

Case Title: HOCHLAND PARK PHARMACY CLOSE CORPORATION CC/2005/0079 1 st APPLICANT GRAHAM TOWN FOURTEEN CLOSE CORPORATION CC/2013/11743 2 nd APPLICANT LIPOLELA BENEDICTA QHOLA ID. NO PASSPORT NO. RC 008100 3 rd APPLICANT TOITOI WILLIAM KAGISO MOLOI ID NO. 71040110247 4 th APPLICANT WINNIFRIDA BAWINILE MOLOI ID NO. 70090610307 5 th APPLICANT vs SME AND MEDIUM ENTERPRISES LIMITED NO. 2011/0174 RESPONDENT	Case No: HC-MD-CIV-MOT-REV-2021/00214
	Division of Court: High Court, Main Division
Heard before: Honourable Mr Justice Oosthuizen	Date of hearing: 09 March 2022
	Delivered on: 6 April 2022
Neutral citation: <i>Hochland Park Pharmacy Close Corporation v SME and Medium Enterprises Limited</i> (HC-MD-CIV-MOT-REV-2021/00214) [2022] NAHCMD 175 (6 April 2022)	

Result on merits: The joinder application fails.

COURT ORDER

Having heard **MS. QHOLA (IN PERSON FOR THE APPLICANTS)** and **MS. Y. CAMPBELL**, on behalf of the Respondents and having read the papers filed of record for HC-MD-CIV-MOT-REV-2021/00214:

IT IS ORDERED THAT:

1. The application to join Mr Elvis Bongani Ndala as a sixth applicant is hereby dismissed.
2. The applicants shall pay the costs of the respondent's opposition which shall not be capped in terms of Rule 32(11) and shall include the costs of one instructing and one instructed legal practitioner.
3. The Rule 61 application shall proceed on 14 April 2022 as previously ordered.
4. The matter is postponed to 14 April 2022 at 10h00.

REASONS FOR ORDERS:

[1] The applicants brought an application for the joinder of a 6th Applicant, Elvis Bongani Ndala. The respondent opposed the application.

[2] The law on joinder is trite and the court will not belabour the point but rather focus on what the applicants needed to prove.

[3] The requirements for a successful joinder application is: whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court in

the proceedings concerned.

[4] In *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others*¹ at 447, para 32, Damaseb JP said:

‘The leading case on joinder in our jurisprudence is *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). It establishes that it is necessary to join as a party to litigation any person who has a direct and substantial interest in any order which the court might make in the litigation with which it is seized. If the order which might be made would not be capable of being sustained or carried into effect without prejudicing a party, that party was a necessary party and should be joined except where it consents to its exclusion from the litigation. Clearly, the ratio in *Amalgamated Engineering Union* is that a party with a legal interest in the subject matter of the litigation and whose rights might be prejudicially affected by the judgment of the court, has a direct and substantial interest in the matter and should be joined as a party.

[5] The applicants’ basis for the joinder is that the intended joined party assists with the running of the business and knows all the operations of the close corporations. However, when the court enquired whether or not the party to be joined is a member of the close corporations (first and second applicants), Ms Qhola spokesperson on behalf of the applicants indicated that Mr Ndala only became a member of the second applicant during June 2021. Ms Qhola was at pains to explain on the papers any justifiable interest Mr Ndala might have.

[6] The respondent's opposition against the application on the basis of the *Kleynhans* case *supra*, is sound. Applicants did not prove what was required from them.

[7] The main application is for the rescission of a default judgment obtained against the applicants, and when the Court enquired whether the party to be joined was involved in the close corporations at the time when the default judgment was granted, Ms Qhola again confirmed that he was not.

[8] In light of the above, I find that the party applied to be joined, namely Mr Elvis Bongani Ndala has no direct or substantial interest in the proceedings and that he would

¹ *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011(2) NR 437.

not be adversely affected or impacted by any outcome reached by this court.

[9] I find that the purpose of the joinder application is to create the exception for Mr Ndala to represent the applicants in the rescission application in order to circumvent the common law requirement that a corporation should be represented by a duly admitted legal practitioner. It is common cause that a Court may allow the alter ego of a corporation to represent it. I repeat that Mr Ndala would not qualify, *inter alia* on the basis that it was not shown that he has a direct and substantial interest in the matters.

[10] I therefore make the following orders:

[10.1] The application to join Mr Elvis Bongani Ndala as a sixth applicant is hereby dismissed.

[10.2] The applicants shall pay the costs of the respondent's opposition which shall not be capped in terms of Rule 32(11) and shall include the costs of one instructing and one instructed legal practitioner.

[10.3] The Rule 61 application shall proceed on 14 April 2022 as previously ordered.

[10.4] The matter is postponed to 14 April 2022 at 10h00.

Judge's signature:	Note to the parties:
Oosthuizen J	None
Counsel:	
Applicants	Respondent
L.B. Qhola Third Applicant in Person Windhoek, Namibia	Y. Campbell Instructed by Fisher, Quarmby & Pfeifer Windhoek, Namibia