IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 63920/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

..... **.....**
SIGNATURE **DATE**

In the application of:

INTERNATIONAL PENTECOST HOLINESS CHURCH Applicant

In the matter between:

MAGALANE BENEDICTA SANDLANA Plaintiff

And

BHEKUMZI MIKE GILBERT SANDLANA First Defendant

BHEKUMZI MIKE GILBERT SANDLANA N.O. Second Defendant

JUDGMENT

AC BASSON, J

Nature of the application

[1] The International Pentecost Holiness Church (*"the applicant"* or *"the church"*) brings an application claiming that it has a direct and substantial interest in the subject matter of the divorce proceedings pending between the plaintiff and the first and second defendants. The plaintiff in the divorce action is Ms Magalane Benedicta Sandlana (born Moswa). The first defendant is her husband, Mr Bhekumzi Mike Gilbert Sandlana. The second defendant is Mr Bhekumzi Mike Gilbert Sandlana N.O. in his capacity as trustee of the Sompisi Family Trust.

[2] The applicant seeks leave, once having been joined, to file a plea and counterclaim within twenty days of the order of this court. The plaintiff opposes this application. Although the applicant initially submitted that the plaintiff's opposition to this intervention application is vexatious and deserving of a punitive costs order, it has indicated during argument that the applicant no longer sought a punitive costs order.

Background facts

[3] The plaintiff and the first defendant were married in community of property on 21 August 2017.

[4] The plaintiff alleges that certain properties, which are registered in the name of the plaintiff and the first defendant, form part of the estate. She seeks in the divorce action a division of the joint estate which includes certain properties (described in paragraph [6] hereunder).

[5] The applicant in this application claims that these properties as well as a Capitec Savings Account (containing a substantial amount of money) held in the name of the first defendant, in fact belong to the applicant and thus do not

fall within the joint estate. The applicant accordingly seeks leave to intervene as the third defendant in the divorce action in which the applicant will seek a declaratory in a counterclaim that these assets (which the plaintiff claims form part of the joint estate) are the property of neither the plaintiff nor the first defendant (the joint estate), but in fact is the property of the applicant.

[6] The applicant claims that the assets in respect of which it (the church) has a direct and substantial interest are the following:

7.1 Three portions of farm Klippoortje 187 (*"the properties"*). The properties are registered in the joint names of the plaintiff and the first defendant.
7.2 The savings account at Capitec Bank in the name of the first defendant.

[7] Both the first and second defendants have each filed a plea to the particulars of claim in the divorce action. The first defendant has also filed a counterclaim in the divorce action in which he sets out the basis upon which he alleges that he and the plaintiff are not the true owners of the properties but that the church is in fact the true owner. In his counterclaim the first respondent states that in 2019, the church (represented by various individuals) as well as the first defendant concluded an agreement in terms of which the church would buy the properties. The church would register the properties in the name of the plaintiff and the first defendant as its nominee. The church would pay the purchase price and would pay all costs associated with the acquisition and development thereof. The immovable property would be transferred to the church or its nominee upon demand,

[8] The plaintiff, in her plea, denies each and every averment made by the first defendant in his counterclaim. More in particular, she denies that the properties and the Capitec Bank account do not form part of the joint estate.

[9] In these circumstances, the applicant seeks to be joined and to intervene as the third defendant in order to defend the plaintiff's case that the properties and the Capitec Bank account belong to and fall within the joint estate and to establish that these assets in fact belong to the applicant.

The law

[10] Rule 12 of the Uniform Rules of Court provides as follows:

"Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to the further procedure in the action as to it may seem meet."

[11] *Herbsten and Van Winsen*[1] explains that:

"On the wording of the rule, the applicant for leave to intervene must be a person 'entitled to join as a plaintiff or liable to be joined as a defendant'. In other words the test to be applied in order to decide whether a person can seek to intervene is to ask whether that person could have been joined as a party. As has been explained above, joinder is competent either on the basis of convenience or on the basis that the party whose joinder is in question has a direct and substantial interest in the subject-matter of the proceedings. A person is accordingly entitled to intervene in three sets of circumstances:
(a) Where the requirements of uniform rules 10(1) and 10(3) are satisfied, in that the determination of the intervening party's matter or dispute depends upon substantially the same question of law or fact as arises in the proceedings in which leave is sought to intervene.
(b) Where wider considerations of convenience favour intervention.
(c) Where the intervening party has a direct and substantial interest (legal interest) in the proceedings."

And further that:[2]

"It is not sufficient for a third party seeking to intervene to merely allege an interest in the action, but such party must give prima facie proof of the interest and right to intervene. It is not necessary to satisfy the court of success in the litigation in which leave is sought to intervene. It will be sufficient to make such

[1] 5th Ed, 2009 chapter 6 p226.
[2] *Ibid* at p 227-228.

allegations as would show a prima facie case (allegations which, if they can be proved in the main action, would entitle success) and that the application is made seriously and is not frivolous. Provided that such prima facie proof is given, however, the intervening party need not show a ius in rem in the subject-matter of the suit."

[12] The Constitutional Court In *SA Riding for The Disabled Association v Regional Land Claims Commissioner and others*[3] confirmed the law as follows:

"[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 predecision 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.' "*

[13] The applicant argues that it has a direct and substantial interest in the matter (a legal interest) that may be prejudicially affected by the judgment of the trail court presiding over the divorce action.

[14] The applicant does not have to satisfy the court at the stage of intervention that it *will* succeed. It is sufficient if such applicant make allegations which, if provem, would entitle it to relief.[4]

<u>The applicant's case</u>

[3] 2017 (5) SA 1 (CC).
[4] *SA Riding* (*supra*), para 9.

[15] The applicant submitted that, although the properties are registered in the names of the first and second defendants, they belong to the church which is entitled to have the properties transferred, on demand, to the church or to its nominee.

[16] The applicant relies on the following facts:

16.1 On 9 February 2016 Mr Glayton Modise, who was the comforter of the church, passed away. Following his passing, the church became embroiled in a leadership dispute which has not yet been resolved.

16.2 As a result of the leadership dispute, the applicant resolved to operate from its facility in the North West Province. That facility was however too small to accommodate the growing number of congregants and it was resolved that the disputed properties be purchased for an amount of R6 million.

16.3 It was agreed that the properties would be purchased in the name of the first defendant and the plaintiff as nominee of the church. The church would pay the purchase price for the properties as well as all transfer costs incidental thereto. The properties would then be developed by and for the church which would pay all the costs of development.

16.4 It was agreed that the properties would be transferred to the church on demand. Resolutions to this effect were passed.

16.5 The church subsequently paid the purchase price for the properties together with the transfer costs. The church also paid for the development of the church on the properties. On 5 June 2021 the church sent a letter to the transferring attorneys advising that, in respect of portions 74 and 75, Mr and Mrs Sandlana would be acquiring the properties on behalf of the church. In a further letter to the other transferring attorneys, the church similarly advised the attorneys that in respect of portion 73, Mr and Mrs Sandlana would be acquiring the properties on behalf of the church.

16.6 In respect of the Capitec Bank account, the applicant states that it is held by the first defendant as nominee of the church. All deposits (in the amount of R260 320.55) made into the account are not for the benefit of the first defendant but for the benefit of the church. The source of the money is from

deposits made by tenants of the church. These monies therefore belong to the church and do not form part of the joint estate.

The plaintiff's opposition

[17] The plaintiff opposes this on various grounds. Some of these grounds relate to allege procedural defects. Firstly, that the Notice of Motion does not give a date for the hearing in the event that there is no opposition. There is no merit in this point as the application is opposed. Secondly, the plaintiff alleges that the founding affidavit was signed after the date of the Notice of Motion. There is also no merit in this contention. Thirdly, the plaintiff contends that it is *"beyond comprehension"* that the application was only launched in November 2021 whereas the resolution was passed in March 2021. There is no merit in this ground particularly in light of the fact that the applicant is entitled to wait until the pleadings in the divorce action were exchanged before it took the decision to intervene and be joined as a party to the divorce proceedings.

[18] The plaintiff disputes that the applicant has *locus standi* to bring this application. I am not persuaded that the church does not have *locus standi* in this application, at least on a *prima facie* basis. Determining the *locus standi* of the applicant cannot be done in isolation. Regard must be had to the facts placed before the court by the applicant to substantiate as to why it is entitled to be joined to the pending divorce proceedings. On the facts, I am persuaded that the applicant has established sufficient facts to demonstrate that it has a direct and substantial interest to intervene in the divorce action in respect of the plaintiff's claim that the properties and the bank account should form part of the joint estate,

[19] The plaintiff tries to establish on motion that the applicant is not the owner of the disputed properties. Most notably the plaintiff disputes that the properties were purchased in the name of the plaintiff and the first defendant as nominees of the applicant. The applicant, as already pointed out, contends that the properties were purchased for the church by agreement between the applicant and the first defendant. And as already pointed out, the applicant had paid the purchase price of the properties and has paid for the development of

the church on the properties. The plaintiff, however, submitted that it is irrelevant who paid for the properties. This is not correct. Although not the only factor to be considered, it may be *a* factor to be considered by the divorce court ultimately called upon to decide what falls within the joint estate.[5]

[20] The plaintiff also raised various other grounds on which she disputes the applicant's entitlement to the properties. It is not necessary to refer to those arguments in detail for purposes of this application. Suffice to point out that, should this court grant this application, those issues will be dealt with in the divorce trial with the usual oral evidence and cross-examination. As such, I am persuaded that the applicant has succeeded in establishing the requisite direct and substantial interest in the outcome of the divorce proceedings.

[21] It is therefore not, for purposes of this application, necessary to consider the merits of the applicant's case and the plaintiff's opposition thereto. The issues raised in the applicant's founding affidavit claiming to be the owner of the disputed properties and the Capitec Bank account and the plaintiff's opposition to these claims go to the heart of the issues which have to be decided in the divorce proceedings. This dispute cannot be decided on motion.

Conclusion

[22] Despite severe opposition to the applicant's application to be joined as a third defendant to the pending divorce action between the plaintiff and the first and second defendants, I am persuaded that the applicant has shown a direct and substantial interest in the subject matter of the proceedings and more importantly, that it is in the interest of justice to grant the application. In coming to this conclusion, I had regard to

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[5] See in this regard: *WT and others v KT* 2015 (3) SA 574 (SCA): *"[34] In these circumstances there was no factual or legal basis for the further finding by the court a quo that the trust was simply a continuation of the previous situation between the parties. WT and KT never owned the property in equal shares prior to the marriage, nor was it established on the probabilities that they ever concluded any agreement relating to the purchase of the property. Moreover, notwithstanding suggestions to the contrary, it was common cause that WT had procured the establishment of the trust, as well as the purchase of the property, prior to his marriage to KT, without the participation of KT and without any significant financial contribution from KT."*

what the Constitutional Court in *International Trade Administration Commission v Scaw South Africa (Pty) Ltd*[6] stated in respect of applications to intervene:

> *"[11] Somewhat belatedly Bridon UK asks to be joined as a party to these proceedings. The application is not opposed by any of the other parties. The attitude of the other parties is an important, but not the only, consideration. The court remains obliged to satisfy itself whether Bridon UK is entitled to intervene in the proceedings. Intervention of a party in proceedings is regulated by rule 8(1) of the rules of this court which must be read together with rule 12 of the Uniform Rules of the High Court. The latter rule requires that a party seeking to intervene must have a 'direct and substantial interest in the subject matter' of the litigation. However, in this court, the overriding consideration is whether it is in the interests of justice for a party to intervene in litigation.*[7]
> *[12] In considering where the interests of justice lie, the question whether the party seeking to be joined has a direct and substantial interest in the subject-matter of the proceedings will rank highly along other relevant considerations. These would include the stage at which the application for joinder is made; whether the party has furnished adequate explanation for the delay, if any, in seeking to be joined; and the nature of the relief or opposition the intervening party puts up. Whether the intervention would materially prejudice the case of any of the other parties to the litigation is also a relevant factor."*

> [23] The applicant has, in my view, at the very least laid a factual foundation from which it can be concluded that the applicant has made out a *prima facie* case. It should be noted that it is not necessary for the applicant to satisfy the court that it will succeed in this case. It is sufficient for the applicant to rely on the allegations made which, if established in the action, would entitle the applicant to succeed. In assessing the applicant's standing, the court must assume that the allegations made by the applicant are true and correct. Further, the possibility that the applicant's legal interest exists is sufficient. It is not necessary for the court to determine positively that it does indeed exist. See in this regard *Peermont Global (KZN) (Pty) Ltd v Afrisun KZN (Pty) Ltd*[8]:

[6] 2012 (4) SA 618 (CC).
[7] My emphasis.
[8] [2020] 4 ALL SA 226 (KZP) at para 18

"[18] The rule is equally applicable to applications. It has not overridden or replaced our common law, which remains applicable to interventions. Our courts have held that a party is entitled to intervene as an applicant in an application where:

[18.1] it has a direct and substantial interest in the right that is the subject matter of the application, which could be prejudiced by the judgment of the court. The interest must be such that the intervenor's joinder is either necessary or convenient. But the possibility that a legal interest exists is sufficient, and it is not necessary for the court positively to determine that it exists;

[18.2] the allegations made by the intervening applicant constitute a prima face case or defence. It is, however, not necessary for the intervenor to satisfy the court that it will succeed in its case or defence. It is sufficient for the party seeking to intervene to rely on allegations which if they can be proved in the main application, would entitle it to succeed. In assessing the intervenor's standing, then, the court must assume that the allegations it advances are true and correct; and

[18.3] the application is made seriously and is not frivolous."

[24] I am also satisfied that the application has been made seriously and is not frivolous. See also *Ex Parte Moosa: in re Hassim v Harrop-Allin*[9] where the court emphasized that at the stage of the application for leave to intervene, the court need not be over concerned with the intrinsic merits of the dispute which can be fully canvassed in the main proceedings. It is also convenient to allow the applicant to intervene so as to avoid a duplication of proceedings concerning the same subject matter.

Costs

[25] I am in agreement with the submission that the plaintiff should be ordered to pay the costs of opposing the application. The plaintiff clearly misconceived the requirements and principles relating to an application to intervene and sought to preclude the applicant being granted leave to intervene by having the merits dealt with in the intervention application. The properties

[9] 1974(4) SA 412 (T) at 416F

forming the subject matter of the dispute are valued at millions of Rands, particularly taking into account the cost towards the development of the church. It is a matter of utmost importance to the applicant and therefore necessitated the employment of both senior and junior counsel.

Order

[26] The following order is granted:

1. The applicant is granted leave to intervene and be joined in the action instituted by the plaintiff against the first and second defendants under case no. 63920/2020.
2. The applicant is joined as the third defendant.
3. The applicant is granted leave to file a plea and counterclaim within twenty (20) days of the order of this court.
4. The plaintiff is ordered to pay the costs of this application, such costs to include the cost of two counsel.

A.C. BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

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 5 May 2022.

Date of hearing

3 May 2022

Appearances

For the applicant

Adv M Osborne SC

Adv P Khoza

Instructed by S Twala Attorneys Inc.

For the plaintiff

Adv KJ Selala

Instructed by KJ Selala Attorneys