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 HIGH COURT, KIMBERLEY)

Case No: 964/16

Heard on: 12/10/2017

Delivered on: 12/02/2018

In the matter between

ALEXCOR (SOC) LTD	**Applicant**
And	
RICHTERSVELD MINING COMPANY (PTY) LTD	**First Respondent**
CRAIG LLEWELLYN MATTHEWS	**Second Respondent**
RICHTERSVELD SELF DEVELOPMENT COMPANY (PTY) LTD Registration No. 2006/034315/07	**Third Respondent**
RICHSTERSVELD SIDA!HUB COMMUNAL PROPERTY ASSOCIATION	**Fourth Respondent**
DUNCAN ERNEST KORABIE	**Fifth Respondent**
JACOB HAROLD ADAMS	**Sixth Respondent**
DENNIS ALPHONZO FARMER	**Seventh Respondent**
WILLEM JOHANNES VRIES	**Eighth Respondent**
JOHN WILLIAM BRISTOW	**Ninth Respondent**
RYNO DENVER THOMAS	**Tenth Respondent**
BRIAN KOOPMAN	**Eleventh Respondent**
PAULUS DE WET	**Twelfth respondent**
SAMUEL NERO	**Thirteenth respondent**

And in the application between

WILLEM JOHANNES VRIES	**First Applicant**
DENNIS ALPHONZO FARMER	**Second Applicant**
And	
ALEXKOR (SOC) LIMITED **Registration No. 1992/006368/30**	**First Respondent**
RICHTERSVELDT MINING COMPANY (PTY) LTD Registration No. 2006/034807/07	**Second Respondent**
CRAIG LLEWELYN MATTHEWS	**Third Respondent**
RICHTERSVELD SELF DEVELOPMENT COMPANY (PTY) LTD Registration No. 2006/034315/07	**Fourth Respondent**
RYNO DENVER THOMAS	**Fifth Respondent**
BRIAN KOOPMAN	**Sixth Respondent**

JUDGMENT ON COSTS IN THE COUNTER-APPLICATION

PAKATI J

[1] Alexkor (SOC) Ltd, the applicant in the main application, approached this Court on an urgent basis seeking the appointment of "*the Declared Representatives*" as comprising the representatives of Richtersveld Mining Company (Pty) Ltd ("RMS"), the first respondent in the main application and second respondent in the counter-application, on the Joint Board of the Pooling and Sharing Joint Venture ("PSJV"), an unincorporated joint venture between Alexkor and RMC. In the alternative it seeks an order authorizing the "*Alternative Declared Representatives*" to conduct the affairs and activities of the PSJV in their capacity as representatives of RMC on the Joint Board, but not limited to taking all steps necessary for the purpose of attending meetings of the Joint Board of the PSJV and voting thereat as representatives of RMC.

[2] The main application and the counter-application were set down for hearing on 25 November 2016. Before the counter-application was argued Mr DW Gess, on behalf of the applicant (Alexkor) in the main application, submitted that it would be

appropriate for the Court to hear argument in relation to the counter-application and determine it prior to hearing argument and determination in the main application. He requested that the *rule nisi* granted on 21 June 2016 be extended pending the determination of the counter-application. He submitted further that the determination of the counter-application was likely to determine the main application. By agreement between the parties the *rule nisi* was extended until 12 October 2017, hence the hearing of the counter-application.

<u>THE COUNTER-APPLICATION</u>

[3] In the counter-application Farmer and Vries, the applicants in the counter-application and seventh and eighth respondents in the main application, sought the following relief:

" "1. Dispensing with the ordinary time periods provided for in the Uniform Rules of Court and directing that this matter be dealt with as one of urgency in terms of Rule 6 (12) (a) of these rules;
2. Dispensing with the provisions in the First Respondent's Memorandum of Incorporation requiring the appointment of the Seventh, Eighth, Tenth and Eleventh Respondents (in the main application) as directors of the First Respondent at a general meeting of the First Respondent;
3. Declaring that the Seventh, Eighth, Tenth and Eleventh Respondents (in the main application) are directors of the First Respondent, alternatively appointing the Seventh, Eighth, Tenth and Eleventh Respondents (in the main application) as directors of the First Respondent;
4. In the alternative to paragraphs 2 and 3 above, prohibiting:
4.1 The Second Respondent (in the main application), in his capacity as sole director of the First Respondent; or
4.2 Any person elected to the board of the Pooling and Sharing Joint Venture, an unincorporated joint venture between the Applicant and the First Respondent ("the PSJV"), on behalf of the First Respondent, from exercising a call option which entitles the first respondent to acquire the 51% interest of the Applicant in the land mining operation of the PSJV subject to certain conditions ("the call option"), <u>until and unless</u> the First Respondent's board of directors ("the Board") is properly constituted and validly authorizes the call option in accordance with the First Respondent's Memorandum of Incorporation.
5. Granting the Seventh and Eighth respondents (in the main application), further and/or alternative relief;
6. Costs of suit in the event of the counter application being opposed."

[4] In dismissing the main relief sought in the counter-application (prayers 2 and 3) I stated the following in para [54] of my judgment:

"In my view, the Court should not be seen to be drafting contracts for the companies by dispensing with the provisions of the company's Memorandum of Incorporation. This prayer should fail."

I therefore granted the alternative relief (interdict) sought in the counter-application and reserved the issue of costs to be dealt with in the main application. Craig Llywellyn Matthews, the sole director of Richtersveld Mining Company (Pty) Ltd ("RMC"), second respondent in the main application and third respondent in the counter-application, opposed the main as well as the counter-application.

[5] In the main application Messrs Dennis Alfonzo Farmer ("Farmer"), Willem Johannes Vries ("Vries"), Ryno Thomas ("Thomas") and Brian Koopman ("Koopman"), are seventh, eighth, tenth and eleventh respondents respectfully. Vries and Farmer, are applicants in the counter-application and Thomas and Koopman, fifth and sixth respondents. They were elected as RMC's Community Directors by the Richtersveld Community during the IEC elections held in 2013.

[6] On 09 October 2017 Adams and Adams, attorneys of record on behalf of RMC, forwarded an email to my registrar by facsimile requesting that I make a directive on whether or not costs occasioned as a result of the counter-application should be argued before the determination of the main application. The request was as a result of inability to reach an agreement by the parties regarding the manner in which costs in the counter-application should be dealt with by the court hearing the main application, so they stated. The matter was the heard on 12 October 2017.

[7] On 12 October 2017 Mr Manentsa argued on behalf of Matthews that the counter-application is distinct and separate from the main application. He insisted that the issue of costs be heard and argued prior to determination of the main application scheduled to be heard on 12 October 2018.

[8] Adv Michelle O' Sullivan, on behalf of Vries and Farmer, submits that the issue of costs is brought prematurely as the Court has not yet made a determination in the

main application which may have a bearing on the costs relating to the counter-application. This is so because the main application requires the appointment of the representatives until a final determination by a court of competent jurisdiction as to whether or not the Board of Directors of RMC is properly constituted, so she argues.

[9] Reasons why it was necessary for the applicants to bring the counter-application are summarized as follows:

9.1 It was brought in good faith and in the public interest by community representatives in an effort to resolve problems that were faced by RMC namely, ensuring that its Board was properly constituted;

9.2 To ensure that RMC functions properly and effectively and counter the fact that it had a sole director, Matthews, who lacks powers other than to call a general meeting. His term expired on 31 October 2017;

9.3 At the time the following entities in the RMC were defunct and community directors could not be formally appointed although elected by the community to RMC's Board and ultimately their representation as directors was desired by the community;

9.4 RMC could not appoint its representatives to the PSJV to manage the joint marine mining and land rights in the community's interests with Alexkor's representatives. The granting of the alternative relief would serve to prevent the dissolution of the PSJV through the call option pending the proper constitution of the RMC Board;

9.5 Ensuring that the restitution entities which are accountable to the community function properly and effectively to the benefit of the community;

9.6 The say so of Matthews that he has extensive power as the sole director of RMC which he alleges entitles him to take all decisions with regard to RMC; and

9.7 Matthews sought to exercise the call option while the judgment of the Western Cape High Court was still pending.

[10] Mr Manentsa, on behalf of RMC, submitted that the counter-application is different and separate from the main application as alluded to earlier and therefore there is no reason why costs should not be argued and determined separately. He conceded that the Court's finding might have a bearing on the main application but claimed that RMC would be prejudiced by the delay.

[11] It is worth mentioning that the issue for determination in the main application is whether RMC's Board is presently properly constituted with Matthews as its sole director. Vries and Farmer contended that Matthews had limited powers as sole director of RMC and lacked the requisite authority and capacity to oppose the relief sought in the main and counter-applications. This is so because there are insufficient numbers of directors in RMC's Board to form a *quorum*. Therefore Matthews' authority still has to be determined in the main application. Regarding the main application Vries and Farmer filed a notice to abide by the Court's decision dated 13 September 2016 on 14 September 2016. Articles 12.1 and 12.2 of the RMC's Memorandum of Incorporation ("MOI") provide that a *quorum* of RMC's Board comprises of three directors. Article 19.8 of the MOI states that should the number of directors fall below a *quorum*, the remaining director(s) only has the authority to summon a general meeting of the company.

[12] According to Vries and Farmer Matthews should be ordered to pay the costs of the counter-application based on the fact that the defence he raised in the main application is not in the best interest of RMC because of his contention that the appointment of community directors would make no difference to the decision making of RMC as well as his threat to prolong meetings by preventing a *quorate* decision making, and yet Vries and Farmer represent the impoverished community who rely on social and financial benefits afforded by the operations of the PSJV.

[13] Adv O'Sullivan submitted that the fact that Vries and Farmer were successful in the interdictory relief and are entitled to costs without determining whether Matthews was indeed authorized to oppose the main and counter-applications. For this contention she relied on **GOLDING v TORCH PRINTING CO (PTY) LTD**[1] where Herbstein J held:

"What the Court must do is to try and make a fair and just estimate of the liabilities of the parties for the costs of the action, having regard to their success or failure, and to the conduct of the case generally. There is one important fact of which the Court cannot lose sight, and that is that the plaintiff succeeded. It is true, he made claims on which he failed, and for the extra costs involved in these he must carry responsibility. He must also carry responsibility and liability for the wasted costs of one day. If I

[1] 1949 (4) SA 150 (C) at 263

proceed on the basis that as he succeeded he is entitled to the general costs of the action and that he must pay any extra costs he occasioned, then I must try as best I can to estimate the time the case would have taken if the claims on which he failed had not been made and if a postponement had not been necessary."

[14] Adv O' Sullivan contended further that the following principle is applicable: "*private litigants who bona fide seek to ventilate issues of public interest, as in the present instance, are immunized from adverse costs orders*".

[15] A proper approach to follow before awarding costs against an opponent especially regarding constitutional issues is laid down by the Constitutional Court in **BIOWATCH TRUST v REGISTRAR, GENETIC RESOURCES AND OTHERS**[2] as follows:

"[16] In my view it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be determined by whether the parties are financially well endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.

[17] Section 9 (1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. No party to court proceedings should be endowed with either an enhanced or a diminished status compared to any other. It is true that our Constitution is a transformative one based on the understanding that there is a great deal of systemic unfairness in our society. This could be an important, even decisive factor to be taken into account in determining the actual substantive merits of the litigation. It has no bearing, however, on the entitlement of all litigants to be accorded equal status when asserting their rights in a court of law. Courts are obligated to be impartial with regard to litigants who appear before them. Thus, litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution."

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[2] 2009 (6) SA 232 at paras [16] and [17]

[16] Notably, this matter involves the restitution entity, the PSJV, which was established when the community successfully claimed its land in the Land Claims Court under Case No. LCC 151/1998. PSJV was established pursuant to a court order which incorporated the Deed of Settlement signed on behalf of the Richtersveld Community, Alexkor and the Government of the Republic of South Africa. This was done in order to hold the mining rights for the benefit of the community.

[17] The applicants suggested that the parties should agree that each party bears its own costs because of "*the partial success of the counter-application and the partial success of the defence (the "Costs Proposal" in a Calderbank letter sent on 27 September 2017).*" The applicants contended that the said letter confirmed that should the offer be rejected and the court in the end award costs on the basis that each party is responsible for its own costs the applicants would seek a punitive costs order on a scale as between attorney and client.

[18] Regarding the Calderbank letter mention in para 17 *supra* Adams and Adams, for Matthews, declined the Costs Proposal and insisted that Matthews is entitled to recover his costs against the applicants. In a letter dated 04 October 2017 Adams and Adams made a counter-proposal in terms of which the applicants should pay 50% of the attorney's costs and full extent of the disbursements incurred when they defended the counter-application. The applicants on the other hand also seek costs in respect of preparation and hearing of this application.

[19] As noted in para [25] of my judgment I mentioned that the issues between the main application and the counter-application are interlinked. I therefore stand by my ruling that costs of the counter-application will be dealt with in the main application. Para [65] of my judgment states:

"Closer reading of this section [s 57 (3) (a) of the Companies Act, 71 of 2008] does not give Matthews authority to act as he pleases. The MOI also does not grant him sole decision making power, he is bound by the confines of the MOI as far as it is consistent with the Companies Act."

[20] The main application requires the appointment of the representatives until a final determination by a court of competent jurisdiction as to whether or not the Board of

Directors of RMC is properly constituted as alluded to earlier. For that reason I will not, at this stage, deal with the *'Costs Proposal'* suggested to Matthews in the *'Calderbank Letter'* forwarded on 27 September 2017 with the purpose of curtailing costs incurred when the matter was argued. I will also not deal with Matthews' counter-proposal at this stage. In my view the outcome of the main application may have a bearing on costs in the counter-application especially if the court finds that Matthews was not authorized to oppose the main and the counter-application.

In the circumstances I grant the following order:

The costs of the counter-application are reserved and will be dealt with in the main application.

BM Pakati

BM PAKATI
JUDGE-NOERTHERN CAPE DIVISION, KIMBERLEY

For the Applicants:	*ADV M O'SULLIVAN*
Instructed by:	*DUNCAN & ROTHMAN*
For the Respondents:	*ADV B MANENTSA*
Instructed by:	*ENGELSMAN MAGABANE*