IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG PROVINCIAL DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.

DATE 6/2/2015 SIGNATURE

06/02/2015

CASE NUMBER: 33443/2014

In the matter between:

PIETER HENDRIK STRYDOM N.O.	First Applicant
JOHN RODERICK GRAEME POLSON N.O.	Second Applicant
LOUIS STRYDOM N.O. **(In their capacity as the Curators of Corporate Money Managers (Pty) Ltd)**	Third Applicant

And

JOHAN HENDRIK BAKKES	Respondent

In re:

BHEKAMA SWAZI MSHIZOBOMVU MANANA	First Applicant

In the application for leave to intervene

VINCENT TREVOR SMITH	Second Applicant

In the application for leave to intervene

JUDGMENT

STRAUSS, AJ:

1. This is the return date of a provisional order sequestrating the estate of the respondent (hereinafter referred to as "*Bakkes*") granted on an urgent basis on 27 May 2014 by Makgoka J. Bakkes has withdrawn his initial opposition to the sequestration application.

2. The *rule nisi* was extended on two occasions on the request of the interveners, Mr Manana and Mr Smith. Mr Manana and Mr Smith launched an application for intervention in the sequestration of Bakkes by way of motion dated 18 July 2014. This application to intervene is opposed by the first to third applicants.

3. Currently I have to decide whether the interveners should be granted leave to intervene in the sequestration application and give directions in regards to the filing of affidavits, or grant a final order of sequestration against Bakkes. The applicants also seek a cost order *de bonis propriis* against counsel and the attorney of the interveners. The applicant also seeks striking out of vexatious and irrelevant matter from the replying and supplementary affidavit of the interveners.

4. Before I deal with these issues, a discussion of the background to the sequestration application is necessary.

5. The applicants brought the application for sequestration in their capacity as joint curators of Corporate Money Managers (Pty) Ltd (hereinafter referred to as "*CMM*") duly appointed as such by orders of this Court

granted during the course of 2009. The curators are judgment creditors of Bakkes in the amount of R860 million plus interest and costs.

6. Bakkes was previously a director of a number of companies, all falling under the applicants' curatorship including a company Nzalo Financial Services (Pty) Ltd (hereinafter referred to as "*Nzalo*") and Thunderstruck Investments 15 (Pty) Ltd (hereinafter referred to as "*Thunderstruck*"), both of which have since been liquidated on application of the curators.

7. The history of the closure of CMF, Cash Management Fund ("CMF") by the Financial Services Board and the grant of the curatorship orders are set out in the main application for sequestration by the curators. The conduct of those involved in the management of CMM, including Bakkes, led to a loss of approximately R1,5 billion of investors' funds. The steps taken by the curators in the recovery of investors' funds are saliently the following:

   7.1 The curators instituted action against Bakkes and 21 other defendants, including Manana and Smith, for various orders in terms of Section 424 of the Companies (Act 61 of 1973) and/or Section 218 of the Companies Act (Act 71 of 2008) and for judgment against those defendants personally for the debts of CMM and a number of related companies.

   7.2 Most of the defendants settled with the curators and the other defendants all consented to judgment, but on 17 March 2014 the case proceeded against Bakkes and three other defendants, including Mr Smith, one of the current interveners.

7.3 The case proceeded in front of Murphy J, and the trial proceeded for some five-and-a-half weeks before Bakkes consented to judgment.

7.4 The relevant findings of Murphy J, is set out in his judgment attached in the papers.

7.5 In the trial, Murphy J, found in favour of the plaintiffs in every respect and in particular held that the promissory notes issued by the relevant entities were not legal commercial paper and the issue of promissory notes against the acceptance of monies by the entities was in contravention of the Banks Act. Further that the investment of CCM of the funds in CMF and of its investors' clients in the said promissory notes was in contravention of legal provisions and their mandate.

8. Bakkes' liability was inevitable and the judgment given against Bakkes was that he was liable to the curators in the judgment amount of R860 million and costs to be taxed. Bakkes committed an act of insolvency in terms of Section 8(b) of the Insolvency Act (Act 24 of 1936) in that upon demand made by the Sheriff to satisfy the judgment debt on 24 April 2014, he failed to satisfy same or to indicate to the Sheriff sufficient disposable property to satisfy it. He instead signed a *nulla bona* declaration. Bakkes is thus factually insolvent. He has got no assets and on 8 August 2014, he completed a net worth calculator form wherein he estimated his personal net worth to be R1,670,000.00. This is

substantially less than the curators' claim against him. These facts are not disputed by the interveners.

9. The applicants submitted that it would be to the advantage of creditors if the final sequestration of Bakkes' estate is ordered. They dispute the claim of Bakkes that he is "man of straw" and they intend investigating the financial means and assets of Bakkes if a final order of sequestration is granted. They argued that the criminal activities of Bakkes yielded considerable returns and it was improbable that Bakkes could have managed to divest himself of all his ill-begotten gains.

10. The applicants argue that Bakkes claims to be entitled to a salary from CMM and should his appeal to the Supreme Court of Appeal in this respect be successful and he is entitled to payment of R9 million as claimed, this will constitute a considerable advantage to creditors.

11. Bakkes has not renewed his opposition to the application for sequestration and has not filed an affidavit showing cause why his estate should not be placed under final sequestration. Thus, I find, the facts upon which the curators' application is based is undisputed.

12. The return date of the provisional sequestration was extended subsequent to receipt of the application for leave to intervene in the sequestration application. The return date was extended to the opposed roll of 1 December 2014 and heard by me on 4 December 2014. After hearing full argument of counsel for the applicant and the interveners, the Court extended the *rule nisi* to 6 February 2015, for judgment in the matter.

13. The applicants' argue that the provisional order would have been confirmed on the original return date but for the application for leave to intervene by the two interveners. On 11 September 2014, by agreement between the parties a order of court was granted which set out that the interveners had to file their replying affidavit within 10 days from 11 September 2014, and within 10 days therefore file their heads of argument. Time frames were also set for the applicants to deliver their heads of argument.

14. The applicant filed their heads of argument and also brought a striking out application together with their heads of argument which was filed timeously on 14 October 2014.

15. The interveners did not comply with the court order as to the time frames and delivered their replying affidavit 4 days late. The replying affidavit was emailed by Adv Meyer the interveners counsel to the attorney of the applicants on 29 September 2014. Adv Meyer indicated in the email that he did not attach any annexure's due to the volume therefore, and indicated that Mr Smith who I can only assume is the second intervener herein; would serve a hard copy the next day.

16. The applicant's attorney took issue with the incomplete papers and the fact that the reply was late as in terms of the court order. Adv Meyer replied by email to the attorney personally, and lodged a scathing personal attack on the attorney, and accused the curators of fraud, wasting investors money and of being vexatious.

17. Adv Meyer also approached the Court in chambers on 25 November 2014, and filed a practice note as well as heads of argument and also the answering affidavit of the interveners to the striking out application.

18. In this answering affidavit received by the court and the applicants three days prior to the set down of the matter, the interveners seek condonation for the late filing of their replying affidavit and heads of argument, and also seeks to supplement their replying affidavit. The applicants therefore had not been provided reasonable time to oppose the condonation application or the application to supplement and they addressed these issues in their heads, and argued against the court granting the relief sought by the interveners.

19. Adv Meyer's apologised for the late filing of the heads and opposition of the striking out application. Counsel explanation for the lateness of all the documents mentioned was four fold. He had the only copies of the application and annexures in the matter *in causa,* he had at some stage misplaced the only copy, the attorney of record had no copies, and lastly that the interveners did not have the funds to make copies of all the papers. These facts stated by Adv Meyer were confirmed in an affidavit of Mr Smit who also in the affidavit stated that Adv Meyer embarked on a series of consultations with traditional and civic leaders and he was therefore not available to file the replying affidavit or the opposing affidavit to the striking out application earlier.

20. Dealing with the striking out application I find, that most of the averments in the founding papers and replying affidavit as well as in the

supplementary heads of argument filed by the interveners deal with the same issues. They continue to accuse the applicants of abuse of the court process and collusion with Bakkes and that the applicants had disregarded for the legitimate claims of the interveners.

21. In regards to the cost being sought *de bonis propriis* against Adv Meyer, his address to the court was that he had been put to task in the matter and that he will take responsibility for each and every submission made in court and that although his heads and the affidavit were late, he confirmed that it was due to time constraints, him having all the documents, and having misplaced them. Even though he was aware of the applicants calling for a *de bonis propriis* costs order against the attorney, Sandy Du Plessis, he made no attempt to obtain an affidavit of Ms Du Plessis setting out the facts as per her and why a costs order should not be granted against her. He has thus placed his attorney at peril and I will not find against Ms Du Plessis as to costs as she, I believe, has not received proper notice of the cost order asked against her. It seems to this court that Adv Meyer unfortunately is a "lone ranger" in this matter and has been running the litigation in a very personal and subjective manner and also without the assistance of an attorney.

22. One only has to have regard to the personal emails to the attorney, the accusation made therein against the curators, and the fact that counsel was the filing clerk together with one of the interveners and also held on to all the documents in the matter.

23. The affidavits filed by the interveners do not seem to me on the face of it to emanate from an attorneys "office or pen" so to say. The reason I say so is that all the affidavits, heads of argument, all supplementary affidavits and supplementary heads were drafted in the same irregular manner font and size, not properly spaced and not indexed and paginated. Further counsel made a written note to the court on the supplementary heads wherein counsel tendered his apology for typographical errors, I find, that most probably all these documents were drafted without the assistance of an attorney.

24. The authorities provide guidance as to what conduct by an advocate would actually be considered to be conduct more akin to that of an attorney and could be considered to be tantamount to the advocate acting without brief of an attorney and taking instruction directly from clients.

See: ***Society of Advocates of Natal v de Freitas and Another 1997 (4) SA 1124 (N) 1162 A – D and 1173 C- H*** and ***General Council of the Bar of South Africa v Rosemann 2002(1) SA 235 (C) at 241 H – 242 B 245***

[At 246 H] *" any responsible advocate knows without having to ask, that certain work is normally performed by attorneys, and that it would be improper for him to accept a brief to do such work instead of the attorney, thereby relieving the attorney concerned of the responsibility for it."*

25. Based on the above and the fact that counsel sought the indulgence and condonation from court in regards to the late delivery and filing of the

replying affidavit and the heads of argument and all subsequent papers filed by counsel, the tardiness and lateness can only be lain before his door. I will grant condonation for the late filing of the replying affidavit and the heads and supplementary heads, and for the indulgence granted I intend to saddle the counsel with the costs therefore. The late filing of all these documents where a inconvenience to the court and the applicants, and was not due to the fault of the interveners.

26. Dealing with the striking out application I find, that most of the averments in the founding papers and replying affidavit as well as in the supplementary heads of argument filed by the interveners deal with the same issues. They continue to accuse the applicants of abuse of the court process and collusion with Bakkes and disregard of the legitimate claims of the interveners. The interveners in the same breath and in the same application requested to supplement their replying affidavit.

27. I will not strike out the content thereof as it is simply more of the same and must be seen in context and in conjunction with the other affidavits of the interveners.

28. As to the supplementation of the replying affidavit I find, that there is no basis set out by the interveners for seeking this relief, there are no sufficient reasons provided to supplement the papers, and there is no allegation that the material contained in the supplementary affidavit was not available when the replying affidavit was drafted. The supplementary affidavit also introduces new material. This is objectionable and should have formed part of the interveners founding affidavit, I will therefore not

allow the interveners to supplement their replying affidavit and any new facts introduced by way of this affidavit will not be considered by this court, and is struck.

29. The only relief thus to be determined is for leave to intervene in the sequestration application.

30. The applicants argue that the application is fatally defective in a number of respects and that there is no merit in the application for intervention.

31. It was clear from the outset that the application for intervention was in breach of the normal rules. If one has regard to the intervention application's format alone, it falls short of a proper application. The application for intervention is drafted in a very shoddy manner. It deals with irrelevant matter and not with the issues of intervention as such.

32. The formal requirements for intervention in sequestration proceedings are unique and they differ altogether from conventional intervention. It is neither a pure intervention nor a substitution of applicants and is really *sue generis* from a procedural point of view as set out in ***Fullard v Fullard 1997 (1) SA 368 (T) at 372.***

33. It is further so that generally in an application for intervention in pending legal proceedings, an applicant has to show a direct and substantial interest in the relevant proceedings, which "*must be a legal interest in the subject matter of the proceedings which may be prejudicially affected by the Court's judgment in the proceedings concerned.*" This is set out in ***Investec Bank Ltd v Mutimeri 2010 (1) SA 265 (GSJ) at p 38 & 39.***

34. Where the purpose of the intervention is for sequestration of the respondent, it is not sufficient that the interveners merely have an interest in the proceedings. They must be creditors with a claim of at least R100.00 and there must be a valid reason for such intervention. This is also set out in ***Fullard*** *supra.*

35. The claim of course must be liquidated, i.e. the amount thereof must be fixed and determined, either by agreement, judgment or otherwise. Consequently a Court cannot grant a sequestration order at the instance of a person who has an unassessed claim for damages, or a claim that is disputed or a claim which is uncertain due to being dependent on a contingency which may or may not be fulfilled.

36. The valid reason for intervention would probably be where the original applicant is unable for any reason to pursue his application or intends to withdraw such and the interveners seeks to ensure that the estate is sequestrated or to prevent the original applicant from protracting the proceedings to the prejudice of other creditors.

37. Where the interveners seeks the sequestration of the respondent he must in his affidavit establish all the elements including furnishing security. Where a provisional order of sequestration has already been granted as in the matter *in causa* the existing order cannot be confirmed at the instance of an intervening creditor. It must be discharged and a fresh order issued with the interveners as applicant. This is set out in ***Fullard*** *supra*.

38. It is argued, that the interveners have failed to comply with the Uniform Rules of Court and the established practice pertaining to intervention in sequestration proceedings. In particular the applicants complain that the interveners have not established their *locus standi* to seek the sequestration of Bakkes as they have not demonstrated that they are creditors with liquid claims of at least R100.00 or provided evidence of a valid reason for intervention.

39. Mr Manana bases his *locus standi* on claims for damages that he and another instituted against Bakkes and others during February 2014. He concedes that he will require expert evidence in respect of his claim, which he says is for approximately R160 million.

40. Smith bases his *locus standi* on damages claims against Corpfin, CMM and Bakkes for his salary, loss of his reputation and earning capacity. Insofar as his claim for payment of his salary may not constitute damages, his claim is conclusively dismissed in the applicants' answering affidavit as follows: "*Smith's claim is yet to be formulated let alone proven. Smith's evidence under oath was that he was employed by the CMM group in terms of an oral agreement and he could not provide proof of any salary payments for those months for which he was paid and in any event his claims have prescribed.*"

41. The main reason by the interveners for intervention is that the curators have colluded with Bakkes, and that the purpose of the sequestration application is somehow to protect Bakkes against Manana's claim. The

interveners, however, I find, do not provide, a single fact in support of this contention.

42. The interveners have also not provided security nor have they given notice of their application to interested parties as prescribed by Section 11(2)(a) of the Insolvency Act. Although it appears that they gave notice of the intervention application to Bakkes' attorney by way of e-mail, Bakkes is not cited as a respondent although he patently has a material interest in the relief they seek.

43. The intervening parties argue that the basis for the intervention is that the application for sequestration of Bakkes' estate is an abuse of process for several reasons, but principally since it was launched on an urgent basis to prevent Mr Manana to obtain a judgment against Bakkes and that it was a collusion and unlawful.

44. The sole basis on which the curators relay in respect of *locus standi* to have brought the application for sequestration is due to the fact that there is a judgment by Murphy J. The intervening creditors state that this application is defective since an application for leave to appeal against the judgment of Murphy J is pending. They further state that the curators who represent CMM are not in law capable of being judgment creditors of Bakkes notwithstanding the express provisions of the order of Murphy J. They also argue that the other plaintiffs in the action before Murphy J, have not been joined as co-applicants in the sequestration application.

45. They also state that the sequestration of Bakkes cannot be in the interest of the creditors, but if it was, the interest would relate to the investigation

of the collusion between Bakkes and the curators, and then such order should be granted at the instance of the interveners and not the curators.

46. It is so that in the main action against Bakkes was heard by Murphy J, the matter (claim) was withdrawn against Manana. In regard to Smith the proceedings were also withdrawn as a result of the consent order against Bakkes.

47. Counsel for the intervening parties also argued that the curators have no *locus standi* to apply under Section 424 of the Companies Act for the sequestration of a company due to the fact that a company cannot commit fraud and in terms of Section 424 if the directors are reckless, there may be an application to liquidate a company, but it refers to the directors of a company and not the company itself.

48. Counsel for the applicants argue that the *locus standi* of the curators emanates from the order of Southwood, J an order granted in 2009, and that further there was no proper leave to appeal noted against the judgment of Murphy J, as the leave to appeal is not accordance with the Rules of Court and should not be entertained by Murphy J. The leave to appeal appears at page 467 of the papers.

49. Mr Smith's applied for leave to appeal and leave is sought only against the order granted by Murphy J, against Smith on 4 April 2014.

50. Having regard to the leave to appeal, it is a notice of motion in regards to Mr Smith, which indicates that the he intends to make application to the

court determining whether Murphy J, directs that the relief claimed in Part A should be heard separately or together with the relief claimed in Part B, C and D. This notice of motion called upon Murphy J, to clarify and/or alternatively to correct or set aside the judgment and costs order.

51. It also goes further to request that Murphy J, establishes whether he is of the view that any order or judgment was granted *iniustus error* or establishing if Murphy J, is *functus officio* in the circumstances or whether he has jurisdiction to set aside the judgment. This document is nonsensical and I doubt if any court has to have regard thereto, it purports to be a notice of motion together with an application to the court to reconsider its own judgment. This can simply not be done.

52. I agree with the applicants in this regard that there is no proper leave to appeal currently in regards to the judgment granted by Murphy J, and the judgment, therefore stands.

53. The judgment relied upon by the applicants against Bakkes is a judgment granted against Bakkes and Nzalo. There is no appeal pending against this judgment, whether by Bakkes or anybody else. The statement therefore of the intervening parties is simply false. Smith, in any event, it is argued has no interest whatever in this judgment which was granted by agreement between the applicants, Bakkes, Nzalo and Mrs Bakkes. Smith is not affected by this order and it does not refer to him as Smith was present in court when the order against Bakkes, Nzalo and Mrs Bakkes was granted.

54. It is evident from the draft order handed up to court that was marked "X" before Murphy J, that Smith was not a party to the court order and has never had an interest and it was not implied by the court order. The applicants argue that they are therefore entitled to proceed with execution of their court order, and sequestration is the ultimate form of execution.

55. It is argued that the interveners are under the misconception that they had a right to oppose the application for sequestration without obtaining leave to intervene. The purpose of a provisional order is to call upon the provisionally sequestrated respondent to appear and show cause why his or her estate would not be finally sequestrated. No general right to appear and object is granted to other parties. An interested party, a creditor with a valid liquidated claim may apply for leave to intervene and so as to either oppose the application or to support the application.

56. The applicants therefore simply argue that the interveners have no *locus standi* to intervene or oppose the application. The interveners in any event originally sought leave to intervene in order to obtain the sequestration of Bakkes' estate in terms of the application. In the replying affidavit they changed track and then opposed the application for reasons contrary to the reasons they advised under oath in their founding affidavit.

57. I find, that the interveners are also incorrect in thinking that the sequestration order will deprive them of their alleged claim against Bakkes. A sequestration order does not affect the claims of creditors, it merely regulates the order of payment. The claim of each creditor must be dealt with as it existed at the issue of the order and all creditors have a

right to prove claims in the insolvent estate. If liquidated, it may be proven as a matter of course. If a claim is unliquidated, it cannot be proven until this amount has therefore been fixed by a judgment or agreed to by the trustee.

58. I find that the interveners can therefore enter the proceedings or continue proceedings against the duly appointed trustees of the insolvent estate. The submission that the application for sequestration of Bakkes is an attempt to obstruct the interveners claims against Bakkes, I find, is unfounded, and somewhat recklessly made. Further, the interveners have not proven to this court that there is a shred of evidence of collusion between the applicants and Bakkes. The onus to prove such collusion is in any case on the interveners, which onus I find, they have not met.

59. It was also argued on behalf of the applicants that the intervening parties in their first application did not apply for the dismissal of the provisional sequestration, but in their supplementary affidavit they now seek dismissal in order for them to launch a sequestration application. It is trite that this cannot be allowed. A party may not be allowed to introduce new material in a supplementary affidavit or in a replying affidavit. I have already found that I will not allow the new material in the supplementary affidavit and this second avenue is therefore not open to the interveners.

60. The applicants further argue that it does not assist the interveners to state that they will make out a case once they have been given leave to intervene. They should have done so already. The interveners have not relied on any allegations made in the curators' founding affidavit and they

make no allegation that Bakkes is in fact insolvent or has committed an act of insolvency. So no order can be made in their favour. I agree with this argument as being the correct legal position.

61. The interveners have also not provided any basis for the opposition of the curators' application for sequestration. There are no such reasons given in any of the affidavits of the interveners.

62. The applicants further addressed me on the abuse of the court process by the intervening parties in that the contents of all the pleadings, affidavits and notices filed on behalf of Manana and Smith were of rhetorical nature, accusing the curators and/or plaintiffs of improper conduct instead of addressing the matter at hand.

63. I find, therefore the interveners for the reasons set out have not established a case for discharge of the provisional order or for the sequestration of Bakkes, they have also not demonstrated a valid reason for intervention and why such an order should be granted.

I therefore make the following order:

1. The respondent, Johan Hendrik Bakkes' estate is hereby finally sequestrated.
2. The application for leave to intervene by first and second interveners is dismissed with cost against the interveners on an attorney and client scale including cost of senior and junior counsel.
3. The interveners counsel Adv HJS Meyer is ordered to pay all and any cost in relation to the late filing of the replying affidavit, the heads of

argument, the supplementary heads of argument, the supplemented replying affidavit, *de boni propriss* on a party and party scale excluding cost of counsel, but including any costs of the applicants attorney's.

STRAUSS, AJ

ATTORNEYS FOR FIRST TO THIRD APPLICANTS:

ROESTOFF & KRUSE

ADVOCATE FOR APPLICANTS:

ADV FH TERBLANCHE, SC
ADV H R FOURIE

ATTORNEYS FOR FIRST AND SECOND APPLICANTS AS INTERVENING PARTIES:

DE JAGER DU PLESSIS & ASSOCIATES

COUNSEL FOR FIRST AND SECOND INTERVENING PARTIES:

ADV HJS MEYER