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**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Not Reportable

Case no: 2025-044627

In the matter between:

**THE TRUSTEES FOR THE TIME BEING
OF THE LAZAREVIC TRUST**

APPLICANT

and

MARIJKE KARINE CHANTAL HAVENGA

RESPONDENT

(Owner of 3[...] O[...] V[...] Road, The Links,
Somerset West)

Coram: COOKE AJ

Heard: 30 JULY 2026

Judgment: 19 AUGUST 2026

Summary: Non-joinder – raised *mero motu* by court – application of two-stage test – appropriate procedure – rule *nisi* granted – formulation of the rule *nisi*

ORDER

[1] A rule *nisi* is issued calling upon interested parties to show cause why the following orders should, or should not, be made:

- a. a declaration that the respondent is in breach of the restrictive condition contained in clause C(c) of her Title Deed, which states that no trees shall be grown to a height that interferes with the reasonable outlook of owners of any other erf in the Estate ('the Estate');
- b. an interdict directing the respondent to prune the tree located on her property at 3[...] O[...] V[...] Road, The Links, Somerset West, to a height that does not interfere with the reasonable outlook of the applicant's property;
- c. in the event of the respondent's failure to comply with (b) above within 14 days from the date of the order, authorising the applicant to appoint a qualified tree-felling service to undertake the pruning at the respondent's cost; and
- d. directing the respondent to pay the costs of this application.

[2] The interested parties who wish to participate in the application ('the participating residents') and the existing parties ('the parties') are directed to comply with the following procedure:

- a. by Friday, 4 September 2026, the participating residents shall send an email to the parties' attorneys at r[...] and j[...] advising of their intention to participate in these proceedings;
- b. by Friday, 11 September 2026, the applicant's attorneys shall provide a full copy of the application papers to the participating residents;
- c. by Friday, 9 October 2026, the participating residents shall deliver an affidavit setting out (i) their address (ii) their interest in the relief sought and (iii) the grounds for opposing or supporting the relief; and
- d. the parties are given leave to reply to any new matter raised in the participating residents' affidavits, by Friday, 30 October 2026.

[3] If no notification is received in terms of 2(a) above, or if no affidavits are delivered in terms of 2(c) above, the parties' attorneys shall inform the Court's registrar accordingly, and the Court will proceed to finalise the judgment on the papers as they stand.

[4] If any participating resident sends the notification and delivers an affidavit in terms of 2(a) and (c) above:

- a. after the parties have replied to any new matter in terms of 2(d) above, the parties and the participating residents are directed, in terms of rule 41A(3)(b), to consider mediating the dispute; and
- b. if the dispute remains unresolved, the parties and the participating residents shall, together with this Court's registrar, arrange a date for a further hearing.

[5] The rule *nisi* shall be served by the applicant's attorneys arranging for this judgment to be circulated across all local neighbourhood WhatsApp groups created for residents in the Estate by Friday, 28 August 2026, accompanied by the following message: 'The Western Cape High Court handed down the attached judgment on 19 August 2026. If you wish to support or oppose the relief described in paragraph 1 of the order, you must follow the procedure described in paragraph 2 of the order. If you are aware of residents of the Estate who are not members of any neighbourhood WhatsApp group, or for any other reason have not received this message, please forward this message to them.'

[6] The costs of the postponement shall stand over for later determination.

JUDGMENT

COOKE AJ:

[1] This matter concerns a Norfolk pine tree ('the tree') located on the property of the respondent ('Ms Havenga') at 3[...] O[...] V[...] Road, The Links, Somerset West. The applicant ('the Trust') seeks an order declaring that Ms Havenga is in breach of a restrictive condition contained in her title deed. This condition states that no trees shall be grown to a height that interferes with the reasonable outlook of owners of any other erf in 'the Estate'. The Trust also asks for an order directing Ms Havenga to prune the tree to a height that does not interfere with the reasonable outlook of the Trust's property. The question of whether the tree interfered with the reasonable outlook from the Trust's property is fiercely disputed on the papers.

[2] I begin with an observation regarding mediation. In Ms Havenga's answering affidavit, she states that she consented to mediation and contended that the appointment of a mediator to determine the dispute would have been a far more appropriate option. In its replying affidavit, the Trust states that the appointment of a mediator would be preferable to burdening the court with what ought to have been a straightforward compliance matter. Notwithstanding the apparent concurrence regarding the suitability of mediation, the parties did not engage in a mediation process. This Court has previously noted that disputes of this nature

should be resolved by way of mediation rather than litigation.¹ At the commencement of the hearing I suggested to the parties that they consider resolving this matter by mediation. After the matter had stood down, I was advised by counsel that the parties had not been able to agree on mediation and therefore the matter needed to be determined by the court. I return to the question of mediation at the end of this judgment.

[3] At the hearing, there was one preliminary matter that required determination. Ms Havenga had applied (a) for leave to file a further affidavit, and (b) to strike out a paragraph, together with two annexures, from the replying affidavit. At the hearing, counsel for Ms Havenga advised that her client did not persist with the striking out relief. That left the request for leave to file a further affidavit. In the replying affidavit the Trust stated that Ms Havenga had posted a message on Facebook in which she admitted that the tree needed to be pruned, thereby acknowledging the validity of the concerns raised and the existence of the servitude. The Facebook post was not annexed to the affidavit. Ms Havenga sought, in the further affidavit, to respond to this allegation. Counsel for the Trust indicated that his client did not oppose that relief, although he did submit that the further affidavit was irrelevant. In my view it is appropriate that Ms Havenga be afforded the opportunity to respond to the allegation arising from her Facebook post, and I accordingly granted leave to file the further affidavit.

[4] I turn now to the main application. At the outset, it is necessary to consider whether all interested parties have been joined. An order ought not ordinarily to be granted where any other person's interests may be

¹ *Baartman v Stubbs* 2015 JDR 0513 (WCC) para 3.

directly affected, without formal judicial notice of the proceedings having first been given to such other party. This is a matter of fairness. All substantially and directly interested parties should be afforded the opportunity to be heard before any order is made.²

[5] The title deed restriction, which is the subject of this matter, is common to the title deeds of all properties in ‘the Estate’. It is not evident from the papers before me, precisely what geographical area constitutes ‘the Estate’. Nonetheless, it appears that each resident in the Estate bears a similar obligation to all the other residents, namely, to ensure that the trees on their property do not grow to a height which interferes with the ‘reasonable outlook’ of the other residents.

[6] It seemed to me that all the residents of the Estate have an interest in the outcome of the application. Notionally, there may be other residents who share the stance adopted by the Trust and consider Ms Havenga to be in breach of her duty. The Trust’s counsel indicated from the bar that there were other residents who intended launching similar proceedings. On the other hand, there may also be residents who do not wish the tree to be pruned. Perhaps, they believe that the symmetrical elegance of the tree improves their vista. Some may not wish a precedent to be set which impacts the trees on their own property.

[7] Ms Havenga did not raise a non-joinder objection to the application. Nonetheless, the courts have an inherent common law power to order a joinder of parties where it is necessary to do so even where there is no substantive application for joinder. A court could, of its own accord, raise

² *Philippi Horticultural Area Food and Farming Campaign and Another v MEC for Local Government, Western Cape and Others* 2020 (3) SA 486 (WCC) para 29.

a question of joinder to safeguard the interest of a necessary party and decline to hear a matter until joinder has been effected.³ In the case of a joinder as a matter of necessity, a failure to join precludes determination of the suit until joinder has occurred.⁴ It follows, in my view, that the question of joinder must be decided before entertaining the merits of the application.

[8] At the hearing I asked the parties to address me in relation to the issue of non-joinder. Although counsel for the Trust did not accept that the application was defective for want of joinder, he agreed that the other residents would have a direct and substantial interest in the relief sought in this application. Counsel for Ms Havenga submitted that joinder was ‘neither here nor there’ and the court did not need to decide the point.

[9] After the hearing, the parties were informed that the court was considering issuing a rule *nisi* to address the non-joinder of interested parties, and specific information was requested. In response to an enquiry from Ms Havenga’s attorneys, the parties were invited to file heads of argument in relation to the question of non-joinder.

[10] In heads of argument filed on behalf of the Trust, counsel submitted that a rule *nisi* should be issued. He contended that a rule *nisi* would allow access to the court for parties who are interested but lack the financial resources to participate in the application. He argued further that a rule *nisi* would avoid a proliferation of actions.

³ *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others* 2018 (1) SA 1 (CC) para 91. See also *Prinsloo v Majiedt MO and Another* 2025 JDR 2398 (SCA) (‘*Prinsloo*’) para 4.

⁴ *Khumalo v Wilkins and Another* 1972 (4) SA 470 (N) at 475A-B; *Snowy Owl Properties 284 (Pty) Ltd and Others v Mziki Share Block (Pty) Ltd* (642/2022) [2024] ZASCA 79 (27 May 2024); 2024 JDR 2196 (SCA) para 25.

[11] Ms Havenga's counsel, on the other hand, submitted that although other residents of the Estate may possess the same servitudinal right, their rights will not be affected by an order that this Court decides to make. In support of this submission, she argued that the relief in this matter is directed to the alleged interference with the outlook enjoyed from the Trust's property, and an order for or against the trimming of the tree would not determine or prejudice another resident's legal rights in terms of the servitude. According to this argument, the present litigation pertains specifically to the Trust's property and does not require an estate-wide interpretation or height determination. As to the proposed rule *nisi*, Ms Havenga's counsel expressed a concern that the class of persons whose joinder is said to be necessary has not been identified. She submitted that the procedure should identify or require a responding individual to establish the legal interest said to be prejudicially affected and the capacity in which joinder or intervention is sought. Counsel also contended that mere publication of an invitation to participate will not cure the non-joinder if an owner does nothing. She warned that publication of a rule *nisi*, inviting unidentified residents of the Estate to file papers, risks creating procedural uncertainty without resolving the underlying question of non-joinder. Finally, counsel submitted that the application should not be transformed after argument into a vehicle for collecting additional supporting evidence.

[12] The law in relation to joinder has been recently summarised by the Supreme Court of Appeal in *Prinsloo*:

‘A person is required to be joined as a party to proceedings if it is concluded that her joinder is necessary. The joinder of a party is necessary if she has a material direct or substantial interest in the relief claimed, unless she has waived that right. A direct and substantial interest is an interest in the right, which is the subject matter of the litigation, not merely a financial interest, which is an indirect interest in such litigation. Where a joint financial or proprietary interest is implicated joinder should follow. Joinder is not dependent on the nature of the subject matter of the suit but on the manner in which, and the extent to which, the court’s order may affect the interests of third parties. If it is concluded that a party should be joined, then it is required of a court to make an order which addresses that conclusion.’⁵

[13] *Prinsloo* confirmed that the test to be applied is twofold: The first question is whether third parties would have standing (*locus standi*) to claim relief concerning the same subject-matter. The second enquiry is whether a situation could arise in which, because third parties had not been joined, any order the court might make would not be finally decided (*res judicata*) against them, entitling them to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.⁶

[14] To my mind both legs of this test fall to be answered affirmatively. First, the other residents of the Estate would have standing to claim the relief sought by the Trust in these proceedings. They too could ask for an order

⁵ Para 13.

⁶ *Prinsloo* para 14.

declaring that Ms Havenga is in breach of the title deed condition, and they too could ask for an order directing her to prune the tree. As to the second leg, if the other residents were not joined to this application, any order that this Court might make would not be binding on them, and, if they were to bring their own application, this could result in a different court making a different order based on the evidence placed before that court by those other residents. It follows, in my view, that the other residents of the Estate have a direct and substantial interest in the relief sought by the Trust, and they should have been joined.

[15] As to the submissions made on behalf of Ms Havenga, it is necessary to express provisional findings in relation to the proper interpretation of the servitude. The findings are provisional because the parties will be entitled on the return day to advance different submissions and the findings in this judgment will not be binding on that court.⁷

[16] In my view the servitude must be construed in accordance with the modern approach to the interpretation of legal instruments. It thus falls to be assessed ‘holistically: simultaneously considering the text, context and purpose’.⁸ In so far as there may be ambiguity in the wording of the servitude, the court will lean towards an interpretation that would burden the servient tenement as lightly as possible.⁹

[17] The argument presented on behalf of Ms Havenga assumes, wrongly in my view, that Ms Havenga’s obligation to the Trust is different to her

⁷ See the discussion in *Raubex Building (Pty) Ltd v Bitou Municipality and Another* 2025 JDR 3961 (WCC) paras 13-18.

⁸ *Huntrex 277 (Pty) Ltd v Berzack and Others* 2025 (4) SA 347 (CC) paras 56-57. See also *Venter and Another v Helfer and Others* 2025 JDR 5142 (WCC) para 17.

⁹ *Fourie v Marandellas Town Council* 1972 (2) SA 698 (R) at 700C; *Kruger v Joles Eiendomme (Pty) Ltd and Another* 2009 (3) SA 5 (SCA) para 8.

obligation to other residents in the Estate. To my mind, Ms Havenga's duty to ensure that her tree does not grow beyond a certain height is a single, objective obligation. In other words, she has one obligation common to all the residents of the Estate. Any other interpretation would be untenable. She cannot have a distinct obligation to each different individual resident. She cannot simultaneously be in breach to resident A, but not in breach to resident B. If Ms Havenga had a discrete obligation to each resident of the Estate, the effect of this would be that she would be obliged to cut the tree to the level required to satisfy the reasonable outlook of the resident most affected by the tree. I do not consider that such a construction would be consistent with the interpretive approach described above. To my mind, the servitude requires all owners to ensure that the trees on their property do not interfere with the reasonable outlook of all other owners in the Estate, considered as a whole. The obligation thus falls to be assessed having regard to the impact a tree has on the view from all parts of the Estate.

[18] In determining Ms Havenga's obligation to the Trust, the court will thus also determine her obligation to the other owners in the Estate. It follows that the present litigation is not property-specific, and it does require an estate-wide interpretation or height determination.

[19] Having found that interested parties have not been joined, I am obliged to make an order which addresses that conclusion. The courts have recognised different methods by which interested parties may be drawn into litigation.¹⁰ For instance, the court could publish an order and ask

¹⁰ See generally Dendy and Loots Herbstein and Van Winsen: The Civil Practice of the Superior Courts of South Africa 6th ed (2026) pp 7-24-25. See also *Mashike NO v Senwesbel Limited* 2013 JDR 0662 (SCA) para 22.

interested parties to advise if they consented to such an order.¹¹ This approach may be justified when the issue of joinder arises for the first time on appeal, or where it is unlikely that the other parties will intervene. Another route is to issue a rule *nisi* calling upon parties to show cause why the relief sought should, or should not, be granted. A rule *nisi* is a judicial invitation to join issue and the failure to appear after proper notice thereof is regarded as a waiver of the right to be joined and a submission to the order of the court. A rule *nisi* is suitable where the necessary parties are numerous, and unknown.¹² In *Ex Parte Saiga Properties* Leach J (as he then was) observed that the practice of issuing a rule *nisi* developed as a result of the difficulty of identifying substantial numbers of interested parties, the probable impossibility of securing the express consent of all such parties and the high cost of serving the application on all of them, even if identified. The learned Judge noted that this would particularly be the case where, for example, a property is situated in a residential area where there are numerous lot holders.¹³

[20] In my view, having regard to the facts of this matter, a rule *nisi* would be an appropriate mechanism for addressing the non-joinder problem. This is preferable to compelling the Trust to start afresh, with the attendant expenses and delay. This is a case where there are numerous possible parties, and their identities are not known to the court. The rule *nisi* will afford them an opportunity to be heard. If they fail to exercise the

¹¹ See for example *Eden Village (Meadowbrook) (Pty) Ltd and Another v Edwards and Another* 1995 (4) SA 31 (A) ('*Eden Village*') at 47E-F.

¹² See for instance *Ex parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T) at 478E-F; *Ex parte Saiga Properties (Pty) Ltd* 1997 (4) SA 716 (E) at 720A-B; *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd, Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* 2007 (4) SA 467 (SCA) paras 27-29; *UMSO Construction (Pty) Limited v City of Johannesburg and Another* (2018/17263) [2018] ZAGPJHC 522; [2018] 4 All SA 507 (GJ) (31 May 2018) paras 77-88; and *Member of the Executive Council for the Department of Health, Eastern Cape v Mbokodi* 2022 JDR 3073 (SCA) para 12.

¹³ *Ex Parte Saiga Properties* at 720A-B.

opportunity, this will constitute a waiver of the right to be joined and a submission to the order of the court. The rule *nisi* will thus resolve the non-joinder and will be effective in preventing a proliferation of litigation.

[21] As to the terms of the proposed rule *nisi*, I am satisfied that the residents seeking to participate should identify their interest. I do not, however, think it appropriate that they be required to formally intervene or join the litigation. This would result in unnecessary costs and delays. In my view the publication of an invitation to participate will cure the non-joinder even if interested parties decline to participate. The order proposed provides for the delivery of affidavits by interested residents, and the parties are given leave to deliver replying affidavits, albeit only to new matter. This should meet the concern regarding procedural uncertainty. The possibility of further evidence on the merits being adduced is inevitable. The very purpose of the rule *nisi* procedure is to allow other parties to be heard. However, by limiting the existing parties to reply only to new matter, the order constrains the additional evidence that may be adduced by them.

[22] Lastly, in relation to the formulation of the rule, in my view parties opposing or supporting the relief should be invited to show cause. Although the conventional formulation of a rule *nisi* only calls upon parties to show cause why the order should not be granted, in this instance, it is preferable that the order also invite parties to show cause why the order should be granted.¹⁴ To my mind, this is a suitable formulation where a rule *nisi* is employed to cure a non-joinder problem,

¹⁴ There is some support for this formulation in the minority judgment of Koen JA in *Selective Empowerment Investments Ltd v Companies and Intellectual Property Commission* 2025 (6) SA 495 (SCA) para 95.

as compared to a case where a rule *nisi* is an adjunct to interim relief. In this case, the court has not yet entered the merits of the application and has thus not made a provisional finding one way or the other. Furthermore, the court has been informed that there are residents who wish to support the relief sought. The invitation issued by this Court should therefore not be addressed only to those opposing the relief.

[23] This brings me to the question of how the rule *nisi* is to be published. In my view this is a case where it is not necessary for there to be personal service on every interested party. Some form of substituted service would be fitting. After the hearing I requested the parties to indicate what service they considered would be appropriate in these circumstances. I raised the possibility of publication on a neighbourhood WhatsApp group or Facebook page. The Trust's attorney advised that he contacted the administrator of the neighbourhood watch groups, who confirmed that any order would be distributed to the relevant groups. I infer that the Trust considers that publication on neighbourhood WhatsApp groups would be appropriate. Ms Havenga's legal representatives did not object to this form of publication. In my view publication on WhatsApp groups is likely to be far more effective than publication in a newspaper. I appreciate that some residents may have elected not to join a neighbourhood WhatsApp group. The order proposed thus includes a message to readers which, amongst other things, requests that the message be forwarded to residents who may not have received it.

[24] As regards the costs of the postponement, ordinarily the Trust, as the party that should have joined the other residents, would be liable for such

costs.¹⁵ I have not, however, had the benefit of argument in this regard, and I think the court hearing the matter on the return day will be in a better position to determine an appropriate costs order.

[25] Finally, I return to the topic of mediation. If the rule *nisi* causes interested parties to indicate their intention to participate, and these persons deliver affidavits, this will change the complexion of the case. In my view, at that point all the parties should pause and consider whether the dispute may be resolved by mediation. I do not have the authority to compel the parties to mediate, but in terms of rule 41A(3)(b) I may direct the parties to consider referring the dispute to mediation.¹⁶ Such a provision will be made in the order.

[26] In conclusion, it is my view that fairness requires that the residents of the Estate be afforded an opportunity to participate in this application before the court decides whether the tree is too high. I therefore grant the order set out above.

DJ COOKE
ACTING JUDGE OF THE HIGH COURT

Appearances

¹⁵ *Eden Village* at 48D-E.

¹⁶ This rule provides: ‘A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation.’

For applicant:	D Welgemoed (main heads of argument drafted by P Tredoux)
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