IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 63143/2013
DATE: 31 October 2014

In the matter between:

PIETER HENDRIK STRYDOM N.O.	First Applicant\ Intervening Party
JOHN RODERICK GREAME POLSON N.O.	Second Applicant\ Intervening Party
LOUIS STRYDOM N.O.	Third Applicant\ Intervening Party

and

GERHARD JOHANNES VAN ZYL	First Respondent
MASTER OF THE HIGH COURT, PRETORIA	Second Respondent

In the *ex parte* application of:

GERHARD JOHANNES VAN ZYL	Applicant

JUDGMENT

DAVIS, AJ

INTRODUCTION:

[1] During July 2013 the initial applicant, Gerhard Johannes Van Zyl ("Van Zyl") issued an ex parte application for the voluntary surrender of his estate. This application became opposed due to the fact that one of Van Zyl's creditors, Absa Bank Limited, had delivered an application for leave to intervene on 16 September 2013.

[2] After some postponements, this application was withdrawn on 1 October 2013 by way of a Notice of Van Zyl's then attorneys of record, Francois Uys Incorporated.

[3] Two days later, i.e. on 3 October 2013 Van Zyl launched a new application for the voluntary surrender of his estate. (In the papers this was referred to as the "second surrender application"). Van Zyl was yet again represented by Francois Uys Incorporated ("Uys").

[4] On 5 November 2013 the second surrender application was accepted by this court (by Maumela J).

[5] On 5 February 2014 new intervening applicants (who I shall more fully refer to herein), obtained an order in the Urgent Motion court before Preller J in the following terms:

> *"2. The order granted by the above Honourable court on 5 November 2013 under case number 63143\2013 whereby the*

First Respondent's application for the voluntary surrender of his estate was accepted, is rescinded.

3. *Leave is granted to the Intervening Parties to intervene in the application for voluntary surrender of the First Respondent's estate and the Intervening Parties are afforded the right to oppose the relief sought by the First Respondent.*

4. *The Intervening Parties' affidavit in support of the application for rescission shall stand as the Intervening Parties' affidavit in support of the application for intervention and the Intervening Parties' opposing affidavit.*

5. *The First Respondents' application for the voluntary surrender of his estate is dismissed with costs on the attorney and client scale as against the First Respondent.*

6. *The First Respondent shall pay the costs of this application on an attorney and client scale."*

*(*The order granted accords with the relief sought in the Notice of Motion of the urgent application by the Intervening Applicants.)

[6] In addition to the order sought by the Intervening Applicants, Preller J made a further order in the following terms:

"*That attorney Francois Uys Inc and person Adriaan and Firm "Fedupfordebt" are called upon to show cause before or on 7 April 2014 why they should not be held liable for the costs of this application jointly and severally with the first respondent, Mr GJ v Zyl".*

[7] After some postponements the matter came before me in the opposed motion court of 21 October 2014 for consideration of the aforementioned issue of costs. The Intervening Applicants were represented by counsel, Uys was represented by an attorney from his office and Smith appeared in person.

THE INTERVENING APPLICANTS:

[8] The Intervening Applicants are, pursuant to a separate set of orders of this court, the curators of a large number of companies, collectively referred to as the Corporate Money Managers ("CMM") Group in terms of the provisions of Section 5 of the Financial Institutions (Protection of Funds) Act, No 28 of 2001.

[9] In their capacities as aforesaid, the Intervening Applicants have instituted an action in case number 21263/2012 in this court against 22 defendants of which Van Zyl is the Fifth Defendant.

[10] In the aforesaid action, the Intervening Applicants claim orders in terms of Section 424(2)(a) of the Companies Act, No 61 of 1973 (read with items 13(1)(c)(ii) of schedule 5 of the Companies Act, No 1971 of 2008) that the Defendants, including Van Zyl, are liable, jointly and severally to pay the amount of R1,152 000 000.00 (One Comma one Five Two Billion Rand)

together with interest thereon to the Intervening Applicants *"… in their capacities as curators of CMF Cash Management Fund and Corporate Money Managers (Pty) (Ltd), for the purpose of enabling them to pay the debts of CMF Cash Management Fund, alternatively Corporate Money Management (Pty) (Ltd) to its investors\creditors."*

[11] The abovementioned action instituted by the Intervening Applicants had been set down for trial on a preferential basis for the period17 March 2014 to 23 May 2014 in terms of directive of the Deputy Judge President of this Division, which set down prompted their urgent application for the rescission of the acceptance of Van Zyl's second voluntary surrender application to which I have referred to.

[12] Principally on the aforesaid basis, the Intervening Applicants stated that Van Zyl had purposely in his application for voluntary surrender omitted references to this claim against him the action him and also contrived that the Intervening Applicants were not given notice of the applications for the voluntary surrender of his estate.

THE ROLE OF JAN ADRIAAN SMITH:

[13] It is common cause that the "person Adriaan" referred to in the order of Preller J is one Jan Adriaan Smith ("Smith") a person employed by a firm known as Fedupfordebt.

[14] In response to the service on him of the order of Preller J, said Smith deposed to an affidavit which I quote here in full, not only to be able to refer to the contents thereof but also to indicate the paucity of his response:

> *"1. I consulted with Mr Gerhardus Johannes van Zyl, ID […]) on the 25th of June 2013.*
>
> *2. I explained to him the advantage and disadvantages of sequestration, the process and what sequestration involved.*
>
> *3. I required a list of his assets and creditors. He could not supply me with the list of creditors and their details and we arranged that he will email it to me.*
>
> *4. I received the list of his of creditors via email from Mr van Zyl on the 26th June 2013 at 2:59pm (see annexure) and forwarded the exact list to Francois Uys Inc.*
>
> *5. After my consultation with Mr van Zyl, I nominated Francois Uys Inc to apply for voluntary surrender of his estate on Mr van Zyl behalf. Signed at Brakpan on this 5th day March 2014."*

So far the role of Smith on his own version.

[15] Annexed to this affidavit was a list of creditors (apparently supplied by Van Zyl) which futures the following creditors together with their account numbers

and the amounts of liability (totalling R2 203 353.56), being Absa Bank Limited, Wesbank (shortfall on vehicle reposition), FNB Cheque account, Discovery Credit card, American Express card, Standard Bank card, Absa credit Card, Bankfin, Nashua Mobile, Direct Access, Vodacom Account, Mweb connect and Telkom.

[16] This list was apparently annexed to the e-mail of Van Zyl directed to Jan Adriaan Smith which read as follows:

> *"Beste Adriaan, Hier is die inligting soos versoek. Ek het vir jou Absa Staat gekry en dit is hierby aangeheg. Dan het ek ook 'n Excel opsomming gemaak van die uitstaande skuld. Ek hoop dit is reg so! Party saldo's in benaderde syfers. Ook aangeheg is jou betaling soos ooreengekom. (Ek stuur die fotos apart) Groete, Gerhard van Zyl."*

[17] The role of Smith is not dealt with at all in the initial affidavit of Uys dated 31 March 2014

[18] Subsequently, the First Intervening Applicant deposed to an affidavit on 10 June 2014 in order to;

> *"…address the allegations made by Uys and Smith in their respective affidavits in support of their submissions why they should not be held liable for the cost of the rescission application."*

[19] In the aforesaid subsequent affidavit the issue raised by Van Zyl in his initial affidavit opposing the recession application to the effect that Smith was an

agent of Uys was dealt with. The issue of agency has expressly been denied by Uys in a belatedly delivered replying affidavit dated 30 September 2014 and delivered only on 15 October 2014 (the week prior to the hearing of the matter by me) as follows:

> *"Smith is not an agent of Uys Inc. "Fedupfordebt" (Smith) referred the matter to my offices… I deny Fedupfordebt is an agent of Francois Uys Inc"*.

[20] Smith's role however and his participation (if not complicity) in the non-disclosure of the Intervening Applicants as contingent creditors by Van Zyl however appears from the answering affidavit of Van Zyl himself in his response to the urgent application of Intervening Applicants. Herein Van Zyl said the following:

> *"When I was interviewed by a certain agent of "Fedupfordebt" Adriaan, I did mention the pending court case, but because it has not come to trial yet and no judgments have been taken against anybody, it was decided to leave it out of the equation… (and) … as explained before, as there was not a court case as yet, it was not considered necessary to include this."*

[21] This aspect was also repeated by Van Zyl in a later e-mail addressed by him to Uys in dealing with the non-disclosure of the Intervening Applicants claims or existence. In this he *inter alia* states the following:

> *"Die stukke vir die tersydestelling van my sekwestrasie is Vrydagaand ongeveer 22:00 hier vir my afgelewer deur die Sheriff. Dit lyk my dit is ook op julle beteken. Ek het deur die stukke gelees die naweek en daar is 'n paar dringende dinge:…6) Ek het aanvanklik vir Adriaan genoem van hierdie hangende hofsaak van CMM en Alegro maar omdat die saak nog nie vooorgekom het nie het ons besluit om dit nie te noem nie. Die aantuigings(sic) wat hulle maak is meestal van waarheid ontbloot en is baie "gefabriseer". Ek sien self julle firma word aangeval!"*

[22] In summary therefore, Smith's role in the proceedings as it appears from the papers, is the following: "Smith, as agent for Fedupfordebt, had contacted Van Zyl. He had interviewed Van Zyl and had "advised" him of the consequences of sequestration (and presumably also a voluntary surrender of his estate) and has described the procedures to him. He had obtained a list of creditors from van Zyl and he and Van Zyl had "decided" not to include the Intervening Applicants as creditors. Whether Smith was *bona fide* or not and whatever the unknown extent might be of his legal knowledge or qualifications to dispense legal advice, once he had joined van Zyl in the decision of non-disclosure (even to Uys, being the attorney to whom Smith then "referred" the matter), he made common cause with the failure of van Zyl to make full and frank disclosure to the court via the elected attorney as well as van Zyl's failure to display *uberrima fides* as required from an applicant who applies for voluntary surrender.

[23] Once a person such as Smith embarks on the business of advising clients regarding the nature and procedure and possible benefits for them in respect

of applications for voluntary surrender, he assumes voluntarily also the duty to advise them of the requirements of full and frank disclosure and the display of utmost good faith in such ex-parte applications. Once he then assists such a client in “deciding” not to make such disclosure in respect of a crucial and pertinent fact, namely an impending action which would lead to the demise of the success of such an application, he makes, in my view, a blameworthy common cause with any consequent non-disclosure.

THE BLAMEWORTHINESS OF UYS:.

[24] In the affidavit delivered by the Intervening Applicants regarding the question of costs pursuant to the order of Preller J, the submission is made that Uys should also be liable in that:

24.1 He was the attorney of Van Zyl who saw to the withdrawal of the first application for voluntary surrender.

24.2 On date of withdrawal of the first aforementioned application, Uys also withdrew as van Zyl’s attorney of record.

24.3 Two days later, Uys again represented van Zyl in the second surrender application.

24.4 No mention has been made a second surrender application of the withdrawal of the first application and neither were the Intervening Applicants reflect as creditors, nor were they given notice.

24.5 The dividend for concurrent creditors was calculated incorrectly and based on inflated values and understated costs.

24.6 The intervening creditor in the first surrender application, Absa Bank Ltd, was not given notice of the second surrender application.

[25] In the absence of proof of collusion and dishonesty there is nothing improper in an attorney representing a client in an application which is withdrawn and thereafter representing the same client in a subsequent application. Uys further, to my mind, also sufficiently indicated that he purely relied on a list of creditors forwarded to him by Smith and that he had no knowledge of the existence of the Intervening Applicants and he had not purposely, negligently or with any ulterior motive failed to include them in the list of creditors.

[26] Irrespective of whether van Zyl had an ulterior motive regarding the avoidance of the consequences of the impending trial against him or not, on his version of the best (incorrect) calculation of the unencumbered assets of his estate in a total amount of R407 687,47, it is clear that once the total amount claimed in the action by the Intervening Applicants (or even on the

version of Van Zyl, the lessor amount of R699 million pertaining to, the Allegro portion", which I assume would mean the portion of the claim in which van Zyl might have been involved) in is included as a claim or prospective claim, there would be no benefit for concurrent creditors in his estate and no conceivable chance of the application for voluntary surrender succeeding. At least, in the discharge of his duties to the court and in the display of utmost faith required, Van Zyl was under the duty to disclose "*all material facts… which may influence the court's decision"*. And Uys was obliged to assist him therein.

(See *inter alia* ***Fesi and Another vs Absa Bank Limited*** *2000 (1) SA 499 (CPD) at 503H-I.*)

[27] Uys however did not pertinently deal with the aforementioned issue or with the issue of the incorrect calculation of the dividend to concurrent creditors. It is common cause that Uys or his "office" had drafted the application and the supporting affidavit. They have also seen to the completion of the statement of affairs of Van Zyl and the arrangements regarding the other formal requirements of an application for voluntary surrender. There is no explanation how, if the valuator had valued the immovable property at R2.7 million and stated that a forced sale value amounted so 80% thereof, the calculation had been inserted as R 2, 208 000.00 and not the correct figure of R 2 ,160 000.00. Be that error of calculation as it may, there is even less

explanation how the final “rounded” amount of R2, 250 000.00 had been arrived at, irrespective of usage of the correct or incorrect figures. The Intervening Applicants have pointed out that although the divergence is only R90 000.00, it is of crucial importance in the present case where the amount available for distribution to concurrent creditors only amounted to R119 626.52. A correct calculation would only have resulted in a dividend of 2c in the rand which would clearly have signal led the end of the success of the second surrender application. (Van Zyl and Uys had calculated the dividend to be 28c\rand).

[28] In so far as Uys may have allowed himself to have been misled by van Zyl (and Smith) on the basis as already found hereintofore regarding the extent of Van Zyl’s creditors, he has been accused of not having disclosed whether:

28.1 He had advised van Zyl of his duty to display the utmost good faith in his affidavit and of his duty to disclose all material facts to the court,

28.2 He had explained to Van Zyl what or who constitutes a creditor in his estate for purposes of an application for voluntary surrender and in particular whether he had advised the Van Zyl at all.

[29] Uys’s latest response to the aforesaid accusations in his affidavit of 30 September 2014 is laconic:

> *"… as stated previously, I filed a sworn affidavit just setting out the reasons why I should not be held liable to pay the costs and did not deal with each and every allegation contained in the application for rescission… I deny that I ever tried to mislead the court. I confirm that I acted on behalf of the First Respondent with the information provided to me by the First Respondent"*.

He further blames Van Zyl for having deposed to the affidavit in the second surrender application, thereby confirming it to be true in all respects.

[30] The standard of ethical conduct required of an attorney in his dealings with the court and clients and his role in the administration of justice has been stated and commented on in various publications and judgments.

[31] In my view the most apposite summary can be found in LAWSA, Joubert (Red) Volume 14, Part 2, Second Edition at paragraph 306:

> *"The attorney has an overriding duty to the court, even when adherence to such duty may create an unfavourable result for the client and that duty is to disclose to the court all factors and matters relevant to the matter in issue in order that a fair and just result may be obtained. Failure to observe and have regard to this duty and the responsibility to the court in any proceedings, and in particular in ex-parte proceedings which can be taken without notice to the party against whom some order is sought, may well amount to a serious breach of professional conduct."* (My emphasis).

[32] The relationship between an attorney and his client imposes on an attorney the duty to exercise due skill and care in the conduct of the client's affairs. A lay client in the position of van Zyl is then ordinarily entitled to regard his

attorney as a skilled professional practitioner and entitled to place considerable reliance upon that legal practitioner's competence, skill and knowledge. In so far as Van Zyl has deposed to the founding affidavit in the second surrender application, he was entitled to assume that Uys had applied the aforementioned competence, skill and knowledge to the contents of the affidavit which he or his office had drafted. This is even more so when Uys as attorney must have been aware of the contents of judgments such as **Ex-Parte Arntzen** 2013(1) SA 49 (KZP) and his failure to apply the principles set out therein or to advise van Zyl fully as to the duties already referred to above, amounts, in my view, to a negligent discharge of his duties. This will remain so even if the duties had been performed by personnel in Uys's office, who clearly must have operated under his control and supervision and in the course and scope of the discharge of their functions.

[33] Although an attorney is not ordinarily responsible for any wrongful act committed by him on behalf of his client, he can be held liable if he breaches the duty of care owed by him to the court in conducting litigation on behalf of his client and the duty of care owed towards other parties.(See *inter alia* ***Wasahya v Wasahya*** *1990(4) SA 41 (ZHC) at 45G-I*.)

[34] The following has also been stated in LAWSA *op cit* in this regard:

> *"If an attorney negligently makes mistakes in litigation they may result in unnecessary costs for his client or the other party. A litigant should not always be obliged himself to pay the costs which have been caused by the negligence of his attorney. For this reason the courts have frequently penalized an erring attorney by an award of costs* ***de bonis propriis*** *or by disallowing certain fees…However, it has been said that administration of justice is sometimes an irritating discipline and even the most skillful practitioners can make mistakes which cause unnecessary costs. The circumstances under which a court will make an order of costs* ***de bonis propriis*** *against an attorney should therefore be reasonably serious, for example dishonesty, wilfulness or negligence of a serious degree."*

[35] I find on the papers before me that Uys was neither dishonest nor wilful in particular regarding the issue of non-disclosure of the Intervening Applicants as creditors in his client's application for voluntary surrender. However, he has not sufficiently assisted his client in meeting the requirements of full and frank disclosure in good faith as required and he has not convinced the court that he had seen diligently to the furnishing of notice of the second voluntary surrender application to Absa (he has attempted to convince the court otherwise in his latest affidavit but failed to annex the required annexure and despite probing questions from the bench regarding the existence of his notice, it was never produced.) The extent to which Uys had relied on the conduct of Smith in providing information to his office or personnel without apparent verification or consultation, resulted in the acceptance of an application for voluntary surrender which was ultimately set aside by this

court at the expense of the Intervening Applicants was also negligent. I therefore find Uys to be liable for a part of the costs occasioned thereby.

[36] Regarding the scale of costs and having regard to the principles set out *inter alia* **Rautenbach v Symington** 1995(4) SA 583(0) at 587H-258G, as well as the fact that a court's discretion to order costs on the scale as between attorney and client scale is not limited to cases of dishonest, improper or fraudulent conduct, I am however not convinced that the conduct of Uys (and also Smith, for that matter) constitutes such special circumstances or considerations justifying the granting of costs on the scale as between attorney and client.

[37] Furthermore, in the exercise of my discretion, I deem this to be an appropriate case to treat Van Zyl, Uys and Smith as *consortes lites* insofar *as the issue of costs is concerned*. It is difficult, if not impossible to apportion the contributory blame between the aforesaid co-litigants. I shall however attempt to do so in what I deem to be a fair and just manner, taking into consideration all the issues raised in this application, including the status of Smith as a lay person.

[38] Consequently, I make the following order:

38.1 It is declared that Francois Uys Inc and Jan Adriaan Smith are each liable for one third of the costs of the Intervening Applicants' application for the rescission of the voluntary surrender of Van Zyl accepted by this court on 5 November 2013;

38.2 The aforesaid liability shall be for costs on the scale as between party and party.

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N DAVIS
ACTING JUDGE OF THE HIGH COURT

DATE OF Hearing: 21 October 2014

DATE OF Judgment: 31 October 2014