

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

Case No : 4793/2012

In the matter between:

ROUTLEDGE MODISE INC.

Applicant for Intervention

and

<u>ANDRIES NICOLAAS EVERHARDUS LOUW N.O.</u>	1 st Respondent
<u>RUSTU GUVEN ATALA N.O.</u>	2 nd Respondent
<u>CARL BOTHMA N.O.</u>	3 rd Respondent
<u>LEON WESSELS N.O.</u>	4 th Respondent
<u>DAWID RYK VAN DER MERWE N.O.</u>	5 th Respondent
<u>GAVIN CECIL GAINSFORD N.O.</u>	6 th Respondent
<u>BAREND PETERSEN N.O.</u>	7 th Respondent
<u>SIVALUTCHMEE MOODLIAR N.O.</u>	8 th Respondent
<u>INVESTEC BANK LIMITED</u>	9 th Respondent
<u>THE MASTER OF THE WESTERN CAPE HIGH COURT, CAPE TOWN</u>	10 th Respondent
<u>THE MASTER OF THE FREE STATE HIGH COURT, BLOEMFONTEIN</u>	11 th Respondent
<u>THE REGISTRAR OF DEEDS, BLOEMFONTEIN</u>	12 TH Respondent
<u>PIETER ADRIAAN GOOSEN</u>	13 th Respondent
<u>AUBREY PHAGO LEDWABA</u>	14 th Respondent

In Re:

<u>ANDRIES NICOLAAS EVERHARDUS LOUW N.O.</u>	1 st Applicant
<u>RUSTU GUVEN ATALA N.O.</u>	2 nd Applicant
<u>CARL BOTHMA N.O.</u>	3 rd Applicant
<u>LEON WESSELS N.O.</u>	4 th Applicant

and

<u>DAWID RYK VAN DER MERWE N.O.</u>	1 st Respondent
<u>GAVIN CECIL GAINSFORD N.O.</u>	2 nd Respondent
<u>BAREND PETERSEN N.O.</u>	3 rd Respondent
<u>SIVALUTCHMEE MOODLIAR N.O.</u>	4 th Respondent
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<u>PIETER ADRIAAN GOOSEN</u>	9 th Respondent
<u>AUBREY PHAGO LEDWABA</u>	10 th Respondent

<u>HEARD ON:</u>	14 NOVEMBER 2013
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<u>JUDGMENT BY:</u>	DAFFUE, J
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<u>DELIVERED ON:</u>	19 NOVEMBER 2013
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INTRODUCTION

- [1] This is an interlocutory application for leave to intervene as a respondent in a main application by the current trustees of the Eagle Creek Investments 74 (Pty) Ltd Debenture Trust against various respondents including the Registrar of Deeds, Bloemfontein, the Masters of the Western Cape and Free State High Courts, Investec Bank Ltd, the previous trustees of the Debenture Trust and the four joint liquidators of Eagle Creek Investments 74 (Pty) Ltd (in liquidation).

THE PARTIES

- [2] The applicant in this application is Routledge Modise Inc (“Routledge”), a law firm of Sandton, Gauteng, represented by Adv GB Rome.
- [3] The first four respondents in the intervention application are the four applicants in the main application, to wit Messrs Louw, Atala, Bothma and Wessels in their representative capacities as the present trustees of the Eagle Creek Investments 74 (Pty) Ltd Debenture Trust (“the trust”). I shall refer to them collectively as the trustees herein. The trustees are represented by Adv GP van Rhyn.
- [4] The next four respondents in this application are the first to fourth respondents in the main application, to wit Messrs Van der Merwe, Gainsford, Petersen and Moodliar in their capacities as the duly appointed joint liquidators of Eagle

Creek Investments 74 (Pty) Limited (in liquidation) (“the company”).

- [5] The ninth respondent in this application is cited as the fifth respondent in the main application, to wit Investec Bank Ltd (“Investec”).
- [6] The following three respondents are the Master of the Western Cape High Court, Cape Town, the Master of the Free State High Court, Bloemfontein and the Registrar of Deeds, Bloemfontein. Messrs Goosen and Ledwaba cited herein as the thirteenth and fourteenth respondents respectively are the ninth and tenth respondents in the main application. They are the previous trustees of the trust and I shall refer to them as Goosen and Justice Ledwaba respectively. (Fourteenth respondent has been appointed as a judge of the High Court of South Africa in the meantime.)

THE RELIEF SOUGHT

- [7] The applicant for intervention seeks an order that leave be granted to it to intervene in the main application as eleventh respondent. No order as to costs is sought in the notice of motion. The trustees oppose the relief sought by Routledge. None of the other parties oppose the intervention application. It is apparent why no costs order is sought in the notice of motion. The trustees initially indicated through their attorneys that they would not oppose the intervention application. Now that it is opposed, Routledge seeks an

order in terms whereof the trustees be ordered to pay the costs of the application.

THE *DRAMATIS PERSONAE* AND FACTUAL MATRIX

- [8] The company was the owner of certain immovable properties situated in the district of Heilbron, Free State Province. It intended to develop the properties into the Lizard Point Golf Residential Leisure Estate.
- [9] In 2005 the company granted a first mortgage bond, a Debenture Bond, over the immovable properties in favour of the trust, which bond was registered with the Registrar of Deeds in Bloemfontein.
- [10] During 2006 the company applied for finance from Investec, which was granted on condition that a first mortgage bond be registered over the immovable properties of the company. For purposes of registration of a first mortgage bond in favour of Investec, Goosen in his capacity as trustee of the trust, signed a waiver in terms whereof the trust waived its preference as a first mortgage bond holder in favour of Investec, the effect being that the Debenture Bond would in future rank as a second bond and that Investec would be the holder of the first mortgage bond. A certain Mr Henk Auret of Auret Goosen and Ledwaba, an attorney and partner of Goosen at the time, prepared the written waiver, but neglected to sign the preparation clause on the relevant document as conveyancer. This document like any other

document to be lodged with the Registrar of Deeds for registration purposes had to be prepared and signed by a conveyancer. The written waiver, together with other documents, was sent to Routledge who held instructions from Investec to register the bond in favour of Investec. Mr Smith, a partner of Routledge at the time, then signed the preparation clause whereupon the documents were forwarded to correspondents in Bloemfontein for registration of the trust's waiver and the new first mortgage bond of Investec.

- [11] The company was finally liquidated whereupon the encumbered immovable properties were sold at the total price of R5 million only. The Debenture Bond was registered for R33 million and the amount owing to Investec at present is in excess of R43 million.
- [12] The trustees assumed office on 13 August 2012. On 14 November 2012 they launched the main application, seeking firstly, a declarator that Goosen and/or Justice Ledwaba acted *ultra vires* in executing the waiver and secondly, a declaration that the Debenture Bond retained its status as a first ranking mortgage bond in preference of Investec's mortgage bond. The trustees, after receipt of Justice Ledwaba's affidavit, no longer seek any declaration that he acted *ultra vires*.
- [13] Investec opposed the main application on the restricted grounds that the Debenture Bond was invalid for want of

compliance with the provisions of section 118(3) of the 1973 Companies Act and that Goosen was not authorised to execute the waiver.

[14] On 12 February 2013 Investec informed Routledge in writing that it had been informed that the purported waiver by the former trustee consenting to the back ranking of the Debenture Bond was null and void and that it appeared as if Mr Smith (of Routledge) failed to ensure that the waiver was properly procured. Furthermore if Investec had been aware of the true facts it would not have advanced the sum of money which it did and consequently it had sustained a loss in excess of R43 million as at 11 February 2013. There is no indication in this letter that Investec will institute legal action against Routledge if it is found liable towards the trustees, but this appears to be an inevitable consequence. There is no reason why Investec would not try to retrieve its damages from its former attorneys.

[15] On 26 July 2013 Routledge launched the application to intervene in the main application. By then, as is the case at the present moment, the main application has not been set down for hearing. Bearing in mind the timeframes applicable to application proceedings, it remains a mystery why the trustees did not ensure that those parties that gave notice of intention to oppose the application, file their answering affidavits within the timeframes set out in Rule 6. As a direct consequence of this delay for which the trustees must accept the blame, the main application has not been set down for

hearing notwithstanding the fact that a year has now lapsed since the launching of the application. Routledge's application was brought on the basis that it would be unopposed as is apparent from paragraph 50 of the founding affidavit, read with the letter of the trustees' attorney dated 19 July 2013 annexed as annexure "JJ15". The trustees thought it fit to oppose the application, notwithstanding their earlier attitude and filed answering affidavits as late as 2 September 2013 to which Routledge replied whereupon the matter was set down for hearing before me on 14 November 2013.

INTERVENTION OF PERSONS

[16] Intervention of persons as plaintiffs or defendants is dealt with in Rule 12. Rule 6(14) stipulates that Rule 12 shall *mutatis mutandis* apply to applications as well. Rule 12 reads 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 further procedure in the action as to it may seem need."

[17] Although accepting that their viewpoint may give rise to difficulties in constitutional litigation, Cilliers *et al*, Herbstein and Van Winsten, **The Civil Practice of the High Courts of**

South Africa, 5th ed, vol 1 at 226 - 228, state the following with reference to relevant authorities:

“A person who has a legal interest must be joined, and is therefore generally ‘entitled to join’ or ‘liable to be joined’ within the meaning of the subrule. The court must allow such a party to intervene, for once a direct and substantial interest becomes apparent the court should not proceed in the absence of a party who has such an interest. This would mean that the court has no discretion when the applicant for intervention demonstrates a direct and substantial interest.”

The authors go further and state that:

“It has been held that the court has a wide discretion in applications for leave to intervene. If the rule does not help an applicant, it is entitled to invite the court to decide the application on common-law principles.

It is not sufficient for a third party seeking to intervene to merely allege an interest in the action, but such party must give *prima facie* proof of the interest and right to intervene. It is not necessary to satisfy the court of success in the litigation in which leave is sought to intervene. It will be sufficient to make such allegation as would show a *prima facie* case (allegations which, if they can be proved in the main action, would entitle success) and that the application is made seriously and is not frivolous. Provided that such *prima facie* proof is given, however, the intervening party need not show a use *in rem* in the subject-matter of the suit.”

- [18] Farlam *et al* confirm the views of Herbststein & Van Winsen in commenting that at the stage of adjudicating the 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: It is sufficient for the party seeking leave to intervene to rely on allegations which, if they can be proved in the main action, would entitle him or her to succeed.

See: Farlam *et al*: **Erasmus, Superior Court Practice**, B1-103 with reference to **Ex Parte Sudurhavid (Pty) Ltd: In Re Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd** 1993 (2) SA 737 (NM) at 742G – H.

- [19] In **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** 1953 (2) SA 151 (O), a judgment which has been quoted frequently over the decades, Horwitz AJP, with whom Van Blerk J concurred, analysed the concept of “direct and substantial interest” and concluded that it refers to an interest in the right which is the subject matter of the litigation and not merely a financial interest.

See also: **Aquatour (Pty) Ltd v Sacks and Others** 1989 (1) SA 56 (A) at 61J – 62G;
Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA) paras [7] – [9].

- [20] In **Home Sites (Pty) Ltd v Senekal** 1948 (3) SA 514 (A) at 520 – 521 it was found that where a person claimed to have a servitude in land, the validity of which might become an issue in litigation between third parties, such person had a

clear right to be joined as a party to the proceedings between those third parties. The court found as follows: “It is true that if she (the servitude holder) remains outside the litigation a decision to the effect that no valid servitude had been granted would be *res inter alios acta* as far as she is concerned and it would not be binding by way of *res iudicata* upon her. But if such a decision were given by this Court it would be an authority on the legal issues which would be directly in point and calculated to operate with decisive effect upon her claim to be entitled to the servitude. Accordingly it seems to me that she has, in the language used in *Collin v Toffie* (1944 AD 456 at p.464), a direct and substantial interest in the results of the decision of this issue, which cannot properly be decided without her being joined as a party.”

[21] In **Standard Bank of South Africa Ltd v Swartland Municipality and Others** 2011 (5) SA 257 (SCA) at para [9] p 259E Lewis JA, writing for the Full Bench of the SCA, stated that although it was trite law that a mere financial interest in the outcome of litigation did not give a party the right to be joined in the legal proceedings, a mortgagee as the holder of a real right in property, which includes the improvements thereon, erected lawfully or otherwise, clearly had more than a financial interest in the outcome of proceedings for the demolition of those buildings.

[22] Having considered the authorities it appears that what is required for intervention by a defendant/respondent is a legal interest in the subject matter of the action, which could be prejudicially affected by the judgment of the court.

EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY THE PARTIES

[23] Investec and the trustees indicated in writing prior to the launching of the application to intervene that they did not have objection to such intervention. The letter of Investec is attached as annexure “JJ14” to the founding affidavit and the letter of the trustees’ attorney dated 19 July 2013 as annexure “JJ15”. The trustees explain their change of heart as follows in paragraph 13 of their answering affidavit:

‘The trustees’ attorney of record, Otto John Brebner Krause (Krause) is indeed the author of annexure “JJ15” to the founding affidavit. However, the consent therein contained was based on telephonic discussions between Krause and Mr Alex Elliott (Elliott) of Routledge. After the invention application was delivered and considered by the trustees and by Krause, it became quite clear that the allegations contained in the application went much further than anticipated when the consent was given.”

[24] No explanation has been given as to what was meant by the phrase “(T)he application went much further than anticipated when the consent was given”. Surely Routledge was fully entitled to make all the necessary averments in order to show its direct and substantial interest and the defences it intended to raise once joined as a party to the main application. It is Mr Smith, a Routledge attorney and conveyancer at the time, who signed the preparation clause of the written waiver as conveyancer. Such conveyancer

accepts responsibility for *inter alia* the fact that the document signed by any person in a representative capacity is duly authorised thereto. Furthermore the conveyancer is obliged to ensure that the transaction (in this case the waiver) was authorised by and in accordance with the trust deed. *In casu* it is alleged that there was no meeting of Debenture holders and that no special resolution was adopted by them to authorise Goosen to execute the waiver. Therefore it appears as if Smith failed to ensure that the waiver was properly procured in circumstances where Investec would not have advanced any monies to the company, unless such advances were secured by a first mortgage bond. Although Routledge has disputed the accuracy of the facts alleged by the trustess and/or Investec, there appears to be sufficient reason for Routledge, not to be a mere spectator and watching the game played by the others from the side-line, but to participate actively as a player in order to safeguard its own interests.

- [25] Although Routledge never acted as conveyancers for the previous trustees, i.e. Goosen and/or Justice Ledwaba, the mere fact that one of its directors, Smith, signed the preparation clause of the waiver as conveyancer without establishing whether Goosen was duly authorised, does not mean that Routledge can be held liable by the trustees based on breach of contract, but surely and as conceded by Mr Van Rhyn, the trustees might have joined Routledge as a party to the main application, alternatively instituted separate action against it, claiming damages based on delict. At this

stage the trustees are seeking declaratory orders only, but there can be no doubt that once orders are granted in their favour, further action will follow.

[26] Mr Van Rhyn submitted with vigour that the requirements to intervene as a party to the main application have not been met. According to him Routledge has not shown that it has a legal interest in the right which is the subject matter of the litigation in the main application, which legal interest could be prejudicially affected by the judgment of the court. He argued that Routledge's only interest in the main application, should it be successful, is dependent on several uncertain events that may not be consequences thereof, such as:

- (i) Investec must have suffered damages;
- (ii) Investec must resolve to recover those damages from Routledge;
- (iii) Instructions must be given to Investec's legal representatives in order to draft pleadings and to advise Investec about the prospects of success and such advice may even be not to proceed with action against Routledge.

Res iudicata

[27] Mr Rome submitted that if Routledge is not allowed to intervene in the main application, it would be precluded through the principle of *res judicata* from contesting the validity of the 2006 waiver when Investec institutes action for some R43 million against it for damages based on

Routledge's alleged negligence. In such action to be instituted Routledge would not be entitled to raise defences pertinent to the validity of the 2006 waiver and the ranking of Investec's bond as a first mortgage bond, the reason being that these issues would have definitely disposed of by the judgment of the court in the main application. He submitted that if Routledge is not granted leave to intervene, the factual foundation of Investec's anticipated claim against it, namely that the waiver was invalid and that Investec's mortgage bond ranked as a second bond will be an undisturbable fact in the subsequent litigation. It is apparent that the issue in the anticipated Investec action would be the same as that in the main application, namely whether the waiver was validly executed and hence which of the two bonds is in fact the first charge over the properties.

- [28] Mr Rome's submission that the rights and obligations of the various parties to the dispute will be forever determined in the main application was not attacked by Mr Van Rhyn who did not try to show that there will not be a final adjudication which may directly and negatively affect the rights of Routledge. He merely relied on the uncertainty as to whether action might be instituted against Routledge. I am not convinced that *res iudicata* is applicable *in casu*, but the principles set out in the authorities quoted and in particular **Homes Sites (PTY) LTD v Senekal** *supra*, are applicable. Mr Van Rhyn argued that the trustees' right to reinstatement of the Debenture bond as a bond of first preference is the right which is the subject matter of the litigation. This might

be so but the validity of the waiver signed by Goosen and prepared by Smith, a director of Routledge, will have to be considered in particular and this is indeed the crucial aspect of the dispute in the main application. I am satisfied that these aspects are so interwoven that Routledge has clearly indicated that it has a direct and substantial interest and therefore a legal interest in the subject matter of the litigation in the main application. The validity of the waiver will be forever determined in the main application. Therefore Routledge should be given an opportunity to participate in that application.

Prescription

[29] I have indicated above that the authorities are to the effect that the party seeking to intervene needs to make sufficient allegations to show a *prima facie* case and that the application is made seriously and not frivolous. I do not have to make a finding at this stage that the defences to be relied upon by Routledge would entitle it to success in the main application. The trust, on the trustees' own allegations, has a right to set aside the execution of the 2006 waiver. Such right is a "debt" for purposes of the Prescription Act, 68 of 1969. See also **Duet and Magnum Financial Services CC (In liquidation) v Koster** 2010 (4) SA 499 (SCA) para [27] at 507H – 508C.

[30] Section 12 of the Prescription Act, 68 of 1969, reads as follows:

“12 When Prescription begins to run

1. Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.”
2.
3. A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

[31] It is possible that a court may find that the right to claim the setting aside of the waiver and its subsequent registration came into being already in 2006 and if that is the case, prescription has taken place. It is also possible that evidence may reveal that the Debenture holders, and in particular those that now act as trustees, became aware of the waiver in the middle of 2009 as suggested in a letter of attorney Groenewald who at a stage acted for Debenture holders in which case it might be found that they could not and should not have waited until 2012 to arrange for the appointment of new trustees and to take the required action. Prescription might be found to have commenced in the middle of 2009. In essence a court may find that the trust, through its trustees or Debenture holders shall be deemed to have knowledge of the invalid waiver as they could have obtained that knowledge by exercising reasonable care already in the middle of 2009 in which case three years has also lapsed prior to the institution of the main application.

[32] Although Mr Van Rhyn indicated in his heads of argument that insofar as a mortgage bond is involved *in casu*, the prescription period is thirty years and not the general period of three years, he conceded in oral argument that the applicable period is three years *in casu*. He also relied on **Barnett and Others v Minister of Land Affairs and Others** 2007 (6) SA 313 (SCA) at paras [20] – [22] for the submission that a “continuous wrong” is being conducted *in casu* and therefore the debt is not susceptible to prescription. The judgment referred to is totally distinguishable from the facts *in casu* insofar as the unlawful occupation by the occupants of the relevant sites on the Wild Coast was regarded as a continuous wrong, neutralising the issue of prescription. Mr Van Rhyn conceded this.

Ratification

[33] It appears from the record in the main application that the trustees do not complain that the previous trustees did not act jointly in executing the waiver. Mr Rome submitted that the complaint is rather that Goosen did not consult with and obtained the approval of the Debenture holders prior to executing the waiver. It is also apparent that Justice Ledwaba resigned as trustee prior to execution of the waiver and that Goosen was the sole trustee at the time. Goosen purportedly acted as agent of the Debenture holders and there is nothing in the trust deed which stipulates that unless prior consent had been given, his conduct would be void *ad*

initio. Therefore, as Mr Rome argued, Goosen's act in executing the waiver could be subsequently ratified by the Debenture holders. It appears that by 2009 the Debenture holders were aware of Goosen's conduct in executing the waiver and agreed thereto. If such evidence is accepted by the court who will be called upon to adjudicate the main application, the defence of ratification may well be found to be good in law. Again as indicated above, it is not necessary for me to make any finding in this regard.

Conclusion

[34] Consequently I am of the view that Routledge has made out a proper case for the relief claimed in the notice of motion. Mr Rome has indicated that should I find in Routledge's favour, it would be in a position to file an answering affidavit in the main application within two weeks from the date of judgment. It appears that the trustees might not be in a position to file replying affidavits thereto before the Christmas holidays, but they would surely be in a position to do that in mid-January 2014 for this matter to be enrolled during February 2014.

[35] It is possible that the intervention of Routledge may cause factual disputes to such an extent that the main application might be referred to oral evidence, which may cause further delay and extra costs. Even if this might be so, such factor should not be a barricade to granting the leave *in casu*. It is possible, even without the intervention of Routledge, that the

main application could not be adjudicated on the papers and that the matter might in any case be referred to oral evidence. Furthermore, the possible referral to oral evidence in the event of Routledge being joined as a party is preferable to a situation where the main application is finalised and further action then instituted by Investec against Routledge with consequences such as that witnesses that testified in the first matter might be called to testify again and be subjected to cross-examination in the second matter. It is thus also in the interest of justice and convenience that Routledge be given leave to intervene. Furthermore the determination of Routledge's dispute depends upon substantially the same question of law or fact that will arise in the main application.

- [36] The general rule is that the successful party is entitled to its costs. During oral argument the matter was raised with both counsel and both submitted that the proper order to be made *in casu*, if the application is granted, would be to reserve the costs for later adjudication. This is the order that I shall make.

ORDER

- [37] Therefore the following orders are made:

1. Routledge Modise Inc is granted leave to intervene as eleventh respondent in the main application, application no 4793/2012.

2. Routledge is directed to file its answering affidavit in the main application on or before 3 December 2013.
3. The costs of the intervention application are reserved for later adjudication.

J.P. DAFFUE, J

On behalf of applicant:

Adv. G. B. Rome
Instructed by:
Lovius Block
BLOEMFONTEIN

On behalf of first to fourth
respondents (first to fourth
applicants in main application:

Adv. G. P. van Rhyn
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN