



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: NO.	
(2) OF INTEREST TO OTHER JUDGES: NO.	
(3) REVISED.	
2024-10-07	
<u>DATE</u>	<u>SIGNATURE</u>

Case Number: 2023-126938

In the matter between:

IBEX RSA HOLDCO LIMITED

First Applicant

IBEX INVESTMENT HOLDINGS LIMITED

Second Applicant

SIHPL PROPRIETARY LIMITED

Third Applicant

SAHPL PROPRIETARY LIMITED

Fourth Applicant

NEWSHELF 1093 PROPRIETARY LIMITED

Fifth Applicant

and

THE SOUTH AFRICAN RESERVE BANK

First Respondent

NOMFUNDO TSHAZIBANA N.O.

Second Respondent

TSUMBEDZO CHARLES NEVHUTANDA N.O.

Third Respondent

DION NANNOOLAL N.O.

Fourth Respondent

THE MINISTER OF FINANCE

Fifth Respondent

and

SILVER POINT CAPITAL, L.P.

Intervening Party

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 7 October 2024.

JUDGMENT

POTTERILL J

Introduction

[1] Silver Point Capital L.P. [SPC] is seeking leave to intervene as the sixth applicant in the review application between Ibex RSA Holdco Limited [Ibex] and Four Others and The South African Reserve Bank [SARB] and Four Others [Case number 126938-2023]. Ibex supports the intervention application and filed an affidavit in support. The SARB opposes the intervention application.

[2] Ibex, "Steinhoff Group" and "Steinhoff" will for pragmatic reasons be used interchangeably in this judgment. It is also recorded that Ibex signed a confidentiality agreement with the SARB and therefor SPC did not have access to the record compiled for the review and some of the affidavits' content were redacted. However, the court was privy to the content of all the documents and affidavits before court.

SPC's application

[3] SPC is a non-South African creditor and is part of a group of non-South African creditors who form part of a wider group of financial creditors. This group of financial creditors whose financial claims reside under the Group Services Debt include direct financial claims against former Steinhoff International Holdings Proprietary [SIHPL]. In 2019 restructuring of SIHPL and the broader Steinhoff Group of companies took place. SPC and other financial creditors agreed to defer payment under the due and payable SIHPL guarantee set out in a contingent payment undertaking instrument [the SIHPL CPU]. The result of this undertaking by SPC and the other financial creditors was that the litigation claimants, whose claims ranked *pari passu* with the financial creditors, now were prioritized above the financial creditors. SPC's claim was thus now ranked lower than the litigation claimants. This agreement was reached and settled in the Global settlement process. The SARB was kept abreast of and agreed to the Global settlement. The payments in terms thereof was valid and binding and the SPC relied on these approvals which affected the payment thereof.

[4] SPC sets out that it agreed to the deferral of claims in terms of the SIHPL CPU to avoid a value destructive liquidation of SIHPL and in contemplation of the Global Settlement that was reached with the financial creditors. The Global Settlement was important to SPC because the Steinhoff Group never accepted the litigation claims. This left the financial creditors at risk that Steinhoff would perform badly or fail altogether resulting in the financial creditors' debt losing value. SPC did so on a pragmatic basis that all parties would benefit as a result. But, particularly, because the SARB had formally granted approvals of these payments. With the deferment of debt owed to them the financial creditors have relinquished their right to prosecute their claims and execute against assets which they would have had recourse to. SPC would never have agreed thereto had it known that the SARB would renege on its approvals preventing it from being paid what they are owed in due course. Had SARB not approved the payments then SPC would have enforced their existing rights under the SIHPL Guarantee that was approved by the SARB which would have procured SPC with a substantially better position.

[5] The prejudice suffered by SPC speaks for itself. The SARB's decision of 9 March 2023 to place a blanket transfer ban on the Steinhoff Group from transferring money abroad coupled with two orders on 18 and 30 May 2023 prohibiting the withdrawal of funds held by entities within the Steinhoff Group with First National Bank is contrary to SARB's prior approvals. Also the failure by the SARB to release EUR 38 million held in a Nostro Account with Standard Bank has created significant uncertainty in the ability of financial creditors to obtain payment for the obligations legitimately and historically owed to them. The ban coupled with the revocation of all approvals previously given by the SARB prevents payment to them in terms of the transactions and arrangements under the Global Settlement. The SARB just boldly denies this. The review includes a prayer that the prior approvals of the SARB be declared valid and binding, directly affecting SPC.

[6] SPC has a direct and substantial interest in the decisions and the trapped funds and the review. If leave is granted to intervene it will adopt the position of Ibex as set out in Chapters 1,11 and 111 of its review affidavit. SPC will not adduce any other facts than those contained in this affidavit. This is so because the record for the review is wrapped in secrecy and SPC cannot access information that is helpful to its case. But, SPC is entitled to the record even if a prima facie case had not been made out in the initial founding affidavit.¹ Upon receipt SPL can amend, supplement or augment its case in the review.

[7] It was argued that it is an absurd proposition that only Ibex has standing and not the financial creditors simply because they are not directly involved with the SARB. A subset of the financial creditors provided letters of support for the review application. SPC as financial creditor has an aggrieved legal complaint; it had an expectation that the SARB would honour its commitments. SPC has a "right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed."²

¹ *Competition Commission of South Africa v Standard Bank* 2020 JDR 0685 CC par 120

² *SA Riding of the Disabled Ass v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC)

[8] Reliance was placed on the matter of *Walter Eleazar Cyril and Another and the Commissioner of SARS* (186/2023) [2024] ZASCA 32 (28 March 2024) par [13] where the Court found that although the SARB was not a party to a criminal trial, it did have an interest in a review to set aside a ruling that evidence was admissible in the criminal trial. The review is brought against administrative action and “administrative action in general terms involves the conduct of the bureaucracy having ‘direct and immediate consequences for individuals or groups of individuals.’”³

[9] The reliance by the SARB on the matters of *Scaw*⁴ and *Wolf*⁵ is not helpful to the Court because in *Wolf* the intervention was granted and in *Scaw supra* the Court found that “there can be no gainsaying that Bridon UK has a pressing commercial interest in the fate of the existing anti-dumping duties against its product ... I will without more grant the application for Bridon UK to intervene as a party.” [par 13]

[10] There is no prejudice to the SARB because a tender was made to agree to a confidentiality agreement and the tender was repeated in open Court.

Ibex's support

[11] Steinhoff's management has in the past six years been focused on recovering maximum value for all its stakeholders in the fallout from the mismanagement that was discovered in December 2017. SPC, as other significant financial creditors, have cooperated in the process to stabilise, restructure the debt and to settle claims against it. This cooperation led to the Global settlement process and the settlement reached under section 155(2) of the Companies Act, 2008 in terms of which the Western Cape High Court sanctioned inter alia a claim of EUR 1,581 billion owed by SIHPL to the financial creditors, of which SPC is one.

³ *PG Group and Another v NERSA* (150/2017) [2018] ZASCA 56 (10 May 2018) par [35]

⁴ *International Trade Administration Commission v SCAW SA (Pty) Ltd* 2012 (4) 618 (CC)

⁵ *Vitorakis v Wolf* 1973 (3) SA 928 (W)

[12] The impact of the SARB's decisions to place a blanket transfer ban on the Steinhoff Group from transferring money abroad as well as the two orders of 18 and 30 May 2023 prohibiting the withdrawal of funds held by entities within the Steinhoff Group with First National Bank is contrary to SARB's prior approvals. Furthermore, the failure by the SARB to release EUR 38 million has vested the financial creditors and SPC a legal interest in the review. The review will determine the rights of the creditors to receive the funds owed to them and the outcome of the review will affect the creditors' rights. SPC has its own right to review and is not merely a parasite.

[13] Ibex, as do SPC, affirm that the restructuring of the debt was made in reliance on the SARB's approvals. If SARB had not approved these payments then SPC would have enforced its debt at the time and not have agreed to an extension of being paid or any restructure.

[14] This is a review under PAJA where "any person" can approach a court. Also in terms of section 38 where SPC is acting in its own interest it has the right to be joined because "the decisions it seeks to attack had the capacity to effect its own legal rights or its interests."⁶ Furthermore, SPC has demonstrated that their "interests or potential interests are directly affected by the unlawfulness sought to be impugned."⁷

[15] Much reliance was placed on the dictum of the Constitutional Court in *South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others* paras [9], [10] and [11]: "It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be

⁶ *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] SACC 28 (29 November 2012) par 30

⁷ *Giant Concerts supra* par 43

affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief. If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation. Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. In *Greyvenouw CC*⁸ this principle was formulated in these terms:

“In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.”

It was argued that akin to the Sadiens’ in the above matter, SPC’s rights would be affected by the review application.

The SARB’s opposition

[16] It was submitted that Ibex is not a co-applicant to the intervention application and seeks no relief, therefore it can only argue on the facts and law set up by SPC and not on its own affidavit or the 180 page affidavit that was filed in the review. This affidavit was contrary to the trite ratio in the *Swissborough*⁹-matter that if reliance is to be placed on annexures it must be specified on what in the annexure they are relying on and what relief is sought thereon.

⁸ *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE)

⁹ *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T)

[17] It was argued that SPC is only agreeing with Ibex and has in its founding affidavit only put secondary facts before this Court. No averments are made by SPC that the payment is due and payable. There is no case made out that the funds that have been blocked are earmarked for SPC, only that a structure has been approved. No facts are set out that its right to payment is being infringed and that Ibex would have paid them now had it not been for the SARB actions. Reliance was placed on the matter of *Die Dros and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) and specifically par 28 which reads as follows:

“It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the court (See: Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa & Others 1999 (2) SA 279 (W) at 323G) for the benefit of not only the court, but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may either be primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts (See: Willcox & Others v Commissioner of Inland Revenue 1960(4) SA 599 (A) at 602A; Reynolds N.O. v Mecklenberg (Pty) Ltd 1996(1) SA 75 (W) at 78I). Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent's own conclusions (See: Radebe v Eastern Transvaal Development Board 1988(2) SA 785 (A) at 793C-E) and accordingly do not constitute evidential material capable of supporting a cause of action.”

[18] It was argued that SPC can achieve no more than what Steinhoff can achieve in the review. It could not add a single fact because it had committed itself to not add any new facts in the affidavit to the intervention application. SPC had thus abandoned and waived its right to file a further affidavit and did not seek relief to file a further affidavit. It was argued that if “Steinhoff wins, then SPC wins.”

[19] It was submitted that SPC merely has a financial interest and not a direct and substantial interest in the review application. Contrary to what the Constitutional Court has found SPC does not raise any new facts or issues or a self-standing version and adds nothing new to the debate and expressly stated that it will not add new facts. The matter of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) is instructive in that in the High Court the Rule “requires that a party seeking to intervene must have a ‘direct and substantial interest in the subject matter’ of the litigation. However, in this Court the overriding consideration is whether it is in the interests of justice for a party to intervene in litigation.”

[20] It is not in the interest of justice to grant the intervention. SARB will be prejudiced if the intervention order is granted because the costs of the review will unnecessarily be increased due to an additional party opening the door for more creditors to join. Permitting a foreign company to intervene will also expose SARB to the risk of disclosure of highly confidential and sensitive information. Even if a confidentiality agreement is concluded with SPC, if it should be breached then it could not be remedied in a South African court. Contrary hereto SPC nowhere in the affidavit alleges that it is suffering prejudice.

[21] SPC has no *locus standi* because SPC would not on its own have standing to institute the review proceedings and seek the relief which is sought. Reliance was placed on the decision of the Constitutional Court in *Giant Concerts v Rinaldo Investments (Pty)(Ltd) and Others*¹⁰: “An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interest or potential interests.” Furthermore, even if the joinder is not allowed and an unlawful decision stands, joinder can only be granted if “the right remedy is sought by the right person in the right proceedings.” The decision of SARB is not against SPC, it is against Steinhoff. SPC can still claim payment from Steinhoff.

¹⁰ 2013 (3) BCLR 251 (CC) at paras [33] and [44]

[22] It was also submitted that the SARB did not block the payments, in terms of Regulations 2 and 3 Steinhoff must first ask permission from Treasury to make the payments. SARB had given advance permissions for certain transactions to the general public, but Steinhoff cannot rely on general permissions, but must seek specific permission for each intended transaction.

[23] SPC is only tangentially affected by the order the review court makes. Reference was made to the decision of the Supreme Court of Appeal in *Judicial Service Commission and Another v Cape Bar Council and Another*¹¹ wherein it was found that a successful appointee can only have a legal interest in proceedings where his appointment is sought to be set aside because it could lead to the removal from him of the post. Although the appointee would always have an interest in the order pertaining to his suitability for the job, that alone is however not a direct and substantial interest in the matter.

Reasons for decision

The test for intervention

[24] Rule 12 of the Uniform Rules 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 meet.”

[25] In terms of this applicable rule it is settled law that SPC must meet the direct and substantial interest test to succeed.¹² In terms of Rule 8 of the Constitutional Court the test is “the interests of justice” which is not the test in this application. In

¹¹ 2013 (1) SA 170 (SCA)

¹² *SA Riding matter supra* par [9]

*Snyders and Others v De Jager*¹³ the Constitutional Court found that: “A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person’s rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person’s rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.”

[26] What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the review court’s order. SPC must accordingly show that it has a right that is adversely affected or likely in the review. If SPC shows a direct and substantial interest in the subject-matter of the case, the court must grant leave to intervene. In *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE) at 89B-C) it was formulated as follows:

“In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.”

[27] The interest cannot be a mere financial interest as that constitutes an indirect interest, or another form of interest, or a derivate interest.¹⁴

Does SPC have *locus standi*?

¹³ (CCT186/15) [2016] ZACC 54 (21 December 2016) par [9]

¹⁴ *Peermont Global (KZN) (Pty) Ltd v Afrisun KZN (Pty) Ltd* (11097/18) [2020] 4 All SA (14 August 2020) par [24]

[28] It was argued that SPC has no *locus standi* because the parties relating to the approvals were Steinhoff and the SARB. SPC would not on its own have standing to institute the review proceedings. SPC is thus only tangentially affected by any order the review court might make.

[29] I understand the *Giant Concerts*-matter to have found that standing cannot be founded only on the illegality of the challenged decision, but that standing is founded on the effect it will have on SPC's interest or potential interest. SPC has to demonstrate the interests that confer standing to bring the review, as well as the impact the decision of SARB has on it. PAJA confers a right to challenge a decision if it "adversely affects the rights of SPC which has a direct, external legal effect." Reference was made to the decision of the Supreme Court of Appeal in *Judicial Service Commission v Cape Bar Council* where the legal interest was discounted because the prayer sought would not have affected the intervening party's appointment to the post.

[30] In this matter the orders sought directly affect the intervening party's legal interest; was SARB's decisions prohibiting the Steinhoff group from transferring funds and withdrawing permissions valid, directing SARB to take a decision pertaining the release of funds, alternatively declaring that the prior approvals by SARB are valid and binding. All affect SPC. The only prayer not relevant to SPC is prayer 4. It is correct that they were not a party to the approvals sought by Steinhoff from the SARB, but they acted upon those approvals and would not have acted the way they did if SARB had not approved the transactions. This demonstrates the interest that confers standing and the impact the decisions had on SPC.

[31] Payment is a financial interest but that is not what SPC is seeking, it is seeking a wider interest in the review; its vested interest in a commercial agreement which directly affects SPC. The review court will need to hear from this party itself about the commercial transaction, its background and reasons therefore.

Will SPC if it intervenes as an applicant achieve what Steinhoff cannot?

[32] In the affidavit by SPC the position it will seek to adopt in the review is set out in Ibex's affidavit in Chapters 1, 11 and 111 and will not seek to adduce any other facts. The argument thus went that SPC has nothing new to contribute, granting intervention will serve no purpose and if Steinhoff wins, then SPC wins. But that is exactly the point, to be joined as an applicant it must rely on substantially the same question of law or fact in which it has a legal interest. The mere fact that Steinhoff can achieve what SPC seeks to achieve does not deprive SPC from its right to be an applicant.

[33] SPC can in the review application file an affidavit, or seek the court's permission to do so, if necessary. The SARB can object if new facts are set out and the review court can decide any objections raised. Steinhoff cannot set out what the thought process and reasons were of SPC in coming to the commercial agreement, only SPC can do that.

Are the facts put up by SPC secondary facts?

[34] Simply put, I understand SPC's reason for the intervention, as set out in its affidavit that it had given up "preferential" rights against Steinhoff and agreed to deferral of claims for the better good of Steinhoff and all its creditors and specifically because the SARB had granted approval of these payments. It avers it would not have done so had these approvals not been granted and would have resorted back to its "stronger" right to claim against the Steinhoff Group. In fact, by deferring the debt and relying on the approvals of the SARB the financial creditors have relinquished their rights to prosecute their claims and execute against assets which they would have had recourse to. The SARB has now taken decisions contrary to their approvals which decisions they want to be reviewed and set aside, or in the alternative a declaratory order granted that the approvals given by the SARB are valid and binding.

[35] These undisputed facts set out are not secondary facts. This was asserted in SPC's affidavit. SPC need not aver that they seek payment out of earmarked funds. They are not seeking payment as a prayer, or escalation of deferred payment. SPC does not seek immediate payment as a prayer, it seeks that SARB approvals stand and consequently that no new approvals need to be sought. The above averments are facts capable of being used to draw inferences and are not just SPC's own conclusions; they are the only entity to explain as to why they took the decisions and actions that it did to come to a commercial agreement with Steinhoff and I am satisfied that SPC set out sufficient direct facts to entertain as to whether it has a direct and substantial interest. Furthermore, it must be remembered that SPC was limited in what facts they could place before me because the record is confidential.

[36] At this juncture I intervene to remark that I did not consider any of the facts contained in the founding affidavit to the review that was not specified in the affidavits in the intervention application. I restate the trite principle that a court will not *mero motu* trawl through annexures to an affidavit without specific references being incorporated in the affidavit. It is not open to a party to merely annex to his affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. As far as Ibex relied on portions of its affidavit in the review application I did not rely on any facts not set out specifically in the affidavit in support of SPC in coming to a decision. The facts relied on were the common cause facts set out by SPC and Ibex only.

Is there prejudice to the SARB if the intervention application is granted?

[37] As the interests of justice is not a factor to consider before me prejudice is not a factor. But, even if I am wrong, and it is a factor to consider, then any prejudice due to confidentiality was addressed in open court with SPC's explicit undertaking to sign a confidentiality agreement. A court can accept that this entity will adhere thereto.

[38] A court cannot not allow a party to intervene as an applicant because it may open the floodgates and increase the costs of the litigation. If parties all have a legal interest in a matter they are of right entitled to be joined. A review court can limit costs or make a cost order that is reasonable, fair and just.

[39] I am satisfied that SPC has shown that it has a direct and substantial legal interest in the review and that it is granted leave to intervene as the sixth applicant in case number 2023-126938.

Costs

[40] I can see no reason why the general rule that the costs should follow the result should not be followed. The SARB must pay the costs of SPC and Ibex, including the costs of two counsel on scale C.

[41] I accordingly make the following order:

- 41.1 The intervening party is granted leave to intervene in the application proceedings launched out of the above Honourable Court case number 2023-126938 as the sixth applicant.
- 41.2 The first to fourth respondents are to carry the costs of the intervening party and the applicants, jointly and severally the one paying the other to be absolved, including the costs of two counsel on Scale C.


S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NO: 2023-126938

HEARD ON: 18 September 2024

FOR THE INTERVENING PARTY: ADV. J. WASSERMAN SC
 ADV. A. GOVENDER
 ADV. N. SIBANYONI

INSTRUCTED BY: Cliffe Dekker Hofmeyr Inc.

FOR THE APPLICANTS: ADV. M. DU P. VAN DER NEST SC
 ADV. D. WILD
 ADV. T. NGAKANE
 ADV. E.A. VAN HEERDEN

INSTRUCTED BY: Webber Wentzel

FOR THE 1ST TO 4TH RESPONDENTS: ADV. N.G.D. MARITZ SC
 ADV. T. TSHETLO

INSTRUCTED BY: Bowman Gilfillan Inc.

DATE OF JUDGMENT: 7 October 2024