

SOUTH AFRICA / JUDGMENT

Villa Retail Park Investments (Pty) Ltd and Others v Lombaard and Others (35617/2022) [2023] ZAGPPHC 1118 (15 August 2023)

[2023] ZAGPPHC 1118

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse van Nieuwenhuizen

CASE / FILE NUMBER

35617/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

Case

Number: 35617/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE:

15 August 2023

SIGNATURE:

JANSE VAN NIEUWENHUIZEN J

In

the matter between:

THE
VILLA RETAIL PARK INVESTMENTS (PTY) LTD
First
Applicant
WITBANK
HIGHVELD INVESTMENTS (PTY) LTD
Second
Applicant
TARENTAAL
CENTRE INVESTMENTS (PTY) LTD
Third
Applicant
FLORA
CENTRE INVESTMENTS (PTY) LTD
Fourth
Applicant
WATERGLEN
SHOPPING CENTRE INVESTMENTS
(PTY)
LTD
Fifth
Applicant
CARLTONVILLE
CENTRE INVESTMENTS (PTY) LTD
Sixth
Applicant
PLANET
WAVES 120 INVESTMENTS (PTY) LTD
Seventh
Applicant
HARLEQUIN
DUCK PROPERTIES 236 (PTY) LTD
Eight
Applicant
BORN
FREE INVESTMENTS 537 (PTY) LTD
Ninth
Applicant
RANGE
VIEW INVESTMENTS (PTY) LTD
Tenth
Applicant
BORN
FREE INVESTMENTS (PTY) LTD
Eleventh
Applicant
PLANET
WAVES 110 (PTY) LTD
Twelfth
Applicant
COLD

CREEK DEVELOPMENTS (PTY) LTD
Thirteenth
Applicant
THE
VILLAGE MALL INVESTMENTS (PTY) LTD
Fourteenth
Applicant
ZAMBEZI
RETAIL PARK INVESTMENTS (PTY) LTD
Fifteenth
Applicant
AMBER
SUNRISE PROPERTIES 95 (PTY) LTD
Sixteenth
Applicant
AMBER
SUNRISE PROPERTIES 96 (PTY) LTD
Seventeenth
Applicant
AMBER
SUNRISE PROPERTIES 97 (PTY) LTD
Eighteenth
Applicant
and
HERMANUS
STEPHANUS PHULLIPPUS LOMBAARD
First
Respondent
DEPUTY

NATIONAL DIRECOR
PUBLIC PROSECUTIONS:

ASSET
FORFEITURE UNIT
ADV.
OUMA RABAJI-RASETHABA
Second
Respondent
NATIONAL
PROSECUTING AUTHORITY
Third
Respondent
NATIONAL
DIRECTOR OF PUBLIC PROSECUTION
Fourth
Respondent
SPECIAL
DIRECTOR OF PUBLIC PROSECUTION
ADV.
LEBA
BALOYI
Fifth
Respondent

SPECIAL
DIRECTOR OF PUBLIC PROSECUTIONS
REGIONAL
HEAD: NORTH GAUTENG
ADV.
MARSHALL MOKGATTLHE
Sixth
Respondent
MINSTER
OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT
Seventh
Respondent
In
re-
HERMANUS
STEPHANUS PHULLIPPUS LOMBAARD
Applicant
ADV.
OUMA RABAJI-RASETHABA
First
Respondent
NATIONAL
PROSECUTING AUTHORITY
Second
Respondent
NATIONAL
DIRECTOR OF PUBLIC PROSECUTION
Third
Respondent
ADV.
LEBA
BALOYI
Fourth
Respondent
ADV.
MARSHALL MOKGATTLHE
Fifth
Respondent
DEVELOPMENT
Sixth
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] The applicants seek leave to intervene in the main proceedings issued under the abovementioned case number (“the main proceedings”) and to be joined in the main proceedings as the 7th to 24th respondents.
- [2] Only the first respondent opposes the application.

BACKGROUND

- [3] During the period 1998 to 2010, a company known as Sharemax Investments (Pty) Ltd (“Sharemax”) engaged in the business of creating and promoting so-called “Commercial Syndication Structures”. The syndication structures were devised as vehicles to acquire commercial properties, the acquisition of which were funded by utilising funds acquired from the investing public through the issuing of prospectuses in terms of the Companies Act, 61 of 1973.
- [4] In 2008, the South African Reserve Bank (“SARB”) investigated the affairs of Sharemax and concluded that there was reason to believe that the funding model utilised by syndication companies, constitutes a breach of section 11 of the Banks Act, 94 of 1990.
- [5] In September 2010, SARB issued directives against the syndication companies, in terms of the provisions of section 83 of the Banks Act, 94 of 1990, directing that the investors be repaid the moneys that they had invested in the various companies. Sharemax did not agree with the directive and brought an application for the review of the directive. In the review proceedings a compromise was reached between all the relevant stakeholders, including SARB, which culminated in a

Schemes of Arrangement, which was made an order of court on 20 January 2012. In the result, the directives were withdrawn by SARB.

- [6] The Schemes of Arrangement created a structure in terms of which scheme shareholders had a right to become shareholders in a new public company (Nova PropGrow) or to receive projected investment returns on and projected repayment of their historical investments from Nova Investments through debentures.
- [7] Since January 2012, Nova PropGrow and its subsidiary, Nova Investments, have been administering the property portfolio of the subsidiary companies (“the applicants”), which companies acquired properties in terms of the Sharemax scheme.
- [8] In view of the aforesaid background, the relief claimed in the main application needs to be considered.

MAIN APPLICATION

- [9] The second respondent investigated the conduct of Sharemax set out supra and decided not to seek a preservation order against the properties administered by the Nova group of companies. The second respondent's view was expressed in a letter dated 29 July 2020 by Adv R de Kock as follows: "there appears to be no 'illegality' as the companies and their underlying assets taken over by Nova complied with the Banks' Act and can therefore not be regarded as assets acquired from the proceeds of crime."
- [10] In other words the assets of the applicants are not considered by the second respondent to be the proceeds of crime.
- [11] The first respondent disagrees with the decision of the second respondent and is of the view that the properties owned by the applicants, are the proceeds of unlawful activities, because the properties were acquired in terms of the Sharemax scheme, which scheme was conducted in contravention of section 11 of the Banks Act.
- [12] As a result, the first respondent brought the main application and claims the following relief:

12.1 that the decision of the second respondent not to proceed with an application as contemplated in Chapter 6, section 38 of the Prevention of Organised Crime Act, Act 121 of 1998 ("the Act") 1998 be reviewed and set aside and that the second respondent be directed to bring such application within 30 days after the date of the granting of the order;

12.2 an order that the Nova Scheme did not have the effect in law of changing the character of the properties that were transferred to Nova.

- [13] Section 38 is contained in Part 2 of the Act that provides for the preservation of property in respect of which reasonable grounds exist that the property concerned is inter alia the proceeds of unlawful activities.
- [14] In order to succeed in the main application, the first respondent will therefore have to convince the court that reasonable grounds exist that the applicants' properties are the proceeds of unlawful activities.

BASIS OF INTERVENTION

- [15] The applicants in their capacity as the owners of the properties that forms the subject matter of the relief claimed in the main application, submit that they have a real and direct interest in the relief claimed in the application.
- [16] The first respondent does not agree and opposes the application on the basis that no relief is sought against the applicants in the application.

LEGAL PRINCIPLE

- [17] Rule 12 of the Uniform rules of court provides for the intervention of a party/parties as an applicant or respondent in an application. Two tests apply to wit: firstly, an applicant in an intervention application must have a direct and substantial interest in the subject matter of the application or, secondly, the intervention must be convenient.
- [18] The fact that no relief is claimed against the applicants, does not mean that the applicants do not have a direct and substantial interest in the matter. In *Standard Bank of South Africa Ltd v Swartland Municipality and others* 2011 (5) SA 257 SCA, Standard Bank sought leave to intervene in an application brought by Swartland Municipality for the demolition of structures on the property of a certain Mr Brand. Standard Bank was the bondholder of the property in question. On the question whether Standard Bank has a direct and substantial interest in the matter, the court held as follows at par [9]

“[9] It is trite that a mere financial interest in the outcome of litigation does not give a party the right to be joined in legal proceedings. But a mortgagee, as the holder of a real right in property, which includes buildings on the land, erected lawfully or otherwise, in my view clearly has more than a financial interest in the outcome of proceedings for the demolition of those buildings. In Home Sites (Pty) Ltd v Senekal Schreiner JA said that where a person claimed to have a servitude in land, and the validity of the servitude might become an issue in litigation between other parties, she had a clear right to be joined — to be given an opportunity to be heard and joined as a party. He cited in support of this the criterion stated in Collin v Toffie: where a person has a 'direct and substantial interest in the results of the decision' the matter cannot be 'properly decided' without her being joined as a party.” (footnotes excluded)

- [19] As set out supra, in order for the first respondent to succeed in the main application, the court will need to make a finding that reasonable grounds exist that the properties of the applicants are the proceeds of unlawful activities.
- [20] Once such a finding is made, the second respondent is directed to bring an application for the preservation of the properties. A preservation order will prohibit the applicants from dealing with the properties in any manner whatsoever and will manifestly impact on the property rights of the applicants.
- [21] In the result, I am of the view that the applicants have a direct and substantial interest in the outcome of the main application.

COSTS

- [22] The applicants were successful and is entitled to a cost order in their favour.

ORDER

The following order is issued:

1. Leave is granted to the applicants to intervene and to be joined as the 7th to 24th respondents in the main application.

2. The first respondent is ordered to pay the costs of the application.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD:

17 May 2023

DATE DELIVERED:

15 August 2023

APPEARANCES

For the Applicants: Advocate D Mahon Assisted by: Advocate L Laughland Instructed by: Faber Goertz Ellis Austen Inc For the 1st Respondent: Advocate GC Nel Assisted by: Advocate P Vorster Instructed by: Hurter Spies Inc

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