IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: 2667/17

Reportable	**Yes**

In the matter between:

MOOVILLE (PTY) LTD — **1ST Applicant**

WILLEM JANSEN VAN VUUREN — **2ND Applicant**

And

LAND AND AGRICULTURAL BANK OF SOUTH AFRICA — **1st Respondent (1ST Applicant in the main application)**

CPAD FARM HOLDINGS — **2ND Respondent (1st Respondent in the main application)**

MR MONGESI ALFRED MDE — **3RD Respondent (2ND Respondent in the main application)**

THE NATIONAL DIRECTOR PUBLIC PROSECUTIONS — **4TH Respondent (Third Respondent in the**

main application)

THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM — **5TH Respondent (4TH Respondent in the main application)**

MIKE TIMKOE TRUSTEES CC — **6TH Respondent (5TH Respondent in the main application)**

DONALD GEORGE DUKE JACKSON — **7TH Respondent (6th Respondent in the main application)**

THE MASTER OF THE HIGH COURT — **8TH Respondent (7TH Respondent in the main application)**

REGISTRAR OF DEEDS CAPE TOWN — **9TH Respondent (8TH Respondent in the main application)**

JUDGMENT

VAN ZYL DJP:

[1] This is an interlocutory application wherein a company known as Mooville (Pty) Ltd and a Mr W J van Vuuren (the applicants) are seeking leave to intervene in, and

be joined as applicants in application proceedings (the main application) instituted by the Land and Agricultural Bank of South Africa (the Bank) for, *inter alia,* the variation of a forfeiture order granted by this Court in terms of the provisions of section 53(1)(a) of the Prevention of Organised Crime Act 121 of 1998 (POCA). The application to intervene is opposed by the fourth respondent in the main application, namely the Minister of Rural Development and Land Reform (the Minister). The basis of the opposition is that the applicants do not have a direct and substantial interest in the subject matter of the dispute raised in the main application.

[2] The forfeiture order that is the subject matter of the main application relates to three farms located in the Humansdorp area. In the forfeiture proceedings the farms were collectively referred to as Honeyville Farm (the properties). A company known as CPAD Farm Holdings (Pty) Ltd (the company), is the registered owner of the properties. The Bank held a mortgage bond over the properties as security for monies lend and advanced to the company. When the company failed to honour the terms of the loan agreement the Bank obtained a judgment in its favour, pursuant to which a warrant of execution was issued, and the properties were attached by the Sheriff of the Court.

[3] Subsequent to the attachment of the properties, the Director of Public Prosecutions (the DPP) applied for, and was granted a preservation order in terms of POCA in respect of the properties. The order prohibited anyone from dealing with the properties pending the determination of an application to declare the properties forfeit to the State. It further provided for the appointment of a *Curator bonis* (the Curator), and directed that **"any person who has an interest in the property and who intends opposing the application for an order forfeiting the property to the State**

or applying for an order excluding his or her interest from a forfeiture order in respect of the property, must enter an appearance giving notice of his or her intention in terms of section 39(3) of POCA". The Curator is cited in the main application as the fifth respondent.

[4] The Bank instructed their attorneys to protect its interests. The DPP and the State Attorney acting on its behalf, informed the Bank's attorney that it would not be necessary for the Bank to enter an appearance in the forfeiture application, and that the order declaring the properties forfeit to the State would exclude the Bank's secured interest in the properties arising from the mortgage bond. However, when the order was granted, and to the Bank's surprise, that did not happen. Instead, the forfeiture order simply provided that the appointed Curator **"shall cause the property to be handed back to the Department of Rural Development and Land Reform for re-allocation in terms of all applicable procedures, and as such to sign all necessary documents in regard thereto. This will be regarded as payment to the State."**

[5] When the Bank raised its concerns about the wording of the order it was given the assurance by the State Attorney in writing that the forfeiture order **"did not purport to refer to any other pre-existing rights, which are were recognised throughout,"** and that should **"your client have any qualms about the above exposition … we will not oppose an amended order spelling out the above …".** The Curator, appointed to administer the properties, subsequently received an offer to purchase the properties from the applicants in the application to intervene. The Bank agreed to the sale of the properties on the basis that the full proceeds of the sale would be paid to it as a secured creditor of the company. The Bank further stated in

correspondence to the Curator that it would require a variation of the forfeiture order to provide for the transfer of the properties to a third party, and for the proceeds of the sale to be paid to the Bank.

[6] On 25 May 2015 the Curator entered into a written deed of sale in terms whereof the properties were sold to the applicants. The purchase price was R8 000 000 (eight million rand) payable in cash against registration of transfer. The Curator is recorded as being the seller in his capacity as **"*Curator Bonis*" of CPAD Farm Holdings … appointed in terms of Order of Court in Case no: 3627/04".** The purchaser was the second applicant acting on behalf of a company to be incorporated. (the second applicant).

[7] When the Bank failed to receive any firm assurances from the DPP and the Minister with regard to the payment to it of the full proceeds of the sale of the properties, it proceeded to launch the main application in August 2017. It seeks the following relief: (a) a variation of the forfeiture order to make the forfeiture of the properties to the State subject to the rights of the bond holders, and (b) **"That it be declared that the Fifth Respondent is entitled to proceed with the sale of the property described herein before subject to the rights of the bond holders."**

[8] It is only the Minister that is opposing the application and the relief sought. His/her opposition is essentially twofold: That the officials of the DPP and the office of the State Attorney were not authorised to act on behalf of the Department of Rural Development and Land Reform (the Respondent) when they gave undertakings with regard to the rights of the Bank arising from the mortgage bond, and that the proceeds of the sale should be shared by the Bank and the Department who were both

"victims" of the fraud which the forfeiture order was intended to address. Such an order is, it was contended, is consistent with intention of the Act, namely to **"protect the interests of the innocent third parties who have become the victims of a fraudulent activity."**

[9] The application to intervene is framed in terms of Rule 12 of the Court Rules. It provides that **"Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet."**

[10] The provisions of Rule 12 are made applicable to all proceedings by way of application by Court Rule 6(14). The question is whether the applicants are **"entitled"** to intervene as parties in the main application. An applicant for intervention is entitled to intervene in pending legal proceedings if he or she has a direct and substantial interest in the proceedings concerned, has *prima facie* proof of his or her interest, and the application is made seriously, and is not frivolous. (*SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC) at paras [9] to [11]; *Minister of Local Government and Land Tenure v Sizwe Development 1991 (1) SA 677 (Tk) at 678J-679A; Ex Parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd 1993 (2) SA 737 (Nm) at 742A-J; Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004 (2) SA 81 (SE) at 89A-C; National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at para [85]; Investec Bank Ltd v Mutemeri 2010 (1) SA 265 (SCA) at para [38] and*

United Watch & Diamond Co v Disa Hotels 1972 (4) SA (C) at 415 C-H. See also *van Loggerenberg Erasmus Superior Court Practice* 2nd ed at D1-137 to D1-139.*)*

[11] The interest of the applicant for intervention in the proceedings must be a legal interest in the subject matter of that proceedings, which may be prejudicially affected by the Court's judgment. It is a direct and substantial interest **"in the issues involved and the order which the Court might make."** (*United Watch & Diamond Co v Disa Hotels supra* at 415 F. See also *National Director of Public Prosecutions v Zuma supra* at para [85].) In *Gordon v Department of Health, Kwazulu Natal* 2008 (6) SA 522 (SCA) in para [9] the Court lucidly explained it as follows:

> **"The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the *Amalgamated engineering Union* case (*supra)* it was found that: 'the question of joinder should … not depend on the nature of the subject-matter … but … on the manner in which, and the extent to which, the court's order may affect the interests of third parties. The court formulated the approach as, first, to consider whether the third party would have *locus standi* to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be *res judicata* against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made**

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

(Quoted with approved in *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (SCA) at para [38].)

[12] If the applicant in the intervention application has a right that is adversely affected, or likely to be affected by the order sought in the main application, permission to intervene must be granted. **"If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation."** (Jafta J in *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others supra* at paras [9] to [11]. See also *Nelson Mandela Metropolitan Municipality v Greyvenouw supra* at para [9].)

[13] In argument counsel for the applicants submitted, with reliance on the decision of the Supreme Court of Appeal in *Smyth v Investec Bank Ltd* 2018 (1) SA 494 (SCA), that leave to intervene may also be granted on the basis of convenience. In that matter the Court made reference to the fact that the authors of *Herbstein & Van Winsen - The Civil Practice of the High Courts of South Africa* vol 1 5th ed at page 225 to 226 state that joinder is competent either on the basis of convenience, or on the

basis that the party whose joinder is in question has a direct and substantial interest in the subject matter of the action. The Court in Smyth v Investec Bank Ltd *supra* did not comment on the correctness of that statement. Instead it proceeded to determine the issue raised on the basis that the appellants in the matter on the facts lacked a legal interest in the subject matter of the litigation. (at para [55].)

[14] The view point expressed by the learned authors of Herbstein & Van Wisen is not without merit. It gives recognition to the interplay and the close link between joinder of parties. (*United Watch & Diamond Co v Disa Hotels supra* at 415 C). It is also consistent with the notion that in the context of joinder or intervention, the Court Rules have not abolished the common law principles, and that if a matter cannot be resolved by recourse to the rules, resort can be made to the common law. (*Ex Parte Sudurharid (Pty) Ltd:* In re *Namibian Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1993 (2) SA 737 (Nm) at 742 E-F and Rabinowitz and Another NNO v Ned-Equity Insurance Co Ltd 1980 (3) SA 415 (W)). It addresses the anomaly that if the Court has a discretion to grant leave to intervene as some authors contend, that discretion would not exist if the party seeking leave to intervene is required, as in the case of joinder or of right, to show that he has a direct and substantial interest in the subject matter of the case. (See Harms Civil Procedure in the Superior Courts at page B - 112(5) and *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others supra* at [11].) It further gives recognition to the view that a distinction should be made between necessary or obligatory joinder on the one hand, and an entitlement to be joined for other reasons, such as on the grounds of convenience, on the other, and that different considerations or principles find application in each instance. In the former, the question is whether the order of the

Court may affect the interests of third parties, while the latter focuses upon the nature of the subject matter of the dispute.

[15] However, it is the aforementioned distinction that may lend support to the viewpoint that Rule 12 is solely concerned with the intervention of persons whose interests may be prejudicially affected by the order of the Court in existing proceedings, while Rule 10 on the contrary, is concerned with the essential features of the plaintiff's right of action and the similarity of the issues raised therein in the context of avoiding a multiplicity of actions, and where considerations such as convenience or the saving of costs may become relevant. (*Van Loggerenberg op cit* at page D1-139 footnote 5) In terms of Rule 10 any number of persons may join as plaintiffs or defendants in one action, provided that the right to relief of the proposed plaintiffs, or the question arising between the defendants and the plaintiff, depends upon a determination of substantially the same question of law or fact. However, any uncertainty that may have existed, appears to have been cleared up by the decision of the Constitutional Court in *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others supra*, and consequently that the test of a direct and substantial interest in the subject matter of the case, is the only and the decisive criterion. **"It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed."** (para [9].) I do not find it necessary to express any further views on this aspect. The reason is that the present matter can be decided without any reference to considerations of convenience.

[16] Turning then to apply the principles of intervention to the present matter, the aim of the applicants in the intervention application is clearly to protect their interest in the enforcement of their rights arising from the deed of sale. The Bank's interest is

twofold, namely to protect its rights as mortgagee, and to receive payment of the proceeds of the sale of the properties. To achieve this the Bank not only ask that its rights as mortgagee be given recognition in the forfeiture order, but also that the Curator must be declared to be entitled to proceed with the sale of the properties. In his or her answering affidavit the Minister did not pertinently deal with the **"entitlement"** of the Curator to proceed with the sale of the properties, save to state that an objection was raised to the sale, and that during the relevant time period dealt with by the Bank in its papers, the Department had not yet made a decision with regard to its position and its rights in terms of the forfeiture order. However, in the application to intervene, the Minister has now clarified matters, and the issue relating to the authority of the Curator was pertinently raised by the Minister by placing the authority of the Curator to sell and give transfer of the properties in dispute. The contention was that it could only take place with the approval of the Minister, and that the Curator did not receive such approval.

[17] The declaratory order that the Bank seeks in the main application raises the authority of the Curator as an issue. It requires the Court to make a determination with regard to his authority to proceed with the sale of the property. The determination of this issue is likely to effect the rights of the applicants in terms of the deed of sale in the manner as envisaged in *Gordon v Department of Health Kwazulu-Natal supra* at para [9]. In argument it was submitted on behalf of the Minister that the deed of sale has no legal validity, and that the applicants have consequently failed to establish a legal right that will be adversely affected, or is likely to be affected by the order sought. For this submission reliance was placed on the absence in the forfeiture order of such authority, the Curator's confirmation that he had no authority, and that the deed of sale does not comply with section 2(1) of the Alienation of Land Act 68 of 1981. Section

2(1) provides that a **"deed of alienation"** in respect of land must be signed by the parties thereto **"or by their agent acting on their written authority."**

[18] It is not necessary to consider the validity of the deed of sale in these proceedings. The reason is simply that in an intervention application the applicant is required to provide nothing more than *prima facie* proof of his or her interest and the right to intervene, and need not go further to also show a prospect of success, or satisfy the Court that he or she will be successful in the main proceedings (*SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others supra* at para [9].) It is sufficient for an applicant to rely on allegations which, if they can be proved in the main proceedings, would entitle him or her to succeed. In *Nelson Mandela Metropolitan Municipality v Greyvenouw CC supra* at para [8] – [9] the Court stated the position as follows:

> **"[8] In my view, the denial of unlawful conduct on the part of the respondents is no bar to the application to intervene. In much the same way as the issue of standing is a preliminary issue in which the merits are assumed in favour of the applicant, in an application to intervene the question is whether, on the applicant's version, he or she is, in the words of Rule 12, 'entitled to join as a plaintiff".**
>
> **[9] In order to satisfy this requirement, an applicant must furnish *prima facie* proof of his or her interest (and hence his or her right to intervene) but he or she need not go further to satisfy the Court that he or she will succeed in the end of the day…"**

(See also *Ex parte Moosa:* In re *Hassim v Harrop-Allin* 1974 (4) SA 412 (T) at 416F; M*inister of Local Government and Land Tenure v Sizwe Development* 1991 (1) SA 677 (Tk) at 678J-679A; *Ex parte Sudurhavid (Pty) Ltd*: In re *Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd supra* at 742G-H; Harms *op cit* at page B-112(5), and *Van Loggerenberg op cit* at page D1-140).

[19] To conclude, the applicants have a legal interest in the properties. Their interest *prima facie* arises from the deed of sale. The relief claimed by the Bank requires a determination of the authority of the Curator who was the seller of the properties in the deed of sale. A decision with regard to his authority to proceed with the sale, where that authority was placed in issue, is likely to adversely affect the validity of the sale, and consequently the applicants' rights arising therefrom. I am accordingly satisfied that they have a direct and substantial interest in the outcome of the main application, and the order which the Court might make, and that the application for intervention is not frivolous, or not made seriously.

[20] In the circumstances I am of the view that the applicants are entitled to succeed in the application for intervention.

[21] There is one final matter. In addition to seeking leave to intervene in the main application, the applicants asked for an amendment of the relief claimed by the Bank in its notice of motion. The suggested amendment was to the effect that the Curator be declared to be entitled to proceed with the sale, with specific reference to the deed of sale entered into between the applicants and the Curator on 25 May 2015. The

proposed amendment does not in my view advance the matter. Should the court hearing the main application find that the Curator did have authority to deal with the properties at the relevant time, the order in its present form will adequately protect the applicants interests. In the event if a finding that the Curator acted without authority at the time, the suggested amendment will not assist the applicants, and they may have to seek alternative relief in order to give validity to the deed of sale. It is always open to the applicants, if so advised, to in due course seek an appropriate amendment of the notice of motion in the main application in terms of the Court Rules.

[22] For these reasons I accordingly make the following order:

(a) The applicants for intervention are granted leave to intervene as second and third applicants respectively in the main application under case number 2667/2017.

(b) The applicants shall deliver any further affidavit(s) required to stand as their founding affidavit(s) in the main application within fifteen days of the date of this order.

(c) The costs occasioned by the opposition to the application to intervene shall be paid by the fifth respondent (the Minister of Rural Development and Land Reform).

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D VAN ZYL

DEPUTY JUDGE PRESIDENT

Counsel for the Applicants:	Adv R G Buchanan SC
Counsel for the Respondents:	Adv T Zietsman
Date Heard:	30 May 2019
Judgment Delivered:	9 July 2019