



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

29 APRIL 2022

Date


L RETIEF

Case No.20553/2021

In the matter between:

MESHACK THEMBINKOSI SILINDA N.O

First Applicant

FRASER TIMOTHY NYONI N.O

Second Applicant

DONALD VUYISILE MDLULI N.O

Third Applicant

TOM MDLULI N.O

Fourth Applicant

TERRY MDLULI N.O

Fifth Applicant

ROY MDLULI N.O

Sixth Applicant

and

MASTER OF THE HIGH COURT, PRETORIA

First Respondent

REGISTRAR OF DEEDS, MPUMALANGA	Second Respondent
MBOMBELA LOCAL MUNICIPALITY	Third Respondent
KRUGER-MOELETSI INC.	Fourth Respondent
MDLULI FAMILY	Fifth Respondent
THE LAWFUL OCCUPIERS OF THE FARM MATSAFENI	Sixth Respondent
NKOSI FAMILY	Seventh Respondent
HL HALL & SONS (PROPRIETARY) LIMITED	Eighth Respondent
HL HALL & SONS PROPERTIES (PROPRIETARY) LIMITED	Ninth Respondent
COMMISSION FOR THE RESTITUTION OF LAND RIGHTS	Tenth Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Eleventh Respondent
MATAFFIN COMMUNITY DEVELOPMENT TRUST	Twelfth Respondent

JUDGMENT

This matter was heard in open court on the 25 February, judgment reserved and now disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

RETIEF AJ:

INTRODUCTION

[1] This matter concerns the confirmation of a *rule nisi* which was issued on 4 June 2021 by Kubuschi J. The application essentially relates to the Court giving final credence to a settlement framework agreement, referred to as “FA1” (“*agreement*”) which records the manner in which competing land claimants’ claims have finally become settled (land distribution and monetary compensation).

[2] The land over which the claims pertain is situated in Mpumalanga comprising of 5 (five) farms owned by the eighth and ninth respondent (“*the Halls*”).

[3] The applicants are the duly appointed interim trustees of the Matsafeni Trust (registration IT7476/2003) (“*the Trust*”). The trust was initially established as a vehicle through which initial land claims by the fifth respondent (the Mdluli family) and the sixth respondent (the lawful occupiers) were settled. The farms were transferred to the Trust (“*trust land*”).

[4] However, the Trust’s effectiveness as a vehicle for the beneficiaries was, *inter alia*, challenged by discourse between the competing interests of the beneficiaries, the wording of the Trust Deed itself and by a further competing land claim by the seventh respondent (Nkosi family).

[5] The discord now between the three parties, as to the use of the trust land and the entitlement thereof, is the fifth, sixth and seventh respondents. To contextualise, the Mdluli family, the lawful occupiers and the Nkosi family.

[6] As a consequence, and in 2018 the agreement was concluded and recorded in a written instrument. All the relevant authorities and State departments having approved it, and now the agreement requires Judicial overview and certain relief to give effect to the terms thereof.

[7] To give effect to the agreement the applicants now seek relief in terms of Section 13 of the Trust Property Controls Act 57 of 1988 ("*Trust Act*") to cater, *inter alia*, for the substitution of the Trust Deed itself, for the appointment and authorisation of the trustees thereof ("*Section 13 relief*"), including declaratory relief relating to the agreement, "FA1".

PROCEDURAL BACKGROUND AFTER THE RULE *NISI*

[8] The *rule nisi* of 4 June 2021 made provision for, *inter alia*, procedural issues relating to the prescribed time limits to be followed by interested parties who wished to object to the Section 13 relief and the declaratory relief before the order was finally confirmed.

[9] The return date of the *rule nisi* was 10 September 2021, Bam AJ was seized with the application on the return date. Prior to the return date, and as directed, notice of the return date and the relief sought was served in the manner as directed by Kubuschi J.

[10] Prior to the return date and on 9 September 2021 and not in accordance with the procedural timelines set out in the *rule nisi*, the sixth respondent, as they then referred to themselves, served and uploaded their notice to oppose the granting of the *rule nisi*.

[11] The sixth respondent is cited as the lawful occupiers and make up approximately 8000 persons, essentially employees and former employees (and their families) of the Halls group of companies and their successors in title.

[12] According to the notice to oppose, the sixth respondent was ostensibly represented by Messieurs Couzyn Hertzog & Horak ("*Couzyns*"). Simultaneously, Nkosi Attorneys & Associates entered the arena ostensibly acting on behalf of 88 people of the Nkosi family, the seventh respondent.

[13] The notices, *supra*, were both met with a rule 7(1) authority request notice. The applicants disputed that Couzyns held the requisite authority to represent all of the 8000 lawful occupiers as cited and too, disputed that Nkosi Attorneys & Associates represented the fraction of the seventh respondent as cited ("*authority dispute*").

[14] Nkosi Attorneys & Associates subsequently withdrew their opposition on the date of the hearing of the application and thus, for present purposes, I only deal with the relevant steps taken by Couzyns on behalf of their clients in so far as they are relevant.

[15] On the 10 September 2021, Counsel for the sixth respondent in a practice note, stated they were not in a position to file their answering affidavit as directed by the rule *nisi* due to the fact that Couzyns had only consulted with their clients on 3 September 2021 and that the founding papers which made reference to a plethora of documentation not annexed to the founding papers, could and would suitably be dealt with by a rule 35(12) and (14) notice.

[16] The *rule nisi* was subsequently extended to 1 October 2021 and Holland-Muter AJ was seized with the application on that date. The court order of 1 October 2021 extended the *rule nisi* yet again to 22 November 2021 and this time incorporated procedural directives for the filing of papers to resolve the authority dispute.

[17] On the return date on 22 November 2021, Davis J who was seized with the application heard the interlocutory authority dispute. The dispute was finally determined by order on 2 December 2021.

[18] The authority judgment and order play a pivotal role in these proceedings, the reasons of which will become clear.

[19] I now turn to deal with the judgment of Davis J.

[20] In paragraph 3.11 and 3.12 of the judgment of Davis J stated the following with regard to the parties represented by Couzyns:

“3.11 Based on all the aforesaid, I am satisfied that Couzyns have the necessary mandate to represent those persons who Mr Mashigo (and his “colleagues”) may lawfully represent. I formulate the court's satisfaction in this fashion because, despite Mr Mashigo's say-so, and in the absence of any formal form of structure of resolution and in view of the denials or confusion of persons approached by the applicant, I am not equally satisfied that Mr Mashigo's authority (and accordingly the authority of Couzyn's) has truly been established or mandated by the remainder of the 8 000 persons constituting the sixth respondent. (own emphasis)

3.12 *It might well be that Mr Mashigo and his clients lawfully represent the whole of the sixth respondent, but in so far as that has not yet been established (own emphasis) and even if they only represent a fraction or portion or even a minority of the 8 000, they are still interested parties as contemplated in paragraph 5 of Kubuschi J's order (own emphasis) and may even be (opposing parties) as contemplated in 5.1 of her order."*

[21] In consequence, he further stated that:

"[5] *The above findings on authority to act are limited to the issue of representation in court in this matter, including the right to deliver opposing papers as contemplated in the rule nisi. These findings do not constitute findings of locus standi of the groups of persons represented by Messrs Mashigo and Mr Nkosi respectively and neither whether these persons constitute the sixth respondent (own emphasis) or the seventh respondent respectively (in respect of last-mentioned, no such claim has been made by Mr Nkosi)."*

[22] In consequence, Davis J:

22.1 declared that Couzyns' authorisation was limited to act on behalf of Mr Mashigo and his colleagues as named in his affidavit dated 29 September 2021, and those persons who they may in turn lawfully represent;

22.2 referred to Mr Mashigo and his colleagues *supra* as the interested parties as referred to in the *rule nisi* and not the sixth respondent as cited;

22.3 that his findings did not constitute findings of *locus standi* of the groups of persons. Simply put, that *locus standi* (legitimate and legal authority) still had to be demonstrated by the parties as each person being a lawful occupier as cited and/or as a direct descendant of Phillip Shepezi Nkosi;

22.4 the interested parties were directed to deliver and upload their opposing papers by 20 December 2021.

[23] In consequence, both the parties represented by Couzyns and Nkosi Attorneys & Associates were limited.

[24] Nkosi Attorneys & Associates filed and uploaded their clients' opposing papers in compliance of the Court order to which the applicants replied. They did not persist with the opposition and gave notice, from the bar, that they intended abiding by the Court's decision.

[25] The interested party whom Couzyns represented did not file nor upload opposing papers as directed by the Court order nor, for that matter, at all. On the date of this hearing the Court was not seized with a formal application requesting the Court's condonation for the non-compliance of the Court order. No affidavit from a representative of the interested party nor from their duly appointed attorney at Couzyns, Mr W Hertz, was handed up setting out the reasons for such non-compliance and requesting an indulgence for the non-adherence thereof.

[26] Instead, when requested to address the Court on the glaring failure, Counsel merely informed the Court that he could not take the matter any further and would oppose the application on behalf of the interested party on the filed pleadings. Counsel's entitlement aforementioned was stated, absent any reference to and/or without any further evidence of the outstanding *locus standi* issue raised by Davis J. Counsel neither filed written heads of argument nor attempted to deal with that failure either.

[27] Absent the aforementioned, Counsel mentioned in argument that Couzyny's had caused a rule 35(12), (13) and (14) notice (*the rule 35 notice*) to be served and uploaded on 16 February 2022, being 2 (two) court days prior to the date of this hearing. This was the same notice referred to in Counsel's practice note in September 2021.

[28] On 18 February 2022 the rule 35 notice was met by the applicants with confirmation that they would not comply with the notice and that they held instructions to proceed with the final order.

[29] Armed with this knowledge the interested party did not proceed to take any further steps nor did they serve a notice in terms of rule 30A before the hearing of this application. Although set down on the 21 February 2022 the matter was only allocated and heard on the 25 February 2022.

[30] Counsel in argument, conceded the point relied upon by the applicants¹ that the rule 35 notice did not suspend the filing of their opposing papers unless accompanied by an application to compel. This was not the case here. Nor was it

¹ **Potpale Investments (Pty) Ltd v Mkhize** 2016 (5) SA 96 (KZP).

clear what procedural and/or tactical advantage was to be gained by the rule 35 notice if no compliance was sought and if no affidavit setting out the reasons and evidentiary value for, *inter alia*, the production of documents listed in terms of rule 35(12) at paragraphs 3, 6, 11, 13, 14, 16, 17 and 19 of the notice, specifically requested in terms of rule 35(14) was made available to the Court to consider.²

[31] The effectiveness of the rule 35 notice appeared to be a 'storm in a tea cup' based on the procedural missteps taken by the interested party.

[32] For the sake of clarity, I mention the following further difficulties facing the interested party's rule 35 notice which was not brought to the Court's attention during argument:

32.1 Notwithstanding the order of Davis J, Couzyns caused the rule 35 notice to be served stating that "*the lawful representatives on behalf of the sixth respondents herewith require the applicants...*". This fallacy naturally elicited a response from the applicants stating that it was unclear who Couzyns represented. And as a consequence irregular. This glaring error was simply not dealt with at all.

32.2 In so far as the 35 notice incorporated rule 35(13), as indicated in the heading of the notice, requesting the discovery of certain documents, no leave was sought by the interested party. Subrule (13) is clear, it states:

² **Democratic Alliance and Others v Mkhwebane and Another** (1370/2019) [2021] ZASCA 18 (11 March 2021).

“(13) The provisions of this rule relating to discovery shall mutatis mutandis apply, in so far as the court may direct, (own emphasis) to applications.”

This is because discovery is rare and unusual in applications and should be ordered by the Court only in exceptional circumstances.³ In other words, the request for discovery in terms of rule 35 in application proceedings is not simply for the taking and it is incumbent upon a party to obtain leave from the Court before simply serving it. Reference to 35(13) in the notice is not sufficient. No leave was before Court.

[33] Southwood J in **Loretz v Mackenzie**⁴ had an occasion to deal with rule 35 and stated at 74F-H as follows:

“It is clear that the Uniform Rules of Court do make provision for rule 35 relating to discovery to apply to applications. But this is clearly unequivocally stated subject to the proviso that the court directs this to be so. The applicants first argument requires that the clear wording of the rule in so far as the court may direct be ignored. This cannot be done and no authority for doing so was referred to.”

[34] In consequence the rule 35 notice is ineffective at this stage of the application and in the absence of argument to the contrary is dealt with on that basis.

³ **Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis** 1979 (2) SA 457 (W) at 470D; **Saunders Valve Company Limited v Insamcor (Pty) Ltd** 1985 (1) SA 146 (T) at 149.

⁴ 1999 (2) SA 72 (T).

[35] I now turn to deal with the background.

BACKGROUND

[36] During 1988 the Mdluli family lodged a claim over "*the Mataffin Farm*", in Mbombela under the Restitution of Land Rights Act⁵ (the "*Restitution Act*"). The "*Mataffin Farm*" is a colloquial term used to refer the farms owned by the Halls. Such claims related to the following 5 (five) farms: Riverside 308 JT, Woodhouse 309 JT, Dingwell 276 JT, Marathon 275 JT and Boschrand 283 JT.

[37] The Halls, in the interest of settling the restitution land claim by the Mdluli family and the prospect of a claim to secure land tenure by the lawful occupiers, entered into settlement negotiations.

[38] The settlement negotiations were entered into between the Halls, the Mdluli family, the tenth respondent (the Commission for the restitution of land rights) and the eleventh respondent (Minister of Land Affairs). The terms of the settlement were recorded in the original settlement agreement to the founding papers⁶ (the "*original settlement*"). The original settlement settled the restitution claim of the Mdluli family.

[39] The original settlement was reached on the basis that the Halls would sell land comprising of 6 000 hectares to the government who in turn would transfer that land to the Trust which would be established for both the benefit of the lawful occupiers and the Mdluli family.

⁵ Act 22 of 1994.

⁶ See original settlement agreement, annexure "FA6", Caselines 011-267 to 271.

[40] The consequence was that the lawful occupiers who did not reside on the land identified within the 6 000 hectares to be transferred to the Trust would vacate the land and move to Trust land.

[41] To give effect to the settlement agreement the Trust was established and lodged with the first respondent, the Master on 3 October 2003.

[42] Further agreements were concluded to effect that the Mdluli family and the lawful occupiers could be beneficiaries of the Trust and that individual lawful occupiers agreed to vacate the Hall's land and to be relocated into the Trust land so purchased and transferred into the Trust. Eviction of any unlawful occupiers and/or lawful occupiers on Hall's and/or Mdluli land was agreed to and initiated to give effect to all the agreements.

[43] By December 2003 the original settlement had been given effect to and the Trust had taken transfer of the Trust land.

[44] Notwithstanding the intention to settle the land restitution claim and to give effect to rights of protected tenure for the lawful occupiers, a number of problems arose from the very outset. Some of the problems highlighted in the founding papers related to disputes with regard to the intended definition of members, in the trust deed, the appointment of trustees, disputes as to which trustees properly held office, accusation of breach of fiduciary duty of certain appointed trustees, validity of certain transactions concluded between the Trust and the municipality (Stadium Agreement) and importantly the inability of the interim trustees to exercise their powers due to an inability to ever consent by way of a quorum of beneficiaries. To illustrate the point, the founding papers state that there are currently about 8,000 lawful occupiers and 800 members of the Mdluli family who are beneficiaries of the

Trust. In consequence, a quorate meeting would thus require an attendance of some 6,160 people (ie. 70% of the members/beneficiaries), which too date has been impossible to convene.

[45] The ineffectiveness of the Trust, the in-house skirmishes between the beneficiaries and between the beneficiaries and the trustees resulted in acrimonious litigation for the last approximate 11 (eleven) years.

[46] The acrimonious litigation was compounded by the land claim brought by the seventh respondent, the Nkosi family, who in January 2008 entered the fracas and complained that the original agreement which gave rise to the Trust and to the transfer of the trust land had been concluded without notice to them and before their land claim lodged with the Land Claims Court over Riverside and Woodhouse farms had become finalised. The Nkosi family claim was later accepted by the Commissioner and published in the Government Gazette No.1134/209 dated 21 August 2009 as a result of which the Nkosi family brought an application to set the original agreement aside. This is still pending.

[47] In 2011 the Mdluli family also brought the Mdluli court case seeking an order removing the lawful occupiers as beneficiaries of the Trust. The management of the Trust had been plagued with difficulties since 2003, a situation which was exacerbated by as previously mentioned a poorly drafted and unworkable trust deed resulting in the Mdluli family and the lawful occupiers not being able to work together and manage the assets of the Trust for their benefit.

[48] In an attempt to settle the dispute between the Mdluli family, the lawful occupier and the trustees of the Trust and the Halls entered into a mediation process

on the basis that the Trust assets would be split between the Mdluli family and the lawful occupiers.

[49] The mediation process did not include the Nkosi family and as a result thereof in 2018, the agreement, the subject matter of this application was finally reached. The agreement contains certain conditions, the thrust of which relates to the relief sought in this application.

[50] The applicants contend that the agreement being the subject matter of the declarator relief finally deals with the award of the trust land to the Nkosi family, the lawful occupiers through the Mataffin Community Development Trust, the Halls and the Mdluli family.

[51] All the parties to the agreement, including the relevant authorities and State departments are cited and agree to agreement being made an order and binding on all the parties thereto. It is only the interested party represented by Couzyns who opposes the relief. Applicant's Counsel put it into contexts by stating that the interested party who oppose the final relief make up about 500 people out of a total of 9 000. To refine it even further of the 500 people it is still unclear who *de facto* are lawful occupiers.

[52] In consideration of all the relevant facts, regard too must be had to the weight of the intention to oppose which was demonstrated having regard to all the papers before Court. This is raised having regard to the following: From the authority judgment it appeared that Mr W Mkhonto and Mr T Mnisi, together with Mr Mashigo and a number of other nominated representatives, consulted with Couzyns on the 3 September 2021. Later referred to as members of the interested party. Notwithstanding the opposition by the interested party, both Mr W Mkhonto and Mr T

Mnisi together with the so called lawfull occupiers of portion 0 Dingwell 276 JT relied on the confirmation of the agreement by this Court in this application to secure their tenancy in a rescission application. Contrary to the intended opposition conveyed to Court herein.

[53] In amplification, In the Regional Court of Mpumalanga, Mbombela (case no: MRCC 167/2020), Mr Mkhonto, together with Mr T Mnisi and the lawful occupiers of portion 0 Dingwell 276 JT unsuccessfully applied for the rescission of their eviction from portion 0 Dingwell 276 JT.⁷

[54] Paragraph 6 of Mr Mkhonto's founding affidavit relies on the terms of the agreement, the subject matter of this application, to secure his right to remain on portion 0 Dingwell 276 JT and states under oath that “- *annexure FA1 (the agreement, own emphasis) is expected to be made an order of court in the high court case.*” The notice of motion in these proceedings and FA1 is attached to his founding papers.

[55] This is surely unfavourable, *vis n vis* the weight of the applicants in rescission application (in so far as they may make up the 500 persons of the interested party) intention to oppose this application.

[56] I now wish to deal with the relief and the opposition by the interested party as raised on the filed pleadings.

THE RELIEF AND THE OPPOSITION THEREOF

⁷ See caselines 001-37-5-48.

[57] In the absence of Counsel for the interested party demonstrating who, of those persons represented by Couzyns possessed *locus standi*, I still deal with his argument in the interest of those who may.

[58] When prompted on the issue of *locus standi*, Counsel merely stated that that is not how he understood the judgment of Davis J. Without commenting I proceed.

[59] The first attack was unsuccessfully levied against paragraph 15.2 and 15.3 of the applicants' founding papers. Paragraph 15 deals with certain undertakings made by the applicants before the final order is sought. I emphasise at this point that the undertakings were made to be fulfilled before seeking a final order.

[60] In terms of paragraph 15.2 of the founding papers, it reads:

“15.2 Second, the Mdluli family and the Nkosi family have both withdrawn all their pending court proceedings before a final order is granted albeit subject to a reservation that they can be reinstated if the rule nisi is not confirmed. (own emphasis) This is necessary because the settlement agreement is intended fully and finally to settle all of those proceedings. The Mdluli and the Nkosi family are not entitled to the benefits of the settlement agreement unless those proceedings are brought to a close.”

[61] Counsel argued that the notice of withdrawals by the Mdluli and Nkosi family are provisional, meaning that the matter is *lis pendens*, stating “that you either withdraw or you litigate – one or the other”. I don't agree with this argument, the content of the notices are clear and paragraph 15.2 makes provision for the

reservation. The parties' withdrawal is not provisional but unequivocally states it is conditional upon the agreement being confirmed. In other words, litigation is suspended pending the fulfilment. The condition in the notice is sound and not only protects the rights of the parties in the event of the *rule nisi* not being confirmed, but if confirmed, protects their respective contractual obligations in that, clause 2.10 of the agreement is triggered and the terms of the agreement will be referred to the Land Claims Court to be made an order of Court. Furthermore, to give procedural effect, it is sound that that the parties are able to demonstrate to the Land Claims Court that the conditions of the notices, in each matter, have been fulfilled and move for the settlement order. Which order will become executable instead of a matter simply withdrawn.

[62] In terms of paragraph 15.3 of the founding papers:

“15.3 Third, the Commission will certify, in terms of Section 14(3) of the Restitution Act, that if the order is granted, the settlement agreement will finalise all land restitution claims made by the Mdluli and Nkosi families in respect of the Trust lands and that consequently those claims need not be referred to the Land Claims Court –“

[63] Counsel referred to the Court to the Commissioner's certificate and submitted that the certificate was irregular in that it was signed whilst litigation was still pending and before the notice of withdrawals. This too, is disagreeable point because the certificate is a certification of the agreement signed in 2018, in that the first paragraph of the certificate, the Commissioner stated that: *“The parties have reached an agreement as to, in which this manner, in which this claim is to be*

finalised", (own emphasis). It is not a certification that claims have been finalised, but that there is an agreement in place which deals with the manner in which the claims will be become finalised.

[64] Counsel too raised issue that there was no proof that the Minister actually consented to the payment of the proceedings. I am not sure whether Counsel actually had insight to the terms of the agreement as paragraph 3.5. clearly states that the Commission will be liable for all the costs of the required application. The required application is this application.

[65] Counsel then referred the Court to paragraph 14.3 of the founding papers which stated that: "In the event of this court raising any matter of concern in relation to this agreement (own emphasis) *the parties undertake to negotiate in good faith to address same and to sign any requisite amendment with due expedition.*" Counsel relying on paragraph 14.3 now contended that they require a case manager to be appointed. The basis at this stage of the proceedings remains unclear, but what is clear is the preamble of paragraph 14.3, states that: in the event that the Court raises any matter of concern only then will the parties negotiate further in good faith. The argument is unclear, baseless and brought without any merit at all. Furthermore, the Court at this stage had not raised any matter of concern to the agreement.

[66] Counsel's opposition on the pleadings was a fruitless exercise and too, did not traverse any provisions in the founding papers specifically relating to the Section 13 relief.

[67] Turning to the relief. The authority of this Court to entertain the substitution of the MatsafeniTrust's deed with "NOM1" and the ancillary relief which flows as a

direct consequence thereof on the grounds raised, is catered for in Section 13 of the Trust Act. Such power to be exercised if the Court is satisfied that the applicants, in this case the interim trustees, have a sufficient interest in the trust property. If that has been established then the Court may, *inter alia*, make any order which it deems just in the circumstances.

[68] The Court is satisfied that the applicants have demonstrated such interest, and that no proposition to the contrary has been raised nor established. Furthermore, that in the light of the agreement, it is in the interest of both beneficiaries of the Trust, including those beneficiaries whose interest will now be catered for with the establishment of the Mattaffin Community Development Trust (the 12 respondent), that the Court exercise its discretionary to grant the relief as sought.

[69] Turning to the declaratory relief the Court has had regard to all the circumstances and has applied the two-stage enquiry for such relief as set out in **Cordiant Trading CC v Daimler Chrysler Finance Services (Pty) Ltd**,⁸ and as adopted by Watermeyer JA in **Durban City Council v Association of Building Societies**⁹.

[70] The inevitable result, and in the exercise of the Court's discretion having regard to all the facts and circumstances put before it, the arguments presented and in consideration of the interests of all the persons who demonstrated that they had interest in the outcome of this application, the declaratory relief must succeed.

⁸ 2005 (6) SA 205 (SCA).

⁹ 1942 AD 27 para 18.

[71] Other than the aspect of clause 3.5 of the agreement pertaining to costs of this application, the aspect of costs occasioned by opposition of this application being included in the undertaking was not put to the Court nor argued. The notice of motion however makes provision for costs to be levied against a party who opposes the application. Furthermore the aspect of costs is in the Court's discretion having regard to all the relevant circumstances.

[72] The interested party represented by Couzyns joined issue, persisted with their opposition and failed to provide an explanation why their non-compliance of the order handed down by Davis J should be excused. Furthermore the failure to point out relevant facts which had been uploaded, pertaining to certain fractions of them relying on the very relief sought by the applicants in this Court, in another Court. This in circumstances when they opposed such relief, weighs against them in the consideration of costs.

Now the following order is made:

1. The rule *nisi* (as set out in prayer 1 (paragraphs 1.1 to 1.11 (including all subparagraphs thereof) of Kubushi J 's order) is hereby confirmed and the order is made final;
2. That notice of any actions taken pursuant to prayers 1.6 to 1.10 of the order referred to in prayer 1 hereof, in so far as such actions relate to the execution of the settlement agreement "FA1", to be given by the relevant party to the attorneys of record of the Fifth, Sixth and Seventh Respondents including Nkosi Attorneys Associates and Couzyn, Hertzog & Horak Inc.

3. Save for the costs of the interested party represented by Couzyns, the costs of this application shall be paid on a party and party scale, in accordance with the undertaking in clause 3.5 of the settlement agreement FA1, save that the costs of this hearing be limited to one day.
4. The interested party represented by Couzyns to bear their own costs.



L.A. RETIEF

**Acting Judge of the High Court,
Pretoria**

Appearances:

Applicants' Counsel:	Advocate A. Bishop Sandton Chambers, Johannesburg
Applicants' Attorney:	SC Mdluli Attorneys, Polokwane
Interested party Counsel:	Advocate G. Kasselmann Circle Chambers, Pretoria
Interested party Attorney:	KT Mokoena Attorneys, Mbombela c/o Couzyn, Hertzog & Horak Attorneys, Pretoria
Interested party Counsel:	Advocate N. Simelane

Interested party Attorney: Nkosi Attorneys, Mbombela
c/o Werksmans Attorneys, Johannesburg

Date matter heard: 25 February 2022

Date of Judgment: 29 April 2022