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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2020/19791

Reportable: No

Of interest to other Judges: No

Revised: No

Date :5/04/2022

In the intervening application between:

M[....] B[....] R[....]

Intervening Party

In re:

MERCANTILE BANK LIMITED

Applicant

and

M[....]2 M[....]3 R[....]

Respondent

J U D G M E N T

MAIER-FRAWLEY J:

1. In this application, the intervening party, who is the ex-wife of the respondent, seeks leave to intervene in the main sequestration application brought by the applicant against the respondent, in order to oppose the grant of a final order.

2. On 13 August 2021, the respondent's estate was provisionally sequestrated by order of court, per the judgment of Weiner J.¹ The learned Judge found, amongst others, that the applicant had *prima facie* proven the requirements for the grant of a provisional sequestration order, *inter alia*, the indebtedness owed to it by the respondent; the act of insolvency committed by the respondent; and the requirement of advantage to creditors, such as to justify the grant of a provisional order. A rule nisi was granted, returnable on a specified date, for a hearing to determine whether a final order should be granted.

3. In the main application, as is apparent from the judgment of Weiner J, the applicant relies on the fact that the respondent committed an act of insolvency in terms of s 8(c) of the Insolvency Act, in that he disposed of his immovable property (referred to in the papers as 'the Gallo Manor property') to the prejudice of his creditors, at a time when he was insolvent. The applicant has also alleged that the respondent is factually insolvent.

4. It is not in dispute that the Gallo Manor property was transferred by the respondent to his then wife (the intervening creditor) in settlement of the latter's claim for maintenance, including a proprietary claim in terms of s7(3) of the Divorce Act, pursuant to an action for divorce between the respondent and his then wife, instituted on 11 November 2019. On 22 January 2020, the court granted a decree of divorce incorporating the settlement agreement concluded between such parties, *inter alia*, pertaining to such claims. Pursuant to that order, on 19 March 2020, transfer of the Gallo manor property was registered in the name of the present intervening creditor.

¹ The order is to be found in the judgment of Weiner J in *Mercantile Bank (A Division of Capitec Bank Limited) v Ross* (2020/19791) [2021] ZAGPJHC 149 (13 August 2021) ('Mercantile Bank'). The court also found that the respondent had failed to demonstrate that he was factually solvent, having failed to deal with his financial position to demonstrate that his assets exceeded his liabilities, and that thus, 'the position of factual solvency has also been established.'

5. The disposal of the Gallo Manor property (hereinafter referred to as 'the property') is dealt with in paragraphs 22 to 27 of the judgment of Weiner J. The judgment records, in paragraph 22(g) thereof that the applicant contended that the divorce between the respondent and his wife was one of convenience, with the main purpose of disposing of an unencumbered immovable property to prevent creditors from laying claim to it. In paragraph 27 of the judgment, the learned judge concluded that the 'disposition of the property obviously caused prejudice to the respondent's creditors, because it resulted in the respondent's financial position deteriorating, and rendering him insolvent. This directly affects the creditors and the applicant's prospects of recovering the debt due to it appear minimal.'

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. The applicant referred to cases relating to Rule 12 applications that state that 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.²

7. In that context, a 'direct and substantial interest' means a legal 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.³

² These included: *SA Riding for the Disabled Association v Regional Land Claims Commissioner* 2017 (5) SA 1 (CC); *Peermont Global (KZN) (Pty) Ltd v Afrisun KZN (Pty) Ltd t/a Sibaya Casino and Entertainment Kingdom* [2020] 2 All SA 226 (KZP); *Ex Parte Moosa: In re Hassim v Harrop-Allin* 1974 (4) SA 412 (T). See too: *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (Tk); *Ansari v Barakat* [2012] ZAKZDHC 1, paras 9 and 10, and the authorities cited therein.

³ *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 177 and 169H; *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others: In re Sizwe Development v Flagstaff Municipality* 1991 (1) SA 677 (Tk) at 679.

8. 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

9. The practice in insolvencies is unique, however, as it is neither a pure intervention nor a substitution and is *sui generis* from a procedural point of view.⁶

10. One of the issues the court hearing the application for a final sequestration order will be required to consider, is whether or not the respondent committed an act of insolvency in terms of s 8(c)⁷ of the Insolvency Act when he caused the property to be transferred to the intervening party in terms of a valid court order.⁸ The applicant alleged in its founding papers that the property was not *bona fide* disposed of but that it was the result of collusive dealings by the respondent and the intervening creditor (his then wife) to prejudice the applicant in pursuing its claim; that the purpose of the divorce was to commit a voidable disposition⁹ of the

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 371F – 372G. See also: *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 creditor.

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

⁶ *Levay and another v Van Den Heever and Others NNo* 2018 (4) SA 473 GJ, par 11; *Fullard supra* at 372B

⁷ In terms of s 8 (c), a debtor commits an act of insolvency 'if he makes or attempts to make any disposition of any of his property, which has or would have the effect of prejudicing his creditors or of preferring one creditor above another.' The applicant relies, amongst others, on such requirement, which it will be required to establish on a balance of probabilities on the return date. (See *Mercantile Bank supra* (cited in fn 1) par 41 and the authority there cited. On the return date, the respondent may well tender additional evidence to oppose the grant of a final order. One cannot therefore preempt the outcome of the main application at this stage.

⁸ It is worth mentioning that the definition of 'disposition' in s 2 of the Insolvency act is the following: " 'disposition' means any transfer or abandonment of rights to property and includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor, **but does not include a disposition in compliance with an order of the court**; and 'dispose' has a corresponding meaning;" (own emphasis)

⁹ Section 29 of the Insolvency Act regulates 'voidable dispositions', where an insolvent disposes of any property in his estate less than 6 months before his sequestration **which has the effect of preferring one of his creditors over another**. A voidable disposition can be set aside by the court if the debtor's liabilities exceeded the value of his assets immediately after the disposition, unless the person who received the disposition is able to prove that the disposition was made in the ordinary course of business and was not intended to prefer one creditor over another. Implicit in the allegations made in the main application concerning the commission of a 'voidable disposition', is an

immovable property to the prejudice of the applicant and other creditors; that the divorce between the respondent and the intervening creditor was one of convenience with the main purpose of disposing of an unencumbered immovable property to prevent creditors from laying claim to it; and that the advantage to creditors in sequestrating the respondent's estate lies in the fact that it will enable the appointed trustee to recover disposed of assets to the benefit of creditors, including that the appointed trustee would have greater flexibility in disposing of assets which may be found and/or recovered at the best value obtainable.

11. The intervening party seeks to protect her interest in the property and to rebut obviously prejudicial allegations pertaining to the alleged collusion between herself and the respondent in 'orchestrating a divorce of convenience', with the alleged main purpose of disposing of the property to prevent the respondent's creditors from laying claim to it, or with the purpose of committing a voidable disposition of the property to the prejudice of the applicant and any other creditors.

12. The papers reveal that the intervening party is and will remain a creditor in the estate of the respondent vis-a vis her ongoing claim for maintenance, not only in so far as the respondent's obligation for payment of the monthly monetary component of R10,000.00 is concerned, but also in relation to the monetary shortfall that could not be met by the respondent at the time,¹⁰ the value of which - computed over the lifetime of the claimant, - was covered, together with the accrual/redistribution claim, by the value of the property that was transferred to her pursuant to the divorce, i.e., the property was transferred in lieu of a monetary payment of the shortfall apropos her maintenance claim, and in satisfaction of her patrimonial claim. In her capacity as creditor, the intervening party has locus standi to intervene in the sequestration application and need not establish an additional legal or other interest.¹¹ As pointed out in *Levay* at para 15:

acknowledgment by the applicant that the respondent's ex-wife (the intervening party herein) is a creditor in the estate of the respondent.

¹⁰ The shortfall amounting to approximately R10,000.00 per month.

¹¹ *Levay and another v Van Den Heever and Others* NNo 2018 (4) SA 473 GJ, par 28. I agree with the reasoning of Van der Bergh AJ by reference to several cases in *Levay*, in concluding that a creditor does have locus standi to intervene in a liquidation application without having to prove an additional legal or other interest, notwithstanding a contrary conclusion arrived at by Vally J in *Absa Bank Ltd v*

“Over the years it has been accepted without argument in a number of cases and textbooks that creditors have a right to intervene in sequestration or winding-up applications in order to oppose the application.¹² 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.¹³”

13. The applicant opposed the intervention application based on applicable principles governing applications under Rule 12. The applicant submits that any appointed trustee will investigate and decide whether he will apply to set aside the transfer of the property to the intervening party on the basis that it amounts to a voidable disposition. Thus, so it was submitted, even if the intervening party's evidence were to be accepted, it would not serve to affect the outcome of the main application which can still be pursued on the ground of actual insolvency of the respondent. The applicant submits that the case of *Maritz*,¹⁴ which is relied on by the

Africa's Best Minerals 146 Ltd; In re Sekhukhune NO v Absa Bank Ltd [2015] 2 All SA 8 (GJ) par 17, a decision in this division.

See too: *Fullard v Fullard* 1979 (1) SA 368T at 372C-E, where the following caution was sounded: “Omrede hy skuldeiser is, het hy *locus standi* om aangehoor te word in 'n *concursum creditorum* wat reeds bestaan en die sogenaamde verlof om tussenbeide te tree is eintlik 'n formaliteit. 'n Mens moet dus versigtig wees om, by die beoordeling van die problem *in casu*, nie oorwegings wat geld in 'n konvensionele proses klakkeloos toe te pas nie.”

¹² For example: *F & C Building Construction Co (Pty) Ltd v Macsheil Investments (Pty) Ltd* 1959 (3) SA 841 (N); *Gilliatt v Sassin* 1954 (2) SA 278 (C) at 280; *Ex parte Arntzen (Nedbank Ltd as Intervening Creditor)* 2013 (1) SA 49 (KZP) para 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 9 ed paras 5.26 and 5.27, p 129 – 30; and earlier editions.

¹³ Catherine Smith Law of Insolvency 3 ed p 79.

¹⁴ *Id Maritz*, (cited in fn 4 above). There, an application was brought for the sequestration of the respondents who were married in community of property. An immovable property owned by them had been attached and sold to the intervening respondent who had purchased same at a sale in execution. The application was made by their accountant, who alleged that the respondents had committed an act of insolvency as intended in s 8(g) of the Insolvency Act 24 of 1936 by informing him in a letter that they were unable to pay their account. The applicant alleged that the respondents were in fact insolvent and that it would be to the advantage of their creditors if their estate were to be sequestrated. The respondents were the owners of a farm which had been sold at a sale in execution to one ‘S’ (the intervening respondent) at a price that was, according to the applicant, well below its market value. S applied to intervene in the sequestration application, alleging that he had a direct interest in the sequestration proceedings because he had purchased the respondents' farm at the sale in execution, which interest he intended to protect by opposing the application for sequestration on the ground that it amounted to a 'friendly sequestration' 'F Bank' also sought to intervene in the sequestration proceedings as intervening creditor, averring that most of the first respondent's debt to it (some R396,000.00) was secured by a second mortgage bond over the farm and that the farm had been declared specially executable. The applicant and the bank in turn contended that S did not have *locus standi* to intervene in the proceedings because he was not a creditor of the respondents and thus lacked a direct and substantial interest in the subject-matter before the Court.

intervening creditor, is distinguishable on its facts, does not constitute binding precedent and should therefore not be followed.

14. The applicant further submits that the court hearing the sequestration application will not be required to decide whether or not the transfer of the property to the respondent's ex-wife is liable to be set aside, and no such relief is being sought in the main application. Should the appointed trustee decide to apply to court in due course under the relevant provisions in the Insolvency Act, the intervening party would have the opportunity to oppose such application at that juncture. Finally, the applicant submits that the intervening party has failed to demonstrate that she has a legal interest to protect, which is not just a financial interest in the matter, and that the legal interest is material enough to affect the outcome of the winding-up application. She lacks a legal interest in the subject matter of the proceedings and her opposition at this stage is premature. I disagree, not only because the intervening party is by virtue of her status, as creditor, entitled to intervene, but, even were that not the position, because I align myself with the views of Mac William AJ in *Maritz* that *'that it can hardly be said that the intervening respondent does not have an interest in the present litigation where the expressly stated purpose of the litigation is to have a trustee appointed so that he can set aside the transaction which the intervening respondent seeks to protect'*, given the same or similar purpose revealed in the main application.

15. In any event, the fact remains that the applicant persists with its reliance on s8(c) of the Insolvency Act for the act of insolvency allegedly committed by the respondent. The allegations made directly adversely involve and implicate the

The court held that that it was the respondents' rights of ownership in the farm which S wished to have transferred to him. While the sale had taken place at the instance of the execution creditor, the rights to be transferred to S pursuant thereto were those of the respondents themselves, and in this respect, S had a direct claim against the respondents. On that basis, it was held that S's right to transfer of the farm was not a derivative right but one in which the respondents' rights of ownership was to be transferred directly to the intervening respondent. There was, moreover, nothing in the Insolvency Act which in any way limited the common-law powers of the Courts in respect of intervention in sequestration proceedings. The court stated, at para 31, that it could hardly be said that S lacked an interest in the litigation in circumstances in which the expressly stated purpose thereof was to have a trustee appointed so that he might be able to set aside the transaction which S sought to protect. Having found that there was nothing in the Insolvency Act which in any way limited the common-law powers of the Courts in respect of intervention in sequestration proceedings, the Court exercised its discretion to allow a party to intervene on grounds of convenience in favour of S so as to allow him to join the proceedings.

intervening party. A failure to give her an opportunity to rebut the obviously prejudicial allegations, which require proof on a balance of probabilities on the return date, would mean that her property would remain at risk based on *prima facie* conclusions reached by a Judge and which, in the absence of controverting evidence, would result in conclusive proof. In that sense she has a material interest in the subject matter of the litigation and any judgment that the court hearing the main application will be tasked to give. It is not for this court to pre-empt what evidence may still be provided by the respondent in the main application in opposition to the relief sought by the applicant therein on the return day.

16. It is apposite to quote the arguments proffered in *Maritz*:¹⁵

“ Both the applicant and the intervening creditor submitted that the intervening respondent did not have *locus standi* to intervene in the proceedings.

They argued that the farm purchased by the intervening respondent does not form the subject-matter of the present applications and that the intervening respondent's interest is a financial interest which was only an indirect interest in the present litigation where the respondents' sequestration was sought. Moreover, the applicant disputed that the intervening respondent was a creditor of the respondents. Accordingly they alleged that the intervening respondent did not have a direct and substantial interest in the subject-matter before the Court (cf *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657) and that its interest was only an indirect financial interest in the litigation (cf *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 169).”

The court dealt with such arguments as follows:¹⁶

“ Moreover, as pointed out by Catherine Smith in *The Law of Insolvency* 3rd ed at 79, there is nothing in the Insolvency Act which in any way limits the common-law powers of the Courts in respect of intervention in sequestration proceedings. See also Meskin *Insolvency Law* at 2-37 para 2.1.11

¹⁵ *Maritz*, paras 21 & 22.

¹⁶ *Maritz*, paras 27, 31 and 35.

In these circumstances **I am of the opinion that it can hardly be said that the intervening respondent does not have an interest in the present litigation where the expressly stated purpose of the litigation is to have a trustee appointed so that he can set aside the transaction which the intervening respondent seeks to protect.**

While this may be correct, the fact is that the Court has a discretion to allow the intervention of a party on the grounds of convenience and in my opinion this is clearly a matter in which I should exercise such a discretion in the intervening respondent's favour and allow him to join in the proceedings notwithstanding the defects in the formulation of this claim. See *Ex parte Pearson and Hutton NNO* 1967 (1) SA 103 (E) at 106H - 108H; *Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd and Another* 1980 (3) SA 415 (W) at 419D - F; *Hetz v Empire Auctioneers & Estate Agents* 1962 (1) SA 558 (T); *Holzman NO and Another v Knights Engineering and Precision Works (Pty) Ltd* 1979 (2) SA 784 (W) at 796H.” (emphasis added)

17. Albeit that the facts in *Martiz* are not exactly the same as in *casu*,¹⁷ the fact remains that the court in that case dealt with a similar argument to that proffered by the applicant in the present application. In paragraphs 44 and 45 of the *Maritz* judgment, the argument was recapped and dealt with as follows:

“...Indeed it is the applicant's and the intervening creditor's argument that it is only upon the appointment of a trustee that the trustee will investigate and decide whether he will apply to set aside the sale in execution.

Moreover, the intervening respondent when seeking to intervene need provide no more than *prima facie* proof of his interest, albeit in a sale

¹⁷ In *Maritz*, the property that was purchased by the intervening respondent had not yet been transferred to him at the time the sequestration proceedings were pending, as opposed to the present matter where the property had been transferred to the intervening creditor some 6 months prior to the launch of the sequestration application. Further, in *Maritz*, the status of the intervening respondent as creditor was disputed. Moreover, the intervening applications were considered by the same court hearing the sequestration application, which took place in one composite hearing. Although the intervention application succeeded, ultimately a sequestration order was granted.

which may be set aside, and his right to intervene, which in my opinion the intervening respondent has done. See *Elliott v Bax* 1923 WLD 228; *Ex parte Marshall: In re Insolvent Estate Brown* 1951 (2) SA 129 (N).” (emphasis added)

18. For all the reasons given, I am inclined to exercise my discretion in favour of the intervening party. The general rule is that costs follow the result. I see no reason to depart therefrom. In her notice of motion, the intervening party gave notice that she would seek costs against any party who opposed the intervention application.

19. Accordingly, the following order is granted:

ORDER:

1. M[....] B[....] R[....] (the intervening party) is granted leave to intervene in the application brought by Mercantile Bank Limited against Michael M[....]3 R[....] under case no. 19791/20 (the main application) and to join the main application as the second respondent.
2. The applicant is ordered to pay the costs of the intervening party in the application for intervention.

AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing:	14 March 2022
Judgment delivered	5 April 2022

This judgment was handed down electronically by circulation to the parties’ legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 5 April 2022.

APPEARANCES:

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Counsel for Second Defendant:	No appearance
Attorneys for Second Defendant:	No appearance