Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE PROVINCIAL DIVISION, KIMBERLEY)

CASE NO: **1149/2006**
DATE HEARD: **1 December 2017**
DATE DELIVERED: **2 March 2018**

In the matter between:

THE REGIONAL LAND CLAIMS COMMISSIONER FREE STATE AND NORTHERN CAPE AND 26 OTHERS First Applicant

- and -

THE PNIEL COMMUNAL PROPERTY ASSOCIATION (LADCOM OF ASSOCIATION) Respondent

Coram: Lever AJ

JUDGMENT

LEVER AJ

1. The second to twenty-seventh applicants in this case seek leave to intervene and to be joined as parties to case number 1149/2006. The application which they seek to join was launched by the Regional Land Claims Commissioner, Free State and Northern Cape

(hereinafter "*the first applicant*") on the 26 September 2006 under the above case number ("*the main application*").

2. In the main application, the first applicant sought to have the Pniel Communal Property Association (the "*CPA*") placed under his, alternatively, the Chief Land Claims Commissioner's administration under the provisions of s13 of the **COMMUNAL PROPERTY ASSOCIATIONS ACT**[1] (the "*CPA Act*"). It appears that one of the underlying reasons for the main application was to investigate whether a joint venture involving the land committee (LADCOM) of the CPA and certain others to obtain a mining right to mine diamonds on the CPA land was in the best interests of the CPA.

3. As can be seen from the case number, the matter has a long history. An order was made by Molwantwa AJ on the 6 October 2006. In such order, provision was made for the filing of papers and further process. However, it also contained the following order:

> "4. *THAT the respondent's LADCOM will not enter into any further agreements or implement those already concluded in relation to the Farm Pniel Estate no. 281 Barkly West:-*
>
> *(a) Pending finalisation of this matter in the Court of first instance*
>
> *or*
>
> *(b) Until the matter is settled*

[1] Act 28 of 1996.

or

(c) Without giving the applicant, by service of written notice on the offices of the applicant's Kimberley attorney of record 21 (twenty one) Court days' notice of its intention to either entering into an agreement (in which event a copy of the said agreement must be annexed to the said notice) or implementing an existing agreement (in which event a copy of the said agreement must be annexed to the said notice).

5. ..."

4. Thereafter an order was made by consent on the 27 March 2007 by Majiedt J, as he then was. In terms of this consent order, the matter was postponed *sine die*. Further, a referee was appointed to determine whether the joint venture to mine diamonds was imprudent to a material degree when measured against certain stated criteria. The referee was also to consider whether Mr Cornelius Solomons had acquired shares in Rushtail 31 (Pty) Ltd (whether on behalf of the Pniel community or not) prior to November 2005. Also, the referee was to consider if the joint venture could be re-negotiated to the extent that he considered it to be imprudent or whether such agreement should be cancelled or set aside. In terms of the said order, the referee's report was to be purely advisory and a deadline was set for the submission of such report.

5. The said order further established certain negotiating committees to establish the rights of claimants under the **EXTENSION OF SECURITY OF TENURE ACT**[2] ("*ESTA*") and other residents on the Pniel property. The said order incorporated by reference orders 4 and 5 of the interim order granted by Molwantwa AJ on the 6 October 2006. The portion of the order granted by Molwantwa AJ relevant to the present application has already been quoted above.

6. Then on 2 December 2016 under case number 1037/2016 I made an order that included the following:

> *"1. That the matter is postponed sine die to enable the 3rd and 4th Respondents to purge their default of the consent order granted in case 1149/16 (this is obviously an error in the typed order and the correct case number should be 1149/06) on 27 March 2007."*

7. The third and fourth respondents in case number 1037/16 were the LADCOM of the Pniel CPA and Rushtail 31 (Pty) Ltd ("*Rushtail*"), respectively.

8. The respondent in the instant case, being the Pniel CPA, has raised certain points *in limine*. The principle points *in limine* argued before me were: None of the second to twenty-seventh applicants have established the necessary *locus standi* to be joined as a party to the main application; the proceedings are either premature or wrongly brought in that second to twenty-seventh applicants must first be joined as parties before the relief sought in prayers 4, 5, 6 and 7 of the Notice of Motion dated 27 July 2017 can be sought;

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[2] Act 62 of 1997.

the internal remedies available under the **MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT**[3] (the "*MPRDA*") have not been exhausted; and there has been a material non-joinder of Rushtail in case number 1149/06, having regard to the relief that the second to twenty-seventh applicants now seek.

9. As set out above the nature of the relief claimed in the main application was to place the CPA under administration. In order to determine the points *in limine* referred to above, it is necessary to set out the relief second to twenty-seventh applicants seek in the present application. For this reason, I set out the material portions of the relevant Notice of Motion:

> *"KINDLY THAKE NOTICE THAT applicant's no 2 to 27, also reflected in case no. 1037/16, will apply to the above Honourable Court on the 18 August 2017 for an order in the following terms:*
>
> 1. *That they be joined as parties in the above matter, case no. 1149/06, as Applicant's no. 2 to 27.*
>
> 2. *The existing applicant number 1 (the Regional Land Claims Commissioner Free State and Northern Cape) as well as the existing Respondent (the Pniel Communal Property Association through its Ladcom) be ordered to abide by the consent Order of the Court of the 27 March 2007, as well as paragraphs 4 and 5 of the Judgment of 6 October 2006, also annexed hereto.*

[3] Act 28 of 2002.

3. *That the respondent, the Pniel Communal Property Association, (through its Ladcom) be ordered to purge their default of the consent order in case 1149/06 before 31 August 2017 in compliance with par. 1 of the Court Order of 2 December 2016 in case 1037/16, annexed hereby (sic).*

4. *That the Honourable Court accepts the report of the appointed referee, Mr Mtembu, annexed hereto as Annexure RA4(1) to RA4(30).*

5. *That the Honourable Court grants the Referee the power to proceed with his investigations of the matter up and until completion of his final report and the Honourable Court then releases him from further investigations and/or reporting in terms of his appointed mandate.*

6. *That, in view of the existing report of the referee (Annexure RA4) no further mining activities shall be conducted unto (sic) the said Pniel Estate up and until a final recommendation of the said referee to the Honourable Court and the resultant order of the Court.*

7. *That copies of the order of the Honourable Court also be served onto (sic) all the parties mentioned in Case no. 1037/2016.*

8. *Leave be granted to any party to put the matter on the roll once the final report of the referee becomes available.*

9. *The Court grants permission that, for the purposes of the prayers requested herein, case 1037/16 be read herewith.*

10. *Further and/or alternative relief.*

11. *Costs in the application to be awarded should any party oppose the application."*

10. The question of whether the second to twenty-seventh applicants have the requisite *locus standi* to be joined as applicants is not only a point *in limine* but is in large measure the substance of the application presently before this Court.

11. In considering such question, it must be remembered that the first applicant, being the Regional Land Claims Commissioner Free State and Northern Cape, sought to have the CPA placed under administration in terms of the provisions of s13 of the CPA Act. Thereafter an order was taken by consent referring certain questions to a referee as summarised above.

12. In considering whether the second to twenty-seventh applicants have the necessary *locus standi* to intervene and be joined as applicants to the main application, it is necessary to consider Rule 12 of the Uniform Rules of Court ("*the Rules*"), which governs the procedure. Rule 12 of the Rules reads as follows:

> *"Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a*

plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure in the action as to it may seem meet."

13. Although the wording of Rule 12 clearly shows that such rule is applicable to actions, the provisions of Rule 6(14) of the Rules make Rule 12 applicable to applications brought under motion proceedings as well.

14. The provisions of Rule 12 provide that only such persons as are entitled to be joined as a plaintiff or as are liable to be joined as a defendant may apply for leave to intervene.

15. The law relating to what must be set out in order to make out a case to intervene was restated and set out by White J in the case of MINISTER OF LOCAL GOVERNMENT AND LAND TENURE AND ANOTHER v SIZWE DEVELOPMENT AND OTHERS: IN RE SIZWE DEVELOPMENT v FLAGSTAFF MUNICIPALITY[4], as follows:

"The undermentioned principles apply to an application in terms of Rule 12, or the common law, for leave to intervene.

(a) The applicant must satisfy the Court that:

(i) he has a direct and substantial interest in the subject-matter of the litigation, which would be prejudiced by the judgment of the Court (references omitted);

[4] 1991 (1) SA 677 (Tk).

(ii) the application is made seriously and is not frivolous, and that the allegations made by the applicant constitute a prima facie case or defence – it is not necessary for the applicant to satisfy the Court that he will succeed in his case or defence (references omitted);

(b) A 'direct and substantial interest' means '...an interest in the right which is the subject matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation (references omitted).

(c) ..."[5]

16. It is common cause that the object of the main application in case number 1149/06 was to place the Pniel CPA under administration. However, this is not the end of the matter, the order taken by consent on the 27 March 2007 at the very least extended the scope and subject matter of the main application. This is so because the original parties to case number 1149/06 and the Court that made the order on the 27 March 2007 must have contemplated that either the recommendations of the referee would be implemented or that the Court determining the matter after the final referee's report had been submitted would make any order competent under the consent order of the 27 March 2007.

17. The consent order appears, at least in part to have superseded the initial relief claimed in the Notice of Motion under case number 1149/06. In this context the second to twenty-seventh applicants

[5] Above at 478H to 479C.

must show a direct and substantial interest in some aspect of the consent order taken on the 27 March 2007. Clearly, on the facts set out by them on the papers, the second to twenty-seventh applicants would have no direct and substantial interest in the placing of the Pniel CPA under administration.

18. The grounds upon which the second to twenty-seventh applicants seek to rely, such as they are, have nothing to do with placing the CPA under the administration of the first applicant.

19. What then needs to be considered is whether such grounds can be classified as a direct and substantial interest in what was contemplated by the consent order of the 27 March 2007.

20. What is contemplated by the term '*direct and substantial interest*' is that it is a legal interest in the subject matter of the application in the sense that they may be prejudicially affected by the judgment of the Court in the relevant application.[6] In applying this test, I believe the emphasis must be on the phrase '*...a legal interest in the subject matter of the application...*".

21. Giving a wide and generous interpretation to what the second to twenty-seventh applicants set out in the founding papers filed on their behalf, the case they make out in the founding papers to be joined in the main application is as follows:

    21.1. They are members of the community;

    21.2. Some of the applicants seeking to join in the main application were born on the farm Pniel;

    21.3. Some of the said applicants are '*ESTA claimants*'; and

[6] Standard Bank v Swartland Municipality 2011 (5) SA 257 (SCA) at 259E to 260A.

21.4. The Court wants the applicants to proceed under application 1149/06 in order to enforce those agreements which the Court made an Order.

22. To this we must add a point raised by Mr Schreuder, who appeared for the second to twenty-seventh applicants, in his oral argument. In this submission Mr Schreuder referred to the report of the referee, which is annexed to the founding affidavit, and in particular where the referee refers to the interest various parties have in the contemplated joint venture to mine for diamonds. In the referee's report, the referee indicates that that the community would have a 9% interest in the said joint venture. Each of the grounds raised by the said applicants as a ground to be joined as an applicant to the main application will be dealt with in turn.

23. It is common cause that none of the second to twenty-seventh applicants are members of the CPA. None of them even make any claim to be entitled to membership of the CPA. No attempt is made to explain which community they claim to be part of and how such community has a direct and substantial interest in the outcome of case 1149/06. Further, no attempt has been made to explain how any of their rights and interests would be affected by any judicial decision in case number 1149/06. Consequently, the grounds summarised in paragraphs 21.1 and 21.2 above cannot be described as affording the applicants a substantial and direct interest that would enable them to be joined as applicants or respondents to the main application.

24. Turning now to the claims of the second to twenty-seventh applicants as ESTA claimants. In their answering affidavit the CPA states that they have negotiated with the ESTA claimants and other residents and through a process of negotiation have agreed

to subdivide the farm Pniel Estate 281 and without compensation to waive their rights to this portion to be subdivided for the benefit of the ESTA claimants and other residents. The CPA contends in its answering affidavit that this includes the second to twenty-seventh applicants.

25. The said applicants' do not deal directly with this contention in their replying affidavit. When one considers that the primary purpose of a replying affidavit is to afford the applicant an opportunity to put up evidence to refute the case made out by the respondent in its answering affidavit[7], the fact that the said applicants' have chosen not to deal with this contention at all, leads unavoidably to the conclusion that the applicants' were unable to put up any evidence to refute the contention that the claims of the residents and ESTA claimants had been negotiated and resolved in the manner set out by the respondent CPA in the answering affidavit filed on its behalf.

26. The ESTA claimants and residents' rights having been negotiated and settled in this manner, means that the second to twenty-seventh applicants cannot rely on their claims under ESTA or as residents to have a direct and substantial claim in the main application that would entitle them to intervene in such main application.

27. Mr Schreuder, on behalf of the second to twenty-seventh applicants, expressly disavowed the ground set out in paragraph 21.4 above, being that the Court wished them to join as applicants under case 1149/06. That being the case, this ground need enjoy no further consideration.

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[7] Standard Bank of SA LTD v SEWPERSADH AND ANOTHER 2005 (4) SA 148 (CPD) at 159G-H.

28. This leaves only the submission made by Mr Schreuder in his oral argument that the community was entitled to a 9% interest in the joint venture. There are two difficulties with this argument. The first being that according to the respondent CPA the joint venture agreement has lapsed and is no longer being pursued. The CPA owns shares in the private company, Rushtail. Rushtail took cession of the previous owner's mining right and thus has a mining right which on the face of it is valid. It is the respondent's case that this mining right is not subject to the consent order of 27 March 2007. More on this below.

29. The second difficulty is that this was not a ground relied upon by the second to twenty-seventh applicants in the founding affidavit filed on their behalf. Mr Schreuder simply plucked it from the referee's report which is annexed to the founding affidavit. The CPA cannot be expected to speculate what might be relevant in the annexures to the founding affidavit. The applicants are required to state their case and the grounds relied upon expressly in the founding affidavit filed on their behalf. This type of trial by ambush is not tolerated. This emerges clearly from the judgment of Cloete JA in the matter of MINISTER OF LAND AFFAIRS AND AGRICULTURE v D & F WEVELL TRUST[8].

30. In these circumstances, the second to twenty-seventh applicants cannot rely on the residents' 9% interest in the joint venture as a basis to afford them *locus standi* for their application to be joined as applicants in the main application in case number 1149/06.

31. On the grounds raised by the second to twenty-seventh applicants to establish their *locus standi* to be joined as applicants in the main application, I find that they have not established their *locus standi* to be joined in the main application as applicants.

[8] 2008 (2) SA 184 (SCA) at 200C-E.

32. In the circumstances of this case, I need to refer to the order I made in case number 1037/16. The material part of such order is set out above. It called upon Rushtail and the CPA to purge their default of the order made by Molwantwa AJ on the 6 October 2006 which was incorporated into the order made by Majiedt J on the 27 March 2007.

33. The CPA has argued that they are not in breach of the relevant orders as the joint venture agreement has lapsed and that Rushtail has acquired its right to prospect for diamonds on the relevant property by virtue of them taking cession of the relevant right. In the alternative they argue that they have given the first applicant (The Regional Land Claims Commissioner: Free State and Northern Cape) written notice as contemplated in order 4(c) of the order issued by Molwantwa AJ issued on the 6 October 2006. In these circumstances, I cannot find that the CPA or Rushtail are in or remain in breach of the said Order. In these circumstances, I cannot grant the relief sought by the second to twenty-seventh applicants in prayer 3 of their Notice of Motion in this matter dated 27 July 2017.

34. The remaining point *in limine* that needs to be considered relates to the non-joinder of Rushtail. Prayer 6 in the said Notice of Motion has a direct bearing and direct impact on the rights of Rushtail. In these circumstances Rushtail ought to have been joined in this application. *Vis-a-vie* prayer 6 of the said Notice of Motion, the non-joinder of Rushtail is fatal to such application for the said relief.

35. In these circumstances, the second to twenty-seventh applicants have not established any entitlement to any of the relief sought in

their Notice of Motion dated 27 July 2017. The application stands to be dismissed.

36. The only outstanding issue relates to costs. Mr Schreuder and Mr Coetzee SC were *ad idem* that costs should follow the event. I agree, there is no basis for me to depart from that general rule.

IN THE CIRCUMSTANCES, THE FOLLOWING ORDER IS MADE:

1) THE APPLICATION IS DISMISSED.

2) SECOND TO TWENTY-SEVENTH APPLICANTS ARE TO PAY THE COSTS ON A PARTY-AND-PARTY SCALE, JOINTLY AND SEVERALLY, THE ONE PAYING THE OTHERS TO BE ABSOLVED.

L. Lever

L. LEVER AJ
NORTHERN CAPE
PROVINCIAL DIVISION

For the Applicants:	**MR J J SCHREUDER** **(oio CM De Bruyn & Partners Att.)**
For the Respondent:	**ADV W J COETZEE SC** **(oio Adrian Horwitz & Ass.)**