IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 07903/11

Date of hearing: 10 March 2011
Date of judgment: 15 March 2011

In the matter between:

RICH STEPHEN MARK NO. 1ST Applicant

LOUW TOBIAS JOHN NO 2ND Applicant

and

ZELBREE INVESTMENTS (PTY) LTD 1ST Respondent

OUTSPAN PLACE (PTY) LTD 2ND Respondent

SELMA RICH 3RD Respondent

In Re:

ZELBREE INVESTMENT (PTY) LTD 1ST Applicant

OUTSPAN PLACE (PTY) LTD 2ND Applicant

and

DISCOVERY LIFE INVESTMENT SERVICES Respondent

JUDGMENT

MOKHARI AJ

1. This application came before this Court on Friday, 25 February 2011 by way of an urgent application ("main application"). The parties to the main application are

Zelbree Investment (Pty) Ltd; Outspan Place (Pty) Ltd; Selma Rich ("first, second and third applicants in the main application") and Discovery Life investment Services (Pty) Ltd ("the respondent in the main application"). Rich Stephen Mark and Louw Tobias John ("first and second applicants in the intervention application") somehow came to know about the main application, and on 24 February 2011, filed an intervention application seeking leave of the Court to be joined as second and third respondents in the main application ("if successful, the effect of it would be that Discovery becomes the first respondent"). The intervention application was heard simultaneously with the main application in the Urgent Court of 25 February 2011. Wepener J, heard the application in the urgent Court and made an order postponing the main application and the intervention application to the opposed motion of 08 March 2011 with time frames set for the exchange of outstanding affidavits.

2. When the matter was argued before me on 10 March 2011, all outstanding affidavits, both in the main and the intervention application had been exchanged. Mr Mundell , who appeared for the intervening party informed the Court that it would be convenient for me to first hear and entertain the intervention application, and depending on the outcome thereof, the main application would be entertained. The effect of it was the separation of the two applications. This approach was endorsed by Mr Da Silva, who appeared with Mr Ascar for the respondents in the intervention application. I dealt with the matter as proposed by the parties. To avoid confusion, the parties herein, will be referred to as they appear in the intervention application.

3. The respondents have sought in the main application an order that Discovery Life Investments Services (Pty) Ltd ("Discovery"), release to the first and second respondents investments made by the first and second respondents with Discovery to the first and second respondents. Discovery has initially opposed the relief sought and then withdrew its opposition. Discovery abides the decision of the Court in the main application. The third respondent is the sole director of the first and second respondents. She is married to Maurice Rich ("called Mickey"). They have two children, a son and a daughter. The first applicant is the son and one Sharon is the daughter.

4. The third respondent and her husband established two trusts ("Emzed Trust – Stephen and Emzed Trust – Sharon") for the benefit of their two children ("first applicant and Sharon"). The first applicant and the second applicant ("a chartered accountant") are trustees of Emzed Trust – Stephen, and Sharon and Mickey are trustees of the Emzed Trust– Sharon. Mickey is no longer of a sound mind. He has been placed under curatorship in terms of an order of the North Gauteng High Court on 22 December 2010.

5. The third respondent and her husband incorporated two companies ("the first and second respondents") also for the benefit of their two children. Emzed Trust – Stephen, holds 50% of the issued share capital in the first and second respondents, and Emzed Trust – Sharon, holds the remaining 50% of the issued shared capital in the first and second respondents.

6. The first and second respondents have invested certain monies with Discovery. The third respondent, in her capacity as the sole director of the first and second respondents, instructed Discovery to release the investments to the first and second respondents. The actual amounts sought to be released are not in issue. They actually appear in the main application as R1 477 132.35 and R2 699 447.76 respectively. It would appear that due to correspondence addressed to Discovery by the first applicant's legal representative, imploring Discovery not to release the investments, Discovery has indeed not released the funds to date, hence the main application was brought.

7. The applicants seek leave of this Court to intervene in the main application. They assert that they have a direct and substantial interest in the outcome of the main application and for that reason they ought to be joined as second and third respondents respectively. The first, second and third respondents ("respondents") oppose the application. They contend that the applicants have no legal interest in the main application nor its outcome. They merely have a financial interest in so far as they assert to be trustees of Emzed Trust – Stephen, which in turn holds a 50% shareholding in the first and second respondents. The respondents further submit that the applicants have no *locus standi* to intervene in the main application. They submit that the shareholder has no business in the running or management of the internal affairs of a company. The directors can do as they wish with the internal affairs of the company, invest and withdraw funds of the company without the shareholders consent. So the argument goes that the third respondent as the sole director of the first and second respondents is entitled in law, as she did, to invest the first and second

respondents' monies with Discovery and to withdraw them at her own will without the consent of shareholders. A further argument was made on respondents' behalf that the first applicant has abandoned or waived any right or entitlement to the benefit accruing to Emzed Trust – Stephen. In pursuing this point, the respondents relied on notes of certain conversations that took place between Bester and the first applicant, recoded on pages 126 to 132 of the paginated papers.

8. The applicants dispute that they have no *locus standi* to intervene. They also dispute that the first applicant has abandoned or waived his right to claim any benefit accruing to Emzed Trust – Stephen. The applicants submit that the first and second respondents are not trading companies. They are dormant companies which own an asset ("the investment"), which is to the benefit of the shareholders. The applicants submitted that they have a legal interest in the outcome of the main application. The applicants have launched a liquidation application which is pending before the North Gauteng High Court and that pending the finalisation of that application, the respondents should be interdicted from receiving monies invested with Discovery. It was argued that if such monies are released to the respondents, they will dissipate them. The third respondent has abdicated her duties as director to Sharon, would give the money to Sharon. That the applicants have a well founded apprehension that Sharon (with the knowledge of the third respondent) will dissipate those assets ("the investments"). The applicants' concern is to ensure that Sharon does not acquire control of the funds of the first and second respondents. If the applicants are not allowed to intervene and interdict the release of the funds, the third respondent and Sharon will dissipate them

prior to the finalisatiion of the liquidation applications and to the prejudice of the Emzed trust-Stephen.

9. Both counsel referred me to the decision of this Court in ***Shapiro vs South African Recoding Rights Association Ltd (Galeta Intervening) 2008 (4) SA 145 (W)***. In this judgment, Gautschi AJ, gave a detailed exposition of Rule 12 of the Uniform Rules of Court. Mr Da Silva, relied on an extract in paragraph 12 of the judgment on page 150 which reads as follows:

"The Learned authors have clearly in mind a direct and substantial interest in the sense of an interest in right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation. Such an interest is referred to as a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the Court."

10. Mr Da Silva submitted that the applicants have failed to demonstrate a legal interest but only showed a financial interest. The applicants did not dispute that they have a financial interest in the subject matter of the main application. They however denied that they only have a financial interest. It was submitted on their behalf that the applicants have also demonstrated a legal interest. Rule 12 provides that:

"12. 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 further procedure in the action as to it may seem meet."

11. The authors of superior Court practice, Erasmus, make a distinction between intervention as of right, and intervention as a matter of desire. Such will also be determined by whether the intervention is sought to be joined as a plaintiff/applicant or as a defendant/respondent. The materiality of the joinder will also depend on the subject matter of the action or application and whether the outcome of the judgment would prejudicially affect the party that seeks to intervene. Rule 12 provides the Court with the wider discretion which it must exercise judicially whether intervention should be granted. Unlike Rule 10, Rule 12 is not dependent on whether the action brought, and for which the party seeks to be joined, depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on such action. Counsel were in agreement that the approach by Gautschi AJ in Shapiro, is the correct approach in that a direct and substantial interest in the subject matter of the litigation, which could be prejudiced by the judgment of the Court is a factor that must be demonstrated. The applicant to the intervention must also show that the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a prima facie case or defence. However, it is not necessary for the applicant to satisfy the Court that he will succeed in his case or defence. In *Shapiro v South African Recording Rights Association Ltd supra,* Gautschi AJ declined to follow the following judgments: *Minister of Local Government and Land Tenure & another vs Sizwe Development and others: In Re: Sizwe Development vs Flagstaff Municipality 1991 (1) SA 677 (Tk); Ex Parte Sudurhavid (Pty) Ltd: In Re: Namibia Marine Resources (Pty) Ltd vs Ferina (Pty) Ltd 1993 (2) SA 737 (Nm); Ex Parte Pearson and Hutton NNO 1967 (1) SA 103 (E); United Watch and Diamond Co. (Pty) Ltd and others vs Disa Hotels Ltd and another 1972 (4) SA 409 (C);*

Ex Parte Moosa: In Re: Hassim vs Harrop-Allin 1974 (4) SA 412 (T); and Registrar of Banks vs Rigal Treasury Private Bank Ltd (under curatorship) and another (Rigal Treasury Bank Holdings (Ltd) intervening) 2004 (3) SA 560 (W).

12. Mr Da Silva also referred me to another decision of this Court in ***Letseng Diamonds Ltd vs JCI Ltd and others; Trinity Asset Management (Pty) Ltd and others vs Investec Bank Ltd and others 2007(5) SA 564 (W)***. In Letseng, a similar point was raised in which the *locus standi* of the applicant to the intervention was challenged. In that matter, the proceedings were concerned with the right of a shareholder to institute proceedings for a declaratory order in which he sought to declare the loan agreement concluded between the company (JCI) and Investec Bank ("the third party") invalid. It was asserted there that the shareholders were not party to the agreement and did not have *locus standi*. Bleiden J, upheld the *point in limine* and found that the shareholders did not have *locus standi*. In upholding the *point in limine*, Bleiden J had found that the shareholders merely have a financial interest and not a legal interest. Mr Mundell brought to the attention of Mr Da Silva during argument that Bleiden J in Letseng, had been overturned on appeal to the Supreme Court of Appeal ("SCA") in the matter of *Trinity Asset Management (Pty) Ltd vs Investec Bank and others Case No: 574/07 (2008) ZASCA 158 (27 November 2008)*. In the majority judgment in which Jafta ("as he then was") dissented, the majority found that the shareholder does have *locus standi* to bring an application to ask for a declarator to set aside an agreement in which he was not a party. Despite the rule in *Foss vs Harbottle (1843) 2 Hare 461*, the SCA found that a shareholder who has demonstrated a direct and substantial interest in the

subject matter may institute proceedings to set aside an invalid agreement concluded by the company.

13. Mr Da Silva submitted that in dealing with disputes of fact, I need to apply Plascon Evans test (See Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)) and deal with disputes of facts on the respondents' version. Applying this test, I need to accept the respondents' version that the first applicant abandoned/waived any right to benefit from the trust or the two companies (first and second respondents) and that I must reject the applicants allegation that the third respondent has abdicate her duties and responsibilities as director of Sharon. Mr Mundell disputed this approach and submitted that in the application for leave to intervene, the matter is approached on the basis that the assertions made by the applicants to intervention, whose *locus standi* is being challenged, have to be accepted as correct. Thus, I need to approach the matter on the applicants' version. In my view in considering application for leave to intervene, I need not decide at this stage disputes of facts, because the same disputed facts may be dealt with by the Court hearing the main application. This does not mean that an applicant who seeks to intervene, and whose *locus standi* is challenged, need not satisfy the Court that it has the necessary *locus standi*. The test is however on a lower scale. I only need to be satisfied that prima facie the applicant has demonstrated a direct and substantial interest ("the legal interest") in the subject matter of the litigation. Mr Mundell referred me to the SCA judgment of Trinity Asset Management supra. In paragraph 37 of the judgment, Farlam JA, writing for the majority, stated that:

"In the circumstances of this case, it would be recalled, the assertions made by the appellants, whose locus standi is being challenged, have to accepted as correct. Thus we must assume, for the purposes of considering whether the appellants have locus standi, that their assertion that the loan agreement is invalid is correct. If that is so they must be able to apply to interdict the holding of the meeting before which materially incorrect information regarding the legal status of the agreement has been put by the directors."

14. Applying the same principle to the facts of this matter, I need to approach the matter on the basis that the assertions made by the applicants that the first and second respondents are dormant entities which are not trading; which only have an asset; which is to the benefit of the shareholders ("Emzed Trust – Stephen and Emzed Trust – Sharon"), which ought to be shared by them equally, must be regarded as correct. Furthermore, the assertion by the applicants that the first applicant has not abandoned or waived his right or entitlement to the benefits accruing to Emzed Trust – Stephen or the shareholding of Emzed Trust – Stephen in the first and second respondents must be accepted as correct. Similarly, the allegation that the third respondent has abdicated her responsibilities as the director to Sharon and that in fact Sharon runs the activities of the first and second respondents and the well founded apprehension that should the funds be released, Sharon with the knowledge of the third respondent will dissipate them, thereby causing the applicants prejudice are correct.

15. At this stage the acceptance of applicants version does not mean that the respondents' version is rejected or disbelieved. The respondents will still be entitled to challenge the applicants' allegations in this regard when the main application is heard. Once I accept the applicants' version, and deal with the application on that basis, the

corollary is that the applicants, as trustees of the Emzed Trust – Stephen, which is in turn a 50% shareholder in the first and second respondents have established their *locus standi* to intervene in the main application. A shareholder is in certain limited and/or exceptional circumstances entitled to intervene or institute legal proceedings on behalf or against the company if he/she can demonstrate harm, actual or potential, direct and substantial interest in the subject matter of the litigation. I am satisfied that the applicants have demonstrated a direct and substantial interest both legal and financial, to the subject matter of the litigation in the main application, and that they stand to suffer prejudice if the intervention is not allowed. I am also satisfied that the application is not frivolous in the circumstance.

16. For these reasons, I find that prima facie the applicants have made out a case for the relief that they seek in the notice of motion. The costs of the hearing of 25 February 2011 were reserved. I do intend to deal with those costs. They shall remain so reserved for determination by the Court hearing the main application. Similarly, I do not intend to grant any cost order against any of the parties in the intervention application. I also intend to reserve the costs of the intervention application for determination by the Court seized with the main application. This is for obvious reasons that the applicants on the one hand and the respondents on the other are each seeking a punitive costs order against one another. This is premised on the historical facts of the accusation and counter accusation relating to earlier correspondence that were exchanged between the parties before the main application was brought and it will be the Court seized with the main application which will be in a

better position to make a final order as to costs after the matter is ventilated in full before it.

17. In the circumstances, I make the following order:

1. the first and second applicants are granted leave to intervene in the main application and be joined as second and third respondents respectively;
2. the first, second and third respondents shall as they appear in the main application, be the first, second and third applicants;
3. Discovery Life Investment Services (Pty) Ltd shall be the first respondent;
4. the costs of this application are reserved for determination by the Court that will be seized with the main application.

W R MOKHARI A J
Acting Judge of the South Gauteng High Court

APPEARANCES:

For the applicants: A.R.G Mundell SC, instructed by Marie-Lou Bester Inc Attorneys

For respondents: C.A Da Silva SC with C C Ascar, instructed by Paul Leisher & Associates Attorneys