation amounted to R9 350 000 and R3 628 590.

[24] Numerous requests were made by the applicant to Patel for payment of an advanced dividend to it as a secured creditor. Patel refused to make such a payment.

[25] After numerous enquiries were made by the applicant regarding the lodging of the first account, in July 2015 a copy of an unsigned first account was sent to the applicant' attorneys, Edward Nathan Sonnenbergs ("ENS"), by Patel.

[26] It appeared from the account that the applicant is the only secured creditor, however several issues arose from this account, including that no provision was made for the payment of interest to the applicant and payments of the proceeds of realised assets were captured as "deposits" and were reflected as being paid months after they had in fact been paid.

[27] As at date of the application, two and a half years since the final order of sequestration was granted, no liquidation and distribution account has been confirmed by the Master and the applicant has not received any payment at all.

[28] On 5 May 2016 the applicant's attorney addressed a letter to Ronel Stofberg ("Stofberg"), who was in the employ of GHT, querying the confirmation of the first account and further enquiring about the funds due to be paid to the applicant, as by that stage it had

come to the applicant's attention that Patel's trust accounts had been placed under the control of the Cape Law Society ("CLS").

[29] Stofberg assured the applicant's attorney that all the monies were being held in the insolvent estate account.

[30] Numerous further enquiries were addressed to Stofberg regarding the confirmation of the account. The last email, dated 20 June 2016, went unanswered. It has since emerged that Stofberg left the employ of GHT on 15 June 2016.

[31] On 21 October 2016, a comprehensive letter was addressed to Patel, setting out the issues and concerns which the applicant had with Patel's conduct as a liquidator or trustee of various entities in which the applicant is a creditor. The contents of this letter are quoted in the founding affidavit. The import of what is stated herein, for the purposes of the present application, is that:

31.1 In a number of the matters the applicant has not received its secured awards, notwithstanding that liquidation accounts have been confirmed;

31.2 Patel's law practice was placed under curatorship and the CLS has brought an application for him to be struck from the roll of attorneys, which application is presently pending before this Court;

31.3 Patel appears to have obtained an interdict restraining the Chief Master of the High Court from removing him from the national panel of liquidators, pending the finalisation of a review application that Patel has brought against the Chief Master for that decision; and

31.4 In breach of various provisions contained in the Insolvency Act 25 of 1936 ("the Act"), including those contained in sections 70, 71 and 92 of the Act, Patel appears to have failed to properly invest or account for the trust monies under his control.

[32] Based on the above, the applicant, understandably, had grave reservations as to the propriety of Patel's conduct, and in light of the facts set out above, it was genuinely concerned that Patel had improperly utilised the proceeds of the applicant's securities.

[33] The applicant requested copies of the insolvent estate bank statements for the Trust for the period from 15 April 2014 to date, and for proof of where the proceeds of the realisation of its securities were held, failing which it would apply to Court for urgent relief. Once again no response was received from Patel.

[34] Stofberg has confirmed under oath that Patel never invested any estate funds, as he was of the view that such investment was not compulsory, and for this reason no provision was ever made for interest on the liquidation and distribution. As Patel's employee, Stofberg was never permitted access to the estate bank account statements, and was therefore never able to include bank charges in the accounts which she drew up for Patel.

[35] Even more alarmingly, the broker with whom Patel took out the security bond for the insolvent estate of the Trust confirmed that Patel had not paid any bond premiums relating thereto.

[36] After Patel failed to respond to the letter from ENS referred to above, the applicant launched this application. On 8 and 9 November 2016 copies of the papers were served on Patel by email to patel@ghtrustees.co.za and patel.m@gmail.com, at the Adderley premises by affixing a copy on the principal doors, and at Patel's residence.

[37] On 8 November 2016, after this application had been issued, the offices of the fifth respondent ("the Master") forwarded a letter to the applicant's attorney, Mr. Leonard Katz ("Katz"), recording that, in light of Patel's failure to provide a proper response in respect of the availability of estate funds, the Master was of the view that he is no longer a fit and proper person to act as a liquidator or trustee or in any fiduciary capacity in relation to any insolvent estate, and he was removed from all estates where he has been appointed as such. The Master did not specify in respect of which estates Patel was removed.

[38] In the additional affidavit filed by Katz, he points out that in terms of section 60(e) of the Act, the Master may remove a trustee from his office on the ground that, in the Master's opinion, the trustee *"is no longer suitable to be the trustee of the estate concerned."*

[39] On 11 November 2016 the CLS served further affidavit in the application to strike Patel off the roll of attorneys of this Court. Michael Bellairs, who has deposed to various affidavits on behalf of the CLS in the striking off application, states as follows:

> *"the respondent* (Patel) *has utilised trust funds to pay his own debts, thereby committing theft of trust funds. In this regard the respondent paid an amount of R102 030.34 in respect of rates due by him to the City of Cape Town… in addition, the*

> *respondent also paid an amount of R38 200 to the advocate who was briefed by, and represented him, in the application brought by the applicants to interdict him from practice. It is respectfully submitted that by doing so the respondent misappropriated trust funds."*

[40] Annexed to the founding papers are various orders and affidavits in similar or related applications involving Patel, such as the *Soudena CC* ("Soudena") matter (in which Absa is also a secured creditor) and the Insolvent *Estate Crimson Moon 32 CC* ("Crimson Moon") matter.

[41] In the *Crimson Moon* matter, according to an affidavit by Patel's joint liquidator, Daniel Terblanche, it appears that Patel has failed to account for, and in all likelihood has misappropriated, trust monies in the sum of R3,400,000. Terblanche has confirmed that he intends filing criminal charges against Patel.

[42] Patel is no stranger to this Court. There are two judgments by Traverso DJP, and by Binns-Ward J, where his conduct as a liquidator has been strongly criticised.

[43] Lastly, on the evidence before the Court, it appears that Patel has two identity numbers, and that he may not have a law degree (UWC has no record of a B Proc degree certificate ever having been issued to an individual with either of Patel's identity numbers), which would of course have the result that he was fraudently admitted as an attorney and as a liquidator.

BASIS FOR ORDER SOUGHT FOR THE REMOVAL OF PATEL AS JOINT TRUSTEE

[44] The primary relief sought by the applicant was for the removal of Patel as a joint trustee of the insolvent estate of the Trust.

[45] *Ex facie* the affidavits filed in this application, including the additional affidavit by Katz, it appears that Patel has conducted himself in a truly egregious manner.

[46] In *Fey & Whiteford NO v Serfontein and Another*[1], the Appellate Division held that at common law, the Court retained the power to remove a trustee in an insolvent estate on the grounds of the trustee's misconduct, which grounds include abuse of trust, dishonesty and recklessness.

[47] Hoexter JA described the positions as follows:

> *" 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."*

[48] The Master has filed a report stating that there is no objection to the relief sought by the applicant, and has informed Patel in writing that he is to be removed as trustee and liquidator from all estates where he has been appointed as such.

[1] 1993 (2) SA 605 (A) at 612I-614F

[49] On the facts before this Court, which have not been placed in dispute by Patel, it is abundantly clear that the misconduct by Patel constitutes grounds for his removal.

[51] In summary, as set out in the heads filed on behalf of the applicant, the affidavits establish that Patel is not a fit and proper person to occupy any office of trust:

51.1 Patel has been interdicted from practicing as an attorney on the application of the CLS, and an application for his striking off is pending before this court. From the affidavits filed by the CLS, it appears that Patel has utilised trust funds to pay of his personal debts, thereby committing theft of trust monies. The CLS asserts that Patel stole the amount of R3,4 million from the insolvent estate of *Crimson Moon* and that he dishonestly sought to cover up the theft by producing a *"concocted bank statement";*

51.2 Patel's law practice has been placed under the supervision of a curator by order of Court;

51.3 All the evidence points to Patel not having a law degree, and to his application for admission as an attorney being fraudulent;

51.4 The Chief Master has convened an enquiry, in terms of section 381 of the 1973 Companies Act, into Patel's conduct as a liquidator of Kingsfield Aviation Leasing One (Pty) Ltd (In liquidation) ("KALI"). His alleged misconduct is that he cost the estate a significant amount of money, he aligned himself with the fraudulent conduct of a creditor of the estate, he delayed its winding up and he misrepresented his identity;

51.5 There are numerous insolvent estates where the applicant is a secured creditor but has not received any liquidation dividends notwithstanding. Details of these estates are set out in the founding affidavit;

51.6 Patel's conduct as a trustee in the insolvent estates of *KALI*, *Crimson Moon, Soudena* and the Trust has been contrary to the interests of creditors. Patel has delayed the confirmation of accounts and it is apparent that he has stolen funds from the liquidation account of Crimson Moon by transferring funds from the liquidation bank account to the account of GHT;

51.7 Patel has perjured himself in several affidavits to which he has deposed;

51.8 In several matters Patel has not paid secured dividends to the applicant in breach of section 113(3) of the Act in breach of his obligation to distribute dividends immediately after confirmation of the liquidation account;

51.9 Criminal charges have been laid against Patel by the joint liquidators of *Crimson Moon* against Patel, and he has been removed as the liquidator due to his misconduct;

51.10 In previous liquidations Patel has excluded his co-liquidators from acting jointly in the administration of estates;

51.11 In the present matter, Patel has failed to disclose the whereabouts of the trust funds due to be paid to the applicant; and

51.12 Patel's conduct as a liquidator has been severely criticised in two separate judgments of this Court.

[52] I cannot imagine a clearer case for the removal of a trustee than the present one.

[53] Patel has been given numerous opportunities to account for the funds which have been entrusted to him as the trustee of the insolvent estate of the Trust. He has simply ignored these requests.

[54] When this application was served on him, Patel did not file a notice of opposition, nor did he endeavor to contact the applicant's attorneys to advise them that he was unavailable to give proper instructions and required further time to file any opposing papers.

[55] It must have been conveyed to Patel by his counsel that he would be afforded an adequate opportunity to file papers, but that for the reasons elucidated above he was required to provide adequate proof of the whereabouts of the trust funds (in the form of a letter from a bank official, or similar documentary proof) pending the further hearing of the matter. He declined to do so.

[56] After his counsel withdrew, Patel did not attempt to contact the applicant's attorneys to advise them of the steps he intended taking to oppose the relief sought. He simply allowed

the matter to proceed on an unopposed basis, and then filed an application for reasons with a view to applying for leave to appeal.

[57] The respondent had ample opportunity to oppose the relief sought, and at the very least to file a preliminary answering affidavit asking for more time and explaining his default of appearance. As an admitted attorney, Patel has full knowledge of the court rules and procedure, and his conduct, both prior to and subsequent to the granting of the order, appears to be nothing more than a carefully planned stratagem to buy himself more time in order to continue with what appears on the face of it to be a nefarious course of conduct.

[58] One would have expected an honest practitioner to have stated upfront that the trust funds were being held in an interest bearing insolvent estate account, and to explain his failure to respond to the numerous enquiries made by the applicant's attorneys, which ultimately led to the necessity for launching this application.

[60] Patel elected, after receiving due, albeit short, notice of the application, not to file any affidavits, despite having legal representation and despite being fully aware that in the absence of any such affidavits being filed and in circumstances where he was in default of appearance, an order would in all likelihood be granted removing him as the trustee and granting the ancillary relief sought by the applicant.

[61] As a trustee Patel stands in a fiduciary relationship towards creditors. He is required always to act openly and in good faith, and to exercise his powers for the benefit of the insolvent estate, and not for his personal benefit.

[62] Patel's conduct has been neither open nor honest. The only inference which can be drawn from his failure to communicate with the applicant or to place his version on record, either through correspondence or by filing affidavits, is that he has in all probability improperly utilised such funds for his own benefit.

[63] Regarding urgency, Patel is in the process of selling his residential property in Rylands, and in light of the pending litigation against him in this and in various other matters, the applicant's fear that he intends leaving the country is well founded. This is particularly so in circumstances where the applicant does not even have the comfort ordinarily derived from the bond of security, as the premiums for such bond have not been paid by Patel or by GHT.

[64] It cannot be stated more simply than it was in the applicant's heads of argument: Patel simply cannot be trusted.

[65] In the circumstances, a proper case was made out for the removal of Patel as a trustee of the insolvent estate of the Trust, and for the ancillary relief granted in terms of the order dated 17 November 2016.

HOLDERNESS, AJ
ACTING JUDGE OF
THE HIGH COURT

APPEARANCES

For the Applicant:	Adv G Woodland
For the First and Second Respondent(s):	Adv Zimmerman
Date(s) of Hearing:	17 November 2016

Judgment delivered on: 13 December 2016