



Editorial note: Certain information has been redacted from this judgment in compliance with the law.

<i>Reportable:</i>	Yes/No
<i>Circulate to Judges:</i>	Yes/No
<i>Circulate to Magistrates:</i>	Yes/No

IN THE HIGH COURT OF SOUTH AFRICA (NORTHERN CAPE DIVISION, KIMBERLEY)

*CASE NO.: 964/2016
Date heard: 12-05-2023
Date delivered: 02-06-2023*

In the matter between:

Alexkor (SOC) Limited

Applicant

And

Richtersveld Mining Company (Pty) Ltd	1st Respondent
Craig Llewellyn Matthews	2nd Respondent
Richtersveld Self Development Company (Pty) Ltd	3rd Respondent
Richtersveld Sida !Hub Communal Property Association	4th Respondent
Duncan Ernest Korabie	5th Respondent
Jacob Harold Adams	6th Respondent
Dennis Alphonzo Farmer	7th Respondent
Willem Johannes Vries	8th Respondent
John William Bristow	9th Respondent
Ryno Denver Thomas	10th Respondent
Brian Koopman	11th Respondent
Paulus De Wet	12th Respondent
Samuel Nero	13th Respondent

CORAM: WILLIAMS J

JUDGMENT

WILLIAMS J:

1. In this application the applicant Alexkor (SOC) Limited (Alexkor) seeks orders that:

1.1 Paragraph 2.1 of the *rule nisi* granted on 21 June 2016, as amended on 13 December 2019 and extended from time to time, be amended by deleting the names contained in paragraph 2.1.2 to 2.1.3 thereof, and substituting them with the following:

“2.1.1 Ms Alvira V Joseph (identity number [...]);

2.1.2 Mr Ryno D Thomas (identity number [...]);

2.1.3 Mr Hendrik G De Wee (identity number [...])”

1.2 The *rule nisi* and interim order granted on 21 June 2016 as amended on 13 December 2019 and extended until 12 May 2023, and more particularly paragraphs 2 and 2.1 to 2.4 of the order and the interim order contained in paragraph 9 thereof, are further extended to 26 April 2024 or such date as the Honourable Court deem appropriate.

1.3 Costs to be costs in the application.

2. As can be seen from the relief sought the *rule nisi* has been in place for almost 7 years, which is not ideal. There are however

reasons for this situation to endure and which will become apparent from a reading of the judgment. The twelfth and thirteenth respondents, Mr Paulus De Wet and Mr Samuel Nero respectively, who are the only parties opposing this application and whom I will refer to collectively as the respondents, at least agree that the rule be extended, although they suggest a shorter period of extension.

3. The opposition to the application in essence relates to the eligibility of the three people the applicant seeks to replace the current Richtersveld Mining Company (RCM) representatives with on the board of the Pooling and Sharing Joint Venture (the PSJV) between Alexkor and the RCM, as reflected in paragraph 2.1.1 to 2.1.3 of the *rule nisi* referred to herein-above. The respondents in addition seek this Court's assistance in facilitating a speedy amendment to the Deed of Settlement entered into between the Richtersveld Community, Alexkor or and the Government of the Republic of South Africa on 22 April 2007, which was made an order of the Land Claims Court, in order to establish a less complex management structure,
4. It is necessary in order to understand the issues which have surfaced in this application, and apparently in previous applications, to outline how it was intended for the board members of the PSJV to be chosen. I must first mention that the purpose of the PSJV is the management of the Land Mining rights held by the RMC and the Marine Mining Rights held by Alexkor. Alexkor is a state-owned company with 51%

participation interest in the PSJV with the remaining 49% participation interest held by the RMC.

5. In terms of the Deed of Settlement of 2007, each of the two parties to the PSJV would be entitled to appoint, remove and replace three members to the Joint Board who shall be duly authorised to represent that party in respect of all matters relating to the pooled operations. All decisions of the Joint Board shall be decided by the Joint Board by majority vote with the exception of certain other matters which would need unanimous decisions.

6. Mr Andre M E Jonker, who has been elected as a community representative to the board of the RMC has filed an affidavit supporting the respondents in which he reproduced an organogram of the different Richtersveld restitution entities and gave an explanation of the composition thereof. Alexkor or does not dispute this exposition, which I for the sake of convenience repeat herein as follows;

“16.2 The RMC, the 1st respondent, is made up of 6 directors; 4 elected community directors and 2 independent directors nominated by the Richtersveld Self-Development Company.

16.2.1 Selfdevco, the 3rd respondent, is made up of 11 directors: 4 elected community directors, 3 independent directors nominated by the trustees of the Richtersveld Community Trust, and 4 persons

nominated by each of the subsidiary companies such as the RMC.

- 16.2.2 *The Trust is made up for 7 trustees: 4 elected from each of the four villages, and 3 independent trustees nominated by the CPA committee.*
- 16.3 *The insurmountable problem challenging the restitution entities including the PSJV and Alexkor today is apparent from the organogram. The proper constitution of Selfdevco depends on the proper constitution of its subsidiaries. If the subsidiaries are not properly constituted and quorate, they cannot nominate their representatives to the board of Selfdevco.”*
7. The entities described by Jonkers above have not been properly constituted for some years. The RMC itself had not been properly constituted since 2012. During June 2016 when the interim order was granted it only had only one director and could not nominate representatives to the Joint Board of the PSJV. This resulted in Alexkor approaching this court to appoint the three RCM representatives initially appointed by the court in June 2016 and who were later replaced by the court on application by Alexkor with the current RMC representatives on 13 December 2019. These are the representatives which Alexkor again seek to replace.

8. I need to explain at this stage that Alexkor brought the application for the substitution of the current representatives of the RMC on 14 April 2023. On that date the matter was postponed to 21 April 2023 for the respondents to file their opposing affidavits and for the applicant to file a replying affidavit. As I understand it, an expedited date for the hearing of the matter was then obtained for 29 May 2023.
9. On 21 April 2023 however, Alexkor brought an urgent application for the temporary substitution of the current RCM representatives pending the outcome of the opposed application to substitute in the main application. This urgent application was also opposed by the respondents and was argued before me on that date. There were however shortcomings in the papers filed by both the applicant and the respondents and I postponed the matter for hearing to 12 May 2023 and extended the rule in the main application accordingly.
10. On 12 May 2023 the parties were ready to argue the main application. The urgent application had become superfluous, save that the contents of the affidavits filed therein are relevant in the main application as well.

The background to the main application.

11. As stated herein, the Richterveld restitution entities were not properly constituted for many years. According to Alexcor the only way the impasse within the restitution entities can be

corrected is for the CPA to call for elections and for new community representatives to fill the vacancies in the various restitution entities.

12. Mr Trevor George Fowler, the interim Chief Executive Officer of Alexkor and the ex-officio CEO of the PSJV, is the deponent to the founding affidavits in both the main and urgent applications. He states that once the board of trustees of the Richtersveld Community Trust (the Trust) has been properly constituted and the correct number of trustees have been appointed by the Master, the Trust would be in a position (as shareholder of Self-Devco) to appoint directors to Self-Devco which would in turn (as shareholder of the RMC) be in a position to appoint directors to the RMC.
13. Self-Devco and the Trust are still in limbo. The CPA has been placed under administration during February 2020 for 3 years pursuant to a court order of this Division under case no 961/2019. The administrator, the Department of Agriculture, Land Reform and Rural Development thereafter appointed Mr Donovan Majiedt from Honey Attorneys as the judicial administrator of the CPA for a period of three years.
14. During November/December 2021, under the auspices of Majiedt, the CPA held elections whereby the following four community members were elected to represent the CPA as RMC community directors – Alvira Joseph from Eksteenfontein,

Ryno Thomas from Kuboes, Hendrik De Wee from Lekkersing and Andre Jonker from Sandrift.

15. Alexkor maintains that due to technical difficulties at the Companies and Intellectual Property Commission, the community representatives could not be registered as directors of the RMC. But that since confirmation of their election as community representatives and as representatives to serve on the board of the RMC has been received by Majiedt, and the committee of the CPA (now no longer under administration) it is necessary to remove the current court appointed representatives from the board of the PSJV and to replace them with persons elected by the community.
16. In addition, the applicant avers that the current representatives on the Joint Board have been acting for more than three years and it would be in accordance with good governance to replace them with the representatives elected by the community. The extension of the *rule nisi* is sought to ensure that representatives are in place on the PSJV Board until the Trust and Self-Devco are fully constituted and a final determination is made by the court that the Board of directors of the RMC is properly constituted.

The basis for the urgent application.

17. The urgent application to temporary substitute the current representatives on the PSJV Board, pending the outcome of the main application, was propelled by Fowler's tenure as

interim CEO of Alexkor and the PSJV coming to an end on 28 April 2023, which would render, it is averred, the PSJV rudderless and unable to make decisions regarding the day to day mining operations as well as wage negotiations and the finalization of mining tenders presently on the table.

18. Fowler in his founding affidavit in the urgent application avers that the current court appointed representatives on the PSJV, Mr Brian Grobbelaar, Ms Adelaide Ranape and Mr Raymond Maboe have during his tenure, only attended a single regular PSJV Joint Board meeting during April 2022 due to the fact that they demand to be paid a monthly retainer by Alexkor, which is in conflict with the Deed of Settlement of 2007. The three incumbent representatives have refused to participate in scheduled meetings of the Joint Board unless they are paid, with the result that the Alexkor component of four Board members are the only participants in the decision making of the Board to ensure the continued operations of the mine. With Fowlers impending departure, and the refusal of the current representatives to attend the Board functions, the Board will not be quorate, which would result in the total collapse of the PSJV. These were the circumstances motivating the urgent application.
19. Although, as stated herein, the main application has now been argued and it is not necessary to adjudicate the urgent application any longer, the averments by Alexkor in the urgent application are relevant in considering the main application.

20. As stated the respondents do not seek the discharge of the rule. They acknowledge the need to have the current representatives on the Joint Board replaced. They are however not satisfied with the three persons proposed by Alexkor, as recommended by Majiedt and the CPA Committee, for various reasons. The respondents dispute the regularity of the elections held to choose the community representatives and the decision of the CPA Committee that the three named community elected representatives serve on the Joint Board of the PSJV. They question the *bona fides* of Mr N Swartbooi, the chairperson of the CPA Committee. They allege that in any event such a decision by the CPA Committee cannot substitute for compliance with the Deed of Settlement or the Settlement Order of the Land Claims Court. In support of their position the respondents have attached supporting affidavits of four of the thirteen CPA Committee members, although they allege that the majority of the CPA Committee members do not support the decision to appoint the three community elected representatives to the PSJV Board.
21. In as far as the community representatives are concerned, the respondents level criticism at the male representatives, De Wee and Thomas. I must mention however that Alexkor has from the outset played open cards about the position of De Wee who, it has come to their attention, is a contractor to the mine. He may be conflicted when it comes to decisions regarding the appointment of contractors. However in terms of the Deed of

- Settlement, the appointment of contractors does not fall under the category of decisions where a unanimous vote is called for and De Wee would be able to recuse himself from such decisions, while still leaving the Joint Board quorate.
22. As far as Thomas is concerned, the respondents, specifically their witness Jonker, make a number of allegations against his appointment *inter alia* that he during 2016/2017 held himself out to be a director of the RMC, that he attended meetings of the PSJV as an observer or an invited guest, for a fee, that he never reported to the Richtersveld community, that he attended trips abroad with the PSJV, etc.
 23. De Wet, the twelfth respondent, who is supported by the 13th respondent, the four CPA Committee members mentioned herein, Jonkers and a director of Self-Devco, suggests that it is in the interest of the Richtersveld community that three specific independent representatives who he had apparently handpicked from applications received in response to an advertisement for trustees and directors of Self Devco, be appointed by the Court to represent the community of the Richtersveld on the Joint Board of the PSJV. According to De Wet his candidates have proven themselves to be upright, honourable citizens and that their appointment will go a long way to ensure accountability and transparency within the PSJV.
 24. De Wet, who is a respected elder within the community, a Reverend Emeritus, no doubt has the best of intentions to

ensure a positive outcome for the Richtersveld community, who have for years after a successful land restitution claim, seen very little benefit thereof. However, Mr Smith, who appeared for the respondents, conceded that the respondents did not have the authority to nominate representatives to the Board of the PSJV.

25. As much as the respondents have reservations about the appointment of the three representatives chosen by the CPA Committee to sit on the Joint Board, at the very least these three persons were elected by their communities to represent them on Board of the RCM, which in turns chooses the community representation on the PSJV board. It is regrettable that the RCM and the other restitution entities are not, after all this time, properly constituted in order to have the representatives to the PSJV board chosen in accordance with the Deed of Settlement. Whether the chosen representatives prove themselves to be good or bad, only time will tell, but it appears that their appointment is the closest to compliance with the Deed of Settlement as can be achieved under the circumstances.
26. I must in this regard also add that I agree with Mr Van Tonder who appeared for the applicant, that if the respondents were serious about the appointment of their nominees, a substantive application should have been brought in this regard. Likewise their complaints about the elections regarding the community representatives and the decision of the CPA committee would

- have been better served with applications to have it set aside on the one hand and reviewed and set aside on the other hand.
27. Mr Smith has requested that I consider making additional orders to facilitate the process of applying for an amendment to the Deed of Settlement and/or Settlement Order of the Land Claims Court (LCC) by ordering that the Registrar of this court write a letter of recommendation for legal aid to Legal Aid SA for the indigent litigants in the application to the LCC and that monthly progress reports be submitted to this court in regard to the LCC application. The problem with such a request is twofold; firstly the Deed of Settlement and Order of Settlement make provision for amendments thereto by certain specific parties. Not all of these parties are before me in this application. No indication has been given as to which of these parties would have to report if and when such an application is brought. Secondly, and as far as legal aid is concerned, s29 (4) of restitution of Land rights Act 22 of 1994, provides as follows:
“29.(4)Where a party can not afford to pay for legal representation itself, the Chief Land Claims Commissioner may take steps to arrange legal representation for such party, either through the State legal aid system or, if necessary, at the expense of the Commission.”
28. The prospective litigants in the LCC application are therefore best advised to apply for legal aid as provided in s29 (4) above.
29. Mr Smith has also requested that Alexkor be ordered to report and update the Richtersveld community on the operations of

the PSJV. There is as far as I am aware, no obligation on Alexkor to report to the community. The community elected representatives are the persons who in all probability bear that responsibility.

30. In conclusion I need to address the length of the extension of the *rule nisi* sought. The respondents request an extension until 15 September 2023 whereas Alexkor seeks an extension to 26 April 2024. Given the issues with which the parties are faced, it will in my view constitute unnecessary expenditure to extend the rule for a short period wherein nothing substantial can be achieved. A longer period of extension is in my view more reasonable.

In the circumstances the following orders are made.

- a) **Paragraph 2.1 of the *rule nisi* granted on the 21st of June 2016, as amended on the 13th of December 2019, and extended from time to time, is amended by deleting the names contained in paragraphs 2.1.1 to 2.1.3 thereof, and substituting them with the following:**

- “2.1.1 Ms Alvira V Joseph (identity number[...]);
2.1.2. Mr Ryno D Thomas (Identity number [...]);
2.1.3. Mr Hendrik G de Wee (identity number [...])”**

- b) **The *rule nisi* and interim order granted on the 21st of June 2016, as amended on the 13th of December 2019, and**

extended until 12 May 2023, and more particularly paragraphs 2 and 2.1 to 2.4 of that order and the interim order contained in paragraph 9 thereof, are further extended to 26 April 2024.

c) Costs are costs in the application.

CC WILLIAMS
JUDGE

For Applicant:

Adv. A G Van Tonder
Messina Inc.
c/o Engelsman Magabane Inc

For 12th & 13th Respondents:

Henk Smith and Associates