

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – BHISHO)**

Reportable/Not Reportable

Case no.: 265/2023

Matters heard on: 29 August 2024

Judgment delivered on: 03 September 2024

In the matter between:

DELTA PROPERTY FUND LIMITED

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL,
EASTERN CAPE DEPARTMENT: PUBLIC
WORKS AND INFRASTRUCTURE**

First Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL:
EASTERN CAPE DEPARTMENT:
SOCIAL DEVELOPMENT**

Second Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL,
EASTERN CAPE DEPARTMENT OF
ENVIRONMENTAL AFFAIRS AND TOURISM**

Third Respondent

THE PREMIER OF THE EASTERN CAPE PROVINCE

Fourth Respondent

JUDGMENT

BRODY AJ

1. Summons was issued in this matter on the 26th of April 2023 where the plaintiff, Delta Property Fund Limited (“Delta”) instituted an action against the Provincial Government of the Eastern Cape: Department of Roads and Public Works (“Public Works”), as landlord, for the confirmation of a cancellation of a lease agreement and the payment of the considerable sum of R138 785 219.00, together with interest at 10.5% *a tempora morae*, and costs of suit.

2. Delta alleged that Public Works was in arrears, in various amounts, arising out of the rental of premises described as erf 1[...], Beacon Hill Building, situated at the corner of H[...] and H[...] Close Buffalo Industrial Area, King William’s Town, (“the premises”).

3. Attached to the particulars of claim was the signed lease agreement between *“the Provincial Government of the Eastern Cape (Department of Roads and Public Works) and Delta”*.

4. Various terms of this lease agreement are relevant to the present application.

5. When Public Works served and filed their plea, they raised a special plea of non-joinder of the Department of Social Development, the Department of Economic Development, Environmental Affairs and Tourism. Their non-joinder plea reads as follows:

“15. Under our law there is a duty to join a party if that party has a direct and substantial interest in any order that the Court might make in proceedings or if such order cannot be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined unless the court is satisfied that he has waived his rights to be jointed.”

6. The plea went further to state that:

“20. Essentially, the lease agreement discloses these two government institutions as being the beneficiaries or occupants standing to benefit from the Lease Agreement. As such these two entities clearly have a direct and substantial interest in the issues involved and in the order the court may make...”

22. These two occupants must be joined, and it was an irregularity not to join them. Clearly the cancellation of the lease and possible eviction and any other order the court may make will be prejudicial to them and affect them.”

7. Public Works then raised the issue of the provisions of section 2(2) of the State Liability Act, No 20 of 1957, as further reason why the other two departments should be joined.

8. Understandably, Delta then brought an application on the 4th of March 2024 to join the Member of the Executive Council, Eastern Cape Department: Social Development, (“Social Development”), the Member of the Executive Council, Eastern Cape Department: Economic Development Environmental Affairs and Tourism (“Tourism”) and the Premier of the Eastern Cape (“the Premier”) as parties to the action.

9. Social Development and Tourism then opposed the application and alleged *inter alia* that Public Works was “*rather mischievous*”, “*unfounded and unsubstantiated*” in their special plea of non-joinder.

10. When the matter was called to be argued I raised the possible conflict of interest with Mr Mlalandle, who acted on behalf of the State Attorney in East London, and who, in turn, acted for Social Development and Tourism.

11. The Premier did not oppose the application brought and there was accordingly no representation on his behalf.

12. I expressed the view to the parties that it was not appropriate for the same law office to be acting on behalf of Public Works, Social Development, and Tourism in circumstances where the one was blaming the other and, in particular, where the one was heavily criticising the other with allegations of being “*mischievous*”, and the like.

13. Mr Mlalandle undertook to take this up with the State Attorney’s office in due course. I can see no reason why another State Attorney’s office, or a private legal practitioner, cannot act for Social Development and Tourism, in the circumstances.

14. Despite the conflict of interest, and in the interests of finality, I directed that the matter should be argued.

15. In the matter of Mulaudzi vs Old Mutual Life Insurance Company (South Africa) Limited and Others 2017(6) SA 90 (SCA); Ponnann JA, in a majority judgment, stated the following principal in regard to joinder applications:

“[23] Joinder is required, only if the party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned.”

16. This principal is also fully set out in uniform rule 10(1) and (2) which provides:

“(1) Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depend upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.”

17. The Constitutional Court in SA Riding for the Disabled Association vs Regional Land Claims Commissioner and Others 2017(5) SA 1(CC) stated the test as follows:

“It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is a legal interest in the subject-matter of the case which could be prejudicially affected by the order of the court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

[10] If the applicant shows that it is some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre-decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.

[11] Once the applicant for intervention shows a direct and substantial interest in the subject matter of the case, the court ought to grant leave to intervene.”

18. There are also many other authorities that set out these principles and tests.¹

19. Ms Martin, acting on behalf of Delta, referred this court to the original letter of demand which made reference to all the abovementioned departments and also various paragraphs in the lease agreement which made it clear that Public Works was entitled to delegate other departments and spoke in general germs to the “provincial government”.

¹ Amalgamated Engineering Union vs Minister of Labour 1949(3) SA 637(A), Ploughman N.O. vs Pauw 2006(SA) 334(C), Gordon vs Department of Health, Kwa-Zulu Natal 2008(6) SA 522 (SCA), Permont Global (KZN) (Pty) Ltd vs Afrisan KZN Limited (2020) 4 All SA 226 and Old Mutual Life Insurance Company SS Limited vs Swemmer 2004(5) SA 373(SCA)

20. She also emphasised that assets belonging to Social Development and Tourism were still on the premises today. She motivated for the joinder of the Premier on the basis that in terms of section 125 of the Constitution, the substantial claim against the various provincial departments, must affect the budget if successful, and there can therefore be no doubt that the Premier has a substantial interest in the outcome of the action proceedings.

21. I am in agreement with Ms Martin that necessity and convenience are the primary factors before considering a joinder application.²

22. Ms Martin argued that, in fact, as the Social Development and Tourism had a direct and substantial interest in the outcome of the action proceedings, this court had no discretion but to grant an order to join.

23. Mr Mlalandle argued that there was “*no answer*” to the intentions of Public Works. His further argument was that Public Works owed a duty of care to the other departments.

24. Although he valiantly attempted to persuade me that the lease of agreement made no provision for a sub-letting, and that no other department could occupy the premises, he conceded that Social Development and Tourism had occupied certain areas of the premises in the past and that as at present date there were boxes and furniture belonging to those departments on the premises. After taking instructions, during argument, he properly conceded that the two departments were “*occupying*” the premises by virtue of their boxes and furniture.

25. It is accordingly clear to this court that Social Development and Tourism have not given vacant occupation of those portions of the premises to Delta, as landlord.

26. Although reference was made to correspondence in the papers that indicated that Social Development and Tourism wanted to relocate to head office, they still

² Harding vs Basson 1995(4) SA 499C at 501H and Conola vs Willers 1972(4) SA 470M, 475A

have an “*interest*” in the matter by virtue of their occupation, although beneficial, in the form of furniture and boxes.

27. I do not agree with Mr Mlalandle that Social Development and Tourism have no “*value*” to the litigation and that, accordingly, they have “*no interest*” in the outcome of the action proceedings. I also do not agree with him that Social Development and Tourism will be prejudiced by being joined especially in circumstances where a concession was properly made by Mr Mlalandle that the departments have beneficial occupation of part of the premises.

28. In reply, Ms Martin conceded that the failure to join the departments and the Premier was an error in the drafting of the particulars of claim.

29. I raised the issue of the form of the relief sought in the applicant’s notice of motion and proposed that this be amended to make provision for further pleadings, once a joinder application is successful, and the time periods related thereto. Ms Martin conceded that this was necessary and undertook to furnish this court with an amended notice of motion. This was duly done and received the day after the matter was argued.

30. There can be no doubt, and based on the authorities referred to above, that Social Development and Tourism, together with the Premier, have a direct and substantial interest in the proceedings and will be prejudiced if they are not joined as parties to the proceedings if the applicant succeeds in its relief.

31. In addition, Public Works not only raised the issue of non-joinder in its special plea, however, pleaded that there was a duty for Social Development and Tourism to be joined.

32. Mr Mlalandle argued that if I found in favour of the respondents, I should order costs on the scale as between attorney and client. Ms Martin requested costs on a party and party basis and on scale B as set out in rule 69(7).

33. I can see no reason why the usual costs order should not follow the result in this application.

34. In the result, the following order will issue:

1. The second, third and fourth respondents are joined to the action proceedings in case no: 265/2023 and the respondents will collectively be described as follows:

1.1 the first respondent is the first defendant;

1.2 the second respondent is the second defendant;

1.3 the third respondent is the third defendant;

1.4 the fourth respondent is the fourth defendant.

2. The applicant shall serve this order on the first – fourth defendants, and second, third, and fourth defendants are required to indicate whether they intend to defend the action proceedings within ten (10) days of receipt of this order.

3. The parties that do defend the matter are required to serve and file their plea and/or counterclaim within twenty (20) court days after filing their notice of intention to defend, and the remaining parties will be required to file their further pleadings in terms of the time-periods afforded in the rules.

4. The plaintiff is granted leave to amend its particulars of claim within five (5) days of the granting of this order to reflect the additional parties, as set out above.

5. The second and third respondents are required to pay the costs of this application on scale B as set out in rule 69(7).

B.B. BRODY
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant : Adv. Martin

Instructed by : Tshisevhe Attorneys Inc.
c/o Squire Smith & Laurie Inc.
44 Taylor Street
KING WILLIAM'S TOWN
(Ref.: A FRIDERICHS/UN/MAT119151)

Counsel for 2nd & 3rd Respondents : Adv. Mlalandle
: The State Attorney
c/o Shared Legal Services
Office of the Premier
32 Alexander Road
KING WILLIAM'S TOWN
(Ref.: 185/24-P4 (Mrs Yoba))