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

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case Number: 068491/2023

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO

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L M MALATSI-TEFFO DATE: 15 NOVEMBER 2023

In the matter between:

EX PARTE:

REYNIER.JEANNOITE VAN ROOYEN First Applicant

AFRICIER VAN ROOYEN Second Respondent

For the appointment of curator ad litem and curator bonis in respect of VERONICA JEANETTE VAN ROOYEN (the patient)

***Case Summary*:** application for the appointment of the curator ad litem and curator bonis in terms of section 57 of the Uniform Rules of Court. *The notice to oppose and* intervention of the third party

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JUDGMENT

MALATSI-TEFFO AJ

Introduction

[1] This is an ex parte application for the appointment of a curator for Mrs. *VERONICCA JEANETTE VAN ROOYEN,* who is regarded as the patient, *("*Mrs Van Rooyen*").* It is brought in terms of rule 57 of the uniform rules of the High Court of South Africa ("The main application").

[2] A notice of intention to intervene and oppose the proceedings of the curator's application was placed on record at the hearing ("The intervening application").

Background

[3] The facts are gleaned from the affidavit deposed by Reynier Van Rooyen, one of the applicants in this matter. Mrs Van Rooyen was married to the late ARCAS MAXMILION VAN ROOYEN ("the deceased"). They have three (3) children biological children, namely; REYNIER JEANNOITE an adult male person ("Reynier"), CARL HEINRICH an adult male person ("Carl"), and ARICIA VAN DER MERWE, an adult female person. ("Aricia")

[4] Reynier and Aricia brought an application for an appointment of a curator for Mrs Van Rooyen. They shut out their brother; Carl from this application for the reasons that will be briefly expounded hereon. Mrs. Van Rooyen is an adult female pensioner and her husband, the deceased was a successful businessman and a pensioner at the time of his death in August 2020. She resides at ERF [..] E[…], P[…] with Carl and his family who moved in after the passing of the deceased.

[5] The deceased had a will at the time of his death. However, at some stage just before his death, it seems he wanted to change a will he had drawn up. The aforementioned was never signed and it was,emailed by the deceased to his attorney on 24 April 2019.

[6] Mrs. Van Rooyen was a very brilliant and hard-working person, however, after her marriage to the deceased, and more specifically after the birth of the children, she stopped working.

[7] The deceased was a very stern and controlling man, who was extremely jealous when it came to Mrs Van Rooyen. She was always an attractive woman who attracted a great deal of attention.

[8] At present, Mrs. Van Rooyen has not dealt with finances for approximately 60 (sixty) years; she is not computer literate; has not held a position for more than 50 (fifty) years; does not know how to use internet banking; cannot use WhatsApp or send a message using her cellular phone; does not know how to use an ATM; and is not capable of driving a motor vehicle.

[9] Mrs. Van Rooyen has a property registered in her name, namely Erf number […], S[…], Western Cape, which was bought for R 1 550 000.00 and registered as such on 9 June 2016; this is the property that Aricia lives in. She also owned immovable property at ERF […] E[…]; Pretoria according to a search using WinDeed, this property was purchased by Carl on 15 November 2022 for R 2 200000.00 (two million, two thousand rands). Reynier was informed that Carl paid the transfer duties and taxes from his mother’s bank account. The purchase price is also seemingly very low, considering the market value of the property.

[10] There is a domestic violence case against Carl in respect of Mrs Van Rooyen and an order was granted on13 of September 2023.

[11] Based on the above allegations, Reynier and his sister Aricia brought this application which was before this court on the 21st of September 2023 without the knowledge of their brother Carl. On hearing about this application Carl decided to bring in a notice to intervene and oppose which was handed in court on the hearing day by Counsel Mr. Marais. The applicant's counsel, Ms. Isparta was opposed to the said notice being allowed in.

[12] I then stood the matter down to 22 of September and directed the parties to go and discuss the way forward. Ms Isparta and Mr. Marais failed to agree, and they made some submissions which are noted below. I however refused further submission and arguments by Mr. Marais as it was not an opposed motion.

Applicant's case

[13] Ms Isparta refused to accept this notice on various grounds. Firstly, the intervening party does not have the *locus standi* to bring these proceedings, and he cannot be a party to the proceedings as he is not on citation as a result he could not be invited onto case lines. Secondly, he is the one causing the problems that exacerbate Mrs. Van Rooyen's condition, hence he is excluded in the winding up of the estate of the deceased.

[14] The other ground relates to alleged procedural defects. In terms of Rule 12 the intervening party must bring a notice of motion with the supporting documents, which the intervening party in this case failed to do.As indicated above Ms. Isparta vehemently disputes that the *locus standi* of the intervening party.

The intervening party's case

[15] Mr. Marais contended that the intervening party is the biological son of Mrs. Van Rooyen and the deceased who had been excluded from this main application by his siblings, as such he has the *locus standi* to bring this application. His instructing

attorneys addressed a letter to the applicant's attorney requesting to be invited onto case lines or to provide them with the application documents, but to no avail.

[16] In the absence of the papers, the intervening party did not have any option but to approach the court with notice of intention to intervene and oppose. Marais submitted that he has a direct and substantial interest in the matter (a legal interest) that may be prejudicially affected by the order of the court presiding over the section 57 application.

[18] He stated that his client tried everything they could in order to comply with the court rules but it was made impossible by the applicants and their legal representatives as they refused them access to the court papers particulary the notice of motion and the founding affidavit.

The issue

[19] The issues to be determined in this matter are whether the notice of intention to intervene and oppose which is non-compliant with the rules be allowed in these proceedings? Whether the intervening party has the *locus standi* to bring this application? Whether this court can consider this notice?

Legal principles and reasons

The inherent jurisdiction

[20] Can this court consider the notice brought in by the counsel for the intervening party at the hearing and whether the court has the power to adjudicate upon this matter?

[21] Section 173 of the Constitution[1] confers upon the High courts, the power to protect and regulate their own process and to develop the common law taking into account the interest of justice.

[22] It was held by Mabuse J (Fabricius J and Teffo J, concurring) in the *Minister of Home Affairs v Ahmed and Others*[2] that;

[1] Constitution of the Republic of South Africa, 1996.
[2] The Minister of Home Affairs v Ahmed and Others (A102/17) [2019] ZAGPPHC 43 (14 February 2019).

"This inherent jurisdiction 'should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the Court would be unable to act in accordance with justice and good reason'; See in this regard the Inherent Jurisdiction of the Supreme Court by Jerold Taitz, pages 8 to 9. Reference was made to the remarks of Sir Jack Jacob in his article on Practice and Procedure in Halsbury's Laws of England, Volume 37 (4th Edition) at paragraph 14 that:
'the inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of the law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.'"

[23] He stated further that this passage was cited with approval by the Court of Appeal of Manitoba in *Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd*[3] that;

"one of the cases in which the Court exercised its inherent jurisdiction to avoid injustice to the parties is *Leibowitz and Others v Schwartz and Others*[4] where the Court had the following to say:
'The Court has inherent powers to grant relief where an instance upon exact compliance with a rule of court would result in substantial injustice to one of the parties. The Court must, in my view, similarly, have the power to grant relief where it is concerned not with a rule of court but with a rule of practice even in a case it seems to me with great respect where the rule of practice has been declared by the appellate division.'"

[24] The court further stated that in *Toubie v S*[5]

"The Court endorsed the inherent powers of the SCA, and so of the superior courts, when it stated the following:

[3] (1971) 21 DLR (3rd) 75 at 81.
[4] 1974 (2) SA 661 T at 662 DC.
[5] [2012] 4 ALLSA 290 {SCA)

'The intention is fora Court of Appeal to dispense justice. An appeal court cannot close its eyes to a patent injustice simply because the injustice is not a subject of appeal."[6]

Requirements for intervening and opposing

[25] Rule 6(4)(b) provides that:

"Any person having an interest that may be affected by a decision on an application being brought ex parte may deliver a notice of application by him for leave to oppose, supported by an affidavit setting forth the nature of such interest and the grounds upon which he desires to be heard."

[26] Rule 12 of the Uniform Rules of Court provides the following:

*"*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 further procedure in the action as to it may deem fit."

[27] The intervention of a party is necessary if that party has a direct and substantial interest that may be affected prejudicially by the judgment of the Court in the proceedings concerned. The SCA has set out the test as follows:

"The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.

…if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined"[7]

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[6] Ibid fn. 4 at 27.

[7] *Gordon v Department of Health* (337/2007) [2008] ZASCA 99 (17 September 2008) at para 9.

See also Judicial Service Commission v Cape Bar Council 2013 (1) SA 170 (SCA) at para 12

[28] Where the application to intervene was opposed on the basis that it was not brought within the ambit of rule 12, it was held that there is no reason why the intervener should not be permitted to voice his opposition to the grant of a provisional order, provided he can show sufficient interest and prejudice.[8]

[29] Another approach to the question lies in the common-law right of the court to permit intervention. In *Bitcoin v City Council of Johannesburg and Arenow Behrman & Co*[9], Krause J expressed the position as follows:

> "…it is a matter entirely within the discretion of the court to allow a party to intervene provided the intervening party can show that he is especially concerned in the issue and that the matter is of common interest to himself and the party he desires to join..."
>
> That will thus depend on the manner and to the extent to which the court order may affect the interests of third parties. The law is therefore settled on this requirement and that is the intervening party must demonstrate a legal interest.[10]

[30] In *SA Riding for the Disabled Association v Regional Land Claims Commissione*r[11] where the Constitutional Court held as follows on the principle:

> If the applicants show that it has same 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 a party a pre-decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[31] 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 *Nelson*

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[8] *Ex Parte Sudurhavid (PTY) LTD In re Namibia Marine Resources (PTY) LTD v Ferina (PTY) LTD* [1993] 4 All SA 69(nm).
[9] 1931 WLD 273.
[10] See *Astral Operation Ltd and Others v The Minister of Local Government Environmental Affairs and Development Planning and Another and Inter-Clay* 2009: ZAWCHC: 11 May 2010 at para [21].
[11] 2017(5) SA 1 (CC) at 5 A-D.

Mandela Metropolitan Municipality v Greyvenouw CC[12] this principle was formulated in these terms:

> "In addition, when, as 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 recognized interest."

[32] Section 165(2) of the Companies Act[13] deals with derivative actions and provides as follows:

> "*A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person-*
>
> (a) *is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;*
>
> *…*
>
> *(d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person".*

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

[34] This has been found to mean that if the order or judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.[15]

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[12] *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (2) SA 81 (SE) at 89 B – C.
[13] Act 71 of 2008.
[14] *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017(5) SA 1 (CC) at 5 A-D at para 9.
[15] *Bekker v Meyring, Bekker's Executor* (1828–1849) 2 Menz 436.

Analysis

Inherent jurisdiction

[35] The main application was brought ex parte and was set down on an unopposed roll. The notice of intention to intervene and oppose was brought to my attention on the day of the hearing of the main application. There was no application that was served and uploaded on the case line in that regard. Advocate Marais indicated that they were denied access to the case line. Ms. Isparta said that they were non-parties to the matter therefore they were not allowed on the case line and could not be invited.

[36] I am not persuaded that the intervening party does not have *locus standi* in this application, at least on a *prima facie* basis. Regard must be had to the facts at face value placed before the court by the intervening party to substantiate why he is entitled to be joined to the main application. The fact that he is the biological son of Mrs. Van Rooyen and the deceased gives him the same legal rights as the other two siblings regarding their family particularly and their mother's affairs.

[37] The intervening party is expected to bring a substantive application before this court in terms of the rules. There is no merit in this ground, particularly because the intervening party is entitled to see and read the papers in the main application before he decides to intervene and be joined as a party to the proceedings. It is very clear in this instance that exact compliance with a rule of the court would result in substantial injustice to the intervening party, as he was denied access to the application that is before the court.I thus cannot close my eyes to a patent injustice simply because the injustice is not a subject of the main application.

[38] Furthermore, justice dictates that every person has a right to be heard before a court of law. By virtue of being the biological child, he must enjoy the same legal status as that of the applicants in the main application.Furthermore ,there are serious allegations leveled against him to which he has to reply. Therefore, in the interest of justice and on the strength of Section 173 of the Constitution, I am persuaded that the intervening party has established a prima facie case to demonstrate that he has an interest in the application for the appointment of a curator.

[39] I am thus,inclined to use my discretion to allow the intervening party's notice of intention to intervene and oppose.

Intervening

[40] The issue in this matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.

[41] The intervention of a party and opposition is necessary if that party has a direct and substantial interest[16] that may be affected prejudicially by the judgment of the Court in the proceedings concerned. In terms of rules 6 and 12 *supra,* the application must be by way of motion supported by an affidavit. In the current case, the intervening party was not given notice of Section 57 proceeding in which there are allegations leveled against him which I will not dwell into at this stage. Besides, other issues like the ones pertaining to the winding up of the estate of the deceased are also to be aired. He was also denied access to the case line despite his request. This made it impossible for him to bring a substantive application before the court, for him to comply with the rules of the court. It is very clear that there was no other way for him to bring the application other than to come to court on the day of the hearing and present his frustration.

[42] It is unquestionable from the aforesaid, that without giving the intervening party a hearing, his existing rights, and interests could no doubt detrimentally be affected by the outcome. Therefore, the duty to act fairly obliges me not to make such a finding without complying with the *audi alteram partem* rule or without having him joined in the proceedings first. His interests and rights are without a doubt, at stake.

[43] The question of joinder should depend on the manner and to the extent to which the court order may affect the interests of a third party. The law is therefore

[16] See *Henry Viljoen (Pty) Ltd v Awerbush Brothers 1953 (2) SA 151 (O); Erasmus Superior Court Practice* B1-102 Footnote where the collection of authorities is made: *Brauer v Café Liquor Licensing Board* 1953 (3) SA 752 (C) at 107A; *National Director of Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at 308 C

settled on this requirement and that is the intervening party must demonstrate a legal interest.[17]

[44] In the instant case, the intervening party is the third son of the patient who has an obvious interest in this application. This is a status matter, therefore, in the interest of justice, it is imperative that all the interested parties, particularly the family members and/or the children as they may be the potential beneficiaries should be involved and be privy to all the information in this regard. The interests that the biological children of the deceased and Mrs. Van Rooyen have in the outcome of this case relate to the right to inherit from the estate of their father as well as the right of access to their mother. It cannot simply be said that such a right is financial in nature. The right to inherit is a legal interest in the subject matter of the application which interest may be prejudicially affected by the order this court may hand down.

[45] The applicants raised various other grounds on which they allege the intervening party should not be part of the process of the application. It is not necessary to refer to those arguments in detail for the purposes of this application. Suffice to point out that, should this court grant this application, those issues will be dealt with in the main 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 Section 57 application proceedings.

[46] It is therefore not, for the purposes of this application, necessary to consider the merits of the applicants's case and the intervening party's opposition thereto. This dispute cannot be decided on an unopposed motion.

Conclusion

[47] Despite severe opposition to the intervening party's notice of intent to be joined to the main application, I am persuaded that the intervening party has shown a direct and substantial interest in the subject matter of the proceedings and more

[17] See *Astral Operation Ltd and Others v The Minister of Local Government Environmental Affairs and Development Planning and Another and Inter-Clay* 2009: ZAWCHC: 11 May 2010 at para [21].

importantly, that it is in the interest of justice to grant the request to oppose and intervene. In coming to this conclusion, I had regard over and above the legal principles mentioned above, to what the Constitutional Court in *International Trade Administration Commission v Scaw South Africa (Pty) Ltd*[18] stated in respect of applications to intervene:

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*[19]:

> "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:
>
> 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 to determine that it exists;
>
> the allegations made by the intervening applicant constitute a prima face case or defence. It is, however, not necessary for the intervenor [sic] to satisfy the court that it will succeed in its case or defence.

…." However, in this court, the overriding consideration is whether it is in the interests of justice for a party to intervene in litigation.[20]

[48] The intervening party has, in my view, at the very least laid a basis from which it can be concluded that he has made out a *prima facie* case. It should be noted that it is not necessary for the intervening party to satisfy the court that he will succeed in this case. 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 and that it is necessary for the court to grant the order in order to safeguard his rights.

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[18] 2012 (4) SA 618 (CC) at para 11 and 12.
[19] [2020] 4 ALL SA 226 (KZP) at para 18.
[20] My emphasis.

[50] I therefore grant an order as follows:

1. The Intervening party is granted leave to intervene and oppose the main application brought by the first and second applicants.
2. The Intervening party is joined as the intervening party.
3. The Intervening party is granted leave to file the answering affidavit within twenty (20) days of the order of this court.
4. The costs shall be costs in the cause.

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MALATSI-TEFFO AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, 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 30 No 2023.

APPEARANCES:
For the applicant:
Adv Isparta
Instructed by: AGM Attorneys

For the Intervening party:
Adv Marais
Instructed by the Rorich,Wolmarans & Luderitz Inc Attorneys