HIGH COURT OF SOUTH AFRICA
GAUTENG PROVINCIAL DIVISION, PRETORIA 3/3/17.

Case No: 95806/2015

(1)	REPORTABLE: No.
(2)	OF INTEREST TO OTHER JUDGES: No.
(3)	REVISED.
03-03-2017 DATE	P.A. Meyer SIGNATURE

In the matter between:

JANINE HARIBHAI Applicant

and

GEORGE DA SILVA RAMALHO N.O. First Respondent
PULENG FELICITY BODIBE N.O. Second Respondent
THE MASTER OF THE HIGH COURT, PRETORIA Third Respondent

Case Summary: Insolvency – Application for the removal from office as trustees in insolvent estate under the common law - whether joint trustees misconducted themselves as trustees – misconduct not established.
In the alternative and under the prayer for further and/or alternative relief, applicant sought to interdict joint trustees from preventing her collecting rentals of immovable properties vesting in them that she requires to sustain her needs and those of her children - trustees were required to answer a case founded on allegations of misconduct on their part that justify their removal from office as trustees - they were not called upon to raise a defence to the alternative interdictory relief - insofar as they have dealt with applicant's claim to rentals, it is impermissible to consider their answering affidavit in isolation, divorced from the context of the case they were called upon to answer.
Application dismissed.

JUDGMENT

MEYER, J

[1] The applicant, Mrs Janine Haribhai, applies under the common law for the removal from office of the first and second respondents, Mr George Da Silva Ramalho N.O. and Ms Puleng Felicity Bodibe N.O. (the trustees), as trustees of the insolvent estate of her husband, Mr Dinesh Haribhai (the insolvent).

[2] The court, and in certain instances the master of the high court, have the power to remove a trustee from office in terms of the provisions of the Insolvency Act 24 of 1936. But the court also derives that power from the common law to remove the trustee of an insolvent estate on the grounds of his or her misconduct as a trustee, which power has not been displaced by the Insolvency Act. (See *Fey & Whiteford v Serfontein* 1993 (2) SA 605 (A).)

[3] The factual matrix surrounding the present application is briefly the following: The applicant and the insolvent were married in community of property on 20 January 1996. They acquired five residential immovable properties as co-owners, which properties are all mortgaged to Standard Bank of South Africa Ltd (Standard Bank). On 10 June 2008, this court granted an order in terms of which they were given leave, in terms of s 21 of the Matrimonial Property Act 88 of 1984, to change their matrimonial property regime from a marriage in community of property to one out of community of property with the exclusion of the accrual system and authorising them to execute such a notarial contract and the Registrar of Deeds, Johannesburg to register the notarial contract. They executed the notarial contract and it was registered on 17 July

2008. In terms thereof, each one of them would be vested with a 50% share in the ownership of one of the immovable properties and full ownership of the other four immovable properties would vest in the insolvent. Transfer of the immovable properties into the name of the insolvent was never effected due to the indebtedness owed to Standard Bank and its refusal to consent to the cancellations of the mortgage bonds in its favour.

[4] The insolvent's estate was sequestrated on 26 September 2013. The trustees were appointed on 5 December 2013. In terms of s 21(1) of the Insolvency Act, the separate assets of both spouses initially vested in the master and from 5 December 2013 in the trustees of the insolvent's estate. Standard Bank's liquidated and secured claim in the amount of R7 602 886.71 was proved and accepted at the second meeting of creditors, which was held on 11 December 2013. In investigating the affairs of the insolvent and administering the estate the trustees ascertained that the applicant and the insolvent had failed to make any payments on any one of the mortgage bond accounts with Standard Bank since 1 February 2011, that the levies, rates and taxes in respect of the five immovable properties were not paid to the respective bodies corporate and that the arrears as at the end of March 2014 amounted to approximately R1,2 million, that some of the immovable properties were rented out to third parties and that the applicant and the insolvent were collecting the rentals.

[5] On 12 August 2014, at the instance of the trustees, the Gauteng Provincial Division of the High Court (Molefe J) granted an order terminating the joint ownership by the applicant and the insolvent of the five immovable properties and authorising the trustees to sell the properties, either by way of public auction or by private treaties. The applicant, on 17 November 2014, instituted an application in which she seeks the rescission of the order terminating her and the insolvent's joint ownership of the

immovable properties and the authority given to the trustees to sell them, which application is opposed by the trustees and is pending. The operation and execution of a decision which is the subject of an application for rescission is not automatically suspended pending the finalisation of the application. (See *Erstwhile Tenants of Williston Court and Another v Lewray Investments (Pty) Ltd and Another* 2016 (6) SA 466 (GJ), paras 17-20.)

[6] The trustees, towards the end of 2014, sold four of the immovable properties to Black Rock Properties (Pty) Ltd (Black Rock). The agreement of sale was consensually cancelled and a new sale agreement was concluded with an associated company, White Rock Properties (Pty) Ltd (White Rock). The four immovable properties are in the process of being transferred to White Rock. The applicant brought an urgent application in the Gauteng Provincial Division of the High Court to interdict the trustees from causing the immovable properties to be transferred into the name of White Rock. On 26 November 2016, Murphy J dismissed the application with costs.

[7] Apart from the court proceedings between the applicant and the trustees to which I have referred, the applicant also instituted an urgent application to stay the transfer of ownership of the four immovable properties to Black Rock pending the finalisation of the application for rescission (the application became moot and was not proceeded with due to the cancellation of the sale agreement), and an application to interdict the trustees from contacting the tenants. The trustees, on the other hand, instituted an urgent application in which they sought an order for the applicant and the insolvent to provide them with the details of the leases in respect of the immovable properties and for them to be interdicted from demanding or receiving the monthly

rentals from the tenants and from contacting, intimidating and threatening the tenants in order to collect rental income from them. I need not elaborate on these applications.

[8] The applicant has not sought the release of the immovable properties or of her 50% undivided share in the ownership thereof in terms of subsections 21(2) or 21(3) of the Insolvency Act. Disputes, however, have arisen between the applicant and the trustees regarding her claim to the rental monies in respect of the immovable properties and her claim that that the trustees are not entitled to realize ownership of the immovable properties.

[9] The applicant now seeks the removal from office of the trustees of the insolvent estate on the grounds that they have breached their fiduciary duties; they have failed to 'satisfactorily' perform the duties imposed upon them in terms of the Insolvency Act; they 'are not acting independently or impartially'; they 'have committed various irregular acts'; they did not give her six weeks' written notice of their intention to realize the immovable properties prior to realizing them as is required in terms of s 21(3) of the Insolvency Act nor did they publish such notice in the *Gazette* and in a newspaper circulating in the district in which she resides or carries on business; they 'formed an unduly intimate relationship with a company that interchangeably calls itself Black Rock Property Management or White Rock Property Management'; they 'abdicated their functions to representatives of these entities' who 'regularly intimidate and harass the insolvent, [their] tenants and [the applicant]' and 'attempt to collect the rentals from the tenants'; they 'utilized the service of the Sheriff of Roodepoort North who they persuaded to act irregularly and to harass and threaten [the applicant's] tenants'; they 'sent people from Park Village Auctioneers to harass the tenants'; they 'stole keys belonging to 21 Mimosa Mews [one of the immovable properties] and sent people from

Black Rock Property into the house without [the applicant's] consent'; and they have subjected her to 'costly and unnecessary litigation'.

[10] It is trite that affidavits in motion proceedings constitute both pleadings and evidence. (See *Radebe and others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A), at 793C-F.) The applicant's allegations against the trustees by large amount to mere conclusions with the primary facts on which they depend omitted. Furthermore, the material facts are in dispute and the facts as stated by the trustees (the respondents) together with the facts alleged by the applicant that are admitted by the trustees, do not justify the final order which the applicant seeks. (*Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634.)

[11] The trustees deny the accusations against them. In particular, they deny that they at any stage instructed or utilised Black Rock Properties or White Rock Properties or the sheriff or Park Village Auctioneers to harass and threaten the tenants of the immovable properties or that they instructed the sheriff to collect rent from the tenants. They aver that written notice in terms of s 21(3) of the Insolvency Act was duly given to the applicant prior to the conclusion of the sale agreement in respect of the four immovable properties with White Rock and that such notice was published in the Citizen newspaper and the Government *Gazette* on 26 September 2014. Copies of the notice and publications thereof are annexed to their answering affidavit. The trustees contend that they at all times acted in the best interests of the proven creditors of the insolvent estate, which includes Standard Bank as a preferred creditor. This contention is supported by the version they have put up in their answering affidavit. The fact that they dispute the applicant's claim to the rental monies as well as her

claim that the trustees are not entitled to realize the immovable properties do not justify their removal from office as joint trustees of the insolvent estate.

[12] The applicant, in my view, has failed to establish misconduct on the part of the trustees of the type that would justify their removal as trustees from the insolvent estate. It has not been shown that continuation in their office will prejudicially affect the future welfare of the insolvent estate nor have they been shown to be dishonest, grossly inefficient or untrustworthy persons whose future conduct will expose the insolvent estate to a risk of actual loss. (See *Hoppen and Others v Shub and Others* 1987 (3) SA 201 (C), at 718D-720H.)

[13] I now turn to the applicant's request that I, under the prayer for '[f]urther and/or alternative relief' claimed in the notice of motion, 'interdict 1st and 2nd Respondents fro using EXTRA legal methods to stop Applicant from collecting rent/her portion thereof that she requires to sustain her needs and the needs of her MINOR CHILDREN.' The trustees oppose the granting of such relief. I am of the view that the case made out in the founding affidavit does not sustain a claim for such an interdict.

[14] The trustees were required to answer a case founded on allegations of misconduct on their part that justify their removal from office as trustees of the insolvent estate. They were not called upon to raise a defence to the alternative interdictory relief now being sought. Insofar as they have dealt with the applicant's claim to the rentals, it is impermissible to consider their answering affidavit in isolation, divorced from the context of the case they were called upon to answer.

[15] In *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A), at 635H–636B, Diemont JA said the following:

"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustee v Lahanas* 1942 WLD 67 at 68 and as has been said in many other cases:

"...an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".

Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, "it is not permissible to make out new grounds for the application in the replying affidavit" (*per* VAN WINSEN J in *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260.).'

[16] And in *Administrator, Transvaal and others v Theletsane and others* 1991 (2) SA 192 (A), at 196 C-E, Botha JA said the following:

'It was not for the appellants to show that the respondents were given a proper hearing; they were called upon only to meet the specific allegations put forward by the respondents in support of the relief claimed. The appellants were required to answer a case founded on the allegation of fact that the respondents were not given a hearing; they were not called upon in any other way to raise a valid defence to the relief sought. In particular, for instance, the question whether the hearing given was unduly limited in its scope was not an issue to which the appellants' deponents were required to address their minds. It is not permissible to consider the appellants' affidavits in isolation, divorced from the context of the case they were answering. To the extent that the appellants' deponents went further than may have been necessary to answer the case as presented, it cannot be postulated *a priori* that they will not be prejudiced if their affidavit is relied upon to determine the nature and ambit of the hearing that took place. To do so may be unfair to the appellants and in effect tantamount to reversing the *onus*.'

[17] Finally, the matter of costs. The trustees have been successful in their opposition to this application. The ordinary course is for costs to follow the event. The trustees seek a punitive costs order against the applicant. In all the circumstances of this case I am of the view that a deviation from the ordinary rule that the successful party is awarded costs as between party and party is not warranted.

[18] In the result the following order is made:

The application is dismissed with costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	8 September 2016
Date of judgment:	3 March 2017
Counsel for applicant:	Mr Zehir Omar
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