**IN THE HIGH COURT OF SOUTH AFRICA**

**WESTERN CAPE HIGH COURT CAPE TOWN**

In the matter between:

**20952/2008**

| | |
|---|---|
| **INTERCAPE FERREIRA MAINLINER (PTY) LTD** | **First Applicant** |
| **JOHANN FERREIRA VERVOER (PTY) LTD** | **Second Applicant** |
| **SA COACH & TRUCK (PTY) LTD** | **Third Applicant** |
| **I C STEEL & TYRE (PTY) LTD** | **Fourth Applicant** |
| **MARINE CIVILS (PTY) LTD** | **Fifth Applicant** |
| **FROZEN FAIRY ICE-CREAM CC** | **Sixth Applicant** |
| **AB MORTUARY CC** | **Seventh Applicant** |
| **ROCK IT CARGO CC** | **Eighth Applicant** |
| **NIXUS LOGISTICS CC** | **Ninth Applicant** |
| **UNWIND 2 SA TOURS CC** | **Tenth Applicant** |
| **WAP SA (PTY) LTD** | **Eleventh Applicant** |
| **AFRICA TRAVEL (PTY) LTD** | **Twelfth Applicant** |
| **BENCHMARK JOINERY CC** | **Thirteenth Applicant** |
| **ONTRAK INVESTMENTS 59 CC** | **Fourteenth Applicant** |
| **DESK INVESTMENTS (PTY) LTD** | **Fifteenth Applicant** |
| **INTERCAPE COACHES (PTY) LTD** | **Sixteenth Applicant** |
| **JOKARIN (PTY) LTD** | **Seventeenth Applicant** |
| **MISHPARK PROPERTY INVESTMENT CC** | **Eighteenth Applicant** |
| TRAPESUIM INVESTMENT AND PROPERTY DEVELOPERS CC | **Nineteenth Applicant** |
| **MATAAR AUTO SERVICES SS** | **Twentieth Applicant** |
| **vs** | |
| **N N MAPISA NQKULA NO** | |
| **IN HER CAPACITY AS MINISTER OF HOME AFFAIRS** | **First Respondent** |
| **MUNICIPALITY OF CAPE TOWN** | **Second Respondent** |
| **CILA EXECUTIVE APARTMENTS 1 CC** | **Third Respondent** |

**NON-JOINDER-RULING (IN LIMINE) DELIVERED ON 13/03/ 09**

**BAARTMAN AJ:**

[1] In this judgment, I deal only with the *non-joinder* of the Department of Public Works (**the Department**), to the main application, the merits of which were not argued before me. At the hearing of the main application, the first and third respondents raised the failure by the applicants to have joined the Department as a point *in limine*. The applicants opposed that application.

[2] The third respondent is the owner of the property situated at Erf 154973 Airport Industria, 3 Township (**the premises**). On 7 October 2005, the third respondent entered into a lease agreement with the Department, in terms of which the Department leased the premises for use as the first respondent's (**the Department of Home Affairs**) office space to accommodate applications of Political Asylum Seekers. The lease agreement's termination date is 31 December 2010.

[3] It appears from the papers that the first respondent initially used the premises to process passport and identity document applications. During January 2008, the first respondent began to use the premises as a Refugee Centre. The applicants are respectively owners or tenants of business premises near the premises. They alleged that the first respondent's activities in respect of the Refugee Centre were unsuited for the premises and claimed the following relief:

> *"Declaring that the establishment and operation of the refugee reception centre by the First Respondent and/or her Department at Erf 115973, Montreal Drive, Airport Industria 3, Cape Town, is unlawful on the grounds that:*
>
> *2.1 it contravenes the relevant zoning scheme of the Second Respondent;*

*2.2 it constitutes and infringement of the constitutional rights of the Applicants, their employees and invitees.*

*That the First Respondent be ordered to cease the activities of the refugee reception centre at the said address and to remove the said centre from the said premises by no later than Friday 27 February 2008 or such other date as the above Honourable Court may deem fit."*

[4] In the matter of **Amalgamated Engineering Union v Minister of Labour** 1949 (3) SA 637 Fagan AJA, as he then was, discussed the principles applicable to joinder applications. Those principles are:

(a) If a party has a direct and substantial interest in any order a court might make in proceedings; or

(b) If the order sought could not be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings; unless

(c) the court is satisfied that he has waived his right to be joined.

(d) Mere non-intervention by an interested party who has knowledge of the proceedings does not make a judgment in such proceedings binding on him;

[5] Aaron AJ, in the matter of **Smith v Stilbaai Municipality and Another** 1985(3) 229, at 234 para F found that a party who has a direct or substantial interest in the proceedings should be joined as a necessary party.

[6] Counsels for the first and third respondents argued that the Department, as the lessee, had a direct and substantial interest the subject matter of these proceedings and should be joined. They were of the view that the Department did not waive its rights in terms of these proceedings and that the relief sought, if granted, might prejudicially affect the Department.

[7] Counsel for the applicants referred the court to the matter of **Hexvallei Besproeingsraad v Geldenhuys NO** 2009(1) SA 547 as authority for the proposition that the Department is not a necessary party to these proceedings and therefore this court should dismiss the point *in limine*. I am

of the view that the Hexvallei matter is distinguishable from the present matter in the following respects:

(a) In that matter, the applicant derived his violated right from a court order. The respondent in violation of the court order acted only on his own behalf and affected nobody else; neither would anybody be affected by the relief sought.

(b) Harms AJA, as he then was, confirms the legal principles as follows at 553 para A:

*"Dit is immers gevestigde reg, soos die hof benede aanvaar het, dat 'he who is entitled to the use of water of a public stream, is entitled to an interdict against anyone who interferes with the course of that stream to his detriment...'"*

(c) However, at 553 G–H, he said that it was not necessary to join any other party to the proceedings as their rights were not affected.

*"Die addisionele getuienis was myns insiens egter onnodig omdat ...Geldenhuys het nie sluis B oopgemaak of laat oopmaak om aan die behoeftes van die Vlakte-boere te voldoen nie; hy het dit gedoen ten einde die water na sy Inverdoorn-plaas af te lei. Dit impliseer noodwendigerwyse dat die belange van die Vlakte –boere nie op die spel was nie."*

(d) Harms AJA referred to the decision of **Peacock v Marley** 1934 AD where Gardiner AJA said that:

*"The object is to get all the parties interested in the litigation before the Court..."*

[8] I am of the view that the Department as lessee with obligations in terms of the lease is in a different position as the parties sought to be joined in the Hexvallei matter. The relief sought will affect the Department's rights in terms of the contract. It appears from the contract that the Department leased the premises, undertook rental obligations, for the use of the "Offices for the Home Affairs (Political asylum Seekers)". The applicants sought an order that the premises may not be used for that purpose.

[9] Counsel for the applicants further argued that the first respondent represented the Government and that it was therefore not necessary to cite another department. He relied on the decision of **Marais and others v Pongola Sugar Milling CO** 1961(2) SA 698 as authority for that proposition.

[10] In my view, the Marias decision is not authority for that proposition. In that matter Wessels J said at 700 para D–E

> *"In my opinion it is probably unnecessary to cite more than one Minister even though more than one Department may be concerned in the subject-matter of the litigation. If more than one Minister is cited as a nominal defendant, questions may arise whether each is then entitled to take part as a litigant and to file separate and possibly inconsistent pleadings. However, in the view I take of this application, it is not necessary to say any more in regard to this matter.*

[11] The further argument of the applicants was that the Department was aware of the proceedings but chose not to intervene therefore it was not necessary to join it. I disagree. In the matter of **Amalgamated Engineering Union v Minister of Labour**, referred to above, Fagan AJA, at 661–662, dealt with a party who had knowledge of proceedings and failed to intervene and said:

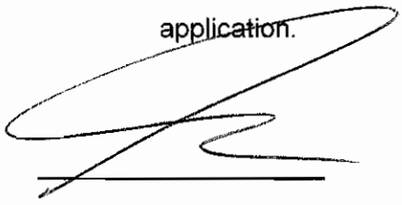
> *"Is the difficulty overcome by the notice which the Council is alleged to have had and its non-intervention despite that notice? A glance at the correspondence which is relied on in this regard will show the danger of regarding extra-juducial notice, put before the Court ex-parte, as sufficient for this purpose. The letter of the 24 th August, 1948, from the applicant's attorney to the Town Clerk, merely tells the latter that they are enclosing, for his information a copy of the papers in the application, which has been set down for hearing....Nothing even to warn him that he or the Council are expected to do anything about it, or that their failure to do something will be regarded as acquiescence. I am not saying that one party could by such a warning put the other side in default,...*

*If the Council had been cited as a party, the form and contents of the notices to it, and the manner and proof of service, would have had to comply with clear and definite rules of procedure, and the Council would have known that it had to defend the suit or suffer a judgment, by which it would be bound. This is a good example of the uncertainties to which we would open the door if we were to start allowing informal notifications to take the place of due and proper joinder of a party."(my underlining)*

[12] I am, for the reasons stated above, of the view that the Department of Public Works should be joined to these proceedings. The point *in limine* is upheld and I make the following order.

(a) The matter is postponed *sine dei* to afford the applicants an opportunity to join that Department to the main application.

(b) Costs of this application stands over for the determination at the main application.



**BAARTMAN AJ**