REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 4049/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

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In the matter between:

SARIËTTE GROENEWALD	**INTERVENING PARTY**
and	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	**APPLICANT**
and	
KM RAMOROKA N.O	**1st RESPONDENT**
CORNELIA MARIA CLOETE N.O	**2ND RESPONDENT**
MABATHA SHIRLEY MOTIMELE N.O	**3RD RESPONDENT**
BEN REDELINGHUYS	**4TH RESPONDENT-**

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] The intervening party has launched an intervention application in which she seeks leave to intervene as a respondent in the application launched by the Commissioner of the South African Revenue Services ("the commissioner") in terms of section 151 of the Insolvency Act 24 of 1936 ("the Insolvency Act") to review and set aside a decision taken by the acting assistant master in the office of the Master of the High Court ("the first respondent") at a meeting of creditors of a liquidated close corporation ("the main application").

BACKGROUND

[2] The close corporation ("Valinor") was finally liquidated on 28 May 2015 pursuant an application by the South African Revenue Services ("SARS") on the ground of its inability to pay its debts. The first respondent convened the first meeting of Valinor's creditors which commenced on 13 November 2015. At the said meeting SARS submitted six claims in terms of the provisions of the Insolvency Act. All the claims were based on assessed tax debts. SARS was at that meeting represented by an official of the commissioner. The claims were objected to by the accountants of Valinor. Despite the commissioner's responses to the objections, the first respondent upheld one of the objections raised and rejected SARS' six claims. Pursuant thereto the commissioner launched the main application. Not one of the respondents in the main application opposes the relief sought by the commissioner therein. Valinor's accountants filed a notice to oppose but later withdrew it.

[3] Pertinent to the application before me is the order sought by the commissioner in prayer 2 of his notice of motion in the main application. The said prayer 2 seeks to substitute the first respondent's decision (taken at the creditors' meeting) with a decision allowing SARS' disallowed claims. Prayer 2 of the commissioner's notice of motion reads thus –

> "2.That the decision of the first respondent [acting assistant master in the office of the Master of the High Court] to reject the claims be substituted with a decision allowing the claims;"

[4] The intervening party's submission is that SARS is not entitled to an order allowing its claims when it has failed to prove the said claims. The fundamental issue according to the intervening party is that SARS calculations are incorrect, as SARS disallowed Valinor's valid input tax deductions for the period in issue. The tax debt claimed should, therefore, be disputed and the claims disallowed. The intervening party believes that the main application should be disputed by the joint liquidators of the insolvent estate of Valinor. She has, however, been informed that absent a final report of an independent auditor the joint liquidators would not of their own volition dispute the claims.

[5] The commissioner is opposing the intervention application on the limited basis that:

5.1 The intervening party has no *locus standi*; and

5.2 That the intervention application is meant to frustrate and delay the finalisation of Valinor's winding-up.

For these reasons, the commissioner seeks the dismissal of the application with costs on the scale as between attorney and own client. At the hearing only the issue of *locus standi* was argued.

THE INTERVENING PARTY'S CASE

[6] The intervening party had initially filed heads of argument but at the commencement of the hearing of the intervention application her counsel handed in, with no objection from the commissioner's counsel, supplementary heads of argument which were used to argue her case.

[7] In argument before me, the intervening party's counsel submits that the commissioner's contention that the intervening party has no *locus standi* is legally incorrect. The argument is that the intervening party has a clear and substantial reversionary interest in the outcome of the main application and (eventually) in the outcome of the decision to be taken by the Master in terms of sections 44 and 45 of the Insolvency Act and should as such be given leave to intervene in the main application. Counsel referred me to a judgment in *Ex Parte Snooke* [1] where the following is stated at para 47:

> "[47] It is possible that applicant may argue and/or request his trustee to object to the proving of claims by creditors at this stage in that their claims have become prescribed. He has a reversionary right in the estate insofar as if no claims are proved and he is eventually rehabilitated, he would be entitled to the balance left in the Guardians' Fund. . ."

[1] 2014 (5) SA 426 (FB)

[8] A further submission is that it is the commissioner who does not have *locus standi* in the present application; and had no *locus standi* when he appeared before the Master to prove SARS' claims. According to counsel the commissioner appeared at the creditors' meeting and proved SARS' claims instead of SARS doing so. In terms of section 169 of the Tax Administration Act 28 of 2011 (as amended), SARS is the statutory created creditor and not, the commissioner. SARS should have attended the creditors' meeting and proved its claims. It was wrong of the commissioner to prove the claims on behalf of SARS, so it is argued. The argument is that the wrong creditor is seeking relief before court and since no other respondent is opposing the main application, the intervening party must be allowed to do so.

THE COMMISSIONER'S CASE

[9] The argument by the commissioner's counsel is that the intervening party cannot be joined as a party to the main application as those proceedings are an extension of the creditor's meeting whereat the intervening party had no *locus standi*. If it happens that SARS' claims are allowed in the main application the intervening party still has an opportunity to object thereto in terms of the provisions of sections 44 and 45 of the Insolvency Act.

THE ISSUE

[10] The issue herein is whether the intervening party has *locus standi* to be joined as a respondent to the main application.

THE LAW APPLICABLE

[11] A 'reversionary interest' is the interest that a person has in a property when a preceding estate ceases to exist. In my research of this subject I could not come across any case law, none was referred to me, where a reversionary interest in respect of an insolvent estate in a close corporation was dealt with. The case law which I found apposite in the circumstances of the case before me were in respect of an insolvent estate where a person has been sequestrated.

[12] The courts have over the years recognised that the reversionary interest which an insolvent retains in the insolvent estate and its proper administration entitles the insolvent to sue on its own behalf if the trustee neglects or refuses to do so.[2] Therefore, where a Trustee refuses to institute proceedings for the recovery of any benefit to which the insolvent estate is entitled, the insolvent has the right, by virtue of her/his reversionary interest in the insolvent estate, to institute the proceedings in her/his own name.[3]

[13] The court in *De Polo v Dreyer* [4] at 176I states the following:

> "The law provides that if there is any residue after paying the debts in an insolvent estate, it is to be handed to the insolvent. Not only so, but it is to the insolvent's interest that as many

[2] See Boberg's Law of Persons and the Family at page 224.

[3] See Business Transactions Law: Robert Sharrock p622.

[4] 1991 (2) SA 164 (W)

> assets as possible shall be brought into the estate in order to have the debts reduced to their proper limits. The insolvent has an interest in seeing that done."[5]

[14] In essence, sequestration does not deprive an insolvent of her/his *locus standi* other than in those instances mentioned in section 23 (6) of the Insolvency Act. The deprivation of an insolvent's *locus standi* is a consequence of the fact that his/her estate vests in her/his trustee who exercises all rights in respect of the property comprising it. Where, however, the insolvent's trustee refuses to institute proceedings against a debtor for the recovery of any benefit to which the insolvent estate is entitled, the right of an insolvent, by virtue of her/his reversionary interest in the insolvent estate, is recognised by our courts.[6]

[15] I am of the view that the principle enunciated in the paragraphs above find application in the circumstances of this matter. It is so that, in this instance, the intervening party is the sole member's interest holder in Valinor and as such she will have an entitlement to be paid back any residue of the close corporation's estate remaining after the close corporation has been wound-up. She has on that basis *locus standi* to protect any benefit to which the insolvent estate of Valinor may be entitled.

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[5] See also Mears v Rissik Mackenzie NO and Mears' Trustee 1905 TS 303 at 305.

[6] See Niewoudt v The Master and Others NNO 1988 (4) SA 513 (A) at 524H – 525G and Voget and Others v Kleynhans 2003 (2) SA 148 (C) para 22.

[16] The right to recover any such benefit rests with the insolvent, in this instance the sole member, only when the trustee to the insolvent estate refuses or neglects to do so. In this instance, the evidence show that during the creditors' meeting Valinor's accountants objected to the claims by SARS and through such objection SARS' claims were disallowed. When the commissioner launched the main application the intervening party approached the joint liquidators of the insolvent estate of Valinor to oppose the application but was informed that they were not in a position to oppose SARS. Under the circumstances, the intervening party has, in my view, the necessary *locus standi* to do so.

[17] In this instance the issue is not an asset but a claim by one of Valinor's creditors. The intervening party's contention is that if SARS' claims are disallowed they will reduce Valinor's debt to its proper limit, which might result in some assets being saved. The intervening party will have some entitlement to such assets. This, in my opinion, is correct.

[18] It is also my view that, the intervening party has a '*direct and substantial interest*' in the subject matter of the claims contested. The rule is that any person is a necessary party and should be joined if such a person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried out into effect without prejudicing that party.[7]

[7] See Erasmus: Superior Court Practice Vol. 2 pD1-124.

ORDER

[19] In the premises I make the following order:

19.1 The intervening party is granted leave to intervene as a respondent in the main application.

19.2 The intervening party should deliver her answering affidavit within ten (10) days after date of this order.

19.3 The costs of this application are costs in the main application.

E. M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	**: 04 MAY 2017**
DATE OF JUDGMENT	**: 31 MAY 2017**
INTERVENING PARTY'S COUNSEL	**: P.A. SWANEPOEL**
INTERVENING PARTY'S ATTORNEY	**: DYASON ATTORNEYS**
APPLICANT'S COUNSEL	**: B. SWART (SC)**
APPLICANT'S ATTORNEY	**: MACROBERT INC.**