

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 5790/2020P

In the matter between:

THE SPECIAL INVESTIGATING UNIT

APPLICANT

and

ANTON VAN KAMPEN

FIRST RESPONDENT

THE MINISTER OF PUBLIC WORKS

SECOND RESPONDENT

In the matter re:

ANTON VAN KAMPEN

PLAINTIFF

and

THE MINISTER OF PUBLIC WORKS

DEFENDANT

ORDER

1. The Special Investigation Unit (SIU) is granted leave to intervene in the action brought by Anton Van Kampen against the Minister of Public Works under case number 5790/2020P and is granted leave to join therein as a Second Defendant.

2. The First Respondent (Plaintiff) is directed to serve all pleadings, notices and documents filed of record upon the Applicant within thirty (30) days of this Order.

3. The first Respondent (Plaintiff) is granted leave to amend the headings of all documents filed of record in the main and counter actions to reflect the joinder.

4. The Applicant is directed to deliver any plea, exception or other pleading in may choose to within thirty (30) days of the expiry of the period referred to in paragraph 2 *supra*.

5. The Applicant is ordered to pay the costs of the application

JUDGEMENT

Delivered on:

Mngadi J

[1] The applicant seeks leave to intervene as a party in an action pending before the court. The plaintiff in the action opposes the application. The defendant in the action has not taken any part in the application proceedings. The parties for convenience referred to as in the main action.

[2] The applicant is the Special Investigating Unit (SIU) established in terms of the Special Investigating Units and Special Tribunals Act No.74 of 1996 (the Act) as amended by promulgation of Proclamation R118 of 2001 in the Government Gazette No. 22531 dated 31 July 2001. The plaintiff is Anton Van Kampen an adult businessperson. The defendant is the Minister of Public Works, a National Minister of the Department of Public Works a state department of the Republic of South Africa.

[3] The plaintiff on 4 September 2020 instituted an action against the

defendant claiming arrear rental of certain premises. He set out four claims in terms of four written lease agreements concluded with the defendant on 17 December 2015 (claim 1 for R434 701.27), on 24 March 2016 (claim 2 for R2 059 143.79), on 24 March 2016 (claim 3 for R3 499 1780.90) and on 24 October 2013 (claim 4 for R2 761 415.22).

[4] The defendant in response filed a plea and a counter-claim. The defendant, apart from raising a special defence, admitted the lease agreements but stated that they were renewals/extensions of the then existing lease agreements. It claimed the SIU investigated and found in respect of the then existing lease agreements that the plaintiff provided less useable space than the useable space stipulated in the lease agreements which resulted in an overcharge and overpayments (in rands) of R482 845, R3 401 156, R11 889 552, and R272 376. In addition, defendant claimed an overcharge for the period 1 September 2013 to 31 August 2015 in the total amount of R272 376.

[5] The plaintiff in his plea to the counter-claim pleaded, *inter alia*, prescription and that in August 2013 the plaintiff and defendant settled the dispute of issues relating to existing lease agreements. Plaintiff, in addition, denied that it provided less space than the space stipulated in the lease agreements.

[6] The pleadings in the action have closed and discovery completed. The action is set down for hearing on August 2023.

[7] On 1 March 2023, the applicant filed the application for leave to intervene. It stated that on 27 August 2014 by Proclamation R59 of 2014 the President authorized it to investigate certain allegations relating to the procurement and administration of leases by the defendant. It investigated the lease agreements between plaintiff and defendant. It found that the plaintiff provided less floor space than that stipulated in the lease agreements but he charged for and the defendant paid for the full floor space.

It resulted in the loss to the defendant in that it paid for a floor space it could not and it did not use.

[8] The applicant stated that by virtue of its statutory mandate it has a direct real and substantial interest in the pending proceedings between the plaintiff and the defendant that entitles it to apply for admission as co-litigant in the pending litigation.

[9] The plaintiff in the answering affidavit stated the following; the applicant lacked *locus standi*, it does not have a right which will be adversely affected by the relief the plaintiff seeks in the action, and the applicant has not made out a case for intervention and any right which the applicant may have has prescribed.

[10] Rule 12 provides '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 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 meet.'

[11] The test for intervention is direct and substantial interest in the subject matter of the proceedings and whether wider consideration of convenience favour intervention, and the determination of the intervening party's matter or dispute must depend upon substantially the same question of law or fact as arises in the proceedings in which leave is sought to intervene. *Herbstein & Van Winsen* The Civil Practice of the High Court of South Africa (5ed) p225 states: 'At common law, it was often held that a person applying for leave to intervene had to establish: (i) an interest in the suit or that (his) interest would probably be affected; and (ii) a common cause of action or common ground with the party with whom joinder was being sought. However, it was also recognised that several defendants could be joined in the interest of convenience, equity, the saving of costs and the avoidance of a multiplicity of actions

The Court Rules have now created wider grounds for intervention. In terms of the Rules it is no longer necessary that the intervening applicant has a common cause of action or common ground with the plaintiff or a direct and substantial interest in the proceedings which are before court. A direct and

substantial interest in the proceedings is still a ground for intervention, and it is often regarded as decisive, but it is not a *sine qua non*.'

[12] The applicant grounds its application on the legislative provisions and the State President's Proclamation. The preamble to the Special Investigating Unit Act 74 of 1996 (the Act) states the purpose as follows: 'To provide for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State instructions, State assets and public money as well as any conduct which may seriously harm the interests of the public and of institution and conducting civil proceedings in any court of law or a Special Tribunal on its own name or behalf of state institutions.' Section 4(1) of the Act states:

'(1) The functions of a Special Investigating Unit are, within the framework of its terms of reference as set out in the proclamation referred to in section 2 (1)-

(a)

(b)

(c) to institute and conduct civil proceedings in a Special Tribunal or any court of law for-

(i) any relief to which the State institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution. Proclamation R59, 2014 of 27 August 2014 states that whereas there are allegations made relating to the affairs of the National Department of Public Works, and that the department suffered losses that may be recovered, power is granted to the SIU to investigate, and institute proceedings emanating from the investigation including recovery of any losses. It states that the investigation relates to unlawful or irregular conduct that took place between 1 January 2003 and 27

August 2014 (the date of the Proclamation) or which is relevant to or connected with, incidental or ancillary to the conduct referred to.

[13] The plaintiff contends that the applicant may institute or defend civil proceedings, but it has no power to intervene in pending proceedings. Counsel argued referring to *Special Investigating Unit re HT Pelatona Projects (Pty) Ltd v Nelson Mandela Bay Local Municipality* 2022 JDR 0117 (ECP). He contends that both the Act and the Proclamation are silent as to the power of the applicant to intervene in pending proceedings, and that it is trite that due to the intrusive nature of the SIU, legislative provisions granting it its powers are interpreted restrictively. He argued that the SIU must provide its evidence to the defendant and conduct the litigation in the name of the defendant. It cannot, he argued, seek to intervene in pending proceedings to support the defendant by mounting a dual defence along the defendant.

[14] The pending proceedings are a main claim and a counterclaim. The applicant seeks to intervene as a co-defendant in the main claim to enable it to file a counterclaim against the plaintiff. It has no desire to plead to the main claim or to seek any relief relating thereto. Its intention is to plead a counterclaim and seek a relief. It intends to seek a relief on the same grounds and the same relief as the defendant although it may plead and conduct its case differently. It is clear that in relation to the main claim the applicant is not claiming to be liable to be joined as either a plaintiff or defendant. The issues in the main claim are confined to the plaintiff and the defendant. The main claim is of relevance to the applicant in that it cannot seek to intervene directly to the counterclaim.

[15] The issue of overcharging and overpayment relates to the then existing lease agreements. The applicant accept that the renewal or extension lease agreements stipulated rental not based on a square meter. However, the defendant withheld rental in respect of the lease renewals/extension based on the findings and advice from the applicant to effect a set off against overpayments relating to the then existing lease agreements..

[16] The papers show that the trial court shall be seized with various special pleas, *inter alia*, failure to give prescribed notices prior to the institution of

the action, a plea of prescription, a plea of compromise or raised issues having been previously settled, issue of set off. It is undesirable for this court for obvious reasons to express a view of these special pleas.

[17] It is entirely up to the litigant in choosing the manner to plead its case. The court as long as the pleading is in accordance with the Rules and the law, the court shall not interfere with the right of a party. The applicant has not yet pleaded its case. The interest of the plaintiff is procedurally safeguarded in that the applicant is bound to set out its case in its pleading and the plaintiff shall have an opportunity to respond to it.

[18] The court has a wide discretion in an application for leave to intervene. The principles applicable in applications to amend a pleading differ from those applicable in applications for leave to intervene. The applicant in an application for leave to intervene is not required to show that if allowed to intervene it may succeed in the relief it intends to claim. It suffices if it shows that it has a direct and substantial interest in the issues raised in the matter before court. It is generally a fundamental right that one is entitled to participate in court proceedings dealing with issues he or she has a direct and substantial interest.

[19] Intervention regulated by the provisions of Rule 12 relates to the manner a party joins the proceedings. It does not deal with the question of whether the party is entitled to be part of the proceedings. The Rule must be interpreted permissively. If the applicant could have instituted or defended the pending civil proceedings, it is fallacious to deny that party intervention on the basis that there is no specific provision authorising that party to intervene in the proceedings. The essence is being entitled to take part in the pending proceedings. The Rule is to be interpreted in a way that promotes the participation in the pending proceedings by those entitled to participate in it. In my view, Rule 12 in referring to plaintiff includes a plaintiff in reconvention.

[20] The legislature grants to the applicant power to deal with the issue for determination in the action pending between plaintiff and defendant. It is statutory mandated through civil proceedings in its own name or in the name of the State institution to recover losses or to prevent losses to the fiscus. It has a direct and substantial interest to recover losses or to prevent

losses to the defendant. The law grants to it an independent power to be exercised, if deemed necessary, independently and in the best of its abilities within the law.

[21] The defendant pleaded to the plaintiff's claim in the manner it chose to, and likewise, it pleaded its counterclaim in the manner it chose to. The applicant is not bound by how the defendant pleaded its defence and its counter-claim. If granted leave to intervene in the action, it shall plead its case as it deems fit.

[22] The applicant as a result of its investigations worked with the defendant from the inception of the litigation. It initially accepted the role of merely assisting the defendant in the litigation. It belatedly after the pleadings closed and the matter enrolled for trial sought intervention. It created a delay and inconvenience to the plaintiff. The plaintiff contends that the delay causes it prejudice which prejudice is not addressed a costs order. Intervention may be sought at any stage of the proceedings. The prejudice to the defendant, in my view, is not of such a nature to justify refusal of an application for leave to intervene to a party who has shown real direct and substantial interest in the pending proceedings.

[23] The usual rule is that costs follow the result except if special circumstances exist for a court to order otherwise. The applicant raised the issue, which is the subject of the litigation between the plaintiff and the defendant. The litigation was at its instance. It instructed the defendant to remain in occupation of the premises and to withhold payment of rent. It did not explain its failure to take part in the litigation from inception in its own name. The plaintiff after close of the pleadings was justified to resist the application for leave to intervene. In my view, the applicant must bear the costs of the application for leave to intervene.

[24] In the result, it is ordered as follows:

1. The Special Investigation Unit (SIU) is granted leave to intervene in the action brought by Anton Van Kampen against the Minister of Public Works under case number 5790/2020P and is granted leave to join therein as a

Second Defendant.

2. The First Respondent (Plaintiff) is directed to serve all pleadings, notices and documents filed of record upon the Applicant within thirty (30) days of this Order.

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Mngadi, J

APPEARANCES

Case Number: 5790/2020

Applicant represented by: R. Padayachee SC

Instructed by: State Attorney
DURBAN

Plaintiff represented by: R. Van Rooyen

Instructed by: PG Sten Attorneys
c/o Grant & Swanepoel Attorneys
PIETERMARITZBURG

Date of Hearing 25 APRIL 2023

Date of Judgment 03 MAY 2023