REPUBLIC OF SOUTH AFRICA

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

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

24.03.2025 [redacted]
DATE SIGNATURE

Case Number: 033595/2022

In the application to intervene of –

HAKHENSA CONSULTING CC Applicant

In re: the matter between –

SOUTH AFRICAN FORESTRY COMPANY SOC LIMITED Applicant

and

PHILLIP BORUCHOWITZ N.O. First Respondent

BASADI BA ITSOSA CONSULTANTS & PROJECTS CC Second Respondent

JUDGMENT

JM BERGER AJ:

[1] This is an application for leave to intervene as a co-respondent in the main application, in which the South African Forestry Company SOC Limited ("SAFCOL") seeks to review and set aside an arbitration award granted in favour of Basadi Ba Itsosa Consultants & Projects CC. At the time the arbitration proceedings ran, Basadi and Hakhensa Consulting CC, the applicant in this intervention application, were comrades in arms. But that is no longer the case. More about this later.

[2] In order to be granted leave to intervene, Hakhensa *"must show that it has a right adversely affected or likely to be affected by the order sought"* in the main application. As the Constitutional Court explained in *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others*:[1]

> *"[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.*
>
> *[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.*
>
> *[11] Once the applicant for intervention shows a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene."*

[3] Two rights are potentially at play here: Hakhensa's right as a cessionary, in terms of a "Deed of Cession and Direct Payment Agreement" entered into with Basadi on 3 May 2021; and its right in terms of an addendum to a memorandum of understanding ("MoU"),[2] which was entered into with Basadi on 4 August 2021. In

[1] 2017 (5) SA 1 (CC) at paras 9 – 11 (footnotes omitted)
[2] The MoU was entered into on 7 May 2021.

terms of that addendum, Hakhensa has a contractual right to a substantial portion of the arbitration award, which currently stands at over R23.8 million.

[4] Before I consider whether either of these rights provides Hakhensa with a direct and substantial interest in the subject-matter of the main application, thereby justifying it being granted leave to intervene in the main application, it is important to consider the factual background to this application. That began in September 2019, when SAFCOL and Basadi entered into an agreement for the provision of certain silviculture services,[3] for a three-year period, backdated with effect from 1 July 2019.

[5] By the end of April 2021, Basadi was struggling to pay the wages of its workers, who were providing the contracted services to SAFCOL. It was at that point that Hakhensa entered the picture, making a R1.6 million contribution to Basadi so that the wages could be paid. In order to secure repayment, Hakhensa entered into the deed of cession with Basadi, in terms of which the latter, as cedent, agreed to cede to the former, as cessionary, *"its right, title and interest in and to any amounts due and owing by SAFCOL in terms of the [services] contract"*.

[6] The deed of cession also records the following:

> *"6. It is recorded that the terms of this agreement will be binding on SAFCOL from the date the representative of SAFCOL signs this agreement.*
>
> *7. It is recorded that SAFCOL's responsibility in terms of this agreement is limited to transferring the amounts payable by the Cedent.*
>
> *8. This cession shall remain in force for as long as the Cedent is indebted to the Cessionary and will expire on the date when the debt payable to the Cessionary has been extinguished.*
>
> *9. It is recorded that this cession constitutes security for payment of the amounts payable by the Cedent to the Cessionary and shall in no way be regarded as extinguishing the liability of the Cedent towards the Cessionary.*
>
> *11.All payments made by SAFCOL shall pro tanto reduce the Cedent's liability to the Cessionary."*

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[3] *"[S]ilviculture refers to the cultivation of trees mainly for commercial purposes and encompasses the treatment and management of trees from being planted until they are harvested."* See *Lakes Forestry & Development CC v Cognad Properties CC* [2024] ZAWCHC 45; [2024] 2 All SA 83 (WCC) at para 63

[7] The agreement was not signed by any SAFCOL representative. The reason for that is neither clear nor relevant. What matters for purposes of this application is whether SAFCOL's apparent failure to consent to the cession has any implications for its validity. On this issue the parties are sharply divided, with Basadi – which was quick to accept Hakhensa's offer of a lifeline and then sign the deed of cession – now making common cause with SAFCOL.

[8] Importantly, no-one makes the submission that SAFCOL's failure to sign the deed of cession, without anything more, affects its validity and/or enforceability. Rather, the argument raised by both SAFCOL and Basadi is that the deed of cession is rendered invalid by clause 18.2 of the services agreement, which provides:

> *"The Service Provider shall not be entitled to cede or assign this Agreement without the written consent of the Client, which consent shall not unreasonably be withheld."*

[9] Clause 18.2 is to be read together with clause 18.1, which provides:

> *"The Client shall be entitled to cede or assign this Agreement without the written consent of the Service Provider, provided that the Client shall be obliged to inform the Service Provider of such cession or assignment."*

[10] Both clauses rely on the definition of Agreement in clause 2.13, which reads: *"this Service Level Agreement together with all the annexures attached hereto".*

[11] The preamble to the deed of cession, which does not seek to create any enforceable rights or binding obligations, notes that Basadi wanted Hakhensa to take over its role as service provider to SAFCOL. Everyone agrees that, in terms of clause 18.2 of the services agreement, that could not happen without SAFCOL's consent.

[12] Seemingly in anticipation of consent being provided, Basadi and Hakhensa entered into their MoU on 7 May 2021. Not only was consent not forthcoming, but just a few days later – on 13 May 2021 – SAFCOL terminated the services agreement. It was that decision that Basadi sought to have declared unlawful and set aside in the arbitration proceedings.

[13] On 4 August 2021, Basadi and Hakhensa entered into their addendum to the MoU, in which they recorded their agreement *"to commence with litigation against [SAFCOL]."* Should the contemplated legal proceedings be successful, as indeed they

were, the parties agreed to allocate *"any monetary settlement which may be received"* in the following way:

a. The legal costs associated with such proceedings would be paid first.

b. Thereafter, whatever was still due to Hakhensa, as at the date of the award, would be paid to them.

c. Finally, the balance would be split equally between the two parties.

[14] As a party to the cancelled services agreement, Basadi initiated the arbitration proceedings against SAFCOL. Its legal costs were covered by Hakhensa, with Mr Lucas Nkuna – Hakhensa's managing member – playing a central role in the proceedings. This is not surprising, given the broad scope of the general power of attorney in terms of which he was appointed as Basadi's *"true and lawful agent for managing and transacting all or any business affairs and transactions"*. Like the addendum to the MoU, that document is also dated 4 August 2021.

[15] The arbitration ran for five days in late January 2022, with oral argument being heard in early April 2022. The arbitration award was published on 1 September 2022. On 10 October 2022, just a little over five weeks later, Basadi –

a. purported to revoke the general power of attorney with immediate effect;

b. advised its then attorneys that Mr Nkuna no longer had any authority to act in the name of Basadi; and

c. advised the attorneys of the details of a new bank account into which the damages awarded in terms of the arbitration award were to be paid.

[16] Just three days later, SAFCOL initiated the review application.

[17] Despite the events of 10 October 2022, Mr Nkuna took part in a decision taken a month later to appoint Basadi's new instructing attorneys, who were granted a *"special power of attorney for the review application"*. But on 26 December 2022, just over a month after SAFCOL's replying affidavit had already been delivered, Basadi's CEO decided to terminate their mandate. Its new attorneys filed a notice of appointment as Basadi's attorneys of record dated 11 January 2023, and a notice of

substitution dated 12 January 2023. Since then, both sets of attorneys have claimed to represent Basadi.

[18] Now back to this interlocutory application.

[19] In addition to the order granting leave to intervene in the main application as a co-respondent, Hakhensa's notice of motion seeks declaratory relief in respect of the following three decisions taken by Basadi:

a. First, to revoke Mr Nkuna's general power of attorney;

b. Second, to revoke Basadi's erstwhile attorneys' mandate; and

c. Third, to appoint Basadi's new attorneys.

[20] Given the nature of the primary relief sought in this intervention application, it would make little sense to grant this declaratory relief. For if it were to be granted, it would effectively put Mr Nkuna back in control of Basadi's defence of the arbitration award, dispensing with any need for Hakhensa to intervene as a co-respondent. In any event, I am not convinced that on the evidence put up in this application, Hakhensa has established that any of the three decisions was taken unlawfully.

[21] That leaves the primary relief sought in prayer 1, and the issue of costs.

[22] *SA Riding for the Disabled* tells us that if Hakhensa *"shows that it has some right which is affected by the order issued, permission to intervene must be granted."*[4] In its notice of motion in the main application, SAFCOL seeks an order – in prayer 1 – that Basadi's claim in the arbitration be dismissed. In addition, in prayer 2, it seeks to make Basadi responsible for the costs of the arbitrator, the costs and fees of the Arbitration Foundation of South Africa, and the costs of recording and transcription, and to recover its own legal costs, to be taxed on a punitive scale.

[23] If SAFCOL were to obtain the relief it seeks in the review, Hakhensa would be directly affected. While the various costs orders would be for Basadi to pay, that would most likely leave Hakhensa without an enforceable legal remedy against Basadi in respect of the various payments made on Basadi's behalf, including the R 1.6 million

[4] At para 10

paid in or around April 2021, as well as legal fees paid in respect of the arbitration proceedings. More importantly, it would leave Hakhensa without its agreed-upon share of the damages award of over R 23 million. If this were to happen, would it affect any of Hakhensa's rights, or would it simply affect its financial interests?

[24] The parties that appeared in this interlocutory application are all of the view that if the deed of cession is valid, Hakhensa has a direct and substantial interest in the outcome of the review, and accordingly, ought to be granted leave to intervene. I agree. If Hakhensa, as cessionary, had a right to be paid what was due to Basadi in terms of the services agreement, then it must follow that it has a right – at the very least – to a portion of any damages award granted in Basadi's favour in respect of an unlawful termination of the agreement in question.

[25] As I have already noted, both SAFCOL and Basadi submit that the deed of cession is rendered invalid by clause 18.2 of the services agreement. When read together with clause 18.1, as well as the definition of Agreement in clause 2.13, it appears to me that what clause 18.1 sought to prevent was Basadi ceding all of its rights and obligations under the services agreement without SAFCOL's consent. This makes sense: SAFCOL's consent would be required should Basadi seek to get someone else to do that which it had been contracted to do.

[26] What clause 18.2 does not appear to do is to require consent for the type of cession at issue in this matter, where all that was ceded was the right to receive payment from SAFCOL, and no more. Mr Thompson, who appeared for SAFCOL, accepted that his client could not have objected had Basadi simply arranged for whatever payments were due to it to be paid into a bank account of its choice, even if that was Hakhensa's account. But, he added, this could not be achieved by way of a cession of the right to receive payment.

[27] In dealing with the validity of an agreement that prohibits cession,[5] Professor Susan Scott delivers the following note of caution: [6] *"Because of the far-reaching consequences of such an agreement, the intention to prohibit or limit transferability should be clear from the agreement between the parties."* There is no such clarity in

[5] Such an agreement is known as a *pactum de non cedendo*.
[6] Susan Scott, *Scott on Cession: A Treatise on the Law in South Africa* (Juta: Cape Town, 2018) at p 193 (footnote omitted)

clause 18.2. It is not, for example, the type of clause at issue in *Born Free Investments 364 (Pty) Limited v Firstrand Bank Limited*, which Ponnan JA described as follows:[7]

> *"Clause 15.1 of each agreement, which contains the pactum de non cedendo, is couched in fairly wide terms. The language could not have been clearer – it proclaims in emphatic terms: 'You shall neither cede any of your rights nor assign any of your obligations under this agreement without our prior written consent.' The prohibition is thus directed in each instance at the other party to the contract, being Summer Season and Central Lake. It stipulates that neither of them shall cede nor assign any of their obligations under their respective agreements with FRB without the prior written consent of the latter."*

[28] But even if I am wrong on the applicability of clause 18.2, I am of the view that it would have been unreasonable for SAFCOL to withhold consent in the particular circumstances of the matter, including – in particular – the common cause fact that but for the R1.6 million payment made by Hakhensa, Basadi would not have been able to pay their workers' wages. As we learn from *Locke v Centracom Property Investments (Pty) Ltd*,[8] a cedent may simply disregard an unreasonable refusal of consent and proceed with the contemplated cession.[9]

[29] Mr Thompson sought to make much of the fact that Hakhensa only dealt with clause 18.2 in reply, after it had been raised and relied upon by SAFCOL in answer. According to him, it was not open to Hakhensa to make its case in reply; it ought to stand or fall on the basis of the case made out in its founding papers. But as I have already held, clause 18.2 is simply of no application. And even if it is, once SAFCOL relied on it in attempting to invalidate the deed of cession, it was open to Hakhensa to make submissions on the enforceability of the *pactum de non cedendo.*[10]

[30] In addition to its right as cessionary, Hakhensa also has a contractual right to a substantial portion of the damages award granted in Basadi's favour, should that be upheld – even in part – in the review. The fact that this right pertains to an amount of money does not change its nature: it does not become a mere financial interest in the outcome of the litigation. Rather, it remains a right to benefit directly from the arbitration

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[7] [2013] ZASCA 166 at para 14
[8] 1985 (2) SA 116 (N) at 118E-F
[9] See also, Scott at p 197
[10] See *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) at para 28

award, should it be upheld in any manner or form. That right would most certainly be affected adversely should the order sought by SAFCOL in the review be granted.

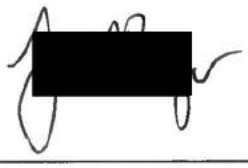
[31] That then leaves the issue of costs. I see no reason why costs should not follow the result, with both SAFCOL and Basadi being ordered to pay Hakhensa's costs, including the costs of counsel, on the ordinary scale. In so far as the first respondent is concerned, there is no order as to costs, as he did not oppose the relief sought.

ORDER

[32] In the result, I make the following order:

a. Hakhensa Consulting CC ("Hakhensa") is granted leave to intervene as a co-respondent in the review application instituted in this Court by the South African Forestry Company SOC Limited ("SAFCOL") under case number 2022-033595.

b. SAFCOL and Basadi Ba Itsosa Consultants & Projects CC are directed to pay Hakhensa's costs in this interlocutory application, including the costs of counsel, on scale A.



JM BERGER
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Dates:

Hearing: 3 March 2025

Judgment: 24 March 2025

Appearances:

For the applicant in the intervention application:	MD Mohlamonyane SC, instructed by Malele Inc. Attorneys
For the applicant in the main application:	CE Thompson, instructed by Richen Attorneys Inc.
For the second respondent in the main application:	BM Khumalo, instructed by Marule Attorneys (with heads of argument having been prepared by GK Shai)