REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2013/34683

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

VAN DER LECO CAREY ANNE Intervening Party

In re:

INVESTEC BANK LIMITED Applicant

And

VAN DER LECO KAREL Respondent

JUDGMENT ON LEAVE TO APPEAL

MOSHIDI, J:

INTRODUCTION

[1] This is an application for leave to appeal against my judgment and order in dismissing with costs the applicant's application to intervene on 26 January 2015.

THE GROUNDS OF APPEAL

[2] The grounds of appeal are as set out in the application for leave to appeal dated 24 February 2015. The application for leave to appeal is also accompanied by an application for condonation for the applicant's late filing of the present application. Both applications are opposed.

[3] The reasons for the lateness of the application are contained in paragraphs 4 to 10 of an affidavit deposed to by applicant's attorney of record, Ms C T Canario. In essence, the application for leave to appeal was filed some 7 days out of time. The delay is ascribed to applicant's previous counsel, Vicky Olivier, as well as applicant's current counsel, N Riley. In my

view, the reasons for the delay have been explained satisfactorily. In addition, the application for condonation was launched within a reasonable time. It is trite that the question of condonation is closely linked to that of whether there are reasonable prospects of success on appeal. It is also a matter in the discretion of a court. See, for example, *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A). I have concluded that the condonation sought ought to be granted, which I hereby do.

[4] At the time of the order on 26 January 2015, I rendered a brief *ex tempore* judgment, without sketching the background facts, significantly, the common cause ones. It has now become necessary to do so in this present application, which I do immediately below.

THE MAIN APPLICATION

[5] In the main application, the applicant (Investec Bank) brought foreclosure proceedings against the intervening party's husband, Mr Karel van der Leco ("*the respondent*"). The main application was for default judgment for the amount of some R3 770 842,82 ("*the debt*"), as well as declaring executable the immovable property situated at Erf 1 B T, Registration Division I.R., Province of Gauteng ("*the property*"). There was other ancillary relief.

[6] Investec Bank's cause of action is based on a mortgage bond and loans advanced to the respondent in respect to the property. Significantly, the property is registered in the name of the respondent husband only, and the

intervening party is not involved in the debt or mortgage bond. As at 20 August 2013, Investec Bank alleged and, indeed proved, that the respondent was indebted to it to the extent of the debt. Further, that the respondent was in arrears with his mortgage payments in the sum of R268 311,50, as at the date of the drawing of the main application. The respondent did not oppose the main application.

[7] The following facts, summarised, are equally not in dispute: the intervening party (applicant in the present application) is married to the respondent out of community of property; out of the marriage, two minor children, aged 13 years and 3 years, respectively, at the time of the divorce summons (April 2012), were born. The minor children currently reside with the intervening party at the property; however, the applicant and the respondent are currently engaged in what appears from the papers, as an acrimonious divorce action, with numerous Rule 43 applications and counter-applications, and maintenance proceedings; the divorce action, including the applicant's counterclaim, stand postponed to an indefinite date; the property is registered solely in the name of the respondent, and awaits the outcome of the accrual system at the conclusion of the divorce proceedings; and the applicant, has no obligations to Investec Bank in terms of the mortgage bond repayments.

[8] In the application to intervene, the applicant contended, *inter alia*, that she has a direct and substantial interest in the main application; that she has a *prima facie* case, that will easily be proved in the main application; and that

her application to intervene is a serious one in nature since her right to, and possession of, the property, would be prejudicially affected. Investec Bank opposed the application to intervene, based on several grounds, as mirrored below later in this judgment.

UNIFORM RULE 10 AND SOME APPLICABLE LAW

[9] Uniform Rule 10, makes provision for the joinder of parties and causes of action. Subrule (1) of this rule provides that:

> "*Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiff depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on such action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff falling.*"

See *Haroun v Garlick* [2007] 2 All SA 627 (C).

[10] It has now become settled law that the overriding consideration for joining a party to proceedings is whether such intervening party has a direct and substantial interest in the matter or outcome thereof. Some 81 years ago, in *Morgan and Another v Salisbury Municipality* 1935 (A) 167 at 171, the Court said:

> "*The position may therefore be broadly stated to be that by South African practice the only cases in which a defendant has been allowed to demand a joinder as of right are the cases of joint owners, joint contractors and partners, in all of which cases there exists a joint financial or proprietary interest, but that in other cases a defendant, as a general rule, has not been allowed to demand such joinder.*"

See also *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 168-170. In *Ex Parte Body Corporate of Caroline Court* 2001 (4) SA 1230, in which the applicant issued *ex parte* proceedings for its winding-up, and addressed only to the Registrar of the Court, the Court at 1238 to 1239 of the judgment said:

> "*It is a principle of our law that interested parties should be afforded an opportunity to be heard in matters in which they have a direct and substantial interest.*"

Reference was also made to *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651, and 659-600. In *United Watch and Diamond Co v Disa Hotels* 1972 (4) SA 409 (C) at 416, the Court dealt with the discretion of the court in applications of this nature, and proceeded to state that:

> "*Moreover, when one comes to examine the decisions relating to intervention it would seem that the test of a direct and substantial interest in the subject-matter of the action is again regarded as being the decisive criterion (see in particular Brauer's case, supra, and the authorities therein cited; Ex parte Pearson and Hutton, NNO, supra).*"

APPLYING LEGAL PRINCIPLES TO THE FACTS OF THIS MATTER

[11] In applying the above principles to the facts of the present matter, in particular the common cause facts, it is plain that the applicant for intervention has not made out a case whatsoever for her to be joined in the main application. She is not a party to the main application, nor has she signed any surety for the due fulfilment of her estranged husband's obligations to Investec Bank Ltd. The latter, as applicant in the main application, has no interest at all in the outcome of the acrimonious and apparently protracted divorce between the intervening party and her husband, but at this stage, simply seeks to protect its own interests. (*Cf* in regard to the above, *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA), where the appellant, who was married in community of property, and had signed a suretyship in favour of the respondent, and without the requisite consent of his wife.)

[12] The respondent in the main application ended in not opposing same, for obvious reasons. Significantly, the applicant for intervention, equally has not advanced any reasonable and noteworthy defence to Investec Bank's application, save for the bald contention that her substantial interest in the main application lie in the fact that, she presently resides in the property with her two minor children, and that the property would form the substantial amount of the accrual calculation in terms of the pending divorce action. She is, as stated above, married to the respondent out of community of property. The short answer to these contentions is this: the applicant is tritely and

generally, not liable for the respondent's debts save for certain exceptions, not relevant here. Furthermore, the operation of the accrual system only becomes effective on the dissolution of the marriage. This eventuality is currently indeterminable. In all probability, should the main action succeed against the respondent, the property will be sold on auction. After Investec Bank is paid the amount owing by the respondent, and if there is any residue, such will accrue to the estate of the respondent, and to which the present applicant may lay claim in terms of the accrual system. Additionally, the main application is clearly not for the eviction of the applicant from the property, but for payment of the debt, and for an order declaring the property especially executable. Investec Bank will suffer prejudice should this be delayed further especially where there is no defence at all to its claim.

[13] It was therefore, for all the above reasons that I granted the order, which I did on 26 January 2015, in dismissing the application to intervene with costs.

THE RULING ON THE APPLICATION FOR LEAVE TO APPEAL

[14] I revert to the instant application for leave to appeal the above order. I have considered carefully the various grounds of appeal, as well as the argument advanced in support thereof. There are plainly no reasonable prospects of success on appeal. In addition, it is clear that the threshold to grant leave to appeal in matters of this nature has been raised by the provisions of Section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013.

The applicant must show that there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under discussion. This, the applicant has failed to demonstrate. For these reasons, the application must be refused.

ORDER

[15] In the result I make the following order:

15.1 The application for leave to appeal is dismissed with costs.

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D S S MOSHIDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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INSTRUCTED BY	RAMSAY WEBBER ATTORNEYS
DATE OF HEARING	8 AND 14 JUNE 2016
DATE OF JUDGMENT	15 JUNE 2016