IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: 45914/2021

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
DATE	SIGNATURE

In the matter between:

GERTBRECHT ELIZABETH SEQUEIRA Intervening Applicant

and

THE STANDARD BANK OF SOUTH AFRICA LTD Applicant

GIDEON PETRUS BRITZ 1st Respondent

GEORGE ANTONIO GONCALVES SEQUEIRA 2nd Respondent

[Application to intervene]

In re:

THE STANDARD BANK OF SOUTH AFRICA LTD Applicant

and

GIDEON PETRUS BRITZ 1st Respondent

GEORGE ANTONIO GONCALVES SEQUEIRA 2nd Respondent

[Main application]

Delivered: This judgment was prepared and authored by the Judge whose name is reflected 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 **27 October 2023**.

JUDGMENT

CARRIM AJ

Introduction

[1] In this application the spouse of the Second Respondent in the main application, seeks leave to intervene in the main application as a respondent.

[2] In the main application, the Applicant (Standard Bank) seeks judgment against First Respondent ("Britz") and Second Respondent ("Seqiuera"), jointly and severally, the one paying the other to be absolved, for cancellation of a loan agreement, payment in the sum of R941,111.98, interest on the amount referred to immediately above at the rate of 4.95% per annum, and an order of specific executability of the immovable property situated at River Lodge, Parys be declared specially executable ("the property").[1]

[3] The main application arises from a credit agreement concluded between Standard Bank on the one hand and Britz and Seqiuera on the other in 2007 in

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[1] For a full description of the property see the Notice of Motion in the main application and Applicant's Practice Note at 011-10, 11, 12.

respect of the property and over which a mortgage bond was registered in favour of Standard Bank.

[4] For convenience I refer to the intervening applicant as the Applicant in this matter and to the First Respondent as Standard Bank or bank.

[5] The Applicant relies on the provisions of rule 12 of the Uniform Rules of Court.[2]

[6] She submits that she is married to Seqiuera in community of property and resides on the property. As a result of their marriage in community of property she is a co-owner jointly with her husband of his share in the property. She is also liable jointly for all his debts and liabilities. For these reasons she has a legal interest in the main application which may be adversely affected by the outcome of the matter. She would like to participate in the main application and state her case pertaining to the relief sought which relief she believes she has a right to oppose.

[7] She raises as her *prima facie* defence that because she is liable for the debts and obligations of her husband that she is also entitled to the same rights he has pertaining to the cause of action and the procedures that are required in law. She wishes to be afforded the same opportunities and rights that section 129 and 130 of the National Credit Act 34 of 2005 (NCA)[3] bestows upon Seqiuera and that a directive be made that such rights and opportunity be afforded to her before the main application may proceed further, so that she may exercise those rights.

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[2] Paragraphs 7 and 9 of the Founding Affidavit at CL015-5

[3] Founding Affidavit, paragraph 17 (015-07

[8] If she is granted leave to intervene, the Applicant seeks a postponement of the main application to allow her to file an application for an order directing that the main application be stayed until such time as Standard Bank has delivered a notice to her as contemplated in s129 and s130 of the NCA and until such time as the bank would otherwise have been entitled to institute legal proceedings.[4]

[9] Standard Bank, the First Respondent opposes the application for intervention on the basis that when the credit agreement was concluded, in 2007, the Applicant was not married to Seqiuera. They were married some 10 years later, in 2017. The Applicant was not a party to the transaction. Hence, she simply does not have a direct and substantial interest in the subject matter of the litigation, the loan agreement and the bond registered as security. She only has an "indirect financial interest', which is an interest that exists only by virtue of the fact that she and Seqiuera are married in community of property.

[10] The bank submits further that as far as she might be affected by an order declaring the property specially executable, her remedies are found in the provisions of Rule 46A. Rule 46A(3) requires affected persons to be notified of applications to declare immovable property executable and Rule 46A(8) provides such affected parties to even apply to have certain conditions included in orders declaring property executable. [5]

[11] Moreover, it submitted, the bank was entitled to proceed against either the husband or the joint estate in terms of section 17(5) of the Matrimonial Property

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[4] Intervening Founding Affidavit 015-7 para 15

[5] ***Petrus Johannes Bestbier and Others v Nedbank Limited*** (150/2021) [2022] ZASCA 88 (13 June 2022) para 28

Act (MPA). [6]

[12] In the bank's view the Application was brought simply to delay the main proceedings and the Applicant had not met the threshold set out in ***Shapiro v South African Recording Rights Association Ltd (Galeta Intervening)***. [4]

Evaluation

[13] Section 17(5) of the MPA provides that:

> "Where a debt is recoverable from a joint estate, the spouse who incurred the debt or both spouses jointly may be sued therefor, and where a debt has been incurred for necessaries for the joint household, the spouses may be sued jointly or severally therefor. "

[14] Standard Bank is given an option by this section to sue the spouse who incurred the debt or to sue both jointly.

[15] In ***Zake v Nedcor Bank Ltd and Another,***[1] the Court said:

- *Technical points of non-joinder could have been raised by either spouse long after the debt had been incurred and creditors, in those circumstances, could be severely prejudiced. In my view, the enactment of s17(5) was done with the specific purpose of protecting creditors in these circumstances so as to enable a creditor to sue the spouse who incurred the debt or the spouse jointly. To attach a different interpretation to s 17(5) would lead to absurdities and give rise to difficulties with regard to who to sue at any given time. It could open the way to unscrupulous debtor-spouses who could avoid their liability in respect of debts incurred in the furtherance of the interest of the joint estate. I agree with Mr Buchanan that s 17(5) is unambiguous and must be interpreted in the sense that a creditor is permitted to sue the spouse who*

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[6] 88 of 1984

incurred the debt in his or her own name. It would in those circumstances be unnecessary for a creditor to join both spouses in the same action."

[16] Thus, the bank was entitled in terms of section 17(5) of the MPA to sue only the husband.

[17] It is trite that a party seeking to intervene must show that he is specially concerned in the issue, the matter is of common interest to him and the party he desires to join, and the issues are the same. The test of a direct and substantial interest in the subject matter of the action is the decisive criterion.[7]

[18] In ***Shapiro*** Gautschi AJ dealt with the differences between intervention as co-applicant and co-respondent. In respect of intervention as co-respondent, he stated the following:

[18.1] "[17] In ***Minister of Local Government v Sizwe Development*** *White, J held that an applicant for intervention has to satisfy the court that—*

> *"(i) he has a direct and substantial interest in the subject-matter of the litigation, which could be prejudiced by the judgment of the court, and*
>
> *(ii) the application is made seriously and is not frivolous and that the allegations made by the applicant constitute a prima facie case or defence — it is not necessary for the applicant to satisfy the court that he will succeed in his case or defence."*

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[7] Harms *Civil Procedure in the Superior Courts* Vol1 B-112(5)

[19] However, because the applicant in ***Shapiro*** sought leave to intervene as a co-applicant and not a co-respondent, Gautschi AJ found the test too limited, and generally inapplicable for persons wishing to join as applicants or plaintiffs. In that case the court found that it is therefore not necessary that Galeta have a direct and substantial interest (i.e. a legal interest) in the subject matter of the litigation which could be prejudiced by the judgment. He simply had to meet the test for a joinder under Rule 10(1), namely that his right to relief "depends upon the determination of substantially the same question of law or fact."

[20] Thus, the Court held that it would suffice if the applicant satisfied the test under Rule 10(1). While setting the test for intervention at the level of rule 10(1), the court still required that an applicant for intervention show that he or she has a prima facie case, that the application is seriously made and is not frivolous.

[21] The Constitutional Court requires in addition the interests of justice.[8]

[22] In this case the Applicant seeks to intervene as co-respondent. ***Sizwe*** and ***Ex parte Sudurhavid (Pty) Ltd*** serve to support the threshold she has to meet, namely that she has a direct and substantial interest in the subject-matter of the litigation, which could be prejudiced by the judgment of the court, the application is made seriously and is not frivolous and that the allegations made by the applicant constitute a prima facie case or defence and it is not necessary for the applicant to satisfy the court that he will succeed in his case or defence.

[23] However, in ***SA Riding for the Disabled Association v Regional Land Claims Commissioner***[9] the Constitutional Court held**-**

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8 Harms supra B-112(6) and the cases cited at footnote 4

9 [2017] ZACC 4, paragraphs [9]-[11]

"[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In ***Greyvenouw CC*** *this principle was formulated in these terms:*

> *"In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed*

in the absence of parties having such legally recognised interests."

[24] In ***SA Riding*** the Association sought leave to intervene because the land on which it was operating and on which it had made improvements of about R7.5m had been transferred without determination of the compensation to it. The Court found that –

"[12] While it is true that the Association had no interest in the subject-matter of the claim by the Sadiens (my emphasis) and that the order issued by the Land Claims Court on 7 December 2012 affected none of its interests, the same cannot be said about the variation of 8 February 2013. The varied order had the effect of transferring Erf 142 to Mr Sedick Sadien without determination of compensation to the Association.

[13] Section 35(9) affords lawful occupiers of state land like the Association the right to claim compensation when the land they occupy is awarded to a claimant for restitution of land rights."

[25] Thus, it was held that while the Applicant had no interest in the subject matter of the claim by the Sadiens, it was entitled to compensation in terms of section 35(9) of the Restitution of Land Rights Act[10] and was granted leave to intervene on this basis.

[26] In ***Snyders v De Jager (Joinder)*****,**[11] the Court, held that –

[10] 22 of 1994.

[11] [2016] ZACC 54**;** See also *Lebea v Menye and Another* [2022] ZACC 40.

> "*A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard*."

[27] In this matter, the Applicant clearly has a direct financial interest in the outcome of the matter. Any adverse outcome for Seqiuera in the main application would also affect her because she is jointly liable for his debts and liabilities.

[28] While she does not claim that the property is her primary residence, she resides there. The bank has suggested that she has the right to place facts before this honourable court to consider when it exercises its discretion in terms of Rule 46A to declare the property executable. However, this might be presumptuous of the bank because it is not inevitable that should Standard Bank succeed in obtaining a money judgment a court would also grant execution against the immovable property. Moreover, the applicant has not limited her interest only to the executability property but to the entire subject matter of the main application which includers the money judgment.

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[29] At the same time, the Applicant's relief as stated in the Notice of Motion[12] and founding affidavit does suggest that she is engaging in a dilatory strategy. Her request that she be given time to bring yet another application to seek an order that the s129 and s130 notices of the NCA be served and then to afford her more time as provided in the NCA cannot be viewed in any other light. The notices have been served on her husband, who is reflected as the debtor. Her husband is opposing the matter with the assistance of legal representatives. He has already disputed that the s129 and s130 notices were validly served on him.

[30] The interests of justice may require that a party, in the position of the Applicant, be afforded an opportunity to be heard by this Court, but they also require that proceedings are not unduly delayed by litigants.

[31] Given that the main matter has already been postponed pending the determination of this application there is no need for me to issue an order to that effect.

[32] On the matter of costs, the general principle is that costs should follow the event. The Applicant has sought costs against the bank if the application is opposed. However, the bank's opposition to this application was based on its entitlement in section 17(5) of the MPA. I accept the *bona fides* of its opposition and am of the view that the issue of costs can be dealt with fully during the main application.

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[12] The relief sought in the original Notice of Motion contemplated a postponement of the main application sine die, the applicant be granted leave to intervene and 30 days to bring an application for the stay of the main action on these same papers. 015-2

Order

[33] Accordingly, I make the following order –

[33.1] The application for leave to intervene is granted.

[33.2] Applicant must file her answering affidavit in the main application within fifteen (15) days hereof.

[33.3] First Respondent, Standard Bank, may file its replying affidavit to the above within ten (10) days thereafter.

[33.4] Costs of the Applicant's intervention application shall be costs in the cause of the main application.

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Y CARRIM
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

APPEARANCES

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DATE OF THE HEARING:	25 October 2023
DATE OF JUDGMENT:	27 October 2023