

SOUTH AFRICA / JUDGMENT

Agriven (Edms) Beperk v Martins NO (ABSA Bank Beperk Intervening) [2008] ZAFSHC 54 (19 June 2008) [2008] ZAFSHC 54

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai

CASE / FILE NUMBER

2771/06

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IN THE HIGH COURT OF SOUTH AFRICA

(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2771/06

In the matter between:-

AGRIVEN (EDMS) BEPERK Applicant

and

PIET JOUBERT MARTINS N.O. Respondent

(In sy hoedanigheid as trustee van die

SNITRAM BELEGGINGS TRUST

ABSA BANK BEPERK Intervener

HEARD ON: 10 AUGUST 2006

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 19 JUNE 2008

- [1] These motion proceedings concerned the substantive intervention application for leave to be granted to the second creditor to be joined in the sequestration proceedings initiated by the first creditor against the common debtor. The debtor opposed the first creditor's primary application as well as the second creditor's secondary application. The second creditor sought an order in precisely the same terms as prayed for by the first creditor.
- [2] This judgment is about my reasons for granting leave to the second creditor to intervene. The relevant cause facts are:

On 19 May 2006 the first creditor, in other words, Agriven (Edms) Beperk filed an urgent application for the provisional sequestration of the debtor, in other words, Piet Joubert Martins N.O. in his representative capacity as the sole trustee of Snitram Beleggings

Trust No. TMP3989. The primary motion proceedings were initiated under case no. 2090/06.

- [3] On 15 June 2006 the primary application was postponed for two weeks by agreement. The reason for the postponement was to afford the debtor an opportunity of arranging a meeting with all its creditors. At the proposed meeting the debtor was supposed to persuade all its creditors including the first creditor, Agriven, to abandon the insolvency proceedings. The second creditor was prepared to abide by the unanimous decision of the creditors.
- [4] By 26 June 2006 no amicable settlement to abandon or withdraw the primary sequestration application had been reached or conveyed to the second creditor. It appeared from the founding affidavit, the answering affidavit and the replying affidavit filed in connection with the primary sequestration application that the second creditor was the biggest of all the debtors' creditors.
- [5] On 28 June 2006 a notice of motion was served and filed with the registrar under case no. 2771/06. The notice of motion constituted a new application by a new party, Absa Bank Limited. This is what I earlier called a secondary application by the second creditor. Here, as in the primary application, the debtor is one and the same entity.
- [6] On 29 June 2006 the secondary application was allocated to me as was the primary application. Both applications were postponed to 10 August
2006. It was also agreed that the second creditor proceed to harvest the potatoes on the farms leased by the respondent.
- [7] On 10 August 2006 the intervention application was argued first. Mr. Reinders, on behalf of the second creditor, argued for the grant of the order. Mr. Fischer, on behalf of the debtor, argued against the grant of the order. This then completes the summary of the relevant common cause

facts.

- [8] The crisp issue which the intervention application raised was whether there was any valid ground to justify the intervention of the intervener, in other words, the second creditor, in the main sequestration application initiated by the applicant, in other words, the first creditor, against the respondent, in other words, the common debtor.
- [9] Mr. Reinders, counsel for the intervener, argued that one creditor of the debtor was entitled to intervene at any time in the pending sequestration proceedings initiated at the instance of another creditor of the same debtor. He cited *JHATAM AND OTHERS v JHATAM* 1958 (4) SA 36 (NPD) as authority for this proposition. Therefore, he submitted that a proper case had been made out for the second creditor to intervene in the primary sequestration proceedings.
- [10] But Mr. Fischer, counsel for the respondent, differed. He contended that there was no valid reason for the second creditor to launch a subsequent application in its own right for the same relief with the full knowledge that such relief had already been claimed in the previous, but still pending, application for the same debtor's sequestration. He submitted that, seeing that the intervention application was not based on any of the recognised grounds of intervention, it fell to be dismissed. Counsel relied on *Meskin: Insolvency Law*, p. 2-45 to p.2.47 and the caselaw therein cited, in particular *FIRSTRAND BANK LTD v WALLACE PIENAAR PROPERTIES CC (ABSA BANK LTD INTERVENING)* 2002 (2) SA 758 (W).
- [11] It seems helpful to embark on a cursory overview of caselaw. In *JHATAM AND OTHERS v JHATAM* 1958 (4) SA 36 (NPD) at par. 38a Holmes J observed:
- "There are several cases dealing with intervention by another creditor after sequestration or winding up proceedings have been launched. See Mohomedy & Sons (Pty.) Ltd v Economic Clothing Manufacturers (Pty.) Ltd., 1955 (1) SA 52 (N), and cases cited therein, and Mayet v Pillay, 1955 (2) SA 296 (N). They differ from the present case in that in all of them the intervention arose after the provisional order had been granted. But they serve to indicate that the Court takes a practical view in these matters, and also bears in mind the interests of the general body of creditors. In the circumstances I granted leave to the second creditor to join as a petitioner in these proceedings."*
- [12] The peculiar character of intervention proceedings in sequestration proceedings was described as follows in *FULLARD v FULLARD* 1979 (1) SA 368 (TPD) at 372 B – E per Coetzee J:
- "(4) Die Hof "takes a practical view in these matters and also bears in mind the interests of the general body of creditors"*
- per HOLMES R in die Jhatam saak op cit te 38A.

Dit is duidelik dat hierdie praktyk 'n unieke een is wat heelwatverskil van konvensionele toetreding. Dit is nòg 'n suiwer toetreding nòg substitusie van applikante en is eintlik sui generis uit 'n prosesregtelike oogpunt gesien. Dit is eerder 'n selfstandige aansoek wat, uiteraard anders as die gebruiklikeen, aangelê

word deurdat die skuldeiser slegs opdaag by die Hof met sy eie getuienis, gewoonlik op die keerdag. Omrede hy skuldeiser is, het hy locus standi om aangehoor te word in 'n concursus creditorum wat reeds bestaan en die sogenaamde verlot om tussenbeide te tree is eintlik 'n formaliteit. 'n Mens moet dus versigtig wees om, by die beoordeling van die probleem in casu, nie oorwegings wat geld in 'n konvensionele proses klakkeloos toe te pas nie. Dit is egter handig om nie uit die oog te verloor dat selfs in 'n konvensionele toetreding 'n geding kan optree op enige stadium, ook nadat uitspraak alreeds gelewer is indien daar 'n appèl moontlik is. Kyk Orphan Board v Van Reenen

[1829] EngR 630; 12 ER 252 'n gesaghebbende Geheime Raadsbeslissing wat aangehaal word deur KRAUSE R in Bitcon v City Council of Johannesburg and Arenow Behrman & Co 1931 WLD 273 te 292."

[13] The author Meskin: Insolvency Law at p. 2-45/6 says the following:

"It is further submitted that, having regard to the implications of the institution of a concursus creditorum, any creditor of the respondent has locus standi to seek to intervene in the proceedings where a valid reason for such intervention exists – eg. where the original applicant is unable for any reason to pursue his application or intends to withdraw such and the intervener seeks to ensure that the estate is sequestrated, or the original applicant is protracting the proceedings to the prejudice of other creditors (whose enforcement of their claims in the ordinary course is blocked) and the intervener seeks to eliminate any sequestration proceedings. The Court may also, in the exercise of its discretion, on the grounds of convenience, permit a person who is not a creditor, but who prima facie has an interest in the sequestration proceedings, to intervene therein."

[14] The concept of intervening in a running adjudication process in a court of law was held to refer to a case where a party, not initially joined as a litigant, subsequently wanted to have a say in the lis pending between the original adversaries by seeking the permission of the court so to participate. The intervention was often, though not necessarily, along the lines of demonstrating, that, if the court were to grant the relief sought by, say the applicant or the plaintiff, whatever the case may be, the court order would adversely impact on the intervening party's interest as well, apart from those of the original respondent or defendant – FIRSTRAND BANK LTD v WALLACE PIENAAR PROPERTIES CC (ABSA BANK LTD INTERVENING) 2002 (2) SA 758 (W) at 760i – 761a per Flemming DJP.

[15] In the second place it is known that intervention proceedings are sometimes launched for leave to allow the new party to intervene in preceding insolvency proceedings in a case where the new party, as an outside observer, reckoned that the original applicant in the preceding insolvency case was not prosecuting such case with genuine swiftness and firm determination to achieve the true purpose as the insolvency law envisages, but rather

deliberately employing the legal process to protect the respondent against the respondent's creditors - *FIRSTRAND BANK LTD v WALLACE PIENAAR PROPERTIES CC*, supra at 761c – e.

[16] In the third place indirect intervention proceedings may be brought by way of an independent application for sequestration or liquidation which falls beyond the lis between the applicant and the respondent in the preceding sequestration application - *FIRSTRAND BANK LTD v WALLACE PIENAAR PROPERTIES CC*, supra at 761e – h.

[17] In *NEL AND OTHERS NNO v THE MASTER AND OTHERS* 2000 (2) SA 728 (W) at 732a – d Bliden J had this to say about the purpose of intervening proceedings:

“From the various cases which are quoted in the Fullard case it is plain that the dominant purpose of the intervention is:

- (a) To avoid delay and unnecessary expense. (*Mahomedy & Sons B (Pty) Ltd v Economic Clothing Manufacturers (Pty) Ltd* 1955 (1) SA 52 (D) at 53F--G; *Ex parte Standard Trading Co (Pty) Ltd: In re Perl v Simco Clothing Manufacturers (Pty) Ltd* 1955 (3) SA 508 (W) at 509C--D.)
- (b) To avoid an hiatus occurring between an order granted at the instance of one creditor and an order which may be granted at the request of an intervening creditor with a view to minimising dealings with the estate in the meanwhile. (*Flax v Berliner: Houndsditch Warehouse (Pty) Ltd Intervening* 1950 (2) SA 259 (W); *Mahomedy & Sons (Pty) Ltd v Economic Clothing Manufacturers* (supra at 53F--H); *Mayet v Pillay* 1955 (2) SA 296 (N) at 297A--B.)
- (c) To avoid any appreciable interval during which the debtor becomes revested with his assets. (*Flax v Berliner: Houndsditch Warehouse (Pty) Ltd Intervening* (supra at 260).)”

[18] The effect of intervention was also explained by Bliden J in *NEL AND OTHERS NNO v THE MASTER AND OTHERS*, supra at 731e – j:

“To a large measure the arguments of the litigants in the present matter centres around the significance and consequence in law of the intervention by the bank which resulted in the final order of winding-up being granted at the same time as the rule nisi issued in the Van Niekerk application was discharged.

The effect of intervention by creditors in applications for sequestration and in applications for the winding-up of companies, where the same considerations apply, has been dealt with in a number of cases. These have been conveniently collected in *Fullard v Fullard* 1979 (1) SA 368 (T) at 371H--372B. The effect of such intervention is, in my view, correctly described by Coetzee J as follows:

'(1) 'n Skuldeiser kan op enige stadium tussenbei tree om

- (a) 'n voorlopige sekwestrasie bevel opgehef te kry of
- (b) waar die applikant nie voortgaan met die saak nie of sy voete sleep, 'n vars sekwestrasiebevel in sy eie reg en naam te erlang.

- (2) Waar die applikant nie voortgaan nie kan die bestaande sekwestrasie bevel nie bekragtig word op aandrang van enige tusssebeitredende skuldeiser nie. Dit moet opgehef word en 'n vars bevel kan uitgereik word met die skuldeiser as applikant en nie as medeapplikant nie. Hy alleen word dus dominus litis en die oorspronklike applikant val heeltemal weg verder vorentoe.
- (3) Die tussenbeitredende krediteur moet 'n saak vir sekwestrasie uitmaak, sekuriteit verskaf ens asof hy aanvanklik die applikant was, maar hy kan steun op feite wat blyk uit die stukke in die bestaande verrigtinge.
- (4) Die Hof "takes a practical view in these matters and also bears in mind the interests of the general body of creditors"
- per Holmes R in *Jhatam v Jhatam* 1958 (4) SA 36 (N).'

As is clear from these remarks the intervening creditor cannot stand on the back of the original applicant who is no longer proceeding with his application, but must bring a fresh application."

[19] I now turn to examine the facts and to apply the foregoing principles. The intervener's application was presented on 28 June 2006 before the provisional order of sequestration had been granted in favour of the first creditor, that is to say the applicant. It was a separate though not independent application for the sequestration of the same respondent against whom the provisional order had already been sought. The matter was allocated a different case number. The intervener furnished the required security. The Master of the High Court issued a certificate whereby he certified that sufficient security had been given – vide annexure 'q'. These features gave the secondary application the hallmark of a substantive and independent application. However, it was not. It will soon become clear why.

[20] The second creditor sought an order in the following terms and I have paraphrased them:

20.1 That the rules relating to formal time limits and service of applications as prescribed in rule 6(12) be relaxed and that the matter be heard as an urgent application

20.2 That Absa Bank Limited be allowed to intervene as an intervening creditor in the primary sequestration application filed under case no. 2090/06.

20.3 That the estate of the respondent be placed under provisional sequestration in the hands of the Master of the High Court together with ancillary relief in accordance with the wording of the notice of motion as filed under case no. 2090/06 dated 19 May 2006.

20.4 That the costs of the sequestration application be costs in the sequestration.

[21] It follows from the foregoing alone that the secondary application was not a concurrent application brought by a new party who was unaware of the preceding application. See also paragraph 4 and 5 of the founding affidavit. By 30 May 2006 Absa Bank Limited, the intervening creditor, was already aware of the primary application by the first creditor, Agriven.

- [22] On behalf of the respondent, Mr. Reinders, argued that the averments of the intervening creditor as contained in its founding affidavit and replying affidavit showed that, Absa as the biggest creditor of the respondent, was throughout motivated by an honest wish to assist the respondent and to ensure that accurate and true facts were placed before the court seeing that the applicant and the respondent in the preceding application had failed to do so. He denied the respondent's claim that the intervening creditor had colluded with certain parties to intervene for the sole purpose of running up the costs of the respondent's sequestration.
- [23] Mr. Fischer argued that there were a few valid reasons, which over the years have crystallised into recognised grounds for intervening in a preceding sequestration application. He contended that unless the intervening creditor can show: that it is against the sequestration of the respondent on the ground that the sequestration order would, if granted, have an adverse impact on the interests of the intervening creditor; or that although it was for the sequestration of the respondent, it wanted to intervene on the grounds that the first creditor who initiated the sequestration proceedings was, in fact, protecting the respondents at the expense of the concursus creditorum; or that, although it was for the sequestration of the respondent, it wanted to intervene on the grounds that the applicant was delaying the sequestration proceedings through tardiness; or that the new party wanted to intervene on the grounds that it launched a separate independent and substantive application to have the respondent sequestrated unaware that a different creditor of the respondent had already initiated a similar concurrent application against the same respondent – then such a second creditor has no business to intervene. Accordingly counsel submitted that in this case the intervening creditor had no valid reason to be here and that the whole intervention application was a disguised collusive scheme to run the costs up.
- [24] The intervening creditor's deponent, Mr. G. L. Botha explained the one reason underlying the decision of Absa Bank Limited to intervene as follows:

“18.

Uit hoofde daarvan dat die Respondent verskeie verwere opper teen die Applikant in die aansoek om sekwestrasie, asook ten opsigte van die meegaande skuldeisers het die Bank besluit om toe te tree tot die aansoek om sekwestrasie-verrigtinge, ten einde toe te sien, dat dit tot die einde toe volvoer word.”

The idea here was to bolster the finalising hand of the applicant as the sequestration creditor by showing that there was no substance in the assortment of various defences the respondent had raised against its creditors. This was the first reason for the intervention.

- [25] At paragraph 19 of the intervening creditor's founding affidavit two more reasons which prompted Absa Bank Limited to intervene were given. The applicant's founding affidavit which was made by a certain Mr. Rossouw contained the allegation that the respondent had committed an act of insolvency in terms of section 8(c) by preferring one creditor, namely,

Absa Bank above, its other creditors. Vide paragraph 13 on p. 121 founding affidavit of Agriven. Now according to Absa Bank the allegation was incorrect. It is quite obvious that Absa Bank was so aggrieved by the allegation it considered untrue that it decided to intervene in order to protect its image unfairly tarnished by what it regarded as false accusation. According to the intervening creditor the respondent was commercially insolvent and had committed an act of insolvency in terms of section 8(g). In this regard the intervening creditor relied on annexure “HV6” dated 11 April 2006 which was attached to the application of the first creditor, Agriven. This was the second reasons which prompted the second creditor to intervene.

[26] The third reason that prompted Absa Bank Limited to bring an intervention application is to be found at paragraph 24, founding affidavit. See p. 24 of the record.

“24.

Ek het reeds gehandel met die redes waarom ABSA op hierdie stadium eers toetree. Dit was ABSA se houding deurgaans, dat die Respondent tot en met die laaste geleentheid gegee moet word om te poog om uit sy finansiële penarie te kom en doen ek met eerbied aan die hand dat die Bank se houding deurgaans spreek van tegemoetkomendheid. Die Respondent kon tot en met 26 Mei 2006, nie daarin slaag om ‘n bevredigende reëling met sy skuldeisers te tref nie. Die Respondent het voorts opgehou met die bewerking van die aartappeloos. Die Bank het in voormelde omstandighede besluit, om dringend toe te tree tot die aansoek om sekwestrasie vir die redes hierin tevore uiteengesit.”

[27] It was also contented on behalf of the intervening creditor that, as the biggest of the respondent’s creditors, coupled with the fact that the intervening creditor was intimately involved in the respondent’s financial affairs, it was best placed to drive the sequestration proceedings against the respondent. This was the fourth reason relied upon to justify the intervention application.

[28] The indebtedness of the respondent to the intervening creditor as on 27 June 2006 consisted of the following five debts:

28.1 i.r.o. acc 470146176 R1038215.05 anx “b” p. 36

28.2 i.r.o. acc 8059395404 R860391.42 anx “c” p. 37

28.3 i.r.o. acc 8059912373 R1112926.11 anx “d” p. 38

28.4 i.r.o. acc 67808288 R110737.76 anx “e” p. 39

28.5 i.r.o. acc 65673113 R180183.81 anx “f” p. 40

Total R3302454.10

[29] There exists a familiar class of grounds on which the relief of intervention is customarily sought according to caselaw. However, the class of such usual grounds remains just that. Such grounds are by no means exhaustively defined. Since the remedy of intervention is discretionary, the list is naturally open-ended. To contend, as the respondent did, that since, in the instant case, the reasons advanced by the second creditor for its decision to intervene were not covered by the usual grounds, the intervention fell to be refused, would erode the discretionary nature of the remedy.

[30] In the case of *FIRSTRAND BANK LTD*, supra at par. 760h Flemming DJP said the following:

“There was no reason why the new party could not wait another three weeks or so to see what the outcome is of the applicant's application for winding-up. It has not even attempted to demonstrate any reason. In the circumstances the starting point ought to be that there was no justification for incurring costs to achieve a result which was possibly or probably underway in any event.”

[31] It must be kept in mind that in this case the respondent had been endeavouring, with the backing of the intervening creditor, to reach some compromise with its creditors. Although the creditors’ meeting

held on 26 June 2006 yielded no fruitful result, it was only one creditor who was against the idea of accommodating the respondent in one way or the other. This was according to the respondent’s own version. The setback of that day notwithstanding the respondent did not give up hope. He was still entertaining the hope that he might persuade his creditors on or before 29 June 2006 to abandon the idea of sequestrating him. If he could succeed, there was, in theory at least, a chance, however remote, that the primary sequestration application might be withdrawn. However, it was not the intervening creditor’s case that it was prompted to seek intervention by the fear of that remote possibility.

[32] By 13 June 2006 the second creditor, by its own version, had come to realise and to accept that the sequestration of the respondent was inevitable. The process had become irreversible. It was not only to the advantage of the general body of the respondent’s

creditors, but also to the respondent as well to accelerate the process and to harvest the potatoes which the respondent no longer

had the capacity to harvest.

[33] The intervention application, although it had all the attributes of an independent application, it was not a concurrent application. The intervener knew about the primary application sometime before the secondary application was launched. Therefore, the second creditor could not permissibly intervene on the grounds of its application been a concurrent application. Both the notice of motion and the founding affidavit clearly indicate that the intervener did not rely on its own fresh course of action and its own peculiar facts to such extend. The second creditor heavily relied on annexure “HV6” of the first creditor’s application. That annexure was a letter by the respondent dated 11 April 2006. When the second creditor presented its application on 28 June 2006 it was fully aware of the particular

annexure. The second creditor was left in no doubt after reading the founding affidavit, the answering affidavit, the replying affidavit and all the annexures thereto pertaining to the primary application that the respondent had committed an act of insolvency in terms of section 8(g). What is more important is that it was never contended by or on behalf of the intervening creditor that the first creditor's application for the sequestration of the respondent was not likely to succeed. It seems to me that the sequestration of the respondent was likely to succeed with or without the intervention of the second creditor.

[34] The reasons advanced by the intervener were not flimsy reasons. They were naturally understandable. I was persuaded, at the time the matter was argued before me, that the reasons given by the second creditor, collectively considered, justified the grant of leave to intervene. But now that I have revisited the facts and the submissions made, I cannot with conviction say so again. None of those reasons advanced by the intervener, individually or cumulatively would contribute something without which the provisional

order of sequestration was unlikely to be granted. I am now convinced that I allowed the second creditor to intervene whereas the primary application was likely to succeed in securing the relief which both the first and the second creditor wanted. Be that as it may, it is now an accomplished fact that the second creditor intervened in this proceedings with the leave I granted. The second creditor could well have waited for the outcome of the first creditor's application.

[35] I am not persuaded that the intervener's decision was induced by the notice to run up the costs. Elsewhere in this judgment I was at pains to indicate the reasons which prompted the second creditor to come to the party. In view of my finding that I erroneously allowed the second creditor to intervene, it follows therefore that an injustice will be done to the respondent if I were to burden the respondent with the costs pertaining to the intervention application. Similarly, I am of the view that considerations of fairness and justice demand that I should not saddle the intervener with the costs of the intervention application. In the circumstances I am inclined to make no order as to costs one way or the other.

[36] This matter has doubly embarrassed. Firstly, because it took me such a long time to get it out. Justice delayed is justice denied. Secondly, there are no reasons to sustain the order I made on 10 August 2006. I tender my profound apology to the parties involved.

[37] In the result I make the following order:

37.1 The rules relating to formal time limits and service of applications as prescribed in rule 6(12) are relaxed and the matter is heard as an urgent application.

37.2 The second creditor, Absa Bank Limited, is hereby allowed to intervene as an intervening creditor in the primary sequestration application filed under case no. 2090/06.

37.3 The main relief sought namely, the placing of the estate of the respondent under provisional order of sequestration in the hands of the Master of the High Court, stands over for later adjudication.

37.4 There shall be no order as to costs one way or the other.

M.H. RAMPAL, J

On behalf of the intervener : Adv. S.J. Reinders

Instructed by:

E G Cooper & Sons Inc

BLOEMFONTEIN

On behalf of the respondent: Adv. P.U. Fischer

Martins Attorneys

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