



**CASE NO.: I 1312/2010**

SPECIAL INTEREST

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**DEVELOPMENT BANK OF NAMIBIA LTD**

**PLAINTIFF/APPLICANT**

and

**MC BOUERS CC  
MARK COLLIN MARTIN  
ELIZE DELPHINE MARTIN**

**1<sup>ST</sup> DEFENDANT/RESPONDENT  
2<sup>ND</sup> DEFENDANT/RESPONDENT  
3<sup>RD</sup> DEFENDANT/RESPONDENT**

*In re: Application for Intervention:*

**HEWAT BEUKES**

**APPLICANT**

and

**DEVELOPMENT BANK OF NAMIBIA LTD**

**RESPONDENT**

**CORAM: HOFF, J**

**Heard on:** 23 November 2010

**Delivered on:** 23 November 2010

**Reasons on:** 28 January 2011

### **JUDGMENT**

**HOFF, J:** [1] This is an application launched in terms of Rule 12 of the Rules of this

Court in which the applicant, Mr Hewat Beukes, sought to intervene as a defendant in a summary judgment application.

[2] On 25 May 2010 plaintiff issued summons against the defendants for the payment in the amount of N\$433 459.62 in respect of a loan agreement.

[3] On 14 June 2010 all three defendants gave notice of their intention to defend the action. On 25 June 2010 plaintiff launched an application for summary judgment against all defendants. This summary judgment application was set down for 16 July 2010. On 14 July 2010 the defendants gave plaintiff notice of their intention to oppose the summary judgment application and an opposing affidavit deposed to by second defendant was filed in support thereof. On 16 July 2010 the application for summary judgment was postponed to 20 July 2010 to be argued with heads of argument.

On 19 July 2010 the applicant, Mr Hewat Beukes, filed a notice of an application to intervene in terms of the provisions of Rule 12 of the Rules of this Court. In this notice it was stated that leave to intervene would be applied for at the hearing which was set down for 20 July 2010.

[4] On 20 July 2010 the court made the following orders:

- (1) that the matter is postponed to a date to be arranged with the Registrar;
- 2) that plaintiff files within 7 days a notice of opposition as well as an

affidavit in support of its opposition in respect of the application to intervene;

- 3) that the applicant for intervention files his replying affidavit within 5 days from receipt of the opposing affidavit;
- 4) that the applicant for intervention pays half of the days fees of plaintiff.

[5] Plaintiff subsequently filed its notice of opposition and answering affidavit. Plaintiff also applied for a date for hearing the application to intervene whereafter 23 November 2010 was allocated and the matter was set down accordingly.

[6] On 23 November 2010 the applicant was absent. Ms B van der Merwe, counsel appearing on behalf of the respondent in the intervention application, provided this Court with a notice of withdrawal dated 11 November 2010 in which applicant gave notice of the withdrawal of his application to intervene.

[7] This Court was also provided with a letter dated 15 November 2010 and addressed to the applicant in which it was stated that his notice of withdrawal was irregular in that he has not tendered wasted costs occasioned by his withdrawal. Applicant was asked to amend his notice of withdrawal accordingly failing which plaintiff would apply to Court for the necessary relief. Applicant ignored this letter.

[8] Rule 42 (1)(a) governs the withdrawal of proceedings and reads as follows:

*"A person instituting any proceedings may at any time before the matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he or she shall deliver a notice of*

*withdrawal and may embody in such notice a consent to pay costs, and the taxing master shall tax such costs on the request of the other party".*

[9] An affidavit filed in support of his application to intervene was signed on 19 July 2010 in which it was alleged by Mr Beukes that he is a member of the first applicant without attaching any documentary proof in support of that contention. In response to the denial of such membership by the plaintiff a document in terms of the Close Corporation Act 26 of 1988 with the heading "*Amended Founding Affidavit*" was filed. This documents reflects Mr Beukes as member of a close corporation "*MC Bouers CO*" and the date of commencement of change of membership as 20 July 2010 i.e. a day after his founding affidavit was filed. Summons was issued on 5 May 2010 and an application for summary judgment was launched on 25 June 2010. On both these dates Mr Beukes was not a member of first defendant. It is further significant that the change of membership has resulted in the third defendant being excluded as a member of the close corporation. I am of the view that this is a manipulative manoeuvre and an abuse of process.

[10] An applicant in an application to intervene must satisfy the Court that:

- "(a) he has a direct and substantial interest in the subject matter of the litigation which could be prejudiced by the judgment of the Court; and
- (b) the application is made seriously and is not frivolous and that the allegation made by the applicant constitute a *prima facie* case or defence".

[11] See *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others; In re Sizwe Development v Flagstaf Municipality 1991 (1) SA 677 (TK)*.

[12] Furthermore Levy AJ in *Yam Diamond Recovery (Pty) Ltd In re Hofmeister v Basson & Others 1999 NR 206* stated that an applicant can only intervene as a defendant in an action where such applicant for some reason is in law liable as a defendant.

[13] It is further trite law that an applicant must make out his case in his founding affidavit.

[14] The applicant's case is that should plaintiff be successful in the summary judgment application applicant will be vicariously liable and will have to pay part of the costs and financial relief granted. Vicarious liability is a delictual principle and has no application in the present matter. Applicant further stated that he has significant financial interests in first defendant in that he invested unsatisfied finances and services therein. No proof is provided.

Applicant further makes a sweeping statement that he has claims against plaintiff since he suffered patrimonial losses and damages such as the loss of income and profits on a brick making project, which was brought to a standstill by plaintiff due to the unlawful seizure of a payment due to the partnership and plaintiff's refusal to release such monies. Again no further details or proof is provided.

[15] The applicant can never be liable to the plaintiff for anything. First defendant is a legal person distinct from its members. There is presently no claim against the applicant. Applicant has for the reasons mentioned *supra* not been a member of first defendant. Applicant has no *locus standi in judicio* in these proceedings.

[16] In the result the applicant's application for leave to intervene was dismissed with costs, which costs included the costs of one instructing and one instructed counsel.

**HOFF, J**

**ON BEHALF OF THE APPLICANT:**  
*(APPLICATION TO INTERVENE)*

**Instructed by:**

**ON BEHALF OF THE RESPONDENT:**

**Instructed by:**

**MR HEWAT BEUKES**

**IN PERSON**

**ADV. VAN DER MERWE**

**ENGLING, STRITTER & PARTNERS**