



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/ NO
Circulate to Magistrates:	YES/NO

Case No.:6302/2018

In the application of:

JOHN DOUGLAS JANSEN KNIPE
ANDRE BAZZETT JANSEN KNIPE
JACKIE VIGNE
ROBERT PETER JANSEN KNIPE

1ST INTERVENING PARTY
2ND INTERVENING PARTY
3RD INTERVENING PARTY
4TH INTERVENING PARTY

In the matter between:

CHAVONNES BADENHORST St CLAIR COOPER N.O. **1ST APPLICANT**
SIMON MALEBO RAMPOPORO N.O. **2ND APPLICANT**

and

THE MASTER OF THE HIGH COURT **1ST RESPONDENT**
BLOEMFONTEIN
JACOBUS STRAUSS N.O. **2ND RESPONDENT**

CORAM: I VAN RHYN, AJ

JUDGMENT BY: I VAN RHYN, AJ

HEARD ON: 2 MAY 2019

DELIVERED ON: RULING DELIVERED ON 2 MAY 2019

INTRODUCTION.

- [1] Several applications and counter applications issued under case numbers 5889/2017, 3864/2018 and 6302/2018 were enrolled for hearing on 2 May 2019 and 3 May 2019. The applications and counter applications concern the liquidation process of the estates of Kameelhoek (Pty) Ltd (in liquidation) and Schaapplaats (Pty) Ltd (in liquidation), (the “Companies”).
- [2] The applicants, the liquidators of the Companies, launched an urgent application for an interim order, pending the return day of the *rule nisi* and adjudication of a review application (the main application), suspending a decision of the second respondent (the “Assistant Master”) to remove the applicants as liquidators in the estates of the Companies. By agreement between the applicants and the first respondent (the “Master”), the applicants obtained an interim order on 19 December 2018. The intervening parties brought this application to intervene in the main application. The application to intervene is opposed by the applicants.
- [3] On 2 May 2019, at the conclusion of arguments and for pragmatic reasons, I granted leave to the first, second, third and fourth intervening parties to intervene in the main application. I reserved my reasons for the ruling. This is my reasons for the ruling and the judgment regarding the costs of the application to intervene.

BACKGROUND.

- [4] Provisional liquidation orders in respect of the Companies were granted on 30 August 2012. The intervening parties, (three brothers and a sister, referred to by the applicants as “the siblings”) as well as another sister, me Carol Lotz (who is not a party to this application) are the shareholders and directors in both solvent Companies currently in liquidation. On 6 September 2012 the first

and second applicants were duly appointed as the provisional liquidators (with Mr Noordman) in the estates of the Companies.

- [5] The applicants' final appointment as liquidators followed on 28 Augustus 2017. The Companies were under winding up orders due to the continuous acrimony between the shareholders of two Companies. The intervening parties contend that the applicants have delayed finalizing the winding up of the estates and thus have failed to pay out the free residue due to the shareholders of the Companies. On the other hand, the applicants argue that, although the administration of the estates of the Companies proved to be not as uncomplicated as initially anticipated, the delay in filing the final liquidation and distribution account and finalizing the winding up process are due to the animosity and numerous legal battles caused by the intervening parties.
- [6] Since their appointment as liquidators, the first and second applicants, apart from their continuing administration of the estates had to deal with incessant litigation that span a period of seven years since 2012. According to the calculations done by the applicants, no less than 22 applications which include appeals, were opposed and some launched by the applicants. A considerable number of these matters were heard by this court and also by the Northern Cape High Court in Kimberley.

APPLICATION FOR CONDONATION.

- [7] On 11 December 2018 the Assistant Master notified the applicants that they are removed as liquidators in both estates with immediate effect. The Applicants brought an urgent application for interim relief pending a review of the Assistant Master's decision. The intervening parties were notified by the Registrar of the High Court on 18 December 2018 that the urgent application will be heard on 19 December 2018 where after the intervening parties instructed their legal representatives to appear on their behalf. The intervening parties objected to the matter being heard but did not apply for intervention in the application at that stage of the proceedings.
- [8] At the hearing of the urgent application on 19 August 2018, the parties were informed by the Honourable Musi JP, being the judge on recess duty at the

time, that he declines from hearing the application on the merits due to previous interactions with the intervening parties. By agreement the applicants and the Master obtained an interim order with the effect that the applicants will remain as the liquidators in the estates pending the adjudication of the *rule nisi* on 31 January 2019. On 31 January 2019 the *rule nisi* was extended to 14th March 2019. By agreement between the intervening parties and the applicants, and in respect of the application to intervene, the application was postponed to 14th March 2019, the applicants to file their answering affidavit on 19 February 2019 and the intervening parties were granted leave to file a replying affidavit by no later than 1st March 2019.

- [9] The intervening parties failed to file their replying affidavit by 1 March 2019. The replying affidavit was filed on 7 March 2019, four court days late. By demand of the applicants the intervening parties filed a substantive application for condonation on 8 March 2019, repeating what they determine as a ‘thorough explanation’ and contained in their replying affidavit for their default. The explanation for the delay provided by the intervening parties was that communication between themselves and their legal team was hampered due to the fact that the third intervening party resides in Kimberley, the fourth intervening party on a farm in the Molopo district and the other two intervening parties in Bloemfontein. These obstacles caused logistical problems to file the replying affidavit within the time ordered by the court. The first intervening party attended his son’s graduation ceremony in Potchefstroom from 4 March 2019 to 5 March 2019 and as a result the replying affidavit could only be finalized on 6 March 2019 and filed the following day.
- [10] The applicants contend that the intervening parties deal with their late filing of the replying affidavit in a manner devoid of detail or apology and have therefore not complied with the requirements for condonation. The application for condonation is furthermore opposed on the basis that the intervening parties have a total disregard for the rules, procedures and orders of the court as well as agreements concluded between the parties. The answering affidavit was delivered to the intervening parties on 19 February 2019 in accordance with the court order issued on 31 January 2019. On behalf of the applicants it was argued that the intervening parties failed to give an

explanation for the delay covering the whole period of delay¹ and merely referred to the period subsequent to the 1st March 2019.

- [11] A court may on good cause shown, condone any non-compliance with the time periods prescribed by the Rules or by an order of court.² In **Uitenhage Transitional Local Council v South African Revenue Service**³ Heher JA held that: *“Condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and to assess the responsibility. It must be obvious that if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”*⁴ The circumstances or reasons that caused the intervening parties to run out of time for filing their replying affidavit by 1 March 2019 were not tendered apart from the statement that the intervening parties and their legal representatives do not all reside in Bloemfontein with the consequential logistical problems. No particularity of the logistical problems nor any valid or justifiable reasons were proffered why the intervening parties were unable to provide instructions to and/or consult with their legal representatives since 19 February 2019 in order for them to file their replying affidavit in accordance with the court order.
- [12] The affidavit in support of the application for condonation is seriously inadequate. The intervening parties contend that the applicants would suffer no prejudice by the late filing of the replying affidavit. The applicants’ heads of argument in the matter had to be filed by 6 March 2019 in accordance with the practice directives of this court. The applicants assumed that the intervening parties, due to their failure to file heads of argument in this application on 24 April 2019 by 12h00, decided not to proceed with their condonation application. Under the prevailing circumstances, this is of course a logical and normal inference by an opposing party. A third requirement⁵ namely that the

¹ Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353 A

² Rule 27(1), Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O).

³ [2003] 4 ALL SA 37 (SCA).

⁴ [2003] 4 ALL SA 37 at [6].

⁵ Erasmus superior Court Practice, Volume 2, page D1-324.

grant of the indulgence sought must not prejudice the other party in any way that cannot be compensated by a suitable order as to postponement and costs, is likewise relied on by the applicants.

- [13] At the hearing of the application for condonation and subsequent to considering the arguments on behalf of the applicants, condonation was granted and Mr Van Rensburg, who appeared on behalf of the intervening parties, was directed to argue the merits of the application to intervene.

APPLICATION TO INTERVENE.

- [14] The intervening parties are 20% shareholders each in the Companies in liquidation. Together with their sister who is not a party to this application, Carol Lotz, who also holds 20% shares in both Companies they are the only directors and shareholders. The intervening parties and more particularly the first, second and third intervening parties, contend that they have the necessary *locus standi* to bring this application for intervention on the basis that they, notwithstanding their previous averments under oath that their shares in the estates were sold, did in fact not sell their shares and merely ceded same *in securitatem debiti*.
- [15] On behalf of the intervening parties it was contended that one of their concerns is the fact that an amount of at least R40 million was realized from the sale of the properties of the Companies during November 2017 but they have since learned that an amount of approximately R25 million is available in the estates' bank accounts. The intervening parties furthermore contend that the applicants' former attorney, Mr Senekal is colluding with the applicants to prevent the intervening parties from receiving their share of the free residue from the estates of the Companies. It is alleged that Mr Senekal, who never had a mandate to act on behalf of the applicants, was paid an amount of R2 million by the applicants from the estates' funds. The Assistant Master, who was in control of both files of the Companies in liquidation at the Masters Office, instructed the applicants to obtain reimbursement of the amount of R2 million from Mr Senekal.

- [16] An application under case number 4606/2016 in terms of the provisions of section 386(3) of the Companies Act NO 61 of 1973 (the “Companies Act”) by the applicants, authorizing them to appoint Mr Senekal as their legal representative was dismissed on 22 June 2017 and the costs to be paid by the applicants *de bonis propriis*. It is contended by the intervening parties that Mr Senekal seemingly claims that an amount of R23 million is owing to him for legal costs by the applicants and that Mr Senekal is holding the applicants ransom for payment of at least R9 million from the estates’ funds. The applicants contend that, due to the intervening parties incessant legal battles and failure to settle taxed cost orders, they owe the applicants in respect of taxed costs an amount in excess of R2 million.
- [17] In a letter (appended to the application and dated 7 November 2018) from Zietsman – Horn Attorneys in Bloemfontein, who acted on behalf of the intervening parties at that stage, addressed to the Assistant Master the removal of the applicants as liquidators in terms of the provisions of section 379(1)(d) and (e) of the Companies Act was requested. It is stated in this letter that the intervening parties have on numerous occasions, at least since 2013, complained about the conduct of Mr Senekal and the applicants. Reference was made to Rampai J’s finding (Case No956/2014 and 957/2014) that the Master and the liquidators had “... *administrated the estate in a disturbingly irregular fashion or at least made incompetent decisions.*”
- [18] In the letter the Assistant Master is furthermore referred to Mr M Modibela’s (the Deputy Master) demand on 5th June 2017 to the applicants to furnish him with reasons why they should not be removed as liquidators and also be suspended from the National Panel of Liquidators. Several incidents and complaints are listed in this letter, comprising nine pages. It is not necessary to refer to all these specific issues in detail and I merely refer to these complaints to illustrate that the intervening parties have raised concerns and complaints about the conduct and suitability of the applicants holding office as liquidators and their relationship with Mr Senekal over a period of approximately six years since 2013.

STATUS OF THE SHAREHOLDING OF THE INTERVENING PARTIES.

- [19] The first point *in limine* raised by the applicants, is the intervening parties' lack of *locus standi* on the basis that, the first three intervening parties previously stated that they have sold their shares in the Companies in liquidation, and now contend that their shares were ceded *in securitatem debiti*. The applicants refer to all four the intervening parties and fail to distinguish between the first to third intervening parties, who now claim to have not sold their shares, but ceded same, and the fourth intervening party, Peter Knipe, who has not indicated that his shares in the companies in liquidation were sold or ceded at any stage.
- [20] The status of the shareholding of the first and second intervening parties form the crux of the dispute under Case No 3864/2018. Case No 3864/2018 was also enrolled to be argued on 2 and 3 May 2019 by the same presiding judge as the current application and therefore I also heard arguments in that application. Carol Lotz launched an application under Case No 3864/2018 for a declaratory and interdictory relief in respect of the sale of the shares in the two companies in liquidation and an order whereby the Sheriff is authorised and instructed to proceed with the sale in execution. Central to the relief sought in Case No 3864/2018 is the question whether there had been a sale or cession of the shares in the Companies in liquidation and what the legal consequences of, more particularly the alleged cession are.
- [21] Carol Lotz, the applicant in Case No 3864/2018 obtained costs orders against the first three intervening parties under Case No 5081/2014 and Case No 4817/2014 and the bills of costs were taxed. The first three intervening parties' shares were attached during January 2018 and the Sheriff was instructed to proceed to auction the shares so attached on 11 April 2018. The auction was re-scheduled for 18 July 2018. During the afternoon of 17 July 2018 the Sheriff received two letters informing him that the first two intervening parties had sold all their shares in the companies in liquidation to third parties, cited as 4th and 5th respondents in Case No 3864/2018.
- [22] The third intervening party indicated that she had, long ago, without providing any details, sold her shares to her husband. The sale in execution was forthwith cancelled by the Sheriff. Since then the first three intervening parties

have adopted an alternative approach and now contend that their shares in the Companies were in fact ceded *in securitatem debiti*.

- [23] On behalf of the applicants it is argued that the first three intervening parties fail to set out the terms of the cession *in securitatem debiti*, when such cessions allegedly transpired and whether such cessions were orally or in writing. In fact, apart from the bald statement that the first, second and third intervening parties' shares were in fact not sold but ceded *in securitatem debiti*, no further facts regarding the alleged cessions of their shares were divulged. Mr Leathern, who appeared on behalf of the applicants contends that the argument by the first three intervening parties that the provisions of section 341 of the Companies Act, which prohibits the disposition and share transfers after winding-up and thus supports the intervening parties' argument that they do have the necessary *locus standi*, cannot be accepted.
- [24] Section 341 of the Companies Act reads as follows: “ ***Disposition and share transfers after winding-up void.-*** (1) *Every transfer of shares of a company being wound up or alteration in the status of its members effected after the commencement of the winding-up without the sanction of the liquidator, shall be void*”. On behalf of the applicants it was contended that section 341 of the Companies Act must be interpreted restrictively and the three intervening parties' failure to provide information and/or the relevant facts to support their allegation regarding the cession of their shares leads to the assumption that it must be accepted for purposes hereof that the intervening parties have ceded all their personal rights and therefore have no *locus standi*. This argument is highly speculative taking into consideration the paucity of information pertaining to the intervening parties' apocryphal version of the sale and subsequent version regarding the cession of their shares.
- [25] In the event of an outright cession, the first three intervening parties would have lost all their personal rights embodied in the shares by transferring those rights to third parties. Nothing would remain vested in them. The only way in which they could again acquire those rights would be by way of re-cession of the bundle of personal rights against the Companies in liquidation. The case argued on behalf of the first three intervening parties is that the cession of

their shares were not an out-and-out cession, but a cession *in securitatem debiti*. In accordance with this construction, the shares were ceded to the third parties as security for future payment of their debts. The intervening parties did not provide copies of the cession documents to support their allegations nor did they append letters or confirmatory affidavits in support of their contentions.

[26] In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the applicant's case should appear clearly from his/her founding affidavit⁶. The founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour and the applicant must stand or fall by his/her founding affidavit.⁷ It is trite that the applicant in motion proceedings must make out his/her case in the founding affidavit. The first three intervening parties did not elaborate on their allegations that their shares were ceded *in securitatem debiti* in their replying affidavit. The intervening parties contend that the cessions of their shares do not deprive them of *locus standi* in this application.

[27] The initial allegation that the first three intervening parties have sold their shares is a fabrication. The letters presented to the Sheriff caused the stay of the execution sale of their shares. Taking cognisance of the long history of litigation and the acrimonious relationship between the intervening parties and Mr Senekal, it is evident that a desperate last minute strategy was devised to avoid the sale of their shares per execution. The scheme did not last long due to the provisions of section 341 of the Companies Act. Therefore an amended version of their plan was contrived whereby the shares in the Company were ceded *in securitatem debiti*. An applicant must raise the issues upon which he/she would seek to rely in the founding affidavit by defining the relevant issues and by setting out the evidence upon which he/she relies to discharge the onus of proof resting on the applicant in respect thereof.

[28] In considering whether the contention regarding the cession of their shares is reliable, the quality of the evidence must of necessity be evaluated. A

⁶ Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D.

⁷ Director of Hospital Services v Mistry 1979 (1) SA 626 (AD) at 635H – 636D.

conspectus of all the facts and evidence presented in respect of the application in its entirety is required. Evidence that is false, on the intervening parties' own admission must be weighed alongside the later version of the purported true facts alluded by the intervening parties. The intervening parties failed to provide such evidence or facts. Surely the intervening parties would have been able to provide this court with the cession documents or confirmatory affidavits from the respective cessionaries. On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of the contention that the shares were in fact not sold, but ceded *in securitatem debiti* or out and out or at all. In the final analysis and in assessing the weight of the probative material, motive is one aspect of probability. Failure to corroborate the alleged facts, the reliability of the contentions as well as the independence of the intervening parties' version of the facts are further aspect to consider. I am not convinced that cession of the intervening parties' shares took place.

- [29] Neither Mr Leathern's argument, that the cession must have been an out and out cession, which leaves the intervening parties without *locus standi* nor the bald statement by the intervening parties that a cession of their shares *in securitatem debiti* occurred at some or other stage can be accepted. In fact due to the paucity of facts and evidence it cannot be found that a cession of shares by any of the intervening parties occurred. I find it unnecessary to decide this debate one way or the other. Suffice it to say, in my view, this settles the point *in limine* regarding the locus standi of the first three intervening parties.

THE APPLICABLE LEGAL PRINCIPLES REGARDING INTERVENTION.

- [30] It was held in terms of the common law that a party applying for leave to intervene had to establish: (a) special concern in the issue; (b) that the matter is of common interest to himself/herself and the party he/she desires to join; and (c) that the issues are the same.⁸ The procedure to follow in this regard is set out in Rule 12 of the Uniform Rules of the High Court (the Rules), which provides as follows: "*Any person entitled to join as a plaintiff or liable to be*

⁸ Bitcon v City Council of Johannesburg and Arenow Berhman & Co. 1931 WLD 273 at 293 -294.

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 the further procedure in the action as to it may seem meet.”

- [31] Rule 12 provides the court with a wide discretion to grant leave to intervene.⁹ An applicant for leave to intervene must be a person ‘entitled to join as a plaintiff or liable to be joined as a defendant’. The question remains whether the relief claimed by the applicants is dependent upon the determination of substantially the same question of law or fact as the right to relief claimed by the proposed intervening party.¹⁰ A direct and substantial interest in the proceedings is a ground for intervention.¹¹ It is often regarded as decisive. In **Amalgamated Engineering Union v Minister of Labour**¹² Fagan JA, held that the court would not determine issues in which a third party may have a direct and substantial interest without being satisfied that the rights of such third party would not be prejudicially affected by its judgment.¹³
- [32] In **Henri Viljoen (Pty) Ltd v Awerbuch Brothers**¹⁴ Horwitz AJP interpreted “the direct interest” referred to as: “...an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation”. 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 is entitled to intervene in the following three sets of circumstances:
- (a) Where the requirement of Uniform Rules 10(1) and 10 (3) are satisfied, in that the determination of the intervening party’s matter or dispute depends upon substantially the same question of law or fact as arises in the proceedings in which leave is sought to intervene.¹⁵

⁹ See *Hertz v Empire Auctioneers & Estate Agents* 1962 (1) SA 558 (T) at 559 C-D.

¹⁰ *Vitorakis v Wolf* 1973 (3) SA 928 (WLD) at 930 C – 931 E.

¹¹ *Vawda v Vawda* 1980 (2) SA 341 (T) at 348 B.

¹² 1949 (3) SA 637 (AD).

¹³ 1949 (3) SA 637 (AD) at 659.

¹⁴ 1953 (2) SA 151 (O).

¹⁵ *Ex parte Sudurhavid (Pty) Ltd: In re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1993 (2) SA 737 (Nm) at 741 A-F.

- (b) Where wider considerations of convenience favour intervention.¹⁶
- (c) Where the intervening party has a direct and substantial interest (legal interest)¹⁷ in the proceedings.

[33] The applicants opposes the application for intervention and contends that the intervening parties barely have a financial interest in the matter as they themselves are the cause of so much financial deterioration in the estates. If they do have a financial interest in the Companies, it is still not a direct and substantial interest in the subject matter of the main application for review of the Master's decision to remove the applicants as liquidators from the estates of the Companies in liquidation. The further argument by the applicants is that the subject matter of the application is a decision by the Assistant Master affecting the rights of the applicants and being an issue between the Master and the liquidators only, no rights of the intervening parties are affected. The intervening parties thus have no legal interest in that decision.

[34] Mr Van Rensburg argued that the intervening parties have a material and substantial interest in the matter insofar as they collectively hold 80% shares in the Companies in liquidation. It therefore follows that the intervening parties should have been joined and the applicants' failure to join them in the urgent application and the review constitutes a material non-joinder. The first to third intervening parties argues that the thrust of the applicants' application for the interim interdict as well as the review application is based on the allegation that the first to third intervening parties colluded with the Assistant Master, alternatively coerced him and/or intimidated him into making the decision to remove the applicants as liquidators. They seek the decision to be reviewed and set aside. Furthermore the applicants went to great length to set the stage why the intervening parties' alleged conduct and influence resulted in the Assistant Master's decision to ultimately remove them as liquidators of the Companies. In the light of these allegations and due to the interest and concern of the intervening parties in the outcome of the proceedings, they apply for intervention.

¹⁶ Rabinowitz NNO v Ned-Equity Insurance Co Ltd and Another 1980 (3) SA 415 (W).

¹⁷ Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) para 21.

PURPOSE AND SCOPE OF INTERVENTION.

- [35] It is trite that in an application to intervene the question is whether, on the applicant's version, he or she is entitled to join in the proceedings as intended in Rule 12 of the Uniform Rules of Court. To satisfy this requirement, the 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 at the end of the day. It is sufficient for the party seeking intervention to rely on allegations which, if proved in the main action, would entitle him or her to succeed. An applicant must satisfy the court that his or her application is made seriously and is not frivolous.¹⁸
- [36] The intervening parties contend that they have a real direct and substantial interest in the removal of the applicants as liquidators and in fact requested the Master to remove the liquidators. They argue that the amount of approximately R40 million in the estates' bank accounts has diminished substantially due to the administration of the estates and they fear for further losses apparently due to the worsening relationship with Mr Senekal. Due to their disputed financial interest in the liquidation process, they seem to be banned from putting their objections and evidence relating to the relationship between themselves, the applicants and Mr Senekal before the court. Surely they do have a financial interest in the outcome of the legal battle as they are the shareholders in the (solvent) Companies currently in liquidation.
- [37] At the hearing of this application to intervene Mr Van Rensburg, with reference to the Companies' estates bank statements and with serious opposition and objection by the applicants, endeavoured to indicate that further payments were in fact made to Mr Senekal since the previous court appearance on 14 March 2019. The question arises whether shareholders, collectively holding 80% of the shares in the solvent Companies has *locus standi* to intervene in the application to review the Master's decision, when in fact the majority shareholders requested such decision to be made by the

¹⁸ 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 678 I-679 B.

Assistant Master.

- [38] Can it be said that the intervening parties are not “directly and substantially” interested in the removal of the appointed liquidators in the estates of the Companies? If the intervening parties consider that their interests in the Companies will be affected by litigation, which is pending between the Master and the liquidators appointed in the estates of the Companies, they cannot be criticized for not leaving the care of their interests to either the Master or the applicants, but has the right to intervene and to be made parties to the review application. 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 canvassed in the main proceedings.¹⁹ It is therefore not necessary to satisfy the court of success in the review application in which leave is sought to intervene. The allegations by the intervening parties regarding the unauthorised payments made by the applicants to Mr Senekal and the Assistant Master’s instructions that such payments must be repaid by the applicants, in my judgment clearly establishes a legal interest in the subject matter of the review which could be prejudicially affected by the judgment of the court.
- [39] Prior to the Assistant Master’s decision to remove the applicants as liquidators and in all the disputes preceding the Assistant Master’s decision to remove the applicants from office, the intervening parties had a direct, principal and legal interest and were parties to the numerous disputes. Mr Leathern, during argument and in contesting the intervening parties’ reference to the bank statements and the payment of approximately R4 million out of the estates account since March 2019, stated that the arguments raised by the intervening parties in this regard is a clear example of their “obstructiveness and nit-picking”. The evidence or input by the intervening parties may in my view affect the outcome of the review proceedings and therefore the impact that the intervening parties may have on the crucial decision to remove the liquidators or not, will constitute a legal interest. It was held in the **Henri**

¹⁹ *Sizwe* at 678 J-679 A.

Viljoen (Pty) Ltd v Awerbuch Brothers²⁰ case with reference to the following dictum in the **Amalgamated Engineering Union v Minister of Labour**²¹ matter that: “...cannot relieve the Court from inquiring into the question whether the order it is asked to make may affect a third party not before the Court, and, if so, whether the Court should make the order without having that third party before it”, the question is wide enough to embrace both non-joinder and intervention.

- [40] Horwitz AJP in the **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** case, with reference to and in a searching inquiry into the practice in the English Courts and the Roman – Dutch Law, pertaining to “voegen” and “*interventie*” found that: “...the fact, however, that, when there are two parties before the Court, both of them desire it to deal with an application asking it to make a certain order, cannot relieve the court from inquiring into the question whether the order it is asked to make may affect a third party not before the Court, and, if so, whether the court should make the order without having that third party before it... The third party’s position cannot be prejudiced by the consensus of the two litigants that they do not wish that party to be joined.”²²
- [41] The intervening parties may therefore be able to show in the main application that the removal of the liquidators was founded on *bona fide* and reasonable grounds placed before the Assistant Master and that their allegations regarding the conduct of the liquidators, if they can be proved in the main application, would entitle the intervening parties to succeed.²³ The question of law and fact in the main or principal application are essentially the same²⁴ and in my view the intervening parties should have been cited as parties by the applicants. The intervening parties’ application for condonation is saved by the merits of their application to intervene.

²⁰ 1953 (2) SA 151 (OPD) at 166 B – G.

²¹ 1949 (3) SA 637 (AD) at 649.

²² 1953 (2) SA 151 (OPD).

²³ Ex Parte Moosa: In re Hassim v Harrop-Allin 1974 (4) SA 412 (T) at 416F-G.

²⁴ Dreyer and Others v Tuckers Land and Development Corporation (Pty) Ltd 1981 (1) SA 1219 (T) at page 1224F-1225B.

[42] During arguments an agreement was reached between the applicants and the respondents regarding the *rule nisi* and a draft order, save for a few paragraphs were made an order of court. By agreement between the parties the review application were postponed to be heard on 19 August 2019 and 20 August 2019.

COSTS.

[43] The intervening parties have succeeded to prove that they are entitled to intervene in the main application. Their application to intervene was opposed by the applicants. In the Notice of Motion no specific costs orders against the Applicants were prayed for pertaining to the application to intervene. The costs orders in prayer 3 refer to the relief claimed under Part A of the main application. During argument and in the Respondents heads of Argument, Mr Van Rensburg did not address the aspect of costs with regard to the application to intervene.

[44] The intervening parties failed to file their replying affidavit in accordance with the court order and applied for condonation. Their application for condonation was wholly inadequate and the applicants were entitled to oppose the application for condonation. The intervening parties should therefore pay the costs of the application for condonation.

[45] I accordingly make the following order:

1. The first, second, third and fourth intervening parties are granted leave to intervene as respondents in the main application.
2. The intervening parties' application for condonation of their failure to file the replying affidavit in the application to intervene is granted.
3. The costs of the application for condonation are to be paid by the intervening parties, jointly and severally, payment by the one, the others to be absolved. Such costs to include costs for the employment of two counsel where one is a senior counsel.

I VAN RHYN AJ

On behalf of the Intervening parties:
Instructed by:

ADV. F. J. VAN RENSBURG
WILLERS ATTORNEYS

On behalf of the First and Second Applicants:
Instructed by:

ADV. M LEATHERN SC
and ADV. K VAN ZYL
HONEY ATTORNEYS

On behalf of the First Respondent:
Instructed by:

ADV. B S MENE
THE STATE ATTORNEY BLOEMFONTEIN

On behalf of the Second Respondent:
Instructed by:

ADV. D GREWAR
ADRIE HECHTER ATTORNEYS

