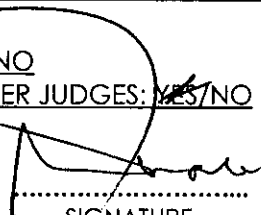


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2014/45865

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: <u>YES</u> /NO
(3)	REVISED.
17/06/15	
DATE	SIGNATURE

17/6/2015

In the matter between:

**THE MBUYANE COMMUNAL PROPERTY
ASSOCIATION**

APPLICANT

and

MR ABE SIBIYA N.O

FIRST RESPONDENT

MS NOSIPHO NGCABA N.O

SECOND RESPONDENT

MS EDNA MOLEWA N.O

THIRD RESPONDENT

**SKUKUZA AIRPORT MANAGEMENT
COMPANY (PTY) LTD**

FOURTH RESPONDENT

J U D G M E N T

TWALA AJ

[1] This is an interlocutory application in which the applicant seeks to join Mr Kuseni Douglas Dlamini N.O. in his capacity as the chairperson of the

South African National Parks (SANParks) as the Fifth Respondent in the review application that was instituted by the applicant on the 23 June 2014.

The applicant prays for the following orders:

- 1.1 Mr Kuseni D Dlamini N.O in his capacity as chairman of the South African National Parks Board and care of Savage Jooste & Adams Inc, Attorneys, 141 Boshoff Street, New Muckleneuk, Pretoria, is joined as the fifth respondent herein.
- 1.2 The applicant is permitted and granted the necessary leave to amend its notice of motion dated 23 June 2014 so as to provide for the joinder of the fifth respondent as provided for, and in the respect set out in, annexure JOIN05 to the affidavit supporting this application for joinder (being the proposed amended notice of motion).
- 1.3 The applicant is authorised to serve a copy of this order and all the papers filed in the application thus far on the party so joined by delivery thereof to the address stated above.
- 1.4 Such respondents as may oppose the application are ordered to pay the costs of this application on a scale as between attorney and own client jointly and severally, the one paying the other to be absolved.

[2] The applicant is described as a community based organisation registered in terms of the Communal Property Association Act 1996 (Act 28 of 1996). It was established with the specific purpose of harnessing and using the benefits accruing to the historically disadvantaged community of Dwaleni Township, Mpumalanga Province, from its contribution to the Kruger Mpumalanga International Airport (hereinafter referred to as the KMIA). Through the applicant, the community owns a ten percent (10%) share in Primkop Airport Management (Pty) Ltd, which in turn owns and operates the KMIA. It receives a monthly levy on all passengers and freight departing the KMIA.

[3] Applicant has instituted review proceedings against the decision of SANParks to reopen the Skukuza Airport in the Kruger National Park to scheduled commercial air traffic. In its review application, the applicant cited Mr Abe Sibiya N.O. in his capacity as Acting CEO and information officer of SANParks.

[4] It is apparent that the applicant requested certain documents from SANParks including those documents that contained the decision to reopen the Skukuza Airport. Applicant was furnished with documents which did not support the view that the decision was taken by management. Applicant served and filed a rule 30A notice to compel the first respondent to file a complete and or proper record of the proceedings wherein the decision was taken by SANParks to reopen the Skukuza Airport. The first respondent responded by filing a Rule 30 notice stating that the first respondent is a

Chief Executive Officer of SANParks. As such the first respondent is a third party as far as the decision of SANParks, that the applicant seeks to set aside, is concerned.

[5] The first respondent and Mr Dlamini contend that the applicant elected to exclude Mr Dlamini in the review application. Therefore it waived its rights to join Mr Dlamini in the proceedings. Further, that applicant is barred from raising a cause of action against Mr Dlamini - thus it will serve no purpose to join him. The issue is moot as between the applicant and Mr Dlamini. Applicant alleges to have learnt of the proposed reopening of the Skukuza Airport in December 2013. It is now too late for the applicant in asking for the joinder of Mr Dlamini.

[6] The applicant in its main application has been seeking a review of the decision of SANParks and not of the management of SANParks. SANParks is a juristic person in terms of Section 5 of the National Parks Act, (Act 57 of 1976) read with Section 54(1) of the National Environment Management Protected Areas Act, (Act 57 of 2003). SANParks is governed by a board in terms of Section 57(1) of the National Environment Protected Areas Act and Mr Dlamini is the chairperson of the SANPARKS Board.

[7] Section 57 of the National Environment Management Protected Areas Act provides as follows:

57 (1) South African National Parks is governed by a board consisting of –

(a) *No fewer than nine and no more than 12 members appointed in terms of section 59;*

(b) *The Director-General or an official of the Department designated by the Director-General; and*

(c) *The Chief Executive Officer.*

(2)

(3) *The Board takes all decisions in the performance of the functions of South African National Parks, except-*

(a) *those decisions taken in consequence of a delegation in terms of section 71; or*

(b) *where the Public Finance Management Act provides otherwise.*

[8] Rule 53 of the rules of court provides as follows:

"Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of motion directed and delivered by the party seeking to review such decision or proceedings to the Magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected -

(a).....

(b)"

[9] I agree with the respondents that the CEO of SANParks is a third party in the review proceedings. The person that the applicant should have cited in the review proceedings is the chairperson of the board of SANParks. The CEO is the executive leading the management of SANParks and he reports to the board as an ex officio member of the board. Rule 53 states it clearly that for a review application for the decision of a board, such application shall be directed and delivered to the chairperson of the board.

[10] The applicant, as a representative of the community and shareholder in the company that owns and operates the KMIA, has taken upon itself to review the decision of the SANParks board to protect the interest of the broader community of Dwaleni Township. It cited the CEO of the SANParks and served all the documents on the CEO as a representative of the board of SANParks. In the circumstances, although the correct person to be cited was the chairperson of the SANParks board, these proceedings did come to the attention of the board including the chairperson who is the presiding officer of the board.

[11] The submission by the respondents that the applicant has by its conduct waived its right to join the chairman of the SANParks board, is unsustainable. Nothing suggest that the applicant deliberately excluded to join the chairperson of the board in the proceedings. It is clear that the applicant at all times was seeking an order to review the decision of SANParks and not the decision of the management of SANParks. Applicant

therefore believed the citing of chairperson together with the CEO of SANParks was *ex abundante cautela*. That cannot be said to be in itself a clear intention to waive the right to join the chairperson of the board.

[12] In *Hepner vs Roodepoort Maraisburg Town Council* 1962 (4) Sa 772 (A) Heyer CJ said the following:

"There is authority for the view that in the case of a waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue".

In *Laws vs Rutherford* 1924 AD at 261 Innes CJ said:

"The onus is strictly on the applicant. He must show that the respondent with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it".

[13] In my view the respondent has not discharged the onus placed upon it to show that applicant, by its conduct and with full knowledge intended to abandon its right to join the chairperson of the SANParks board.

[14] Applicant has requested documents from the SANParks which relate to the decision that led to the reopening of the Skukuza Airport. Applicant was not furnished with these documents or was furnished with some documents which did not contain the information on which the decision was based. The CEO in its Rule 30 notice stated that it was a third party and only the chairperson of the board can provide such documents.

[15] It is therefore my view that there is a case for the chairperson of the board to answer in the review application. He is the presiding officer of the board and is the custodian of the minutes of the board. It is necessary to join him in the proceedings. It is therefore in the interest of justice that he be joined in these proceedings. No prejudice will be suffered by the board or the chairperson if joined in these proceedings for the board is aware of the review proceedings. The CEO is an ex officio member of the board and all the pleadings of the review application were served on him.

[16] Counsel for the respondents submit that the review application itself is out of time for it was not instituted within 180 days from the date upon which the applicant became aware of the decision of SANParks board as required by section 7 of the Promotion of Administrative Justice Act, Act 3 of 2000.

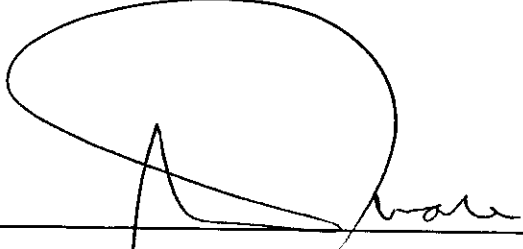
It is my view that the issue whether the application for review was lodge within the prescribed time frames as required by the law is for determination by the court hearing the review application. All issues relating thereto may be ventilated in that court.

[17] I am persuaded by counsel for the respondents' submission that a costs order should be made against the applicant for its sloppiness in preparing its papers. Applicant brought the application for a joinder because it was necessary to join the chairperson of the board in the proceedings. It is not correct to say that the joinder application is brought as a matter of extreme

and abundant caution. Applicant has procedurally failed to join the chairperson of the board although at all times it was seeking to review the decision of the board. In my view the joinder application is necessary and for that reason the applicant is to bear the costs for making such an error.

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

1. Mr Kuseni Douglas Dlamini N.O. in his capacity as chairman of the South African National Parks Board is joined as a fifth respondent herein.
2. The applicant is permitted and granted leave to amend its notice of motion dated 23 June 2014 so as to provide for the joinder of the fifth respondent as provided for and in the respect set out in the proposed amended notice of motion.
3. The applicant is authorised to serve a copy of this order and all the papers filed in the application thus far on the party so joined.
4. Applicant to pay the costs of this application including the costs of two counsels.



TWALA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, PRETORIA

Counsel for the Applicant:

Adv. SWART SC

Instructed by:

Erasmus Attorneys

Counsel for the First &
Fifth Respondents:

Adv. MARITZ SC

Instructed by:

Savage Jooste & Adams

Second and Third Respondents
Instructed by:

State Attorney

Fourth Respondent
Instructed by:

Cliffe Dekker Hofmeyr Inc

Date of Hearing:

18 May 2015

Date of Judgment:

17 June 2015