Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No: 14866/2022

(1) REPORTABLE: ~~YES~~/NO

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(2) REVISED YES/~~NO~~

EW Dunn

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SIGNATURE

.1…4…S…e…p..t.e…
m….b..e…r..2023

DATE

In the matter between:

NORTIGER LOGISTICS SA (PTY) LTD **Applicant**

and

HENDRIE ANDRIES MARAIS NO **First respondent**

CHRISTINA MAUREEN PENDERIS NO **Second respondent**

ADRIANA MARIA VAN WYK **Third respondent**
(Identity number: […])

In re:

HENDRIE ANDRIES MARAIS NO **First applicant**

CHRISTINA MAUREEN PENDERIS NO **Second applicant**

and

NORTIGER LOGISTICS SA (PTY) LTD **Respondent**

Delivered: This judgement was prepared and authored by the Judge whose name is reflected in it and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 September 2023.

JUDGMENT

DUNN AJ:

Introduction and background

1. The present application is for the joinder of Mrs Adriana Maria van Wyk (**Mrs AM van Wyk**) as a respondent in the main application brought under the same case number (**the joinder application**).[1]

2. In the main application,[2] the joint provisional liquidators of Marboe en Seuns (Pty) Ltd (in liquidation) (**Marboe**),[3] *viz*., Mr Hendrie Andries Marais N.O. and Ms Christina Maureen Penderis N.O. (**the provisional liquidators**), seek, among others, the following relief (**the main application**):[4]

    2.1. That they (i.e., the provisional liquidators) be granted leave to bring the main application in terms of section 387 (3) of the Companies Act 61 of 1973 (**the previous Act**);

    2.2. that the sale to the respondent, Nortiger Logistics SA (Pty) Ltd (**Nortiger**), of a certain crane, namely a Tadano TR-250 EX with registration number RYC 735 GP (**the mobile crane**), be set aside; and

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1 Joinder application: CaseLines, pp. 09-1 to 09-23.

2 Main application: CaseLines, pp. 01-1 to 01-65.

3 Marboe was placed in final liquidation on 15 April 2021. See, in this regard, main application (founding affidavit (**MA-FA**)): para 1.5, CaseLines, p. 001-7, read with annexure '**B**' thereto, pp. 001-23 and 001-24.

4 Main application (notice of motion): paras 1 to 3, CaseLines, pp. 001-1 and 001-2.

2.3. that the Sheriff further be authorised to attach and remove the mobile crane from Nortiger, or wherever else it might be found, and to hand same to the provisional liquidators, and – should that be necessary - to also make use of the South African Police Service to assist him in doing so.

3. The main application is not presently before me for adjudication. It is only the joinder application that I am currently seized with.

4. The joinder application was instituted by Nortiger against the provisional liquidators for the joinder of Mrs AM van Wyk – who is the same person, and who is also known, as '*Ms Adriana Maria Honiball*'[5] - because she sold the mobile crane to it (i.e., Nortiger) for the sum of R650 000.00 on 6 November 2020 in terms of a written sale agreement (**the agreement**).[6]

5. In Nortiger's founding affidavit, its deponent, Mr Frank Peter Nortier (**Mr Nortier**), states, among others, the following:

5.1. First, under the caption '*Purpose of Application*', that it is an application '… *for reasons relating to convenience and to avoid multiplicity of actions and costs*';[7]

5.2. second, that Mrs AM van Wyk is also an interested party to the main application as she is liable to Marboe;[8] and

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5 Joinder application (founding affidavit (**JA-FA**)): para 2.5, CaseLines, p. 009-8.

6 JA-FA: paras 5.1 to 5.3, CaseLines, pp. 009-9 and 009-10, read with annexure '**FPN 1**' thereto, pp. 009-15 to 009-18.

7 *Ibid*., para 4.1, CaseLines, p. 009-8.

8 *Ibid*., paras 4.2 and 4.3, CaseLines, p. 009-9.

5.3. third, that the principal relief essentially sought by the provisional liquidators in the main application is the setting aside of the agreement Nortiger concluded with Mrs AM van Wyk and for which Nortiger paid her the sum of R650 000.00;[9]

5.4. fourth, what the provisions of Rule 10 (3) of the Uniform Rules of Court (**the Rules**) provide for, which he then – assumedly on the advice of Nortiger's legal representatives – proceeds to quote in its entirety;[10]

5.5. fifth, refers to the provisions of section 82 (8) of the Insolvency Act 24 of 1936 (**the Insolvency Act**) of which he quotes the portion considered germane to Nortiger's case;[11] and

5.6. lastly, contended that (i) Nortiger had acted in '*good faith*' in purchasing the mobile crane from Mrs AM van Wyk and that it should enjoy the protection afforded under section 82 (8) of the Insolvency Act;[12] (ii) the question of law van Wyk in the main application is substantially the same because it has always been Nortiger's case that it had acted *bona fide* and that the provisional liquidators' claim for relief actually lies against Mrs AM van Wyk;[13] (iv) Nortiger, as an innocent party, will stand to lose a substantial amount if the provisional liquidators were to be successful with the principal relief sought

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9 *Ibid*., para 6.1, CaseLines, p. 009-10, read with para 5.3, CaseLines, p. 009-10, as well as with annexure '**FPN 2**' thereto, p. 009-19.

10 *Ibid*., para 6.4, CaseLines, p. 009-12.

11 *Ibid*., para 6.5, CaseLines, p. 009-12.

12 *Ibid*., para 6.6, CaseLines, p. 009-12.

13 *Ibid*., para 6.7, CaseLines, p. 009-13. The contention that the provisional liquidators' claim for relief actually lies against Mrs AM van Wyk is assumedly based on the premise that the court is likely to find that the mobile crane was indeed an asset of Marboe at the time it was by Mrs AM van Wyk to Nortiger. Obviously, if it was indeed Mrs AM van Wyk's personal asset and she was at liberty to dispose of it at will, the provisional liquidators would have no recourse against her whatever.

in the main application;[14] and (v) that Mrs AM van Wyk should therefore be joined as a party in the main application so that her version would also be before the court.[15]

The provisional liquidators' opposition to the joinder application

6. The provisional liquidators oppose the joinder of Mrs AM van Wyk as a respondent in the main claim on the grounds that she neither has a direct and substantial interest in it[16] nor that the question of law and fact (i.e., as to whether Nortiger or Mrs AM van Wyk is, or ultimately would be, liable to Marboe) is substantially the same.[17]

7. The provisional liquidators further contend that Nortiger's reliance on Rule 10 (3) of the Rules is misplaced and that, having confined itself to the provisions of this Rule, the joinder application is bound to fail.[18]

8. The provisional liquidators, moreover, submit that Nortiger's reliance on section 83 (3) of the Insolvency Act is equally misplaced and also bound to fail, because this section only affords protection to a third-party acquirer of property *after* the second meeting of creditors was held by a liquidator authorised to sell same.[19]

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14 *Id*.

15 *Ibid*., para 6.8, CaseLines, p. 009-13.

16 Joinder application (answering affidavit (**JA-AA**)): para 7, CaseLines, p. 011-6.

17 *Ibid*., paras 9 to 12, CaseLines, pp. 011-6 and 011-7.

18 The provisional liquidators' heads of argument (drawn by Adv JC Carstens): paras 9 to 13, CaseLines, pp. 025-4 to 025-6.

19 *Ibid*., paras 14 to 18, CaseLines, pp. 025-6 to 025-8.

Has Nortiger made out a case for the joinder of Mrs AM van Wyk?

Rule 10 (3) of the Rules:

9. It is convenient first to deal with the provisional liquidators' submission that Nortiger's application for Mrs AM van Wyk's joinder as a respondent in the main application, is confined solely to the provisions of Rule 10 (3) of the Rules.

10. If that were to have been the case, the joinder application was bound to fail because Rule 10 (3) cannot be used at the instance of a respondent (i.e., such as Nortiger) to join another respondent (i.e., Mr AM van Wyk in this instance).[20]

11. However, I am not convinced – although Rule 10 (3) is prominently quoted in joinder application – that Nortiger's case is necessarily confined to it. Admittedly the joinder application is neither a model of elegance nor clarity, but does it contain sufficient rudimentary averments that might otherwise rescue it from failure? On a benevolent reading of the joinder application, as a whole, I think it does, but, perhaps, then also only just.

12. Elsewhere I pointed out that Mr Nortier states that the purpose of the joinder application is for reasons relating to convenience and to avoid multiplicity of actions and costs[21] and that Mrs AM van Wyk is also an interested party to the main application.[22] In this respect it is certainly distinguishable from ***Notshe's*** case[23] where the header to the joinder application unambiguously referred to it having been

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20 ***Notshe v State Attorney, Johannesburg and Another*** (2022/00966) [2023] ZAGPJHC 480 (15 May 2023) at para [8].

21 See, paragraph 5.1 above.

22 See, paragraph 5.2 above.

23 See footnote 20 above.

brought in terms of Rule 10(3) and the founding affidavit itself specifically relying on it.

Reasons relating to convenience and to avoid multiplicity of actions and costs:

13. Leaving aside for the moment the obligatory joinder of a party who has a *direct and substantial interest* in the subject matter of litigation, it is clear that South African courts have over a long period of time held that a party, such as a defendant, may be joined under the common law on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity of actions.[24]

14. In ***Van der Lith's*** case[25] the court (*per* Barry, JP, with whom Maritz and Malan, JJ concurred) held as follows:

> 'In our Courts, the question of convenience has been recognised. In the case of ***Morgan and Others v Salisbury Municipality*** 1935 AD 167, DE VILLIERS, J.A., in dealing with the question of non-joinder points out that there is no authority in Roman- Dutch works on practice on the question of non-joinder, and proceeds to say as follows: "*The South African practice was no doubt in the first instance founded on grounds of convenience or equity or in order to save costs or in order to avoid oppression or multiplicity of actions or on other similar grounds*" **and continues to state that the practice has hardened so as to confer on a defendant a right of demanding joinder of parties in certain cases**. The wide language used is equally applicable in considering the question of misjoinder.' (Own emphasis)

15. However, a closer examination of De Villiers JA's above-quoted *dictum* in the ***Morgan*** case, where the learned judge refers to '*the practice* [**that**] *has hardened so as to confer on a defendant a right of demanding joinder of parties in certain case'*, shows that he did not intend to suggest that a defendant automatically had such right irrespective of the specific factual circumstances of the case. This is illustrated by

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[24] ***Morgan v Salisbury Municipality*** 1935 AD 167 at p. 171; ***Van der Lith v Alberts*** 1944 TPD 17 at p. 22; and ***Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another*** 1980 (3) SA 415 (W) at p. 419 D – F.

[25] ***Van der Lith v Alberts***, *supra*, at p. 22.

the words that immediately followed those quoted above, where De Villiers JA proceeded to state:[26]

> '… the practice has in course of time so hardened as to confer on a defendant a legal right of demanding that the other joint owner, or joint contractor, or partner, shall be joined as a party to the action. Now the feature which is common to the cases of joint owners, joint contractors and partners, is that in all of them there is a joint financial or proprietary interest. It has been stated that the interest is indivisible as well as joint, but that point need not be here discussed. The feature to which I draw attention is the joint financial or proprietary interest. **The position may therefore be broadly stated to be that by South African practice the only cases in which a defendant has been allowed to demand a joinder as of right are the cases of joint owners, joint contractors and partners, in all of which cases there exists a joint financial or proprietary interest, but that in other cases a defendant, as a general rule, has not been allowed to demand such joinder. Now it is not necessary or advisable to formulate here any general statement as to the principles on which the practice, hitherto so narrowly confined, ought to be based in the future, or as to the directions, (if any) in which it ought to be extended or enlarged**.' (Own emphasis).

16. This common law practice now under discussion, does not appear to support Nortiger's insistence or demand that Mrs AM van Wyk must be joined as of right.

Is Mrs AM van Wyk an '*interested party*' to or in the main application?

17. This averment by Mr Nortier, *viz*., that Mrs Van Wyk is an '*interested party*', is inadequate. The test is not whether Mrs AM van Wyk merely has an '*interest*' in the main application: It is whether or not she has a *direct and substantial interest* in it. In ***Erasmus: Superior Court Practice*** the author expresses the test and its ramifications as follows (footnotes omitted):[27]

> 'The test is whether or not a party has a '*direct and substantial interest*' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court. **A mere financial interest is an indirect interest and may not require joinder of a person having such interest. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea**. **The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party**, unless the court is satisfied that he has waived his right to be joined.'

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[26] *Supra*, at p. 171.

[27] Van Loggerenberg, DE at RS 20, 2022, D1-124 to D1-126.

18. Applying this approach – and especially the wording I have also emphasised in the penultimate phrase (i.e., '… *or if such an order cannot be sustained or carried into effect without prejudicing that party* …') – I consider that Mrs AM van Wyk's does not merely have '*an interest*' in the main application, as Mr Nortier avers, but that she actually has a *direct and substantial interest* in it – and, at the very least, even if I were to be wrong about this, the principal relief claimed by the provisional liquidators in the main application certainly cannot be sustained or carried into effect without prejudicing Mrs AM van Wyk.

19. The reasons for this conclusion are essentially the following: (i) If the principal relief in the main application were to succeed, it would imply that Marboe was the owner of the mobile crane and that Mrs AM van Wyk was not authorised to sell it to Nortiger; (ii) if the proposition in (i) is correct (*which I consider to be the case*), then Nortiger will be obliged to deliver the mobile crane to the provisional liquidators, or they will be entitled as of right to enforce its removal from Nortiger; and (iii) if propositions (i) and (ii) are correct (*which I also consider to be the case*), the purchase price for the mobile crane that accrued to Mr AM van Wyk upon, or pursuant to, the sale thereof to Nortiger, will have to be repaid by her to Nortiger – *thereby directly affecting and prejudicing her rights to such purchase price*. In my view, it would be quite improper for the court in the main application to grant such principal relief, which would clearly be adverse to Mr AM van Wyk's interest and rights, without first hearing what she has to say about such order.

20. In addition to the abovementioned considerations, I consider that it is right and proper for Mr AM van Wyk to be joined for the reasons mentioned and, even if Nortiger's joinder application were entirely deficient, I consider that this court should use its

inherent power to order Mr AM van Wyk's joinder as an additional respondent in the main application.[28]

Section 82 (8) of the Insolvency Act:

21. In view of the conclusion I have arrived at, it is strictly speaking unnecessary for me to deal with Nortiger's contention based on this section. But, for the sake of convenience, I synoptically state why I disagree with such contention. Section 82 (8) of the Insolvency Act must be read in context. This requires a consideration of the *text*, *context* and *purpose* of section 82 (8) of the Insolvency Act.[29] This also means that it, at least, must be read in the context of section 82 thereof.

22. Section 82 (1) of the Insolvency Act deals with the sale of property *after the second meeting of creditors* and is clearly not applicable to the sale of the mobile crane in the circumstances of this case. However, I consider that Nortiger cannot rely on the protection of section 82 (8)[30] simply because it did not acquire the mobile crane from Marboe's insolvent estate, or from any of the categories of persons described in subsection (7) thereof, but rather directly from Mrs AM van Wyk, who does not fall into any of those categories either. In other words, Nortiger's purported reliance on the protection section 82 (8) is intended to provide, is entirely destructive of its main contention too.

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[28] ***Ploughman NO v Pauw*** 2006 (6) SA 334 (C) at 341E–F; and ***Matjhabeng Local Municipality v Eskom Holdings Ltd*** 2018 (1) SA 1 (CC) at paras [91] and [92], p. 33 D - G.

[29] ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012 (4) SA 593 (SCA) at paras [18] and [19], pp. 603 E to 605 B; ***Telkom SA SOC Ltd v Commissioner, South African Revenue Service*** 2020 (4) SA 480 (SCA) at paras [10] to [17], pp. 485 to 489; and ***Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*** 2022 (1) SA 100 (SCA) at para [25], pp. 107 and 108, as
well as at paras [49] to [51], p. 115.

[30] Bertelsmann, E *et al*, **Mars's Law of Insolvency in South Africa**, Tenth Edition (2019), ISSN (Online) 2224-4743, at §15.15.6, p. 366, as well as ***Sheonandan v Thorne NO*** 1963 (2) SA 226 (N), where the reference to section 81 in the headnote should read section 82.

23. A successful applicant usually would be entitled to the costs of application. However, in this case I consider that the interests of justice would better be served if the costs were to be dealt with as costs in Marboe's estate.

Conclusion

24. In the circumstances, I make an order in the following terms:

24.1. The third respondent in the joinder application, i.e., Mrs Adriana Maria van Wyk (also known as Ms Adriana Maria Honiball), with identity number 451213 0043 086, is hereby joined as the second respondent in the main application under case number 14866/2022;

24.2. the applicant in the joinder application, is given leave to amend the headings of the notices and affidavits already delivered in the main application to reflect Mrs AM van Wyk's joinder as the second respondent therein; and

24.3. the costs of the joinder application are to be costs in Marboe's estate in liquidation.

EW Dunn

EW DUNN
Acting Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the applicant: Adv WJ Prinsloo

Instructed by: Botes Mahlobogoane Christie & Van Heerden Inc.

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Hertzberg Attorneys, Hyde Park.

Date of hearing: Monday, 4 September 2023

Date of Judgment: Thursday, 14 September 2023.

Judgment handed down electronically