THE REHOBOTH BASTERGEMEENTE & 1 OTHER -vs- A. 163/93

THE GOVERNMENT OF THE REPUBLIC OA NAMIBIA

AND 4 OTHER. 1993/10/22

Coram: Strydom, J.P., et Hannah, J and Teek, J.

PRACTICE.

Locus standi of applicant -Joinder of other interested parties - what must be shown. when necessary.

CASE NO.

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE REHOBOTH BASTERGEMEENTE JOHANNES	FIRST APPLICANT
GERARD ADOLF DIERGAARDT	SECOND APPLICANT

and

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	FIRST RESPONDENT
THE REGISTRAR OF DEEDS, REHOBOTH	SECOND RESPONDENT
CORNELIUS MICHAIL BRANDT	THIRD RESPONDENT
THE KHOMAS REGIONAL COUNCIL	FOURTH RESPONDENT
THE HARDAP REGIONAL COUNCIL	FIFTH RESPONDENT
THE REGIONAL COMMISSIONER FOR THE CENTRAL REGION	FIFTH RESPONDENT

CORAM: STRYDOM, J.P. et HANNAH, J. et TEEK, J.

Heard on: 1993/10/22 Delivered on:

1993/10/22

JUDGMENT

STRYDOM, J.P. et HANNAH, J et TEEK, J.: We have before us a Notice of Motion in which the Rehoboth Bastergemeente (Rehoboth Baster Community), the first applicant, seeks certain relief in connection with land situated in the District of Rehoboth to which it claims ownership. The

second applicant claims to be the duly elected Kaptein of the Rehoboth Baster Community and to represent that community in this application. He also seeks certain relief in his personal capacity.

Of the six respondents only the Government, cited as the first respondent, has chosen to oppose the application. It opposes the grant of the relief sought on the merits and it also raises two points in limine. The two points are that the applicants do not have locus standi and that other interested parties should have been joined as respondents.

At the outset of the hearing it was decided that it would be more convenient to limit argument to the two preliminary objections raised by the first respondent and to an application made by the applicants to cross-examine two deponents to affidavits filed on behalf of the first respondent. This judgment is therefore confined to those matters. We will deal first with the question of locus standi.

In order to put the arguments and counter-arguments advanced by counsel in their proper perspective it is necessary to set out the history of the Rehoboth Basters with particular reference to a number of legislative enactments which have in one way or another affected them over the years. Their history is guite long and what follows is very much an abbreviated account. It is based on the evidence which has been placed before the Court.

Towards the end of the eighteenth and the beginning of the nineteenth centuries a number of Baster communities emerged in the area between the North-western frontier of the Cape Colony and the lower course of the Orange river. One of these inhabited the area known as de Tuin and in 1868 its people decided to emigrate north. They settled in Rehoboth where, after negotiations with the Swartbooi tribe, they acquired land. Whilst en route to Rehoboth this Baster Community drafted a provisional constitution to regulate their affairs and this constitution, in a revised form, was promulgated at Rehoboth on 31st January, 1872. It became known as the Paternal Laws of 1872 and, according to the evidence adduced on behalf of the first applicant, these laws, as amended from time to time, remained in force to the present day.

We do not propose to set out the Paternal Laws of the Rehoboth Basters in detail and will content ourselves with merely high-lighting a few of them. They provided for the appointment of an elected supreme ruler known as the Kaptein who was to hold such office for life. Also for a Raad (Council) consisting of two citizens to assist the Kaptein and a Volksraad (Parliament) consisting of a further two citizens. They provided that every Baster, or anyone married to a Baster, should be a citizen and that all tax-paying citizens should have the right to vote in the election of the Kaptein and members of Parliament. Provision was also made for non-Basters to become citizens. The Kaptein, his councillors and members of Parliament were enjoined -

> "... through the slapping of hands instead of the taking of an oath, to fulfil their office and profession without self-interest and for the benefit of the Domain."

The Paternal Laws also provided for the appointment of judges by the Kaptein to hear criminal and civil matters and for the appointment of field-cornets, the equivalent of modern-day deputy-sheriffs. A number of offences were specified together with the penalties to be imposed. A system of taxation was created "in order to defray the necessary government expenditure." There were laws pertaining to marriage and restrictions were imposed on the sale of land. There was a call-up system in the event of attack by enemies. And, as the town of Rehoboth grew, laws governing the keeping of livestock in the town were passed. As must be clear from the foregoing, the Paternal Laws provided a framework of rules defining the organs of government of the Baster people and their rights and duties.

Germany annexed South West Africa in 1884 and in the following year a "Treaty of Protection and Friendship" was concluded between the German Imperial Government and the Kaptein and Council of the Basters whose freedom in, and rights to, their territory were acknowledged. The treaty also provided that should there be future matters to be settled between the German Empire and the Basters these would be resolved by agreement between the two Governments. In fact, one such matter was military service by Basters on behalf of the Imperial German Government and this was settled by a treaty entered into by the two Governments in

1895 whereby the Kaptein undertook to assign a continent of recruits annually to the Germans. Despite the 1884 treaty the German Administration did in fact exert a considerable influence on the system of Baster Government but nonetheless it survived and was still functioning in 1915 when the Germans were defeated. With the defeat of Germany, mandatory powers over the Territory of South West Africa were given to the Union of South Africa by the League of Nations and in 1923 an agreement was entered into between the Administration of South West Africa and the Kaptein and Council of the Basters. This agreement was given force of law by Proclamation 28 of 1923 which provided, inter alia, that the Administration acknowledged the right and title of the Rehoboth Community to the land then occupied by it and the right of the Community to local self-government in accordance with the Paternal Laws. The Administration also recognised the duly elected Kaptein and provision was made for the appointment by the Administrator of a magistrate to represent the Administration in its relations with the Kaptein and Council of the Community. The boundaries of the territory occupied by the Community were defined comprising an area of approximately 14200 square kilometres.

The person occupying the position of Kaptein died not long after this agreement was confirmed by Proclamation and this led to a certain amount of political dissension amongst the members of the Community. As a result, a further Proclamation was issued in 1924, the Rehoboth Affairs Proclamation, No. 31 of 1924, whereby as from 16th December, 1924 -

> "all and several the powers functions and duties vested by law in the Kapitein, Council of the Kapitein and Volksraad respectively of the said Community shall vest in the Magistrate of the District of Rehoboth who shall exercise all such powers, functions and duties in accordance with the laws of the said Community at present in force within the Gebiet..."

The reference to "the Gebiet" was a reference to the territory occupied by the Community.

Then, by Proclamation No. 9 of 1928, the Administrator established an Advisory Board for the Gebiet the duties and functions of which were to advise the Magistrate in the exercise and execution of the powers, functions and duties vested in him by the 1924 Proclamation. The Board consisted of six members chosen by members of the Community. They had to be males not less than thirty years of age with full burgher-rights under the laws and constitution of the Community, ordinarily resident in the Gebiet and either registered in the Deeds Registry at Windhoek as the owner of land situate in the Gebiet or registered in accordance with the Paternal Laws as the holder of such land in the register maintained at Rehoboth by the Magistrate.

At this point some mention must be made of land-ownership within the Gebiet. The Paternal Laws make no mention of the method by which ownership of land could be granted to individual members of the community but, as is stated by P.A.L. van den Heuvel in his article entitled "The survey and tenure of land in Rehoboth, South West Africa 1870 -

1984" published in SA Survey Journal, April, 1985, an article which we have drawn upon in setting out this history, land could very well have been granted verbally by the Kaptein and his Council in the early years. Be that as may, a custom evolved of issuing "papieren" to evidence the grant of land and much of the land occupied by the Community passed into private ownership.

Mention must also be made of the Rehoboth Affairs Proclamation, 1939. This provided that the Rehoboth Baster Community -

> "shall be entitled, as an association of persons, to acquire immovable property .... in addition to the land, the right and title to which is recognised in terms of [the 1923 Agreement] ...".

The Proclamation also provided -

> "that the title to such immovable property so acquired shall be registered in the name of the Kapitein and Raad of the said Community for and on behalf of the said Community."

Ordinance No. 20 of 1961 provided for the re-instatement of an elected Kaptein but it does not appear that the Ordinance ever took effect. Whether it did or not is of no real relevance as no steps were taken to hold such election. The Magistrate continued to exercise all the powers, functions and duties vested in the Kaptein and it was not until 1976 that any real change occurred.

In 1976 the Rehoboth Self-Government Act, No. 56 of 1976,

was passed and it is necessary to refer to certain parts of this Act in detail. The long title of the Act was as follows:

> "To grant self-government in accordance with the Paternal Law of 1872 to the citizens of the "Rehoboth Gebiet" within the territory of South West Africa; for that purpose to provide for the establishment of a Kaptein's Council and a Legislative Council for the said "Gebiet"; to determine the powers and functions of the said councils; and to provide for matters connected therewith. "

The Preamble then reads:

> "WHEREAS it is the desire of the citizens of the 'Rehoboth Gebiet* that self-government within the territory of South West Africa be granted to them;
>
> AND WHEREAS the citizens of the said "Gebiet" have great respect for their own traditions and the management institutions of their ancestors as embodied in their paternal laws;
>
> AND WHEREAS it is desirable to grant self-government to the people of Rehoboth on the basis of the proposals by the Baster Advisory Council of Rehoboth and at the request of the said people and without prejudicing any further constitutional development of the territory of South West Africa, to establish on such basis and at such request a government for Rehoboth that -
>
> will maintain law and order in Rehoboth and
>
> will ensure justice to all;
>
> will promote the material and spiritual well-being of Rehoboth and its inhabitants; will protect and develop their own traditions

and culture;
will propagate the ideals of the Christian civilization; and
will strive after peace with and goodwill to the other inhabitants of the territory of South West Africa."

Moving now to the body of the Act, section 1 provided that the Rehoboth Gebiet shall be a self-governing territory and sections 2, 3 and 4 provided for the election of a Kaptein's Council and a Legislative Council which together constituted the Legislative Authority of Rehoboth. At the head of the Kaptein's Council was the Kaptein. Unlike the provisions of the Paternal Laws, however, the Kaptein was not to hold office for life but for a five year term only and the number of members in the Council and Parliament also differed from that originally provided for. Section 5 of the Act made provision for citizenship. These sections were contained in Part I of the Act under the heading "GRANT OF SELF-GOVERNMENT TO REHOBOTH AND RE-INSTITUTION OF THE PROVISIONS OF THE PATERNAL LAW OF 31 JANUARY 1872".

Part II of the Act contained general provisions and of note is section 12 which vested the executive government of Rehoboth in the Kaptein's Council. Section 16 then empowered the Legislative Authority to make laws in respect of matters set out in the Schedule to the Act. As for transfer of land the following provision was made in section 23:

" (1) From the date of commencement of this Act the ownership and control of all movable and

immovable property in Rehoboth the ownership or control of which is on that date vested in the Government of the Republic or the administration of the territory of South West Africa or the Rehoboth Baster Community and which relates to matters in respect of which the Legislative Authority of Rehoboth is empowered to make laws, shall vest in the Government of Rehoboth.

(2) The said property shall be transferred to the Government of Rehoboth without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Act.

(3) The Registrar of Deeds concerned shall upon production to him of the title deed to any immovable property mentioned in subsection (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Rehoboth and shall make the necessary entries in his registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Rehoboth to the said property."

Of particular note is the qualification of the words "ownership and control of all movable and immovable property" by the words "and which relates to matters in respect of which the Legislative Authority of Rehoboth is empowered to make laws."

Another enactment which affected the Basters of Rehoboth was the Registration of Deeds in Rehoboth Act, No. 93 of 1976.

This was enacted shortly after the Rehoboth Self-Government Act and provided for the registration of deeds in the Rehoboth Gebiet. Of particular interest in the context of the present application is section 48 which provides that the registrar shall not register the transfer of any land or any document which relates to land or issue any land title -

> "unless the person who applies therefor submits a document issued by the office of the Rehoboth Baster Community in which it is stated that all taxes and other moneys payable to the Rehoboth Baster Community in respect of the land in question have been paid."

and section 49 which provides:

> "Any amount payable in terms of this Act in respect of the performance of any act shall be paid to the registrar for the benefit of the Rehoboth Baster Community."

Other references in the Act to the Rehoboth Baster Community are contained in section 13 which provides that land shall not be transferred unless a prescribed certificate is submitted to the Registrar accompanied by:

> "a document issued by the office of the Rehoboth Baster Community stating that the legal provisions and customs applying to the transfer have been complied with."

and section 52 which makes the Baster Community liable for any damage suffered as a result of mala fide acts or omission of the registrar.

We now come to the final chapter of the present history of the Baster Community. Self-government continued until 1989 when, by Proclamation No. AG. 32 of 1989, the Administrator-General proclaimed that the Rehoboth Self-Government Act and various other laws pertaining to Rehoboth should cease to be of any force and effect until the date immediately before the date upon which Namibia became independent. All the powers, duties and functions of the Legislative Authority became vested in the Administrator-General and the Administrator-General was deemed to be the Government and Legislative Authority of Rehoboth. The Proclamation was an interim measure to have force and effect only until the date of independence of Namibia and it further provided that:

> "6(2) Subject to the provisions of this Proclamation, any Paternal Law, as defined in section 42 of the Rehoboth Act which was in force in Rehoboth immediately before the commencement of this Proclamation, shall continue in force in so far as it was so in force."

Namibia became independent on 21st March, 1990 and on that date the Namibian Constitution came into force. The Constitution repealed the Rehoboth Self-Government Act, 1976 and Proclamation AG 32 of 1989 and Schedule 5 of the Constitution dealt with the vesting of certain property in the Government of Namibia. The Schedule reads:

> "(1) All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any

Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.

(4) For the purpose of this Schedule, "property" shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein.

(5) All such immovable property shall be transferred to the Government of Namibia without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.

(6) The Registrar of Deeds concerned shall upon production to him or her of the title deed to any immovable property mentioned in paragraph (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Namibia and shall make necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Namibia to the said property."

On 16th October, 1991 the Registrar of Deeds, Rehoboth, the second respondent, acting on the instructions of the first respondent, and purporting to act in terms of Schedule 5, endorsed title deeds to certain land in Rehoboth to the effect that the land in question now vested in the Government of Namibia. The first applicant claims that the title deeds so endorsed relate to land which belongs to it and it was in these circumstances that the present application was launched on 8th December, 1992. The applicants seek an order declaring that all the endorsements made by the second respondent on 16th October, 1991 on the title deeds in question are null and void, an order directing the second respondent to cancel the endorsements, an interdict restraining the first and second respondents from taking any steps to endorse any title deeds registered in the name of the first applicant except for certain named properties, and certain other relief. The second applicant in his personal capacity seeks an order declaring that certain properties allegedly owned by him are not vested in the first respondent as a result of endorsements made by the second respondent on 16th October, 1991 and directing the second respondent to rectify the deeds records accordingly. The second applicant also seeks relief against the third respondent in respect of one of the properties. The fourth, fifth, and sixth respondents were joined more as a matter of form.

With that background we now come to the two points in limine. The first point raised by Mr Maritz, on behalf of the first respondent, concerns the locus standi of the first

applicant. He submitted that the first applicant does not have locus standi to bring the application for two reasons. Firstly, because it is not an association of persons with legal personality and capacity to sue. Secondly, because the second applicant could no longer act as Kaptein of the first applicant after the date of independence and could not, therefore, bring the application on behalf of the first applicant in that capacity. Further, that insofar as the second applicant purports to act as an individual member of the first applicant rather than in his capacity as Kaptein, he cannot do so because he lacked proper authority. We should mention here that counsel's submission does not extend to the relief sought by the second applicant in his personal capacity and it is conceded that the second applicant not only has locus standi in respect of those claims but that he is entitled to the relief sought.

Mr Maritz therefore makes a two-pronged attack on the locus standi of the first applicant and we will deal first with his submission that the first applicant is not an association of persons with legal personality and capacity to sue. In dealing with this issue counsels' submissions were directed, in the main, to the question whether the first applicant possesses the characteristics of a universitas but, and as we understand it Mr Maritz accepts this, it does not necessarily follow that if the first applicant is not a universitas then it does not have the capacity to sue in its own name. This was considered, albeit in different circumstances, by the Full Bench of this Court's predecessor in Parents' Committee of Namibia and

Others v Nuioma and Others 1990(1) SA 873 (SWA) when the Court, following De Meillon v Montelair Society of the Methodist Church of Southern Africa 1979(3) SA 1365 (D), held that even if the applicant was not a universitas it was, in any event, an unincorporated voluntary association and as such clearly fell within the ambit of "association" as used in Rule 14 of the Uniform Rules of Court, a rule couched in identical terms to Rule 14 of the High Court Rules. That Rule provides that an association may sue or be sued in its own name and defines association as "any unincorporated body of persons, not being a partnership".

Mr Maritz accepted that the Rehoboth Baster Community exists as a community within the ordinary meaning of that word but he contended that it cannot be regarded as an association of persons in the legal sense. He submitted that when regard is had to the history of the Rehoboth Basters it is clear that they were a body of persons organised into a political unity more in the nature of a nation than a voluntary association founded on a contractual basis. He submitted that this view of the Basters is reinforced when account is taken of the Paternal Laws, assuming them still to be in force, which is, in essence, their constitution.

The argument presented by Mr Maritz in support of this submission was, if we may say so, a seductive one. There can be no question that prior to the independence of Namibia the Rehoboth Basters were bound together not only in a social unity but in a political unity and there can also be no question that from the date of independence that

political unity came to an end. Pursuant to Article 1 of the Namibian Constitution the Republic of Namibia became established -

> "as a sovereign, secular, democratic and unitary State founded upon the principles of democracy..."

and all power was vested in the people of Namibia generally-

> "who shall exercise their sovereignty through the democratic institutions of State." (Article 1(2)).

There was no place in this unitary State for communities to organise themselves into separate political unities of a governmental kind outside the framework of the Constitution.

But the fact remains that the Rehoboth Baster Community does continue to exist. As we have said, Mr Maritz was constrained to accept this to be so. And until at least 1976 the Baster Community qua a community did own land. The Basters' rights to their territory were acknowledged by the Executive Power as far back as the Treaty of Protection and Friendship, 1894 and this was re-affirmed in 1923 when, by Proclamation 28 of that year, the Administration acknowledged the right and title of the Baster Community to the land then occupied by it. The Rehoboth Affairs Proclamation, 1939 went further and gave the Baster Community the right, "as an association of persons", to acquire immovable property in addition to the land, the right and title to which was recognised by the 1923 Proclamation and expressly provided that -

> "the title to such immovable property so acquired shall be registered in the name of the Kapitein and Raad of the said Community for and on behalf of the said Community."

Section 23 of the Rehoboth Self-Government Act, No. 56 of 1976, clearly presupposed that the Baster Community owned and controlled immovable property. And the Registration of Deeds in Rehoboth Act of the same year, an Act which is still in force, recognised the Baster Community as an entity which is capable of issuing certificates relating to land, capable of benefiting from payments made to the Registrar of Deeds and capable of being sued for damages in respect of any mala fide act by the Registrar.

What happened to the Community's land in and after 1976 is, of course, the subject of fierce debate. The first respondent contends that the land owned by the Community, or at any rate the land the subject of this application, vested in the Government of Rehoboth by virtue of section 23 of the Rehoboth Self-Government Act and, in 1990 in terms of Schedule 5 to the Constitution of Namibia, it vested in the Government of Namibia. For its part, the first applicant contends that section 23 had a much more limited effect because it was only that part of its land "which relates to matters in respect of which the Legislative Authority of Rehoboth is empowered to make laws" which vested in the Government of Rehoboth. That issue can only be determined once the merits of the application are argued and for the purposes of deciding the locus standi point it must, in our view, be assumed, although not decided, that there was at

least a residue of land left in the ownership of the community after 1976 and that such residue may include the land to which the first applicant asserts rights of ownership in this application.

Once the question of locus standi is approached on the hypothesis that the first applicant is a community of persons which owns land it must, in our opinion, be seen in a different light to that contended by Mr Maritz. Although the first applicant has lost its political complexion it cannot be lightly dismissed as an amorphous body of persons having no common basis apart from ancestry, as Mr Maritz would have it. It must, in our opinion, be seen more in the nature of an association of persons which has, as a common basis, the ownership of land and in our judgment that is sufficient to bring the first applicant within the ambit of "association" as used in Rule 14 of the High Court Rules. Even if the Paternal Laws have fallen away, as Mr Maritz submits they have, it is not essential that an association has a written constitution and, on the assumption that the first applicant owns land, it can, in our view, be inferred that its members must, in all probability, regard themselves as bound together by a common interest in that land not least of which interest is the protection of such land. Insofar as an association must be founded on a contractual basis it may be that it is difficult, in the case of the Baster Community, to point to a contract which falls within any of the well-defined classes of contract known to our law; but that does not constitute an insurmountable obstacle. The contract can be regarded as sui generis, as

was the case in In re Cape of Good Hope Permanent Building Society (1898) 15 SC 323, 336, and can be implied from the circumstances which we have outlined.

As for Mr Maritz's rather intimidating argument that any finding that the first applicant has the capacity to sue would open the way for other groups to make similar claims, we can see no merit in it. It seems to us that this was more an emotional appeal than one based in reason and what rights others may or may not have is not a proper consideration in determining this matter.

We now come to the second prong of Mr Maritz's attack on the locus standi of the first applicant which is that the second applicant, subsequent to the date of independence, could no longer act as Kaptein of the first applicant and, in consequence, could not bring this application on behalf of the first applicant in that capacity, as he claims to do. Further, that insofar as the second applicant purports to act as an individual member of the first applicant he lacks proper authority.

Dealing with the first of these two points, Mr Maritz submitted that the office of Kaptein owes its existence to the Paternal Laws of 1872 and subsequent legislation made in relation thereto. He submitted that all this was swept away by the Namibian Constitution and the office no longer exists. If he is wrong in this broad submission and the office of Kaptein survived the Constitution then counsel submitted that the office of Kaptein is held by the

Magistrate of Rehoboth in terms of the Rehoboth Affairs Proclamation, 1924.

As we understand it, the argument in support of the first point is based on the premise that the Rehoboth Self-Government Act gave statutory recognition to the office of Kaptein, the Kaptein's Council and the Legislative Council, offices or organs of State which had first been created by the Paternal Laws but which had, since 1924, vested in the Magistrate of the District of Rehoboth. That from 1976 onward those offices or organs existed by virtue of the Rehoboth Self-Government Act, and that Act alone, and with the repeal of that Act in 1990 those offices or organs were abolished.

We agree that the Rehoboth Self-Government Act had the effect contended for by Mr Maritz. To our mind, that much is clear from those provisions of the Act which created a Kaptein's Council at the head of which was a Kaptein and a Legislative Council. Also, the reference in the heading to Part I of the Act to the "Re-institution of the Paternal Law of 31 January 1872" can only be construed as meaning that it was the intention of the Legislature that those traditional offices and organs of the Rehoboth Baster Community which had been taken away from them in 1924 and vested in the Magistrate were to be reconferred although in a somewhat different form. We also agree that with the repeal of the Act those offices and organs disappeared as offices and organs of government. They no longer had any place or part to play in a modern Namibia. However, it by no means

follows from this that the office of Kaptein in a different form or guise is not still extant in the Rehoboth Baster Community. Traditional community leaders exist the world over, not least on the Continent of Africa, and although many have long since been stripped of the political power they once had some still have significant roles to play in the domestic affairs of their respective communities. To assert that the office of traditional leader automatically disappears from the community hierarchy once it has lost its political role is, in our view, fallacious. The circumstances of each individual case have to be carefully examined to ascertain the true position.

In the case of the office of Kaptein of the Rehoboth Basters there are, in our opinion, a number of pointers to its continued existence in its traditional non-political role. The two pricipal ones are these. The Rehoboth Baster Community held and owned land. The right and title of the Community to the land then occupied by it was acknowledged by the Administration in the 1923 Agreement and one party to that agreement was -

> "Cornelius Van Wijk, Kapitein of the Burghers of Rehoboth and the members of the Raad of the Rehoboth Community for themselves and their lawful successors as representing the Community of Rehoboth."

It seems to us reasonably clear from this that the land owned by the Community was held in the name of the Kaptein and his Council for and on their behalf. Indeed confirmation of this is to be found in the

Proclamation, 1939 which specifically provided that the title to any further immovable property acquired by the Community "shall be registered in the name of the Kapitein and Raad of the Community for and on behalf of the Community". Also various examples of title deeds to land in the Gebiet held by "The Kaptein and Raad of the Rehoboth Baster Community for and on behalf of the said Rehoboth Baster Community" are to be found in the record.

The fact that land owned by the Rehoboth Baster Community is held in the name of the Kaptein and Raad is, in our view, a strong pointer to the continued existence of those offices. There is a need for them to exist in order to hold the property.

There is also evidence that on 18th May, 1991 a public meeting was held in Rehoboth attended by hundreds of Basters at which it was resolved that the Baster Community would take all necessary steps to protect the Community's communal property. A further meeting was held on 22nd June, 1991 and on this occasion the second applicant was elected as Kaptein. According to the second applicant more than one thousand adult members of the Baster Community attended this meeting. It is true that one of the first respondent's deponents, Nicolaas Angermund, seeks to pour scorn on this meeting alleging that it was a party political meeting held by the second applicant to further his battle for power with the Government of Namibia; but the deponent does not deny that the meeting elected the second applicant as Kaptein. His dismissal of the second applicant's claim to be the

elected Kaptein seems to be based more on his view that the Paternal Laws no longer had any force or effect and that an election could not properly be held in terms of a defunct law.

If, as appears to be the case, more than one thousand members of the Rehoboth Baster Community approved the election of a Kaptein then this again seems to us to be a pointer to the continued existence of such office. And it is not without significance that for the duration of the period of self-government in terms of the Rehoboth Self-Government Act the second applicant was the Kaptein of the Baster Community duly elected by the enfranchised citizens of Rehoboth.

In our judgment, the Paternal Laws of 1872 did survive Independence although in a severely truncated form. They survived, in particular, as a constitution regulating the manner in which such land as the Rehoboth Baster Community may own should be held. For this purpose the office of Kaptein remained extant and, subject to Mr Maritz's second argument, we are satisfied that the second applicant was the proper person to bring this application on behalf of the first applicant.

Mr Maritz's alternative argument was to the effect that if the office of Kaptein has survived the repeal of the Rehoboth Self-Government Act then the office must vest in the Magistrate for the District of Rehoboth in terms of the Rehoboth Affairs Proclamation, 1924. The difficulty we have

with this argument can be very shortly stated. The purpose and intention of the 1924 Proclamation was clearly to vest the governmental powers, functions and duties of the Kaptein, the Raad and the Volksraad in the Magistrate who was, by virtue of Proclamation 28 of 1923, the Administration's representative in Rehoboth. Once it is accepted, as it has to be, that the office of Kaptein and his Council disappeared as offices and organs of government when the Rehoboth Self-Government Act was repealed by the Constitution it is difficult to see how the Magistrate could or should continue to occupy what then became, in essence, a titular position. To hold that the Magistrate still occupies the office of Kaptein, but in name only, would in our view, not only be wholly inconsistent with the purpose of the 1924 Proclamation but would bestow on the office some kind of political or governmental significance which, as we have been at pains to point out, we are satisfied it no longer possesses.

The answer to Mr Maritz's argument is, we think, that the Constitution of Namibia swept away all formal legislative recognition of the office of Kaptein and the residue of that office which survived only exists today in terms of private law and by reason of the will of the Rehoboth Basters themselves.

For the foregoing reasons we are satisfied that the second applicant does have authority to bring this application on behalf of the first applicant and therefore the first point in limine must be dismissed.

Coming now to the second point in limine Mr Maritz * s argument, in a nutshell, was as follows. The applicants seek an order which, in effect, necessitates a finding that all the immovable property which was registered in the name of the Kaptein and Raad of the Rehoboth Baster Community for and on behalf to the Community prior to the date of commencement of the Rehoboth Self-Government Act did not, after the commencement of that Act, become the property of the Government of Rehoboth and, therefore, did not vest in the Government of Namibia by virtue of Schedule 5 of the Constitution. It is common ground between the parties that many of these properties or portions of them were sold by the Government of Rehoboth during the period 1976 to 1989 and that, after independence, the Government of Namibia did likewise. If the first applicant were to be granted the order which it seeks the effect of such an order would be to render these sales void and, in these circumstances, the third parties to whom the properties were sold have a direct and substantial interest in the outcome of the proceedings. They should have been joined as parties to the application.

We intend no disrespect to counsel if we devote rather less time to this argument than they did. In our view, the point raised can be disposed of quite briefly. In United Watch and Diamond Co. (Ptv) Ltd and Others v Pisa Hotels Ltd and Another 1972(4) SA 409 (C) at p. 415 Corbett J, as he then was, had the following to say on the subject of non-joinder:

> "It is settled law that the right of a defendant to demand the joinder of another party and the duty of the Court to order such joinder or to

ensure that there is waiver of the right to be joined (and this right and this duty appear to be co-extensive) are limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the Court might make ... In Henri Vilioen (Pty) Ltd v Awerbuch Bros 1953(2) SA 151 (0), Horwitz AJP (with whom Van Blerk J concurred) analyzed the concept of such a 'direct and substantial interest' and after an exhaustive review of the authorities came to the conclusion that it connoted (see at 169) -

> '... an interest in the right which is the subject matter of the litigation and . .. not merely a financial interest which is only an indirect interest in such litigation'.
>
> This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions ... and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court ..."

See also Aguatur (Ptv) Ltd v Sacks and Others 1989 (1) SA 56 (A).

We respectfully agree with what is set out in this passage and we also agree with Mr De Bruin that the narrow question to be determined is whether it can properly be said that the third parties to whom Mr Maritz refers have "an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest ..."?

Mr De Bruin based his argument that the third parties referred to do not have a direct and substantial interest in the outcome of this application on the following proposition. A sale is not void merely because the seller is not the owner of the property sold. Frye's (Pty) Ltd v Ries 1957(3) SA 575 (A) at p. 581. If the seller acted in good faith believing himself to be the owner he is bound only -

> "to defend the buyer against those who seek to deprive him of his possession, or to prevent him from exercising the rights of ownership."
>
> (Pothier, Treatise on the Contract of Sale, 1.)

And so, submitted Mr De Bruin, any order made by this Court in the present application would not render any sale to a third party void, as Mr Maritz contends. So long as the possession of such third party remains undisturbed he can have no complaint. It is only if the first applicant should seek to disturb such possession that a third party's rights would be affected and even then the first respondent, as successor to the Government of Rehoboth, or in its own right, would be bound to defend the third party. In other words, such interest as a third party may have will arise only in the event of the first applicant seeking to evict him. According to Mr De Bruin such interest is too remote to be considered a direct and substantial interest as referred to in the United Watch and Diamond case (supra)

Prima facie this argument appears to be inviting and not

without merit, but it is, in our opinion, not to be acceded to for the following reasons. In many instances the third parties in question will entertain no doubt whatsoever that they enjoy good title to the properties sold to them because transfer of title will actually have been effected by endorsement on the land title. This is not the usual run of case where the seller is not the true owner and transfer of title cannot, for that reason, be effected. It would doubtless be a matter of great concern to these third parties that a certain decision made in the instant application would expose them to the risk of eviction despite transfer of title having been effected and registered.

Further, that risk is by no means an illusory one. In his replying affidavit the second applicant states that an attack on the validity of any transaction affecting the rights of any third party can conveniently be dealt with in separate actions. It can be inferred from this that the second applicant anticipates such an attack. If such an attack is launched what will the position of the third parties then be? While it is true that the matter would not be res judicata they would, nonetheless, be faced with a decision of the Full Bench of this Court dealing, inter alia, with the proper construction to be placed on section 23 of the Rehoboth Self-Government Act and it is difficult to envisage a single judge of this Court hearing the matter allowing himself to be persuaded that the Full Bench decision was wrong. In our view, it is clear that the third parties would be severely prejudiced in their conduct of the

litigation.

In our opinion, the right which the first applicant seeks to establish is so interwoven with the right which the third parties presently possess that the only proper conclusion to be reached is that the third parties have an interest in the right. It may be that the interest is not as direct as would normally be required where the question of non-joinder is raised but we are satisfied that it is "... not merely a financial interest which is only an indirect interest ...". In these circumstances we are satisfied that the third parties in question should either have been cited in the application or the first applicant should at least have sought a rule nisi calling on such third parties to show cause why the relief prayed for should not be granted.

The next question to be considered is what steps should be taken to remedy the matter. Mr Maritz submitted that the application should be dismissed leaving the first applicant to start over again; but that, in our view, would be far too draconian a step to take. The answer, we think, is for the first applicant either to join the third parties in the application or to apply to the Court for a rule nisi to issue. We refrain from issuing such a rule mero motu because it may require careful formulation after hearing further argument.

We now come to the application made by the first applicant to cross-examine certain of the first respondent's deponents on specified issues raised in their affidavits. A part of

that application was abandoned during the course of argument but Mr De Bruin persisted with the application to cross-examine the deponent Van Wyk.

Mr Maritz conceded that the Court has a discretionary power to order the cross-examination of a deponent in cases where a dispute of fact is shown to exist and he further accepted that oral evidence should be allowed if there are reasonable grounds for doubting the correctness of allegations made by a deponent particularly when the facts are peculiarly within the knowledge of that deponent. He also conceded that there was a real dispute of fact with regard to various allegations made by the deponent Van Wyk concerning the question whether the properties, the subject of this application, were properties which related to matters in respect of which the Legislative Authority of Rehoboth was empowered to make laws in terms of the Rehoboth Self-Government Act. Mr Maritz's only real opposition to the order sought was on the basis that to order cross-examination of one deponent on this issue would unfairly disadvantage the first respondent. He suggests that the proper course would be to refer the issue to oral evidence.

We agree with Mr Maritz that simply to order cross-examination of one deponent on what may be a vital issue may prove to be to the disadvantage of the first respondent and it may also place the Court in a difficult position. In our view, the right course would be to refer the issue to oral evidence.

For the foregoing reasons the following orders are made:

(7) The point in limine concerning the locus standi of the applicants is dismissed;

(8) The second point in limine concerning non joinder is upheld and the application is postponed sine die until the first applicant joins all interested third parties or this Court issues a rule nisi calling on all such third parties to show cause why the relief sought by the first applicant should not be granted;

(9) The first applicant is given liberty to apply to the Court for the issue of such a rule nisi;

(10) The issue whether the properties, the subject of this application, were properties which related to matters in respect of which the Legislative Authority of Rehoboth was empowered to make laws in terms of the Rehoboth Self-Government Act is referred to oral evidence;

(11) The deponent Jurie Charlotte Van Wyk is ordered to appear at the hearing for cross-examination on the aforesaid issue;

(12) Each party is to furnish the other with a copy of an affidavit sworn to by the witness or witnesses it intends to call in oral evidence setting out the evidence to be given by such witness or witnesses. The affidavits are to be served not less than 14 days before the date fixed for hearing;

(13) Discovery, inspection and production of documents relating to the aforesaid issue is to take place in accordance with Rule 35 of the High Court Rules; and

(14) When the order set out in paragraph 2 has been complied with either party is at liberty to apply for a date of hearing.

STRYDOM, J.P.

HANNAH, J.

TEEK, J.