

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 42818/20**

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

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**SIGNATURE**

...12/12/2024.....  
**DATE**

In the matter between:

**JOHANNES HENDRIK JACOBUS STEYN      FIRST INTERVENING APPLICANT**

**GUNTHER DONALD FREYER                  SECOND INTERVENING APPLICANT**

*In re:*

**SINGLE DESTINATION ENGINEERING (PTY) LTD                  FIRST APPLICANT**

**GUARDIAN INTERGRATED SYSTEMS CC                  SECOND APPLICANT**

and

**T VAN DEN HEEVER N.O.                  FIRST RESPONDENT**

**NAG OMAR                  SECOND RESPONDENT**

**T C LOURENS N.O.**

**THIRD RESPONDENT**

[in their capacities as the joint liquidators of Skincon Calibrate (Pty) Ltd (in liquidation)]

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**JUDGMENT**

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**Manoim J:**

- [1] This is an application for intervention in what I will term the Main application. The two applicants are erstwhile directors and shareholders of a company called Skincon Calibrate (Pty) Ltd (“Skincon”) that is now in liquidation
- [2] The respondents in this application, Single Destination Engineering (Pty) Ltd (“SDE”) and Guardian Integrated Systems CC (“in business rescue”) (“GIS”), are the applicants in the Main application. (For convenience I will refer to them from now on collectively as the respondents, since that is their status in the present application which is interlocutory to the main application. Where I deal with them separately, I refer to them by name.) They allege that they are creditors of Skincon. On that basis they brought the Main application in terms of section 360 of the Companies Act, 71 of 2008 (“the Act”).
- [3] That section provides for a creditor or member of a company that is being wound up to apply to inspect its documents. Some background is required to situate the present intervention application.

**Background**

- [4] SDE together with Skincon and another firm was a member of a consortium tasked with the construction of a facility for First National Bank. GIS was a sub-contractor to the consortium. According to the respondents, Skincon was the principal contractor, which meant it was responsible for managing the consortium's finances. In this capacity it allegedly received all payments made to the consortium by FNB, as the consortium did not have its own banking account. The consortium also made use of sub-contractors. Certain subcontractors have obtained an arbitration award against Skincon, SDE, and another firm called Maine Consulting, for approximately R 20 million. The respondents allege that instead of paying the amounts, Skincon's directors, who are the two applicants in the intervention application, placed Skincon into voluntary liquidation and went to Australia where they now reside.
- [5] The money from FNB was paid into the Skincon account. This is the reason the respondents say they want access to the books. They allege that prior to launching the main application they had sought access to the books from the applicants who initially ignored their requires and then said this was a matter for the liquidators.
- [6] The respondents both allege they are owed money by Skincon arising from the construction project which Skincon has refused to pay. In May 2020, Skincon was voluntarily wound up by the applicants who were its only two directors and members.
- [7] In the main application the respondents refer to two separate lawsuits relevant to the present matter. In the first, Theo Gaffner, a director of SDE, is being sued

in his personal capacity from debts arising from the FNB project along with the two applicants, and another person, by a firm called Master Power Technologies (“MPT”).

[8] In the second matter a judgment was obtained against Skincon and SDE and a firm called Maine Consulting Pty Ltd. The three are jointly and severally liable for the judgment debt of R 6 million. But ironically the plaintiff in this matter is GIS. Nevertheless, despite this judgment both firms have made common cause in this litigation.

[9] They did so by jointly bringing an application in terms of section 360 of the Act. That section provides, inter alia, for a creditor of a company being wound up to apply to court for an order to inspect the books and papers of that company.

[10] Since the main application was brought in 2001, GIS was placed in business rescue. It is in that capacity, represented by its business rescue practitioner, that it joins SDE in opposing the intervention application.

[11] In the main application, the respondents allege that they are creditors of Skincon and thus are entitled to inspect the books of the company, now under the control of the liquidators. They give seven reasons for doing so. Amongst those relevant to the intervention application are those that contemplate future litigation against the applicants in their personal capacities. I mention them briefly:

a. That it may be necessary to hold an insolvency enquiry for the purpose of gathering evidence to hold the applicants personally liable. The documents

they seek to inspect they allege "... will be vital in motivating such an enquiry;"

- b. SDE (the first respondent) needs the documents to prove its claims against Skincon and the respondents in their personal capacities and to prove that they ("Skincon") and the respondents are liable to indemnify SDE against claims made against it.
- c. The respondents need to ascertain whether any payments from FNB have been routed to a company called Yaris which had been set up by the applicants.

[12] But despite these several mentions of the applicants in the founding affidavit in the main application only the liquidators of Skincon are cited as respondents. Although at one stage it appeared that the applicants might be cited this never transpired. Initially it appeared the application would proceed unopposed. In September 2021, the three joint liquidators had indicated to the applicants that they would not oppose the main application. The applicants then brought the present intervention application in October 2021. But the liquidators have changed their position, since the papers in the intervention application were finalised, and in June 2024, they filed papers to oppose the main application.

[13] The intervention application was thus premised on the main application proceeding unopposed. But that has now changed.

[14] Nevertheless, I now consider what facts the intervention application was based on when it was launched. The applicants allege that:

a. The main application has been brought mala fide because SDE wishes to use the information gleaned from the inspection to bolster its own case where it faces a lawsuit brought against it at the instance of MPT. The real motive it is alleged, is to seek information that could lead to the applicants, as erstwhile directors, becoming personally liable.

b. The applicants have a direct and financial interest in the main application because as the sole shareholders of Skincon they have a reversionary interest in the company.

c. Certain inaccurate factual allegations have been made about the applicants in the main application which must be corrected. Specifically mentioned is the allegation that they left to go to Australia when they wound up Skincon.

d. The liquidators were not opposing the application and as a result certain legal issues might not get raised if the application proceeded unopposed. Specifically, the applicants placed in issue that the respondents are not creditors of Skincon and hence had no locus standi to bring the application in terms of section 360. In the case of SDE it is alleged that it has never proved its claim and in respect of GIS that the judgment it relies on is a nullity, at least as against Skincon, as it was brought on an unopposed basis after the company had been placed in provisional liquidation.

### **Requirement for intervention**

[15] Intervention applications are governed by Rule 12 of the Uniform Rules. It is trite law that the requirements for an intervention application are that the party seeking intervention must meet at least two minimum requirements:

a. it has a direct and substantial interest in the main application; and

b. Its rights would be prejudicially affected if it were not allowed to intervene.<sup>1</sup>

[16] The respondents argue that the applicants have not met either of these requirements. First, they argue that they have not shown a direct and substantial interest in the subject matter of the main application. Given that Skincon is now in the process of being wound up the liquidators stand in the stead of the erstwhile director's and members.<sup>2</sup> Hence, they have no direct interest. Nor does their shareholding in the company amount to more than a financial interest. The courts have held that a financial interest is only an indirect interest in the litigation. But they also argue that the applicants failed to make out the second element of the requirements for intervention – that they are affected by the outcome of the case.

### **Analysis**

[17] The test for intervention is not controversial. Nor are the legal issues that the respondents rely on. The applicants' shareholding in Skincon is a financial interest. It does not give rise to a direct and substantial interest in the subject matter of the main matter, otherwise each shareholder would always have such

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<sup>1</sup> See for instance *Amalgamated Engineering Union v Minister of Labour* 1949(3) SA 637(A) at 659.

<sup>2</sup> Section 80(8)(b)(ii) of the Companies Act 71 of 2008

an interest.<sup>3</sup> Nor does the fact that they are the only shareholders of the company; that goes to the quantity of their interest not its legal nature. The fact that they were directors is also of no moment once the company is in the process of being wound up.

[18] But even if they were able to contend for such an interest as being direct and substantial, they fail on the second leg. The applicants are not prejudiced by the outcome of the application. It is important not to lose sight of what the application is for. It is the right to inspect documents of the company. What the applicants are concerned about is that the respondents will uncover some documents in the course of the inspection, which might encourage the respondents to act against them in some later proceedings. But that is not what is meant by prejudice caused by the order. That prejudice, if it is occasioned, would be the product of any later proceedings, not an order to inspect granted in the main application. Those documents exist already. The order does not have any transformative effect on them. The only implication if the main application is successful is that a class of persons gains access to inspect them. No other direct implication for the applicants flows from this.

[19] Nor is it relevant for the court to consider now what the respondents' motives are. Doubtless most creditors or members seeking a right of inspection have some future proceeding in mind. Speculation for that purpose it is to be used later is irrelevant at this stage.

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<sup>3</sup> *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (0), at page 167



[20] Then the applicants make the point that certain false accusations have been made against them in the main application. The respondents alleged that applicants had left for Australia after things got tough. But say the applicants they will be able to show that this chronology of events is false. But even if they can sustain this version it goes to the reasons for the decision not the decision itself. As was held in the *Zuma* case this is not a basis to permit intervention. There Harms JA explained:

[21] *“Nevertheless, to be able to intervene in proceedings a party must have a direct and substantial interest in the outcome of the litigation, whether in the court of first instance or on appeal. The basic problem with the application is that the applicants have no interest in the order but only in the reasoning. They are in the position of a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed. Such a person has no ready remedy especially not by means of intervention. To be able to intervene in an appeal, which is by its nature directed at a wrong order and not at incorrect reasoning, an applicant must have an interest in the order under appeal. The applicants do not have such an interest.”*<sup>4</sup>

[22] But while the *Zuma* case dealt with intervention in an appeal the reasoning remains apposite in the present case. An interest in the reasoning does not constitute a basis for intervention because the party has no interest in the order.

[23] Finally, the applicants seek to challenge the respondent’s status as creditors. When the main application was unopposed this was a central plank of the

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<sup>4</sup> *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

intervention application. The concern was that if the main application continued unopposed, possibly unauthorised parties might get access to inspect Skincon's documents. But since then, the liquidators have decided to oppose the application, and they have raised this point themselves. Thus, even if they could have intervened in the proceedings on some extended notion of intervention contemplated in the *United Watch* case, that plank has now been removed.<sup>5</sup> The court hearing the main application will now have the benefit of hearing argument on this point.

[24] The application for intervention fails. The respondents are entitled to their costs.

**ORDER: -**

[25] In the result the following order is made:

1. The application is dismissed with costs, including costs of counsel on scale B.

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**N. MANOIM**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION**  
**JOHANNESBURG**

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<sup>5</sup>See *United Watch and Diamond Co Pt Ltd v Disa Hotels Ltd* 1972 4 SA409 C at 416A, where it was held that a court has a discretion where a party seeks leave to intervene and there is no authoritative definition of the limit of that discretion.

Date of hearing: 06 December 2024

Date of Reasons: 12 December 2024

Appearances:

Counsel for the Intervening Applicants: M P van der Merwe SC

Instructed by: Tim du Toit & Co Inc

Counsel for the First Respondent: WKC Pretsch

Instructed by: Primerio Law Inc