

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **20309/2023**

In the matter between:

CRAIG KEVIN ALLAN BUTTERS

Applicant

and

TAKEOVER REGULATION PANEL

First Respondent

THE EXECUTIVE DIRECTOR OF THE TAKEOVER

REGULATION PANEL

Second Respondent

THE DEPUTY EXECUTIVE DIRECTOR OF THE

TAKEOVER REGULATION PANEL

Third Respondent

ZARCLEAR HOLDINGS LIMITED

Fourth Respondent

AFRICAN PHOENIX INVESTMENTS LIMITED

Fifth Respondent

EXTRACT GROUP LIMITED

Sixth Respondent

ENX GROUP LIMITED

Seventh Respondent

Coram: Wille, J et Norton AJ et Mapoma, AJ

Heard: 4 August 2026

Delivered: 28 August 2026

Non-joinder: Applicant seeks to review and set aside the decision that allegedly confidentially settled a governmental investigation into the affairs of various respondent companies through a confidential, unsigned settlement agreement with the respondent companies. The respondent companies raise the 'in limine' shield of non-joinder because they allege that not all the companies that were investigated by the panel respondents were joined as parties to these review proceedings. The company respondents raised the non-joinder point in their answering affidavits, and the applicant proceeded notwithstanding. The non-joinder shield is upheld, and costs are to stand over in the interests of the administration of justice, considering the nature of the review proceedings.

JUDGMENT

WILLE, J: (unanimous)

Introduction

[1] The applicant seeks to review and set aside the first, second and third respondents' decision to settle an investigation into the remaining respondents by means of a confidential and unsigned settlement agreement.¹

[2] For the purposes of ease of clarity, the parties will be referenced as follows:

- (a) The aggrieved shareholder will be referred to as the applicant.
- (b) The first, second and third respondents will be referred to as the panel respondents.
- (c) The fourth, fifth, sixth and seventh respondents shall be referred to as the company respondents.²

Background and relevant context

[3] The applicant's core grievance focuses on an alleged systematic failure by the panel respondents to protect the integrity of the marketplace against a pattern of conduct by the company respondents, purportedly led by Warren Chapman.³

[4] The applicant alleges the company respondents failed to disclose they were acting in concert, allowing them to bypass mandatory offer requirements and seize control of four target companies (the respondent companies) without paying a fair control premium.⁴

[5] By failing to disclose their concert party status, the company respondents allegedly denied minority shareholders equal access to information and exploited the target companies' balance sheets and cash flows for their own commercial benefit.⁵

¹ The settlement agreement was in writing but was not signed. The terms of the settlement were agreed.

² These are the companies that the applicant alleges benefitted from the settlement reached.

³ The applicant also says that Warren Chapman was in control of many other of the entities investigated.

⁴ Thus this review case is about a monetary loss but not only about an alleged monetary loss.

⁵ The allegation is that the company respondents benefitted to the sum of R499 million.

[6] The applicant contends that the eventual 'remedial action' (*ex post facto mandatory offers at 2020 share prices*) was totally inadequate and served only to 'tie a ribbon' around an unlawful scheme to the sole benefit of the company respondents.⁶

[7] The applicant seeks to review and set aside the settlement (and the settlement agreement) and the panel's report, arguing that the panel respondents facilitated the company respondents' control of the target companies rather than ensuring market fairness and integrity.⁷

[8] The core of the legal challenge is that the panel respondents abandoned their investigative duties in favour of an unauthorised, confidential settlement agreement that materially prejudiced minority shareholders.⁸

Non-Joinder 'in limine' shield

[9] The panel respondents initiated an investigation in response to complaints alleging that the company respondents acted in concert to seize control of the target companies without making mandatory offers to minority shareholders. The applicant says that despite evidence of wrongdoing, the panel respondents concluded their investigations through a settlement agreement that effectively granted the respondent companies a R499 million discount on the required mandatory offer price. This was allegedly detrimental to minority shareholders.⁹

[10] The company respondents' main point regarding the in-limine challenge is that, following the complaints, an investigation was conducted not only against the company respondents but also against several other parties. They say this because the initiation

⁶ The applicant says this was the easy way out for the panel respondents.

⁷ Thus, this case is also about holding the panel respondents accountable.

⁸ The applicant also wants the panel respondents to be held accountable.

⁹ All the minority shareholders suffered a monetary loss.

statement (regarding the complaints) identified two *separate and discrete* categories of parties to be investigated, namely:

- (a) ‘...the “Parties”, consisting of Peresec South Africa Limited, Peresec Prime Brokers Proprietary Limited, MCC Contracts Proprietary Limited, Nick Sennett, Sui Generis, and Crimson Harvest, together with the company respondents...’ and
- (a) ‘...the “Other Parties”, consisting of Zolospan Proprietary Limited, Nkholi Consolidated Investments Proprietary Limited, Hampden Capital Proprietary Limited, and Kuchuma Capital Proprietary Limited...’¹⁰

[11] The company respondents contend that the settlement agreement determined the fate of all the ‘Parties’ and the ‘Other Parties’ as alluded to above. Thus, by seeking to set aside the settlement agreement (and, in that manner, reverse the fate of the two categories of those parties), the applicant has incorrectly cited only the four company respondents. This failure, they say, constitutes a material non-joinder of the (at least) ten other investigated parties.¹¹

[12] In response, the applicant says that the company respondents themselves did not join any of the other investigated parties when they launched an application to set aside *another* discrete interlocutory ruling requiring disclosure of confidential information.¹²

[13] In response, the company respondents say that their approach in those proceedings is completely irrelevant to the non-joinder point raised in these proceedings. In developing this argument, they say that their previous approach (even if it was flawed) can never be determinative of the correct legal position in this application. The core issue now is whether the other investigated parties have a direct and substantial legal interest in the relief *sought*

¹⁰ This is common cause.

¹¹ Not all these parties have been identified.

¹² This was they referred to as the Johannesburg litigation.

by the applicant, given that they were not required to make mandatory offers under the settlement agreement.¹³

[14] Put another way, the other parties (who are not before the court) were not directed to perform positively under the settlement agreement and the compliance notice subsequently issued by the panel respondents.¹⁴

Consideration

[15] What concerns me most is the possible fate of the other parties under investigation. I say this because the fate of the other investigated parties may possibly once again be considered in a fresh investigation if the settlement agreement is set aside. Put another way, it cannot be contended that the other investigated parties have no interest in the setting aside of the settlement agreement because it imposed no punitive obligations on them.¹⁵

[16] The other parties under investigation would want to maintain the initial outcome, as far as they are concerned, especially if the period for the sanction imposed on them has now been completed. Put another way, this would be especially so (in this case) because the sanction imposed on them took the form of a prohibition for a certain period, and that period has now passed.¹⁶

[17] For the purposes of clarity, the sanction imposed upon them was to the effect that the entities and the relevant executive directors and/or principals referenced in the relevant annexure were not permitted to contravene the mandatory offer provisions in the Companies Act for (24) months from the date of the settlement, failing which the panel respondents reserved their rights to pursue all remedies available to them.¹⁷

¹³ This seems to be the core issue for determination,

¹⁴ This point surfaced in the applicant's heads of argument.

¹⁵ The panel respondents reserved their rights to proceed against these other investigated parties.

¹⁶ The other investigated parties have now "served" their time regarding their sanction.

¹⁷ If the settlement was set aside these other investigated parties could be vulnerable.

[18] The time for this prohibition sanction has now lapsed by effluxion of time. Thus, the company respondents argue that the other parties investigated (at the very least, those identified in the relevant annexure) should have been joined as interested parties to this review application. With this, I agree.¹⁸

[19] The applicant contends that these interested parties (and any other interested parties) were at liberty to intervene if they believed they held a direct and substantial interest in the outcome of the review application.¹⁹

[20] Finally, the applicant claims that the other investigated parties have had actual knowledge of this litigation for several years and, because none of them has sought to intervene, they have waived the right to complain about a non-joinder.²⁰

[21] I disagree with this waiver point. I say this because the applicant's claim is not supported by the evidence, as he does not make this allegation in the affidavits he has filed. I am unconvinced that this positive allegation could be made, as the applicant would not have such knowledge of the other parties under investigation.²¹

[22] Some factual support is sought for this 'waiver' argument in the suggestion that a single individual is the controlling mind, principal, or director of most of the investigated parties, and that this non-joinder point is merely a delaying tactic. However, it is not suggested that this named individual represents the interests of all the investigated parties. Most importantly, it could well be that none of the other investigated parties has complained about the non-joinder because they have not had sight of the papers.²²

¹⁸ The investigated parties undoubtedly have a cognizable direct and substantial interest.

¹⁹ This is no defence to a non-joinder.

²⁰ There is no evidence to suggest these other parties were served with copies of the application.

²¹ The applicant cannot contend for a waiver under these circumstances.

²² There is no evidence to suggest these other parties were served with copies of the application.

[23] This is simply not known. It must be that if you do not have full knowledge of your rights, you cannot waive your rights. Waiver is a question of fact. When assessing the probabilities, the factual presumption that a party is not lightly deemed to have waived a right or rights finds application.²³

[24] In addition, it must be so that the applicant can never excuse the non-joinder by pointing out that the parties under investigation have a right to intervene. This would defeat the principle of non-joinder.²⁴

[25] The non-joinder shield was squarely raised in the company respondents' opposing affidavits, and the applicant was not taken by surprise by this point. In addition, the papers contain no evidence that the parties investigated, as referenced in the schedule by the panel respondents, were served with copies of the review papers.²⁵

[26] Notwithstanding this, the applicant's position remains that the non-joinder point is a technical distraction without legal merit. The applicant argues that the parties not joined (the other parties referenced in the panel respondent's schedule) do not have a direct and substantial legal interest in the eventual outcome of the review application. The applicant says this because the settlement agreement only required the company respondents to make mandatory offers. The other parties were merely subject to a general injunction which did not necessitate their joinder. The applicant contends that other parties have only a '*contingent interest*' in the completion of the investigation rather than a direct interest. I do not see it this way.²⁶

[27] The substantial test is whether the party alleged to be a necessary party for the purposes of joinder has a legal interest in the subject matter of the litigation, which may be

²³ Feinstein v Niggli 1981(2) SA 684 (A).

²⁴ Especially in circumstances where the papers have not been served on the other investigated parties.

²⁵ One would expect the applicant to have taken steps when the non-joinder point was raised in opposition.

²⁶ This is because of the reservation of rights by the panel respondents.

prejudicially affected by the court's finding in the proceedings concerned. This test must now also be approached through a constitutional lens. I say this because our Constitution confers certain legally enforceable rights, and the existence of such a right may mean that a person has a direct and substantial interest that requires joinder.²⁷

[28] Here we are dealing with review proceedings. Our 'Uniform Rules' require a review applicant to deliver the notice of motion on 'all other parties affected' by the review.²⁸

[29] This requires such parties to be joined as respondents to the review.²⁹

[30] This must be so because those parties' interests cannot be adjudicated upon in their absence. The test for joinder in these circumstances is well established: if a party has a direct and substantial interest in the relief sought, they must be joined.³⁰

[31] Thus, the test here must also be considered in the context of review proceedings. It must be that a broader interpretation is needed to consider the meaning of rights in this context. Under this more expansive approach, administrative conduct nearly always adversely affects someone's rights (broadly construed). If a 'decision' entails at the very least a determination of someone's rights, as a matter of logic, it must cover a potential deprivation of those rights. If the settlement is set aside and the investigation is reopened, each of the parties under investigation may be directly and substantially affected. There will be a direct external legal effect.³¹

[32] Not only will they be stripped of the benefit of the settlement (more than three years after it was concluded), but they will be subject to renewed regulatory scrutiny and an uncertain outcome.³²

²⁷ Section 34 of the Constitution of the Republic of South Africa, 1996.

²⁸ Uniform Rule 53(1).

²⁹ *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 670C.

³⁰ *Prinsloo v Majiedt N O and Another* 2025 JDR 2398 (SCA), paras 13–14.

³¹ This is self-evident the papers.

³² Especially so because of the reservation of rights by the panel respondents.

[33] The implication of the applicant's failure to join all the investigated parties is that this court may not grant the relief sought now. This is a consequence of the trite principle that: '...no court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it...' ³³

[34] Thus, what is of crucial importance to me in this case is that the applicant failed to take any steps to join these other parties after being notified of the non-joinder. This must be weighed against the argument that the parties under investigation should have intervened. The latter contention must fail as a matter of pure logic. ³⁴

Remedy, conclusion and costs

[35] The company respondents argue that although non-joinder is classically a dilatory plea, it can be dispositive in certain circumstances and that this is one such circumstance. I disagree. I say so because it is in the interests of the administration of justice that the main application be postponed, thereby affording the other parties under investigation the opportunity to state their positions (if any). ³⁵

[36] I say this also because the panel respondents have specifically reserved their rights to proceed against the other parties under investigation. ³⁶

[37] During the hearing, we asked the panel respondents to inform the court of the details of the other parties to be joined. They have now provided the information requested. The parties to be joined are those very parties that appear on the schedule to the notice that imposed the injunctive relief on the other investigated parties identified. ³⁷

[38] Costs are a largely discretionary issue. Considering the nature of the proceedings and the relief sought by the applicant, I hold the view that the issue of costs should be dealt

³³ Matjhabeng Local Municipality v Eskom Holdings Limited 2018 (1) SA 1 (CC), para 92.

³⁴ This cannot be a defence to the shield of non-joinder.

³⁵ Taking into account the facts of this case.

³⁶ This is an important consideration.

³⁷ The other investigated parties initially identified by the panel respondents.

with after the hearing of the main application. A court seized with the main application in due course would be in a much better position to deal with the issue of these costs and which party should be liable for these costs.³⁸

Order

[39] In the result, the following order is granted:

1. The plea of non-joinder is upheld.
2. The applicant is granted leave to join such parties to the application who have a direct and substantial interest in the outcome of the main review application as identified by the panel respondents.
3. The costs shall stand over for later determination.

WILLE, J

We agree.

NORTON, AJ

MAPOMA, AJ

APPEARANCES

For the applicant:

Advocate G Elliott SC

Advocate K Ngqata

For the panel respondents:

³⁸ It may be that the parties joined elect not to participate in the main application.

Advocate V Maleka SC

Advocate L Mgudlwa

For the company respondents:

Advocate J Blou SC

Advocate A Molver