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 971/2016

In the matter between:

INDUSTRIAL DEVELOPMENT CORPORATION

and

IZAK DIDERICK JOHANNES BELL AND 7 OTHERS

Heard: 21 April 2016

Delivered: 12 May 2016

MOCUMIE, J

[1] On 21 April 2016 I reserved judgment but due to the urgency of the matter, I granted the following order:

'1. The provisional sequestration order granted on 14 April 2016 is extended to 12 May 2016.

2. Costs to be costs in the cause.'

[2] This an urgent application for leave by the applicant/ intervening party, the Industrial Development Corporation, (IDC), to

(a) intervene as the fourth respondent in the main application, the sequestration, of Bethlehem Framers Trust (BFT) launched by the first respondent Mr I D J Bell (the first respondent) and applicant in the main application and in order to oppose the first respondent's application for the sequestration of BFT.

(b) Leave to file supplementary affidavit as answering affidavit in the main application within fifteen days from the date of this order;

(c) An order that the provisional sequestration order granted on 3 March 2016 and further extended on 31 March 2016 be further extended to 9 June 2016;

(c) Costs of the application.

[3] No relief is sought in this application against any of the respondents other than leave to intervene in the main application as a respondent in order to oppose same, save in the event of opposition to the intervention application, in which event costs will be sought against any party which opposes the relief sought. This application is nonetheless opposed by the first respondent and eight respondents, Afgri Operations (Ltd) (Afgri). I will refer to both respondents as such whenever necessary.

[4] The IDC is a corporation established in terms of s2 of the Industrial Development Corporation Act, 22, 1940, with its principal place of business in Sandown, Sandton, Gauteng. The first respondent is an adult male residing in Bethlehem and the applicant in the sequestration application pending in this court under case no 971/2016 (the main application).The Afgri Operations (Ltd) (Afgri) is a public company duly registered and incorporated in accordance with the company laws of the Republic South Africa, with its registered address alternatively its principal place of business in Centurion, Gauteng.

[5] On 3 March 2016 this court granted a provisional sequestration order. On 31 March, the return date was extended by agreement between the parties to 14 April 2016. On 14 April it was further extended to 21 April.

[6] Ms Dippenaar appeared on behalf of the IDC, Mr Tsangirakis on behalf of the first respondent and Mr Grobler on behalf of Afgri. The parties agreed that the issue of urgency be addressed first followed by the rest of the grounds relied upon by the IDC as set out in the Notice of Intervention. Although we dealt with the issues as indicated, however for purposes of this judgment I will start with the issue of *locus standi,* as it was, correctly so, abandoned by both respondents. Followed by the application to strike out the replying affidavit filed by Afgri. The rest will flow from there.

Locus Standi of IDC

[7] Initially and in the heads of argument the first respondent strenuously argued that the IDC had no *locus standi* in the sequestration proceedings and thus these proceedings. Although this issue was addressed much later during the deliberations, I deem it appropriate to dispose of it at this stage. Both Messers Tsangirakis for the first respondent and Grobler for the eight respondent abandoned this ground of opposition on the basis of the long standing legal principles in this regard as well as the provisions of Rule 12; which is in line with what the IDC set out extensively in its application which need no repeat for the sake of brevity of this judgment. Suffice to state that the IDC indeed has *locus standi* in these proceedings; in particular the IDC has shown unequivocally that it has direct and substantial interest in the subject matter; as correctly conceded by the respondents on the basis of well-established legal principles governing proceedings of this nature.

The replying affidavit filed by Afgri on 14 April

[8] In any application any party is entitled to request the court to strike certain portions of an affidavit or as in this instance the whole replying affidavit filed by another. Rule 6(15) governs such an application. The Rule provides that a court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs including costs as between attorney and client. The court shall not grant the

application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.

[9] Ms Dippenaar submitted that on 14 April Afgri cited in the intervention application as an interested party and creditor of BFT, filed a replying affidavit, Apart from explaining that Afgri was formerly known as SOC[1], which the IDC accepted may be correct, and other allegations in respect of the two companies, no relevance of such information is set out in the replying affidavit. Moreover, there are no allegations set out that Afgri is indeed the correct party before this court or that Afgri has the necessary *locus standi* for purposes of this application to express any views on the matter. Afgri is not even a party to the main sequestration proceedings and has elected also elected not to formally oppose the IDC's intervention application.

[10] Ms Dippenaar contended that the first respondent could hardly rely on what is contained in Afgri's replying affidavit when the deponent had no personal knowledge of the correctness of the content of such affidavit. To that extent, the first respondent's evidence amounted to hearsay evidence which, in terms of the Civil Proceedings Evidence Act[2], is not relevant or permissible to be admitted at this stage and in this manner. She contended further that in the same vein, UFS which now contended that it is a major creditor of BFT is not a party either in the present intervention application or the main sequestration application. UFS can only form part of the main sequestration application by formally joining in those proceedings. Likewise, it must do the same if it wants to oppose the IDC's intervention application.

[11] Mr Grobler, in reply, submitted that the IDC cited Afgri as an interested party in the sequestration and even in the intervention application. The postponement on 30 March was granted to afford the IDC time to settle outstanding creditors of

[1] Registration number 1995/009996/08.
[2] Civil Proceedings Evidence Act 25 of 1965.

BTF including Afgri. He argued that the IDC itself referred to and cited Afgri as an interested party. It can therefore not be allowed to blow hot and cold when the circumstances permitted. Afgri was entitled to respond as a creditor of BFT and as admitted by the IDC, an interested party in the subject matter. Mr Tsangirakis supported Mr Grobler's contention that on that basis the first respondent was justified to rely on Afgri's replying affidavit and its content, when it confirms that BFT owes it a substantial amount of money and was insolvent no matter how much the IDC was prepared to pay off BFT's creditors. Once the creditors have been paid off, other debts would continue to build up. Such debts included salaries of BFT's employees. He submitted that, once the court accepted that Afgri was a creditor and an interested party, there was no reason why the affidavit should not be allowed. The application not to admit the replying affidavit was the IDC's attempt to conceal information contained in the replying affidavit from the court, including the resolution to approach the court on an urgent for a sequestration of BFT.

[12] In essence, both counsel for the respondents, particularly Mr Grobler for Afgri, maintained that the IDC dragged Afgri into this application by citing it and even referring to it as a major creditor of BFT. Thus Afgri was entitled to reply as it did in the replying affidavit.

[13] I deem it expedient to dispose of this issue as well before I go into the merits of the application for intervention. Joining in any proceedings is provided for by Rule 12 of the Uniform Rules of Court as follows:

'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 the further procedure in the action as it may seem meet.'

[14] The legal principles applicable in this regard were not in contention at all. To that extent, I accepted that both counsel were *ad idem, albeit* in not so many words,

with the exposition of the law presented by Ms Dippenaar on behalf of the IDC, in this regard. The mere fact that the IDC cited Afgri as an interested part and a major creditor can under no circumstances, without further ado, entitle Afgri to jump in and file a replying affidavit at this stage. This is contrary to practice and in conflict with Rule 12. This was done clearly to avoid being mulcted with costs as the IDC had declared that in the event of any opposition, it will ask for costs against such party. On this legal basis alone, i.e. apart from the issues of relevance and vexatiousness, the replying affidavit filed by Afgri ought not to be heard at this stage and outside the proper processes set out in the Rules of the Courts.

Urgency

[15] Mr Tsangirakis submitted in court and in his heads of argument that the application of the IDC on an urgent basis did not satisfy the requirements of R6(12) (a) and (b)[3] on the following bases: (i) it failed to disclose when the applicant first received the sequestration application;(ii) it failed to give an explanation for the entire period that lapsed since the applicant received the sequestration application; (iii) it failed to seriously grapple with the reasons for urgency in such manner as envisaged by Rule 6(12) (a) and (b);and (iv)[4] it failed to deal or disclose the resolution by BFT to apply for the urgent sequestration of BFT.

[16] Both Messers Tsangirakis and Grobler contended that the IDC's application was also not *bona fide* because in its own words the sole reason for its intervention

[3] Rule 6(12)(a) and (b) provides:

'(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet.
(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.'
[4] Rule 6(12).

was for altruistic reasons i.e. to save BFT from insolvency. That, they argued, is not a *bona fide* defence in our law. More particularly because the IDC has not denied the first respondent's claim which is what triggered the main application for sequestration in the first place and even undertook to pay such claim. The application for sequestration was also supported by the most substantial creditor Unigro as indicated in the replying affidavit filed on 14 April by Afgri.

[17] The respondents made the point that the application is not urgent, if anything the urgency was self-created.[5] In her founding affidavit, Ms N Mthembu, representing the IDC, stated that the IDC became aware of the provisional sequestration order against BFT on 3 March. From that moment, considering the interests at stake, it set the wheels in motion to resolve the matter with all relevant stakeholders. Discussions and negotiations between the parties included payment of all the debts of BFT, restructuring it and putting relevant measurements in place to save BFT from insolvency were put on the table. There were volumes of receipts/invoices that the IDC had to go through to establish the correctness of BFT's debts. The veracity of some of the invoices is questionable and need to be investigated. Those negotiations failed. And by that time, 13 April, the IDC had to approach this court to seek an intervention. There was strenuous opposition to such application. But once the postponement was granted the IDC was then in a position to instruct its attorneys of record to formally intervene and oppose the main sequestration application. Further legal advice was sought on the matter. Counsel was briefed and thus this application.

[18] Ms Dippenaar, for the applicant submitted that by its very nature and the prevailing circumstances set out by Ms Mthembu in the founding affidavit, the application was urgent. She submitted further that these protracted negotiations between the parties in an attempt to settle the matter between BFT and the first respondent and other creditors, failed a few days before the return day, 14 March 2016 as Ms Mthembu stated. She argued that the respondents were not

[5] See *Schweizer Reneke Vleis Mkpy (Edms) v Die Minister van Landbou en Andere* 1971 (1) PH F11 (T). at F11-12.

prejudiced in any manner by this application to intervene nor could they show any likelihood of prejudice. To the contrary, she argued, BFT is largely funded by the IDC in line with its mandate in terms of the Industrial Development Corporation Act, 22 of 1940 as amended.[6] It serves as a vehicle for employment and economic development and benefit to many families in the area of its location. Those families would benefit more from its continued existence than its shutting down. She maintained that the application was launched under R 6(14) of the uniform rules court. Not Rule 6(12) (a) and (b) under which there must be strict compliance with the requirements of the rule.

[19] From the background set out in paragraphs [17] and [18] of this judgment, it is evident that the IDC did not drag its feet before it approached this Court on an urgent basis. In my view, it approached its statutory duty to safe guard the rights and interests of the beneficiaries of BFT in a responsible manner by seeking to resolve the problem through negotiations in order to settle the dispute with the first respondent and major creditors including Afgri. When such negotiations collapsed and failed, it approached this Court for relief in terms of Rule 12, on the return day (14 March) on which the provisional sequestration order would have been confirmed. Had it not approached this Court on that day, its efforts 'after the horse had already bolted' would have been worthless. It is trite that, the fact that, a judgment or final order has already been issued is not a bar to leave to intervene.[7] What is however practically more arduous and expensive for any party, particularly ,an entity such as the IDC, which operates on a budget dependent on tax payers' contributions in the fiscals' of this country; the process to reverse what the Court has already made a final order would have disastrous financial consequences.

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[6] As set out in the IDC's website,http/www.idc.co.za,the IDC is mandated to develop domestic industrial capacity, specifically in manufactured goods to mitigate the disruption of trade between Europe and South Africa...The mandate was expanded to include investment in the rest of Africa...which includes mining, agriculture, manufacturing, tourism and telecommunication...The IDC remains committed to playing a major role in facilitating job creation through industrialisation...'

[7] *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972(4) SA 409 (C) at 416 B-C. See also *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 678H-679D.

[20] The attitude of the respondents that the application for intervention should be dismissed on the basis that, apart from that it was not urgent but self-created, it did not disclose a *bona fide* defence is not justified. In *Nelson Mandela Metropolitan Municipality*[8] the court stated the law with regard to urgent applications succinctly as follows:

'It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency.[9] It is also true that when courts are enjoined by Rule (6) 12 to deal with urgent applications in accordance with procedures that follow the Rules as far as possible, this involves the exercise a judicial discretion by a Court 'concerning which deviations it will tolerate in a specific case'[10].

[21] The court continued at para [38][11]:

'...It is not in every case in which the applicant may have departed from the Rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. Each case depends on its special facts and circumstances. This is explicitly recognised by *Kroon J* in the *Caledon Street Restaurants CC* case where he held-looking at the issue from another perspective, as it were -that the approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the Rules should be obeyed and that the interest of the other party and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not.'

[22] I am in agreement with the *dicta* above and am on that basis of the view that the argument of the respondents on the point of urgency is based on a degree of inflexible formalism that, Kroon J[12],did not intend to suggest should be the norm in all cases irrespective of the circumstances. Rules are, in any event, not an end to in themselves to be observed for their own sake. They are provided to ensure

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[8] *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE).
[9] *Ibid at para [37].*
[10] *Ibid.*
[11] *Ibid.*
[12] *In Caledon Street Restaurants CC v D' Aviera [1988] JOL 1832 (SE).*

the inexpensive and expeditious completion of litigation before the courts. Naturally it is for the Court to decide whether the matter is really one of urgency and whether the circumstances warrant a departure from the normal procedures. To hold otherwise would, make the Court captive of the Rules. Whereas the Rules should exist for the Court, not the Court for the Rules. Rules are designed to ensure fair hearing and should be interpreted to in such a way as to advance and not reduce the scope of the entrenched 'fair trial right' contained in s34 of the Constitution.[13]

[23] Having said that, I am satisfied that the application of the IDC to intervene is urgent.

Application for Intervention.

[24] Coming to the application before me, it is trite that in an application to intervene the question is whether, on the applicant's version, it is entitled to join in the proceedings as intended in Rule 12 of the Uniform Rules of Court. 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 at the end of the day. Stated differently, it is sufficient for the party seeking intervention to rely on allegations which, if they can be proved in the main action, would entitle him or her to succeed. This is the criterion which constitutes a *bona fide* defence as required by a defendant who wishes to stave off an application for summary judgment in terms of Rule 32 of the Supreme Court Rules.[14] An applicant must satisfy the Court too that his or her application is made seriously and is not frivolous.[15]Furthermore

[13] *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others above.*
[14] *Ex Parte Moosa in re Hassim v Harrop-Allin* 1974 (4) SA 412 (T) at 416G-H.
[15] *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 678I-679B. See also Van Winsen, Cilliers and Loots *The Civil Practice of the Supreme Court of South Africa* (4th ed edited by Dendy, Cape Town, Juta & Co Ltd: 1997 at 179.)

'When, as in this matter, the applicant bases its claim to intervene on a direct and substantial interest in the subject matter of the dispute, the Court has no discretion: it must allow it to intervene because it should not proceed in the absence of parties having such legally recognised interests.'[16]

[25] Both counsel for the respondents submitted that the extension of the return date in order to intervene in the proceedings; and even the setting aside of the provisional sequestration order, which the IDC is seeking through this urgent application will not be to the benefit of all the creditors. They submitted further, that the IDC has understated the trade creditors and thus not taken the court into its confidence regarding the actual debts of BFT.

[26] They argued that BFT has in any event committed an act of insolvency in terms of s8 (g) of the Insolvency Act[17]. Fourie, one of the trustees of BFT, and authorised to act on behalf of BFT, sent a letter to all creditors including the respondents and Unigro in which he gave notice of BFT's inability to pay its debts. Nothing could change such state of affairs.

[27] Ms Dippenaar, for the IDC, submitted that BFT has not committed an act of insolvency in terms of s8 (g) as the respondents argued because at the time that the urgent application for sequestration was brought before the court there was no 'debt owed and due.' This, she based on what the IDC believes were inaccuracies in the invoices which the first respondent submitted to BFT to trigger off the alleged act of insolvency. The IDC could only prove such inaccuracies and that there was no debt owing to the first respondent during the main sequestration application where all issues will be ventilated. Not at this stage and during this application for intervention as the respondents were doing.

[16] *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* above at 89A-C and cases cited therein.
[17] Section 8 (g) of the Insolvency Act 24 of 1936 provides: 'A debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts.'

[28] She submitted from the onset and throughout these proceedings with reliance on precedent setting cases (which contention I agree with), that it was contrary to the nature of these proceedings and even irregular for the respondents to refer *ad nauseam* or even to the slightest extent to the merits of the main sequestration application. She submitted that (a) the application for intervention was urgent and that (b) the IDC was entitled to intervene in the main application for sequestration because (i) it was a substantial creditor and had direct interests in the matter (ii) if the final sequestration order was granted, the interests of the creditors including itself would be adversely affected. Whereas if BFT was refinanced and restructured the interest of the body of creditors of BFT will be best served. There would be no undue preference which comes into play as a result of the main application and the provisional sequestration order.

The Law.

[29] Rule 12 provides:

> '12 Intervention of Persons as Plaintiffs or Defendants
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> 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.'

[30] Rule 6 (14) provides that *inter alia* Rule 12 shall *mutatis mutandis* apply to all applications.[18]

Application of the law to the facts

[31] The IDC claims direct and substantial interest in the subject matter; a direct interest in the matter based on the fact that it is one of the major creditors of BFT

[18] See *Shapiro v South Africa Recording Rights Association (Galeta intervening)* 2008 (4) SA 145 (W) at para [10].

as already conceded by the respondents when it accepted unequivocally that the IDC has *locus standi* in these proceedings. The IDC declared unreservedly that apart from its own interests there was more at stake, i.e. the interests of families who depended on BFT for their livelihood. This meant, if BFT was finally declared insolvent, without allowing the IDC to intervene at this stage and place all the relevant information and or evidence before the court in the main sequestration application , such order will be to the detriment of those beneficiaries. It also maintains that once it has paid off BFT's debts, BFT will have no debts and thus not actually insolvent. In addition, the insolvency act relied upon by the first respondent is not based on a true reflection of the Insolvency Act (s8 (g)) in that the amount BFT is alleged to owe to the first respondent was not due and payable at the time the provisional sequestration order was sought and granted as the Insolvency Act prescribes.

[32] I am inclined to agree with Ms Dippenaar as a matter of law and on the facts presented that the application should be upheld. Once all the parties were *ad idem* that the IDC has substantial and direct interest in the subject matter, the *substratum* of the opposition of the respondents fell away. Under the circumstances and in line with authorities cited throughout this judgment, and because this Court should not proceed in the absence of parties having such legàlly recognised interests, this Court has no discretion but to allow the IDC to intervene.[19] It follows that, I am satisfied that the IDC has made out a clear case for its intervention in the main application for sequestration.

Costs.

[33] The issue of costs. In sequestration proceedings the practice is to order costs to be costs in the sequestration. Although the IDC initially and in the Notice of Motion sought costs against those respondents who opposed this application, however Ms Dippenaar, in court, wisely so, deemed it appropriate to ask that costs be costs in the sequestration in the event that the application is granted in

[19] *Nelson Mandela Metropolitan Municipality and Others* above and cases cited therein.

favour of the IDC. Both Mr Grobler and Tsangirakis argued that the IDC should bear the costs on the basis that this application is not urgent and should be dismissed followed by the general rule applicable that costs follow the event.

[34] Although the general rule is that costs follow the event, equally so, the decision to grant costs or not fall within the discretion of the court. As alluded to earlier on, in proceedings of this nature, generally, costs are either reserved for later determination or are appropriately so ordered to be costs in the sequestration. I deem it appropriate, and in line with authoritative decisions[20] in this regard, to make the latter order.

[35] In the result, the following order is granted.

ORDER

'1. The applicant's/intervening party's failure to adhere to the Uniform Rules of Court relating to time periods and service is condoned.

2. The applicant/intervening party is granted leave to intervene in the main proceedings under Case Number 971/2016 as the fourth respondent.
3. The applicant/intervening party is granted leave to file a supplementary affidavit in the main application within 15 (fifteen) days from the date of this order.
4. The provisional sequestration order granted on 3 March 2016 and extended to 31 March 2016 and 5 May 2016 is further extended to 9 June 2016 in order for the applicant to act in line with paragraphs 2 and 3 above.
5. The costs of this application to be costs in the main application.'

[20] *Vitorakis v Wolf* 1973 (3) SA 928 (W) at 933E.See also *Ex Parte Moosa in re Hassim v Harrop-Allin* 1974 (4) TPD.

B.C. MOCUMIE, J

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