REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER : 42283/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE YES
(2) OF INTEREST TO OTHER JUDGES YES
(3) REVISED

13/12/2017
DATE

SIGNATURE

LEVAY, TIBOR First Applicant/Intervening Party

LEVAY, IBOLJA KONGO Second Applicant/Intervening Party

and

THEODORE WILHELM VAN DEN HEEVER N.O. First Respondent

GAILLIYN WARRICKER N.O. Second Respondent

SALIM ISMAIL GANIE N.O. Third Respondent

In re:

THEODORE WILHELM VAN DEN HEEVER N.O.	First Applicant
GAIL LIYN WARRICKER N.O.	Second Applicant
SALIM ISMAIL GANIE N.O.	Third Applicant
and	
WATERFALL TROUT PROPERTIES (PTY) LTD	Respondent

Summary: Companies - Application to intervene in winding-up application - a creditor or minority shareholder has *locus standi* to intervene in a winding-up application in order to oppose it, and does not have to show that it has an additional legal or other interest-*Registrar of Banks v Regal Treasury Private Bank Ltd* 2004 (3) SA 560 (W)and *Fullard v Fullard* 1979 (1) SA 386 (T) followed-*ABSA Bank Ltd v Africa's Minerals 146 Ltd In re: Sekhukune NO v ABSA Bank Ltd* [2015] 2 All SA 8 (GJ) not followed.

JUDGMENT

VAN DER BERG AJ:

[1] The joint liquidators ("*the liquidators*") of Choice Decisions 212 (Pty) Ltd (in liquidation) ("*Choice Decisions*") brought an application ("*the liquidation application*") for the winding-up of Waterfall Trout Properties (Pty) Ltd

("*Waterfall*") on the basis that it is unable to pay its debts. There is an intervention application where the applicants ("*the intervening parties*") seek to intervene in the liquidation application in order to oppose it.The intervention application is opposed by the liquidators.

[2] Both applications are before me. The parties agree that should the intervention application fail, I should deal with the liquidation application on an unopposed basis.

[3] On 30 November 2015 the liquidators issued the liquidation application.

[4] On 14 December 2015 a notice of intention to oppose the liquidation application was served, purportedly on behalf of Waterfall Properties. The liquidators thereafter successfully brought an application to declare the notice to oppose to be unauthorised. The intervening parties allege that Ms Katharina Christine Peters ("*Peters*"), Waterfall's sole director, had instructed attorneys to oppose the liquidation application on behalf of Waterfall, but that she afterwards made an about turn. The liquidation application is at this stage unopposed.

[5] The intervening parties launched the intervention application on 17 March 2016.

TEST FOR INTERVENTION

[6] A party seeking to intervene in proceedings can either do so in terms of rule 12 of the Uniform Rules of Court, or in terms of the common law. A party seeking leave to intervene must prove that:

[a] he or she has a direct and substantial interest in the subject matter of the litigation which could be prejudiced by the judgment of the court; and

[b] the application is made seriously and is not frivolous, and that the

allegations made by the applicants constitute a *prima facie* defence to the relief sought in the main application.[1]

[7] A "direct and substantialinterest" means alegal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court. A mere financial interest is only an indirect interest in such litigation and is insufficient.[2]

[8] The question arises whether a creditor or minority shareholder has *locus standi* to intervene in a liquidation application in order to oppose it. (Different considerations apply where the intervention is sought in order to support the liquidation application.[3])

[9] In *ABSA Bank Ltd v Africa's Minerals 146 Ltd In re: Sekhukune NO v ABSA Bank Ltd*[2015] 2 All SA 8 (GJ) (a decision in this division) Vally J said:

> *"[10] In order to succeed in the quest to intervene King Sekhukhune must satisfy this Court that he, or the community he represents, has a direct and substantial interests in the application to wind-up ABM, which could be prejudiced should the Court issue an order winding-up it up… Furthermore, the direct and substantial interest has to be an interest in the right to challenge the winding-up application and not just a mere financial interest.*
>
> *…*
>
> *[17] Apart from asserting the existence of a shareholding (or a loan, if the oral submission is to be accepted), no further factual substratum is provided to show that the intervention, if allowed, is*

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1 *Minister of Local Government and Land Tenure and Another v Development and Others: In re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (Tk);*Ansari and Another v Barakat and Others, In re : Barakat v Copper Sunset Trading 424 (Pty) Ltd and Others* [2012] ZAKZDHC 1, paragraphs [9] and [10], and authorities referred to therein.

2 *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 177 and 169H; *Sizwe* (*supra*) at 679

3 *Shapiro v South African Recording Rights Association Ltd (Galeta intervening)* 2008 (4) SA 145 (W)

necessary and will affect the outcome of the winding-up application. As mentioned above, the law is settled on this score: a party that wishes to intervene must demonstrate an interest in the proceeding that is not just a mere financial interest. An application to intervene solely as a shareholder or solely as a creditor is insufficient. The aspirant intervener must demonstrate that he has a legal interest to protect and not just a financial interest in the matter. The legal interest must also be material enough to affect the outcome of the winding-up application. Anything less than that will not do." (Own emphasis)

[10] The learned judge referred to *Ex Parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1993 (2) SA 737 (Nm) and *Registrar of Banks v Regal Treasury Private Bank Ltd*2004 (3) SA 560 (W).

Intervening Creditors: Case Law

[11] It is well established that an intervening creditor may be given leave to intervene at any stage, either to oppose a sequestration or to have a *rule nisi* discharged.[4] A creditor may also intervene when an applicant for a sequestration order does not proceed with his application or does not succeed therein. The court takes a practical view in these matters and also bears in mind the interests of the general body of creditors.[5]The practice in insolvencies is unique as it is neither a pure intervention nor a substitution and is *sui generis* from a procedural point of view.[6]The aforesaid principles have been summed up in In *Fullard v Fullard* 1979 (1) SA 386 (T).

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4 *Uys and Another v Du Plessis (Ferreira intervening)* 2001 (3) SA 250 (C) at 252: *Fullard v Fullard* 1979 (1) SA 368 (T) at 371 F to 372 G. See also: *Maritz t/a Maritz & Kie Rekenmeester v Walters and Another; Maritz t/a Maritz & Kie Rekenmeester v Walters and Another FirstRand Bank Ltd Intervening; Maritz t/a Maritz & Kie Rekenmeester v Walters and Others* 2002 (1) SA 689 (C)where it was accepted that the intervening party would have *locus standi* to oppose the sequestration if it could be found that he was a credtor.

5 *Fullard(supra) at 372B; Jhatam v Jhatam* 1958 (4) SA 36 (N)

6 *Fullard (supra) at 372B*

[12] These principles also apply in applications for winding-up of companies.[7]

[13] In *Fullard* a provisional sequestration order had already been granted, and a *concursus creditorum*had already been formed. In this matter,in line with the practice in this division, the liquidators do not seek a provisional order in the liquidation application, but a final winding-up order. There is no reason why the principles set out in *Fullard* should not be applicable before a final winding-up order has been made. Should a final winding-up order be granted, a *concursus* will come about which has far reaching consequences for a creditor. As there will be no provisional order, a creditor will not have a subsequent opportunity to oppose the winding-up application.

[14] *Africa's Minerals* referred to *Regal* and *Sudurhavid. Sudurhavid* did not deal with intervening creditors. In *Regal* the court said:[8]

> *"It seems to me that a finding in favour of Regal Holdings that it has a prima facie claim against Regal Bank…has two consequences for the application to intervene. First, it would provide Regal Holdings with locus standi. Secondly, it would provide Regal Holdings with an interest in the liquidation process."*

The court held on the facts in that case that the intervening party did not have a claim against the company. The above *dictum* though does not seem to support the decision in *Africa's Minerals*, but rather suggests that a creditor does have *locus standi* to intervene in a liquidation application without having to prove an additional legal interest.

[15] Over the years it has been accepted without argument in a number of cases

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7 *Nel and Others NNO v The Master and Others* 2000 (2) SA 728 (W) at 731F and at 732 F; *M & V Tractor and Implement Agencies BK v Vennootskap DSU Cilliers en Seuns en Andere (Kelrn Vervoer (Edms) Bpk (tussenbeitredend) and other related matters* 2000 (2) SA 571 (NC) at 577F

8 At 567I-568A

and text books that creditors have a right to intervene in sequestration or winding-up applications in order to oppose the application.[9] Catherine Smith expressed the opinion that creditors in insolvency proceedings may be added to joint owners, joint contractors and partners as parties who are allowed as of right to intervene in proceedings.[10]

Intervening shareholder: Case law

[16] In *Sudurhavid* Hannah J held:[11]

> *"A member of a company may also suffer prejudice in consequence of a provisional order, particularly if he is one of only two shareholders, as is the position in the present case. I can see no reason why he should not be permitted to voice his opposition to the grant of a provisional order, provided he can show sufficient interest and prejudice".'*

[17] Hannah J then went on to say the following:

> "*The winding-up proceedings concern the basic right of Ferina*[the company] *to continue to exist and it is clear to me that Sudurhavid* [the intervening party] *has a direct and substantial interest in that right. It is not only one of only two shareholders in Ferina but Ferina is the corporate entity upon which the partnership between Sudurhavid and NMR*[co-shareholder] *depends for its existence. If Ferina is dissolved then the partnership will suffer the same fate. In my judgment not only does Sudurhavid have a direct and substantial*

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9 For example: *F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (3) SA 841 (D);*Gilliatt v Sassin* 1954 (2) SA 278 (C) at 280; *Ex parte Arntzen (Nedbank Ltd as intervening creditor)* 2013 (1) SA 49 (KZP), paragraph [1];*Ex parte Clifford Homes Construction (Pty) Ltd* 1989 (4) SA 610 (W) at 612D-F;Bertelsmann et al *Mars: Law of Insolvency in South Africa*,9th edition, paragraphs 5.26 and 5.27, p 129-130; and earlier editions.

10 Catherine Smith, *Law of Insolvency,* 3rd edition, p 79

11 At 739H - 740A

interest in the winding-up proceedings, but it will clearly be prejudiced if a winding-up order is made."

[18] In *Regal* Loxton AJ referred to the above *dicta*and then said:

> "*In my view a sole shareholder's interest in the company whose shares he holds is not merely financial. A shareholder is not a mere investor in a company. He has a number of other rights, in particular concerning the governance and continued existence of the company. I shall, out of prudence, confine my remarks to the position of a sole shareholder. Different considerations may apply where the applicant's shareholding is insubstantial.*
>
> *Hannah J's conclusion that there is no reason why a shareholder should not be permitted to voice his opposition to the grant of a provisional order is subject to the proviso that 'he can show sufficient interest and prejudice'. It is not clear to me what interest, in addition to that provided by the shareholder's shareholding in the company sought to be liquidated, the learned Judge was referring to."*(Own emphasis)

[19] As pointed out by Mr Wickens who appeared on behalf of the liquidators, Loxton AJ left open the question whether minority shareholders have a sufficient legal interest to bring an application for intervention.

[20] In my view the conclusion in *Regal* should not be confined to sole shareholders or majority shareholders. A share in a company consists of a bundle, or conglomerate, of personal rights entitling the holder thereof to a certain interest in the company, its assets and dividends.[12] Those rights

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12 *Standard Bank of SA Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 288H.

include the right to attend and vote at meetings of shareholders.[13] For this reason a minority shareholder does in my opinion have a sufficient legal interest to intervene in a winding-up application in order to oppose it and does not have to show an additional interest. This isconsistent with *Regal* where the court questioned the proposition that a shareholder must show an interest in addition to his shareholding in order to be allowed to intervene.

[21] In *Helderberg Laboratories CC and Others v Sola Technologies (Pty) Ltd* 2008 (2) SA 627 (C) the full bench of the Cape Provincial Division held (without referring to either *Sudurhavid* or *Regal*):

> *"[37] In the instant matter the intervention applications were brought by fifth appellant in his capacity as a member of first appellant and shareholder of second to fourth appellants. In this capacity he clearly has a legal interest in the subject-matter of the applications, which could be prejudicially affected by the judgment of the court. See Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151 (O) at 167F - H."*

[22] In *Ansari*[14]the court also seems to have accepted that being a (minority) shareholder *per se* confers *locus standi* to intervene in an application for winding-up in order to oppose it. The court likewise did not refer to *Regal* or *Sudurhavid*.

Section 354 of old Companies Act

[23] There is another reason why a creditor or a shareholder should have *locus standi* to oppose a winding-up application: In terms of section 354 of the old Companies Act a creditor or a member (or shareholder[15]) can bring an

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13 *Letseng Diamonds Ltd v JCI Ltd and Others; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2007 (5) SA 564 (W)

14 Paragraph [25]

15 See: *Henochsberg on the Companies Act 71 of 2008*, volume 2, APPI-102

application to set aside a winding-up order. It has been held that the language of the section is wide enough to afford the court a discretion to set aside a winding-up order on the basis that it ought not to have been granted at all.[16] The applicant for rescission of the order must furnish a satisfactory explanation for the failure to have opposed the winding-up application.[17] It would be anomalous if a creditor or a shareholders does not have *locus standi* to intervene to oppose an application for liquidation, but must wait for the winding-up order to be granted (possibly unopposed, as would be the case here) and then approach the court afterwards to rescind the order.[18]

Test for Intervention: Conclusion

[24] In my view *Africa's Minerals* is in conflict with *Fullard* in respect of intervening creditors and in conflict with *Helderberg* and *Regal* in respect of intervening shareholders. *Africa's Mineralsis* a decision of a single judge sitting in the Gauteng Local Division. The question arises whether I am bound to follow *Africa's* Minerals in the absence of a finding that it was clearly wrong.

[25] Firstly, in the absence of any other decisions in this division, I would be obliged to follow *Africa's Minerals* even though there is a conflicting decision of the full bench of another division (i.e. *Helderberg*) with which I agree.[19]

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16 *Ward and Another v Smit and Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) at 180H

17 *Herbst v Hessels NO en Andere* 1978 (2) SA 105 (T) at 109H-110A; *Ward* (*supra*) at 181D

18 It does not follow from the fact that a shareholder cannot bring an application to wind-up a company on the basis that it is unable to pay its debts (section 346(2) read with section 344(f) of the old Companies Act)that a shareholder cannot intervene to oppose an application for winding-up of the company.

19 *Ex parte Le Grange van den Heever* 1961 (4) SA 683 (T) at 684; Hahlo and Kahn, *South African Legal System and its Background*,p 254.

Judge Wallis writes as follows in Joubert (ed), *The Law of South Africa*, volume 10, paragraph 527:

[26] *Regal* and *Africa's Minerals* are both decision of this division. I should therefore follow the judgment which I consider to be correct.[20]

[27] *Fullard* was a decision of the Transvaal Provincial Division.[21] I do not have to find either *Fullard* or *Africa's Minerals* wrong, but I am at liberty to follow the decision that I think is correct.[22]

[28] For reasons set out above I consider *Fullard* and *Regal* to be correct,and that *Regal* should apply to all shareholders. I accordingly find that a creditor or a shareholder (including a minority shareholder) has *locus standi* to intervene in a winding-up application in order to oppose it, and does not have to show that it has an additional legal or other interest. (It does not follow from this finding that a court may not in appropriate circumstances refuse a creditor or shareholder leave to intervene where the intervention application is in bad faith. This question does not arise in this matter.)

> "*Historically, one High Court, however constituted, was not bound by a decision of another High Court, but whether that remains the rule now that all are divisions of a single High Court is debatable. There seems to be no reason why a judge in one division should not for the same general reasons that underpin the operation of the rule of* stare decisis *be bound by a judgment in another division and certainly by a judgment of a full court or full bench of that division.*"

This passage does not seem to deal with the situation where there are *conflicting*judgments in different divisions. I am in any event still bound to follow the rule in *Ex parte Le Grange van den Heever (supra)*.

20 *Manganese Corporation Ltd v South African Manganese Ltd* 1964 (2) SA 185 (W) at 191

21 The Transvaal Provincial Division became the Gauteng Division, and the Witwatersrand Local Division became the Gauteng Local Division. The Gauteng Local Division currently has concurrent jurisdiction.

22 *Schnellen v Rondalia Assurance Corporation of SA Ltd* 1969 (1) SA 31 (W) at 34F; *Silwer Heinings (Pty) Ltd v Standard Bank of South Africa Ltd* 1984 (2) SA 821 (T) at 825E-F. These cases dealt with conflicting judgments between the Witwatersrand Local Division and the Transvaal Local Division. The Transvaal Provincial Division became the Gauteng Division, and South Gauteng High Court (where this case is heard) is now a local seat of the Gauteng Division and has concurrent jurisdiction with the Gauteng Division.

RELEVANT EVIDENCE

[29] In the founding affidavit in the liquidation application,the liquidators allege that according to the books and records in the liquidators' possession "Waterfall is indebted to Choice Decisions in respect of a loan account" in the amount of R3 867 260,98. It is alleged that the amount was advanced to Waterfall by Choice Decisions during the 2008 financial year and was repayable on demand. Reliance is placed on a letter furnished byindependent auditors ("Zeelie De Kock") who had been appointed by the liquidators to investigate the affairs of Choice Decisions. The letter (dated 28 July 2015) is attached to the founding affidavit.

[30] The liquidators then caused a demand in terms of section 345 of the old Companies Act to be served on the registered address of Waterfall on 6 October 2015. There was no response to this demand.

[31] The intervening parties are husband and wife. In the founding papers in the intervention application they explain that they had discussions with Peters and one Mr Kenneth Heuer ("*Heuer*") (then Peters' husband) about the acquisition of a trout farm and business which was at the time being offered for sale as a going concern. On 14 April 2007 a memorandum of agreement between the intervening parties and Peters was entered into.

[32] In the memorandum of agreement it was recorded that Peters acquired the rights to purchase a certain property for a purchase consideration of R3 650 000,00 and that she was desirous of registering the property in the name of a company to be formed, namely Waterfall Trout Properties (Pty) Ltd. In addition to the purchase consideration, an additional R1 000 000,00 would be required for improvements to be effected to the immovable property and working capital.

[33] The intervening parties agreed "*to invest via loan account an amount of 33.3% x (3 650 000+1 000 00) equalling R1 550 000,00 in Waterfall Trout*

Properties (Proprietary) Limited in return for which 33,3% of the issued share capital of this company will be issued to [the intervening parties] or their nominee." The loan accounts "*introduced by [Peters] and [the intervening parties] into Waterfall Trout Properties (Proprietary) Limited*"will be interest bearingand shall be payable quarterly in arrears and will be payable depending on the cash flow of Waterfall.

[34] The memorandum of agreement contained the following provision:

> "*Of the above amount R1 216 667,00 can be released by auditors WKH Landgrebe… to the Seller*[i.e. Peters] *upon the property being transferred free of any encumbrances into the name of Waterfall Trout Properties (Pty) Ltd….*"

[35] The intervening parties allege that a variation agreement was subsequently prepared and signed by the intervening parties. It was sent to Heuer for signature by Peters, but she never signed the variation agreement. The intervention parties allege that an exchange of e-mails between the first intervening party, Heuer and Peters show that the variation agreement was accepted by Heuer and Peters.

[36] In terms of the variation agreement the intervening parties would pay a reduced amount of R1 416 525,00 into W K H Landgrebe's trust account (the amount was adjusted due to the reduction of the amount required for improvements and working capital). The variation agreement containsthe following provision:

> "*Of the above amount R1 216 667,00 must be released to the Seller K C Peters by auditors W K H Landgrebe… to the Seller immediately. The parties confirm that the full purchase price has been paid to the transferring attorneys …*"

[37] The intervening parties allege that all the suspensive conditions have been

fulfilled, fictionally fulfilled, or waived.

[38] Waterfall was incorporated on or about 17 May 2015. Attached to the founding affidavit in the intervention application are share certificates indicating that Peters hold 600 shares in Waterfall, and the intervening parties 150 shares each.

[39] The intervening parties made the required transfer of the aforesaid amount of R1 416 525,00 into WHK Landgrebe's trust account on 21 July 2007. WHK Landgrebe paid the amount of R1 216 667,00 to Choice Decisions upon Heuer's specific request.

[40] In the liquidators' answering affidavit in the intervention application the following is stated:

> *"Katharina Peters, the sole director of Waterfall Trout Properties (Pty) Ltd, confirms such indebtedness and inability to pay. The debt arose by virtue of an oral agreement with Choice Decisions in 2007 in terms of which it lent the company the amount of R3 550 000,00 to purchase the immovable property referred to by the intervening parties in the founding affidavit, as well as R1 317 260,98 to pay the transfer costs. The loan was interest free, had no fixed terms of repayment and was repayable on demand."*

[41] Peters' confirmatory affidavit is attached to the answering affidavit.

[42] In respect of the intervening parties' version regarding the conclusion and terms of the memorandum of agreement and the variation agreement, the subsequent payment made to WKH Landgrebe and WHK Landgrebe's payment to Choice Decisions, the following is said in the answering affidavit deposed to by one of the liquidators:

> *"I have no knowledge of the circumstances in which the alleged*

agreements were concluded between the intervening parties and Peters."

[43] The intervening parties filed a replying affidavit, and thereafter a supplementary replying affidavit to which the liquidators responded. I allow the filing of the supplementary replying affidavit, as there can be no prejudice to the liquidators.

PROBATIVE VALUE OF PETERS' EVIDENCE

[44] It is trite that the affidavits in motion proceedings comprise both the pleadings and the evidence.[23]Peters' evidence of the loan agreement will not even pass muster as a pleading, as it does not set out where the agreement was concluded, or who represented the respective parties.

[45] Peters' failure to deal with the intervening parties' allegation that they are creditors of Waterfall has a further consequence: it remains unexplained why it was necessary to conclude a loan agreement between Choice Decisions and Waterfall for the payment of the purchase price of the immovable property, when there was agreement that part payment thereof was to be made by the intervening parties. The payment made by the intervening parties pursuant to the memorandum of agreement or the variation agreement cannot be divorced from the alleged loan agreement concluded between Choice Decisions and Waterfall.

[46] The role of Heuer in seemingly making decisions on behalf of Choice Decisions and/or Waterfall (including the flow of money and the payment for the immovable property) has not been explained. Zeelie de Kock found that Heuer had used and transferred funds available in Choice Decisions at will. I am mindful that there was no specific finding by the auditors that any transfer of funds to Waterfall was unlawful, but one is still left with a feeling of unease about the payment by Choice Decisions for the purchase of the immovable

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23 *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793 C – G

property in the absence of an explanation.

INTERVENING PARTIES SHAREHOLDERS AND CREDITORS

[47] It was argued on behalf of the liquidators that as the money which WHK Landgrebe had received from the intervening parties was paid to Choice Decisionsand not to Waterfall, the intervening parties cannot be creditors of Waterfall.

[48] In determining whether a person has standing to intervene in pending proceedings, a court is required to assume that the allegations made by that person are true or correct.[24]The intervening parties' case is that their payment to WHK Landgrebe constituted payment to Waterfall, which is consistent with the agreement(s) they concluded. It was contemplated in the agreement(s) that payment made to WHK Landgrebe would constitute payment to Waterfall, even though WHK Landgrebe would not have made a subsequent payment to Waterfall directly but would have paid Peters.

[49] The intervening parties' version is uncontested, even though Peters (and hence the liquidators)was in a position to dispute this version but did not do so.

[50] I therefore find that the intervening parties are creditors of Waterfall.

[51] It is not disputed that the intervening parties are shareholders of Waterfall.

***PRIMA FACIE* DEFENCE TO RELIEF IN LIQUIDATION APPLICATION**

[52] At the stage of an application for leave to intervene the court need not be over concerned with the intrinsic merits of the dispute which can be fully

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24 *Zulu and Others v eThekwini Municipality and Others* 2014 (4) SA 590 (CC), paragraphs [16] and [21]

canvassed in the main proceedings.[25]

[53] Should the intervening parties be granted leave to enter the main case the so-called *Badenhorst* rule will apply, in terms of which an application for the provisional or final winding up should be refused where the debt is disputed on *bona fide* and reasonable grounds.[26]

Prescription

[54] A creditor cannot apply for a liquidation order on a prescribed debt.[27]

[55] A loan which is repayable on demand becomes due the moment it is advanced by the creditor to the debtor and will be prescribed three years thereafter. However, if the parties clearly indicate that they intend demand to be a condition precedent for the debt to become due, prescription will only commence from the date of demand.[28]

[56] Peters has not stated that the loan agreement would only become due on demand. It was submitted on behalf of the liquidators that the parties intended demand to be a condition precedent for the debt to become due. It was in the first place based on the evidence of Peters who confirms that the debt "*remains due and payable*". Her bald allegation is however insufficient to justify such a conclusion.

[57] It was secondly argued on behalf of the liquidators that it was not the intervening parties' case that the debt prescribed three years after its advance in 2007. However, it was in the answering affidavit in the intervention application that the liquidators first relied on Peters' version of

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25 *Sizwe* at 678J-679A

26 Named after *Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (20 SA 346 (T). See also: *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A) at 980.

27 *Louw v W P Koöperatief* 1998 (2) SA 418 (SCA)

28 *Trinity Asset Management (Pty) Ltd v Grindstone Investments (Pty) Ltd* (*CCCT 248/16*) [2017] ZACC 32 (5 September 2017)

the loan agreement. (In the founding affidavit in the liquidation application the liquidators relied on the report of Zeelie de Kock.) The intervening parties'replyto the allegation that the parties had concluded an oral loan agreement is that "*the nature of the debt ought to be investigated, alternatively whether, if the loan was correctly entered into, the debt has prescribed*". I find that the intervening applicants have showed that they can raise a *prima facie* defence based on prescription in the main application, which is all that is required from them at this stage.

Existence of loan agreement

[58] The liquidators initially relied on the report of Zeelie de Kock to establish the debt.Zeelie de Kock amended the amount of the debt from an earlier reportsubmitted by them when one S Heuer (who appears from some of the correspondence to have been a director of Choice Decisions at some stage, and is not to be confused with Kenneth Heuer) advised them that Choice Decisions only paid the purchase price and the transfer fees in respect of the movable properties, and not the commission. This confirms (as is to be expected) that the Zeelie de Kock reports (drawn up years after the event) constitute hearsay evidence, and the auditors cannot confirm the *causa* for the payment made by Choice Decisions.

[59] The liquidators are therefore dependent on the evidence of Peters to establish the debt. I have already indicated that Peters' evidence is problematic.

[60] I therefore agree with Mr Reineke who appeared on behalf of the intervening parties that there is a "fair amount of doubt as to the validity of the claim of Choice Decisions vis-à-vis Waterfall". The intervening parties may therefore be able to show in the main case that the debt is disputed on *bona fide* and reasonable grounds.

CONCLUSION AND ORDER

[61] The application for leave to intervene succeeds. The parties agreed that in the event of such a finding costs should be in the cause.

[62] The following order is made:

1. The applicants in the application dated 16 March 2016 are granted leave to intervene in the application for liquidation of Waterfall Trout Properties (Pty) Ltd brought by the liquidators of Choice Decisions 212 (Pty) Ltd (in liquidation).

2. Costs of the application will be costs in the liquidation application.

VAN DER BERG AJ

Acting Judge of the High Court

APPEARANCES

Counsel for the Applicants (in intervention application):

M.Reineke

Instructed by:

Schultz Mmuoe Inc.

For the Respondents (in intervention application):

GD Wickens

Instructed by:

De Vries Incorporated

Date of hearing: 13 September 2017

Date of judgment: 13 December 2017