IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO. 1344/2020

(1) REPORTABLE: ~~YES~~ NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO

(3) REVISED

22/01/2024

22/01/2024

DATE

[redacted]

SIGNATURE

In the matter between:

MINING AND ENVIRONMENTAL JUSTICE COMMUNITY NETWORK OF SOUTH AFRICA	**FIRST APPLICANT**
GROUNDWORK	**SECOND APPLICANT**
BIRDLIFE SOUTH AFRICA	**THIRD APPLICANT**
ENDANGERED WILDLIFE TRUST	**FOURTH APPLICANT**
FEDERATION FOR A SUSTAINABLE ENVIRONMENT	**FIFTH APPLICANT**
ASSOCIATION FOR WATER AND RURAL DEVELOPMENT	**SIXTH APPLICANT**
BENCHMARKS FOUNDATION	**SEVENTH APPLICANT**

And

GERT SIBANDE DISTRICT JOINT MUNICIPAL PLANNING TRIBUNAL	**FIRST RESPONDENT**
DR PRIXLEY KA ISAKA SEME LOCAL MUNICIPALITY: MUNICIPAL APPEAL AUTHORITY	**SECOND RESPONDENT**
ATHA-AFRICA VENTURES (PTY) LTD	**THIRD RESPONDENT**

MINISTER OF AGRICULTURE, LAND REFORM
ATHA-AFRICA VENTURES (PTY) LTD — FOURTH RESPONDENT

MINISTER OF AGRICULTURE, LAND REFORM
AND RURAL DEVELOPMENT
THE MABOLA PROTECTED ENVIRONMENT — FIFTH RESPONDENT

LANDOWNERS ASSOCIATION — SIXTH RESPONDENT

RULING ON POINTS *IN LIMINE*

Mankge J

[1] The applicants before this court seek to Review and set aside the approval by the first respondent of a land use change application in respect of this Portion 1 of farm Yzermyn 96 HT. (*"The Farm"*) and further Reviewing and setting aside the decision of the second respondent to dismiss an appeal by the applicants against the first respondent's decision.

[2] In opposing the application before this court the respondents raised three points *in limines*, For the purpose of this judgment I will deal with only one of the points raised extensively, as it will at any rate be dispositive of the other points raised.

[3] This court was initially of the view that the points *in limines* as well as the merits of the application (*The main application")* will be considered together. During the arguments in court, it became clear that there was a need for this court to first adjudicate and resolve the points in *limines* before the remainder of the application is heard.

[4] The key reason for this was the point of non-joinder, and I explain this thoroughly later in this judgment.

<u>The parties and relationship to the facts</u>

[5] The applicants are identified as non-profit environmental and environmental

justice organizations with the objectives that include environmental conservation, environmental justice and advancing the rights of those who are most vulnerable to the effects of environmental degradation and injustice. Their objectives include protecting the environment, and the people who depend on it for their health, well-being and livelihoods.

[6] The first respondent is the party who heard category 1 land development and land use application that is the subject of this application. The tribunal approved the land use change application by the third respondent in respect of Portion 1 of Yzermyn 96 HT ("*The Farm")*.

[7] The second respondent is the party who dismissed the appeal by the applicants and the coalition parties, of the approval of the land use change application by the third respondent.

[8] The third respondent is the party who had applied for the rezoning and a land use change of the "*The Farm"* which is the subject matter of the main application.

[9] The applicants allege that they are bringing this application in their own interest under section 38(1) of the Constitution of the Republic of South Africa and under section 32(1)(a) of the National Environmental Management Act 107 of 1998. They also allege that they are bringing the application on behalf of their members in terms of section 38 (e) of the Constitution and in the public interest under section 38(d) of the Constitution and under section 32(1)(d) of Act 107 of 1998. ("NEMA"). I will only quote the provisions of NEMA for the purpose of the discussion herein.

[10] Section 32(1)(a) "*Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in chapter 1, or any provision of a specific environmental management Act, or any other statutory provision concerned with the protection of the environment or the use of natural resources-*

(a) ***in that person's or group of person's own interest***

(b) *"in the interest of, or on behalf of a, person who is, for practical reasons, unable to institute such proceedings,*

(c) *in the interest of or on behalf of a group or class of persons whose interest are affected*

(d) ***in the public interest. . ."***

[11] The following points *in limines* were raised*: Locus Standi, Non-Joinder and Lis Pendens*, against the application.

[12] As I consider these points *in limines*, the purpose is not to delve into the merits of the application, only where necessary I will do so.

Locus Standi

[13] The first respondent contends that the applicants lack *locus standi* to bring this application, as they do not have legal interest in this matter. The first respondent contends further that the applicant's do not provide any facts or pinpoint any breach of NEMA, and their reliance on Section 32 of NEMA is unsubstantiated. They contended further that the applicants' lack of direct or membership interest in *"the farm"* Mabola area and affected community.

[14] I do not intend to give a prolonged ruling on this point, for the reason that the last point I shall deal with, will dispose of all the points in *limines* once and for all.

[15] The point on *locus standi* stands to be dismissed on the following brief reasons:

[16] The applicants highlighted one of their objectives as being "*to promote, defend and advocacy of environmental and human rights of communities affected by mining and ensuring the sustainable use of mineral resources.* (**Own emphasis underlined)**.

[17] I will connect the underlined portion with the last point *in limine* later in the discussion.

[18] It is common cause that the third respondent's application was for the change of the agricultural land *to mining and ancillary purposes.* It is common knowledge that there is a link between the land use and the protection of environment.

[19] Let me then at this juncture draw reference from the international reflection, which in my view demonstrates that the two are (land use and environment protection) inseparable in most cases. The underlined portion clearly demonstrating the importance guarding against environmental and human rights harm. This I find to be pertinent even in our country when regard is had to our Constitution.

> *"Land use is a product of society and as spatial planning limits land use options of the people, measures need to be justified, to guard against environmental and human rights harm"* (**Mining and Spatial Planning Interreg Europe**).

[20] I also find the preamble of South Africa's Spatial Planning and Land Use Management Act of 2013 to be indirectly speaking to this inseparable nature of these two, in my considered view. This act which provide a framework for spatial planning and land use management in our country, acknowledges this fact to a great extent.

[21] The 2013 Act revere Section 24 of the Constitution, "*to have the environment protected for the benefit of present and future generations. . .",* The similarity between the European outlook and South African Act of 2013, on the 'protection of the environment, when land use is considered, is notable, and hence the comparison.

[22] The applicants' core nature and their objectives, are in my considered view

protected in terms of section 24 of the Constitution. The applicants alleged threat of infringement of a right in terms of Section 24 of the Constitution.

[23] The applicants on the Review application also state that, "*the impugned decision failed to consider environmental considerations*" This in my view is sufficient for the applicants to find *locus standi* on section 38(1)(a) "*acting in their own interest*". As well as section 38(1)(d) *"acting in the public interest"*.

[24] Section 32 of NEMA is in any event also protective of the applicants' *locus standi*, as seen above in subsection 32 (c) and (d), more especially when regard is had to the ground that the decision by the first and second respondent failed to consider environmental considerations.

[25] The applicants' objectives as non-profit organisations have not been placed in dispute by any of the respondents. The applicants in their reply to the first respondent's objection stated that, they are an organisation that operate all over the country. This on its own also supports the finding of this court that, their *locus standi* is found on the Constitution itself as well as in NEMA.

[26] The first applicant was involved with the first respondent (though on a very narrow basis) when the application under review was serving before the first respondent. There is nowhere in the papers where the first respondent appeared to have objected to the first applicant's legal standing, to attempt to do so now is found to be opportunistic and unsustainable.

[27] The applicants have established, and sufficiently so in my view that, they have a legitimate interest in the protection of the environment of its members, and consequently shown that there is real fear of the invasion of their recognised legal right (as provided for in section 24 of the Constitution).

[28] The applicants submitted that their core business is conserving the environment. All the parties have not denied that mining affect the environment, whether it will

affect it positively or negatively in "*The farm*" is to be determined by the court that will hear the main application, and possibly by the appeal courts when hearing the two appeals which emanates from the application for the approval of a land use change.

[29] The applicants have also established in their papers how in their view the application of rezoning that was granted by the first respondent is likely to harm the environment, whether this will prove to be correct, can only be determined when the main application and possibly the pending appeals both Mbombela and Gauteng Division are heard.

[30] I find myself restrained on this issue, and I will not traverse on it beyond this point, for the reason I have already mentioned that there are pending appeals which are likely to consider these two issues in a clearer detail.

[31] I do not see why groups which have demonstrated and shown a special interest in the environment and whose core business is to protect and conserve the environment across the country (as alleged by the first applicant) can be said they lack *locus standi* to challenge a decision which is likely to affect the environment, in the area where they have people to protect.

[32] I find therefore that the applicants' public interest in the environment is sufficient interest to establish its standing. In any event the Act of 2013 provides for 'future generations' and this cannot be ignored even by this court.

[33] The applicants have established a sufficient interest. Their objectives support this 'sufficient interest. The interest they have establish is found not to be too remote, it is an actual interest considering the objectives of the applicants.

[34] The applicants have proven that on the basis of a legally enforceable right they have a right to claim the relief sought in the main application. For this reason, the point *in limine* on *locus standi* is dismissed.

[35] Even though I don't intend to deliberate much on the point of pending cases, for a reason that the point on non-joinder will yield, I however need to make the following remarks briefly.

[36] The applicants refer to a few cases that are serving before different divisions of the High Court. They also disclosed that these cases stem from farm '*Yzermyn 96 HT ("The Farm").*

[37] The principle of *lis pendens* has four requirements (i) Pending litigation, (ii) between the same parties or their privies; (iii) based on the same cause of action, (iv) in respect of the same subject matter (***Eravin Construction CC v Twin Oaks Estate Development (Pty) Ltd[1].***

[38] It is clear to me that though the issue between the parties emanate from "The farm", that these issues they differ on the causes of action and on the subject matters. A decision of the applications in the two other divisions will not bring finality in the application of land use change" that the applicants seeks to review before this court.

[39] I however agree that when the issues are decided on the other two divisions that the matter serving in this division may be affected. But the fact remains that, these matters are not based on same causes of actions and on the same subject matter. It can be the same parties, the issue arises from the same thing, however the issues in the two other divisions are not necessarily the same cause as the one before this court.

[40] For the reason of the above I conclude that the requisites for *lis alibi pendens* have not been established and the point on *lis pendens* cannot succeed.

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[1] **(1573/10) [2012] ZANWHC 27 (29 June 2012).**

Point of non-joinder

[41] The last point I now interrogate, is that one of non-joinder. I have to determine whether it meets the test for direct and substantial interest.

[42] The first and second respondent in unism contends that the applicants failed to join the party/ies with material interest, and they mention a number of parties in their papers. The mutual one being the applicant in the intervening application. For the reasons that are clear later in this discussion I focus more on this party.

[43] Of interest to note in the applicants' application is that, the applicants contend that the first respondent's decision would impact the adjacent farms, the local community and other provinces, yet in their own indistinct wisdom they joined only the Mabola Protected Environment Land Owners Association in this application.

[44] The applicants own case in my view should have been a cautionary light to them that, not only the fifth respondent has a direct and substantial interest in the subject matter, but that the decision that was made by the first respondent will impact other nearby communities as they themselves argues in their papers.

[45] The applicants in my view should have at least explained in this application why the parties they alleged that they will be impacted by the impugned decision are now excluded in this application. There is no such an explanation in their papers neither was any in their oral submissions in court.

[46] The intervening party application was attached to the Review application, and the parties also traversed on their application during the submissions in court. I am however alive to the fact that I am not called upon to determine the intervening application, but the fact remains that such application was forming

part of the documents that were submitted to this court, therefore the interest of justice commands that I speak to the content of this application.

[47] The decision of the first respondent and second respondent being the subject matter of the application in the Review application, I consider the probability of direct and substantial interest of the intervening party on this basis.

[48] The local community ('The Voice') the applicant in the intervening application in my view might be found by a court of law to have a direct and substantial interest in the **subject matter** of the litigation. I say this from the mere perusal of their application that is forming part of these proceedings. After perusing this community's application, it is clear to me that, this community has a strong view on the land use change.

[49] Let me then paint the following picture by way of example: If the Review court set side or confirms the decisions on the land use change application by the first and second respondents, the Review Court's decision is likely to prejudice the local community, as their views (as they appear in their attached application) would have been excluded from the Review Court's reflections. The upshot of this will be that, the relief sought cannot be sustained without prejudicing the interest of this community.

[50] I also need to highlight the following arguments and submissions by the applicants, that I find to be contradicting the course they are pursuing as an organisation, (the organisations which claim to be protecting the environment, and the people who depend on it for their health, well-being and livelihoods).

[51] The argument by the applicants articulate well in my view, why communities like 'The Voice's presence is of necessity.

[52] The applicants argued in the heads ofa arguments that, "*The tribunal and the Appeal Authority failed to consider the following factors when considering the*

proposed utilisation of Portion 1 of the farm Yzermyn by Uthaka, (i) . . .

(ii) . . . ;

(iii) The Spatial Development Framework shows that agriculture and the services sectors provide far more employment opportunities in the area than those provided by mining activities. (**Own emphasis is underlined**).

[53] The applicants argue further that, *the proposed land use change is irreconcilable with the existing land uses on adjacent properties and the surrounding area. Uthaka's application did not engage with or provide any information on the impact of the land use on the adjacent properties*.

[54] When proper regard is had to the underlined portion of the applicants' argument alone, it is not easy to comprehend why the applicants now in this review application argues a point which gainsay the all-inclusive approach.

[55] The underlined portions from the applicants' own argument supports the fact that entities like 'The Voice' needed to be part of land use change as a matter of necessity. It would seem to me that the applicants' opposition to a point of non-joinder, seeks to contest the very same thing they are complaining about, which is: 'the exclusion of affected parties in the communities'.

[56] This is also found to be inconsistent with the applicants' own submission that this court must only concentrate on the application for review of the third respondent's application for land use change only.

[57] The applicants proposition that seeks to narrow this court's view of the issues is against their very own proposals and their objectives as an organisations that claim to be "*genuinely*" acting in the public interest.

[58] If the applicants on their own they allege that the application by the third respondent did not provide information on the impact of the land use on the adjacent properties, they should be arguing for inclusion of nearby communities rather than their exclusion in my view.

[59] When the nearby communities are excluded further in the review application, the practical effect of that will be that, they will not be heard at all, there will be no information from them on the impact of the land use change to their properties, employment opportunities or lack thereof in the area.

[60] The inclusion of the communities in the area of 'The farm' will in my view not only allow the communities to be heard, but it is also likely to assist the court in the review application to consider the application in a rather holistic manner, as opposed to the approach that the applicants are contending.

[61] The applicants argue further that the Department of Cooperative Governance provided conditional support for Uthaka's application. And that this support was conditional upon *(i). . .(ii). . .(iii) the rights of nearby communities not being adversely affected."*

[62] The applicants' oral submission to the non-joinder point, they seem to be separating the two issues, the setting aside of the first and second decisions and the impact this might have on the surrounding communities. But from their own papers it is clear that the two issues cannot be separated as they propose.

[63] I say so because in their own papers they submit that, the first and the second respondent "*were obliged to take environmental consideration into account and the failure to do so renders the impugned decision reviewable"* . It is clear from the application before this court, and the applications which are serving before that Mpumalanga High (Mbombela) and the Gauteng Division of the High court, that environmental considerations cannot be interrogated without the views of the relevant communities.

[64] To me the fact that there is a need for the communities of the likes of 'The Voice' to be joined in the proceedings is glaring in the applicant's own papers.

[65] The applicants' goes further in their submissions and contends that, "*the impact of the development is not limited to subject property. The establishment of the mine in the area would have numerous far-reaching negative impacts on the surrounding environment*".

[66] The question is whether the reviewing court will be able to arrive at a just decision in the review application without the need of taking environmental consideration and the effect this have on the relevant communities into account.

[67] My firm view is that the reviewing court will be required to take environmental consideration into account in order for it to arrive at a just decision, more so because the applicants are the ones who are complaining of the failure by the Tribunal and the Appeal Authority to do so.

[68] This in my view can only be achieved when all parties with material interest are given the platform to table their views, the 'nearby communities' being one of such parties.

[69] The applicants have conceded that '*The Voice'*, showed interest in the matter, and there was also no denial on any party in these proceedings that the said community is placed in close proximity with "*The farm".*

[70] The undisputed fact is that this community registered its interest in this application, and their reasons are found in their application which is contained in the papers that are serving before me.

[71] The first applicant during the submissions in court conceded that, the reason why this community did not form part of these proceedings, is because of the lack of legal representation. I did spell it out during the hearing of this application, that once such an assertion is made this court cannot turn a blind eye to this.

[72] Section 34 of the Constitution "*Everyone has the right to have any dispute that*

can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum". The right to legal representation in civil matters is also protected as much as it is in the criminal matters.

[73] In terms of the Constitution, the right to access to courts is guaranteed. Section 34 requires the state to provide free legal representation in civil matters where the failure to do so would deprive litigants of a fair hearing. This principle was confirmed by the Constitutional Court in ***Legal Aid South Africa v Magidwana and Others[2].***

[74] The intervening party in their application which was apparently struck off the roll (as per the applicant's submission), contended that, it is necessary that they form part of the proceedings because they represent the communities in the municipal areas of the Gert Sibande District Municipality and Dr Pixley Ka Seme Local Municipality.

[75] They go further in their application to allege that the applicants in the main application are *"excluding the social economic factors that negatively affects the communities"*. This reason alone is a clear indication in my view that, when this party is excluded in the main application they are likely to be deprived a fair hearing.

[76] This is the key reason why this court, opted to hear only the points *in limines* at this stage, as the hearing of the main application would have closed the door at the face of the party that is likely to bring relevant information in the subject matter but for the legal representation.

[77] In the application for intervention it seems this community does not only desire to be heard but also is a party with material interest in the main application.

[78] It is worth mentioning what the applicant in this intervening application are

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[2] **[2015] ZACC 28, 2015 (6) SA 494 CC, 2015 (11) BCLR 1346 CC Magidwana II (CC).**

saying. In the main this applicant (in intervening application), alleged that the needs and the views of the community in areas have been overlooked. They allege further that, an order that will be granted in the main application could negatively affect their members and communities it represents.

[79] I have articulated above the reasons why this court is of the view that the hearing of the main application in the absence of this community may prejudice this party. The Supreme Court of Appeal in ***Absa Bank Ltd v Naude NO*** **[2015] ZASCA 97** para 12, set out a test for non-joinder as follows: *The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined"*

[80] I have come close to answering this questioned above, and I have also explained why on the basis of the applicant's submissions alone this particular party might have a direct and substantial interest in the matter of its environmental rights, and issues that is likely to affect their employment opportunities.

[81] I am therefore of the considered view that, the circumstances of this case points that to ignore this party's and to exclude them from the main application might deprive 11 communities (that are represented by the applicant in the intervening application) of a fair hearing.

[82] As correctly argued by the first and second respondent, the applicants on their own make reference to the effective and impact of the decision and that this decision would impact the adjacent farms and local community. They further submitted (correctly so in my view) that, a party who has direct and substantial interest in any order carried into effect without prejudicing that party, is necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined.

[83] There is no evidence or any allegation from any of the parties in this application that the 'intervening community' has waived its right to be joined, but the

submission is that they are not part of the proceedings due to lack of legal representation. This in my view will be an exclusion on the basis of inequality.

[84] I do not wish to delve on the reason why the court saw it fit to strike the matter off, firstly because I was not favored with all the facts, and secondly, because I cannot do so because I am not seating as an appeal court.

[85] What is however clear is that (as suggested by the second respondent) if the Review application can proceed with the exclusion of the communities like 'The Voice' and other interested parties there will be "*disintegration of processes*" on the issue of the farm Yzermyn 96, and it is not really clear why the applicants will prefer this fragmentation of issues, if their goal is what they assert in their papers.

[86] From the reading of the papers, I am also in respectful agreement that there are other parties with a possible direct and substantial interest which are not part of this application.

[87] The hope going forward is that the applicants will go back to the drawing board and consider this on a very serious note, especially when regard is had to objectives they claim to be pursuing. Otherwise the applicants will be having too many unnecessary pieces of the puzzle which requires construction each time they litigate regarding this farm. For fear of burdening this judgment with many details on non-joinder, I concentrated only on one party, 'intervening community', as seen above.

[89] I hold a firm view that, the single-out community and some of the parties as suggested by the respondents might have interest in the outcome of the Review application, as seen from the applicants' own papers alone.

[90] The Supreme Court of Appeal in ***Judicial Services Commission and Another v Cape Bar Council and Another***[3]**,** held that:
"*It has by now become settled law that the joinder of a party is only required as*

[3] **2013 (1) SA 170 (SCA) para [12].**

*a matter of necessity as opposed to a matter of convenience, if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned. . ." (***Own Emphasis underlined**).

[91] The underlined word '*may*' is a clear guidance to me that, if there is such a possibility of the party's interest being prejudicially affected by the outcome of the proceedings in the main application that, the party concerned is the necessary party. I have explained above, why and how this interest is likely to be affected, and this is drawn from the applicant's own papers alone.

[92] The applicants should have discerned and perhaps consider to change its approach as soon as the answering affidavits and points *in limines* were served on them. Especially considering the applicants own submissions on the effective and impact of the decision to the local communities.

[93] In this case I am of the view that the pause in this Review application was foreseeable but the applicants in their own indescribable wisdom ignored this fact, the applicants proceeded to place this matter for hearing, despite this glaring fact.

[94] On the basis of the above the point of non-joinder when looked against the applicants' submissions and objectives, what they sought to achieve in the Review application, that the point of law raised is conceivable, it stands to succeed. As mentioned above, this was foreseeable and for this reason the first applicant must pay the costs.

Order

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

95.1 The point *in limine* regarding *Locus Standi* is dismissed.

95.2 The point on *Lis Pendens* is dismissed.

95.3 The first and second respondent's point *in limine* regarding Non-joinder is granted.

95.4 The first applicant is ordered to pay the costs of the first, second respondents.

MT Mankge
Judge of the High Court
Middelburg

DATE OF HEARING:	14 November 2023
DATE OF JUDGMENT:	22 January 2024
For the Applicant:	Adv Muvangua (with Adv Hardy)
For the first respondent:	Adv Adv N Gama
For the second respondent:	Adv Adv Mathapuna