

SOUTH AFRICA / JUDGMENT

Bakubung ba Ratheo Traditional Community and Another v Gumbi N.O. and Others (UM48/2017) [2017] ZANWHC 88 (8 December 2017)

[2017] ZANWHC 88

COURT

North West High Court, Mafikeng

BEFORE

GUTTA

CASE / FILE NUMBER

UM48/2017

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“IN
THE HIGH COURT OF SOUTH AFRICA”
NORTH WEST DIVISION,
MAHIKENG
CASE
NUMBER: UM48/2017
In
the matter between:-
BAKUBUNG
BA RATHEO TRADITIONAL COMMUNITY
1st
Applicant
SOLOMON
MPHUPHUTE MONNAKGOTLA N.O
2nd
Applicant
And
JABULANI
BEN GUMBI
N.O
1st
Respondent
MARGARET
MAPASEKO MONNAKGOTLA N.O
2nd
Respondent
SIMON
SIMI MORWANE
N.O
3rd
Respondent
MALAOLI
EDWIN MOHLABI N.O
4th
Respondent
PETER
MOTLAPELE HAMLET MORULE N.O
5th
Respondent
BAKUBUNG
MINERALS (PTY) LTD
6th
Respondent
WESIZWE
PLATINUM
LIMITED
7th
Respondent

FLUXMANS
INCORPORATED ATTORNEYS
8th
Respondent
FIRST
NATIONAL
BANK
9th
Respondent
THE
DEPARTMENT OF MINERAL RESOURCES,
NORTH
WEST
10th
Respondent
THE
MINISTER OF RURAL LAND DEVELOPMENT
AND
LAND
REFORM
11th
Respondent
THE
MASTER OF THE HIGH COURT, GAUTENG
LOCAL
DIVISION, JOHANNESBURG
12th
Respondent
REFILWE
MONNAKGOTLA N.O
13th
Respondent

JUDGMENT

GUTTA J.

A.

INTRODUCTION

[1] The applicant launched its application in two parts. In Part A the applicant sought the following urgent relief:

1.1 Pending the final determination of the relief sought in Part B of this application:

“2.1 First National Bank (“the Ninth Respondent”) is directed to retain all monies held in the name of the Bakubung Ba Ratheo Community Trust (“the Community Trust”) with the ninth respondent in the bank accounts with account numbers [...] and [...] (“the Community Accounts”), respectively;

2.2 The ninth respondent is interdicted from transferring, releasing or in any other manner dealing with the monies held in the Community accounts;

2.3 The ninth respondent is directed to retain all monies held in the name of the Bakubung Ba Ratheo Traditional Administration Trust (“the Traditional Administration Trust”) with the ninth respondent in the bank account with account number [...] (“the Traditional Administration Trust Account”);

2.4 The ninth respondent is interdicted from transferring, releasing or in any other manner dealing with the monies held in the Traditional Administration Trust Account;

2.5 Jabulani Ben Gumbi (“the First Respondent”), Margaret Mapaseko Monnakgotla (“the Second Respondent”), Simon Simi Morwane (“the Third Respondent”), Molaoli Edwin Mohlabi (“the Fourth Respondent”) and Peter Motlapele Hamlet Morule (“the Fifth Respondent”) are restrained and interdicted from withdrawing, transferring or dealing in any manner whatsoever with the monies in the Community accounts, held with the ninth respondent;

2.6 The first to fifth respondents are restrained and interdicted from withdrawing, transferring or dealing in any manner whatsoever with the monies in the Traditional Administration Trust account, held with the ninth respondent;

2.7 The first to fifth respondents are interdicted from passing, adopting and/or acting on any resolution of the Community Trust to withdraw, transfer or utilise any money from any bank account, investment or otherwise, held in the name of, and/or for the benefit of, the Community Trust;

2.8 Fluxmans Incorporated Attorneys (“the Eighth Respondent”) is directed to retain any and all monies received from the Community Trust or the Traditional Administration Trust and/or any of the respective Trustees of the two Trusts held in the eighth respondent’s trust account, in such Trust Account;

2.9 The eighth respondent is interdicted from utilizing, allocating and/or transferring any of the monies received from the Community Trust and/or the Traditional Administration Trust from its Trust Account to its Business Account or any other account, or to any other person or entity;

2.10 The eighth respondent is interdicted from allocating or utilising any monies received from the Community Trust and or/or the Traditional Administration Trust, which is held in the eighth respondent’s Business account;

2.11 Bakubung Minerals (Pty) Ltd (“the Sixth Respondent”) is interdicted from making any payments arising out of the Notarial Lease Agreement entered into between the Minister of Rural Development and Land Reform (“the Eleventh Respondent”), the Bakubung Ba Ratheo Community (“the First Applicant”), and the Trustees of the Community Trust, to the Community Trust or to any third party;

2.12 The sixth respondent is to make the payment into an interest bearing trust account held in favour of the Community Trust at an independent firm of attorneys, any and all amounts that are, or may become, due to the Community Trust;

2.13 The first to fifth respondents are directed to provide the applicants, within 7 days of the date of the Court Order under Part A, with all information sought in respect of the administration and finances of the Community Trust, as contained in the letters dated 15 May 2017, 19 July 2017 and 24 July 2017 (annuxures FA9, FA14 and FA16), the letters of authority of the Trustees, the credit balances of all and any of the Community Trust's bank accounts (in the event that no financial statements had been prepared in respect thereof);

2.14 The first to fifth respondents, and the ninth respondent (to the extent that the Community Trust's bank accounts are all held at the Ninth Respondent) are directed to provide the applicants with copies of bank statements, for the period January 2017 to date of the Court Order granted under Part A, of all the Community Trust's bank accounts held at the ninth respondent and/or any other bank, within 30 days of the Court Order granted under Part A".

[2] In Part B, the applicant applies for the following order:

"1. To set aside the decision and/or resolution of the Trustees of the Community Trust held on 12 July 2017 to withdraw and/or transfer the amount of R3 400 000.00.

2. To remove the first and fifth respondents as trustees of the Bakubung Ba Ratheo Community Trust;
3. The costs of this application are to be paid by the first to fifth respondent's jointly and severally, the one paying the other to be absolved, and any of the respondents that oppose the relief sought".

[3] On the 2 November 2017 Leeuw JP after hearing counsels on behalf of the applicants, first respondent, eighth respondent and the Traditional Administration Trust, granted the following relief:

"1 Pending the final determination of the relief sought in Part A of this application:

1.1 First National Bank ("the Ninth Respondent") be directed to forthwith freeze all monies held in the name of the Bakubung Ba Ratheo Community Trust at the ninth respondent in accounts with account numbers [...] and [...], respectively;

1.2 The ninth respondent be directed to forthwith freeze all monies held in the name of the Bakubung Ba Ratheo Traditional Administration Trust at the First National Bank in an account with account number [...];

1.3 Jabulani Ben Gumbi NO (“the First Respondent”) MARGARET MAPASEKO MONNAKGOTLA NO (“the Second Respondent”), SIMON SIMI MORWANE NO (“the Third Respondent”), and PETER MOTLAPELE HAMLET MORULE NO (“the Fifth Respondent”) undertake not to withdraw or utilize the funds held at the ninth respondent in First National Bank accounts with account numbers [...] and [...], or any other account held in the name of the Community Trust.

1.4 Fluxmans Incorporated Attorneys (“the Eighth Respondent”) undertake to retain any and all amounts of monies received from the Bakubung Ba Ratheo Community Trust or the Bakubung Ba Ratheo Traditional Administration Trust and/or any of their respective

trustees of the two Trusts held in the eighth respondent’s Trust account, and refrain from utilizing and/or allocating and/or

transferring any of the monies received from the Trustees of the two Trusts;

1.5 Bakubung Minerals (Pty) Ltd (“the Sixth Respondent”) be interdicted from making any payments arising out of the Notarial

Lease Agreement entered into between the Minister of Rural Development and Land Reform (“the Eleventh Respondent”),

the Bakubung Ba Ratheo Community (“the First Applicant”), and the trustees of the Bakubung Ba Ratheo Community (“the

Applicant”), to the Bakubung Ba Ratheo Community Trust and to make payment to an interest bearing trust account held in favour of the Bakubung Ba Ratheo Community Trust at an independent firm of attorney”.

B. POSTPONEMENT

[4] On the 24 November 2017, the first and second respondent applied for an order postponing the matter sine die pending the outcome of the completion of the process pertaining to the removal and withdrawal of the certificate of recognition as Kgosi in respect of the second applicant and for an order that the costs of the application and of the postponement be costs in the cause. The first and second respondent on the day of the hearing filed a substantive application for postponement. The reasons advanced for seeking a postponement were inter alia that:

4.1 On the 19 November 2017, a meeting was held at the Royal Family of the Bakubung Ba Ratheo Traditional Community wherein the Royal Family resolved to remove the second applicant from his position of Kgosi of the Community.

4.2 On the 20 November 2017, the attorney Fluxman addressed a letter to the Premier informing him of the removal and requiring the Premier to complete the procedure required by section 14 of the North West Traditional Leadership and Governance Act 2 of 2005.

4.3 The effect of the removal of the Kgosi is that his locus standi will be nullified once he is removed.

4.4 The resolution affects the standing of the second applicant in both his capacity as Kgosi and in his capacity as the statutory representative

of the first applicant being the Community. It is only by virtue of the second applicants' status as Kgosi that any application

could be launched by the Community as the first applicant.

4.5 If the recognition of the second applicant is withdrawn then neither applicants have any further standing before the Court.

4.6 If the Premier fails for any reason to implement the withdrawal of the recognition it will be necessary for the Royal Family to institute proceedings to compel the withdrawal of the recognition.

4.7 Out of the 38 members of the Royal Family, 24 voted in favour of the resolution.

4.8 There is no prejudice in postponing the matter as the first and second respondents are prepared to extend the undertaking given on the 3 November 2017. Hence the applicants' interest is protected.

4.9 There are good and strong reason for the Court to grant the postponement.

4.10 The balance of convenience favours granting of postponement.

[5] Counsel for the applicant opposed the application for postponement and submitted inter alia that:

5.1 The respondents have not played open cards as to where the R3 400 000.00 is. The respondent says it's of no concerns to applicant where the money is. The applicant wants to protect the Community's money.

5.2 First applicant is the Community with its own locus standi.

5.3 The Court has already ruled on the second applicant's locus standi.

5.4 The second respondent is still the Kgosi.

5.5 There are unfounded allegations of impropriety.

5.6 The resolution by the Royal Family does not constitute an administrative decision.

5.7 The case of *Mamogole v Premier North West Province and others*[1] requires just administrative action. The Premier must afford the second applicant a hearing before removing him.

5.8 The meeting of the Royal Family to remove the second applicant is flawed.

5.9 There is prejudice as a new Kgosi may or may not be appointed. The decision to remove the second applicant will be challenged. The delay will be prejudicial to the Community as trust money cannot be used on projects to benefit the Community.

5.10 Community money is used to litigate against the community.

[6] This Court after hearing counsels for both the first and second respondent, dismissed the application for postponement. The reason for the dismissal is briefly set out hereinbelow:

6.1 In terms of Section 14 of the North West Traditional Leadership Act 2 of 2005, a Kgosi may be removed from office by the Royal family.

“(2) Whenever any of the grounds referred to in subsection (1) come to the attention of the Royal Family and the Royal Family decides to remove the kgosi or kgosigadi, the Royal Family must within a reasonable time inform the Premier of such decision and the reasons therefor.

- (3) The Premier shall upon receipt of such decision and reasons therefor, withdraw the certificate of recognition of such a kgosi/kgosigadi by
 - (a) publishing a notice of withdrawal of recognition of such kgosi/kgosigadi in the Gazette;
 - (b) informing the Royal Family concerned, the kgosi/kgosigadi concerned and the Provincial House of Traditional Leaders of such removal”.

6.2 From the foregoing, it is apparent that the second applicant remains the Kgosi and the statutory representative of the first applicant until such time that the Premier withdraws the certificate of recognition by publishing the notice of withdrawal in the government gazette and informing the Royal Family.

6.3 Hence the second applicant has locus standi in this matter. That is why the respondents cautiously framed its words that “locus standi is now in issue” and not that the second applicant does not have locus standi.

6.4 Furthermore the prejudice that the Community will suffer if this matter is postponed in my view outweighs any prejudice that the first and second respondent will suffer if I granted the postponement. There are no time frame provided for when the Premier will publish the notice of withdrawal. Should the Premier fail to publish the notice this may necessitate a further application to compel him to remove the second applicant. It is common cause that the first and second respondent wrote a letter to the Premier, challenging the decision to remove the second respondent. Should the Premier withdraw the certificate of recognition, the applicant will launch a review application to set aside his decision. This matter will then be stayed pending the review application. Hence there will be a lengthy delay which will prejudice the Community as no monies from the Community Trust can be used for the benefit of the Community.

[7] Accordingly, I dismissed the application for postponement and reserved the issue of costs.

C. HISTORY

[8] It is common cause that the second applicant was recognised and designated as the Traditional Leader of the Community on the 14 March

2016. The certificate of recognition was issued in terms of the provisions of the North West Traditional Leadership and Governance Act No. 2 of 2005.

[9] Prospecting rights were granted to Bakubung Minerals (Sixth Respondent) over the Community's land in Ledig by the Department of Mineral Resources, North West (DMR). The Community's land is leased which lease is governed by a notarial lease agreement

entered into on the 15 March 2015 between the Community Trust, Bakubung Minerals, the Minister of Rural Development and Land Reform

and the Trustees. A Community Trust was set up to administer the lease income as the Trust assets flow from the Notarial lease. In terms of the Notarial Lease, Bakubung Minerals has to pay the Community Trust an amount of R 926 966.00 per annum. The sixth respondent is two years in arrears with the rental payment.

[10] The following clauses in Community Trust Deed are relevant for purposes of this application:

10.1 The Community Trust was established for the purpose of implementing, administering and furthering the Community Trust's Object (clause 3);

10.2 The sole beneficiary of the Community Trust is the Community (clause 1.1 (9));

10.3 The Trust Object is to receive and hold the lease income, and to provide allocations so as to achieve the social upliftment and economic empowerment of the beneficiary, (clause 6);

10.4 The Community Trust's Funds must be devoted exclusively towards achieving the Trust Object (clause 10, read with clause 12);

10.5 The management and control of the Community Trust vests in the Trustees. The Trustees shall at all times comply with, and observe, the provisions of the Trust Deed and the Trust Property Control Act (clause 5);

10.6 The Trustees are prohibited from awarding or distributing any benefits for any reason to any person other than an allocation in furtherance of the Trust Object (clause 18); and

10.7 The Trustee cannot, without the prior consent of at least 80% of the Trustees present and voting at a duly convened meeting, approve or make any allocations (clause 18.3).

[11] It is common cause that a Trustees' meeting was held on 12 July 2017, where the trustees resolved inter alia that:

11.1 The Community Trust would transfer R3 400 000.00 for legal fees and Trust needs, from the Community Trust's 32 Day Cash Index Investment account (account number [...]) to the Community Trust's Platinum Business Account (account number [...]);

11.2 Once the amount of R3 400 000.00 was in the Community Trust's Platinum Business Account an amount of R3 000 000.00 was to be transferred to the account of the Traditional Administration Trust at First National Bank (account number [...]).

11.3 The Trustees increased and/or included additional signatories to the Community Trust's bank accounts at First National Bank.

D. APPLICANT'S CASE

[12] The applicant's case is briefly that:

12.1 The R3 000 000.00 payment in legal fees appears to be earmarked for payment to Fluxmans (the Eight Respondent). The Traditional Administration Trust is not a beneficiary of the Community Trust. There is no apparent reason why the Traditional Administration Trust would be entitled to receive such a significant amount of money from the Community Trust or on what basis legal fees payable to Fluxmans would be an obligation of the Community Trust.

12.2 The decision taken by the Trustee to transfer money appears to be based on a request by the Khuduthamaga of the Royal Family. Whilst the Khuduthamaga plays an important role in a Traditional Community, it is essentially an advisory body, and does not have the power or authority to make such a request.

12.3 The Trust Deed does not provide for the utilization or allocation of the Trust Funds for the payment of legal fees, especially legal fees that were not incurred for the benefit of the Community. The withdrawal of the amount of R3 400 000 for purposes other than in accordance of the Trust Object is, and will be, unlawful. The payment was clearly not to achieve the Trust Object. It was not for the benefit of the Community, and not a Trust Benefit activity.

12.4 In the resolution the Trustees passed on 12 July 2017 the Trustees resolved to make an allocation of Trust Funds without the requisite consent of 80% of the Trustees. The purported resolution has effectively only been signed by three Trustees.

12.5 The Community, as the sole beneficiary of the Community Trust, is entitled to the protection of the assets of the Community Trust, more specifically the Trust Funds held in the Community Trust's First National Bank accounts. These funds are to be utilised for purposes of the Trust Object, and ultimately, for the benefit of the Community.

12.6 The first applicant has proven, on a balance of probabilities, a clear right which the applicants are entitled to rely upon. The applicants will suffer irreparable harm and have a reasonable apprehension of continued harm if the interim relief is not granted. No harm will accrue to any of the respondents if the interim relief is granted as the Trustees will be interdicted from utilising funds that were never earmarked for the payment of monies in conflict with the objects and purpose of the Community Trust. Similarly, the Traditional Administration Trust and Fluxmans will not suffer any prejudice for the very same reason that the Community Trust's Trust Funds were not earmarked for any payments to these entities. In addition, the prejudice the Community will suffer outweighs any prejudice that any respondent may potentially suffer. The

applicants have no other remedy available to protect the Community's Funds.

[13] On the 28 November 2017, an agreement was reached between the first and second applicant, in respect of Part A of the application and the first and second respondent (Community Trust) and the parties sought an order in terms of a draft order. The parties also agreed that Refilwe Monnakgotla could be joined as the thirteenth respondent and the argument in the intervention application was to be postponed to the same day as the hearing of part B. The content of the draft order is included under paragraph 24 infra. The second respondent in her capacity as trustee of the Traditional Administration Trust persisted with her opposition of the

application. Hence what remains for determination is the relief sought by the applicants against the second and thirteenth respondent

in their capacity as trustees of the Administration Trust, namely to interdict them from withdrawing or transferring any amounts

transferred from the Community Trust to the Traditional Administration Trust held in the Traditional Administration Trust account and directing the ninth respondent to freeze and retain all monies held in the Traditional Administration Trust and interdicting

the ninth respondent from transferring, releasing or in any other manner dealing with the monies held in the Traditional

Administration Trust accounts.

E. SECOND RESPONDENT CASE (Traditional Administration Trust)

[14] The second respondent (Traditional Administration Trust) in paragraph 14, 15 and 16 of her answering affidavit said the following:

"15 The applicants have failed to establish how the trustees of the Traditional Administration Trust have breached their fiduciary duties towards the trust. They have also failed to show how they will suffer irreparable harm. In their failure to do so, they have misinterpreted and or misunderstood the role of the trustees in working towards the objectives of both the community trust and the Traditional Administration Trust. In working towards the objectives, and by legal implication, the trustees have ancillary powers and rights to obtain professional advice, including legal advice and representation in those matters that affect the community.

16 The legal advice and representation sought by the trustees in achieving the objectives of the trust, is set out more fully in the answering affidavit of the first respondent and will not be repeated herein for the sake of brevity. In this regard I submit that, the trustees of the Traditional Administration Trust are authorised to apply resources to the obtaining of such legal advice and representation".

- [15] The second respondent (Traditional Administration Trust) was on the 2 November 2017 given leave to file a supplementary affidavit which she did on the 23 November 2017 wherein she said inter alia the following:

“5. Chief among reasons why such an order is not competent is the fact that the Traditional Administration Trust has been in existence prior to 12 July 2017 and it has been conducting its business without the intervention of the Community Trust nor is the decision or resolution reached by the Community Trust on 12 July 2017 affects the business or the mandate of the Traditional Administration Trust.

7. Critical, there is no role the Traditional Administration Trust will play in the main application referred to as Part B therein. Against this backdrop, it is respectfully submitted by the Traditional Administration Trust that there are many ways to perverse its right in relation to the resolution reached by the Community Trust without having the Traditional Administration Trust monies withheld for a period, which is not determinable from the papers.
11. The Traditional Administration Trust needs its bank account held by the ninth respondent to be at all material times operational and accessible to its trustees or designated signatories as it has among other donors that donate funds or otherwise in the benefit of the community and granting the relief sought by the applicants as it currently stands will have huge prejudice towards the running of the Traditional Administration Trust and to its beneficiaries as the order will have a completely halt/stop the Traditional Administration Trust from trading and or conducting its business and fulfilling its
- mandate solely by the reason of the resolution taken by the trustees of the Community Trust.
12. Legal submissions will be advanced during the hearing of this application that the Traditional Administration Trust is solely employed here in as an agent of the Community Trust, in relations to the decision taken by the trustees of the Community Trust on 12 July
2017. To this extent, the Traditional Administration Trust only is not actively acting on its own mandate with regards to the activities and or implementation of the resolution of the Community Trust.
14. It must be appreciated at this stage that the Traditional Administration Trust is not against stating and or detailing the amounts transferred by the trustees of the Community Trust as per the resolution. It can and is willing to do so should the Community Trust trustees give consent or permission to the trustees of the Traditional Administration Trust and such information can be made available at the hearing of this application.
16. It is for the aforementioned reasons that, factual, legally or otherwise the applicants cannot and ought not to seek such a drastic relief in relating to all monies held by the ninth respondent's in the bank account belonging to the Traditional Administration Trust solely on the resolution reached by the trustees of the Community Trust on 12 July 2017.

18. To this extent and as indicated above, the Traditional Administration Trust is willing to declare all monies received and the instructions given to it on how to deal with such monies. Notwithstanding the fact that I am also a trustee to the Community Trust, I am bound by the decision of the Community Trust and to the extent it mandates the Traditional Administration Trust, I am also bound by its decision to act independently therein”.

[16] Mr Nel, counsel for the applicant referred the Court to an extract from Honore South Africa Law of Trust[2] where the author said that a trust beneficiary is entitled to demand from a Trustee information about the state of investment of and other dealings with the Trust property and in particular information regarding the claimant’s share of it, *Mia v Cachalia*[3]. Mr Nel said prior to institution of the application, information was requested but nothing was forthcoming. He submitted that the Traditional Administration Trust is the author of its own misfortune. By failing to disclose what amount it has, resulted in the order the Court granted. He submitted further that:

16.1 There is no explanation of what business or trading the Traditional Administration Trust needs to conduct, nor has it indicated what payments it needs to make in order to trade or conduct its business.

16.2 The second respondent alleges that the Traditional Administration Trust is prepared to provide details of the amounts transferred to the Traditional Administration Trust by the Community Trust, but requires the “consent or permission” of the Trustees of the Community Trust to do so. The Traditional Administration Trust does not need the permission or consent of the Community Trust to play open cards with Court and indicate precisely what amounts it received, particularly in circumstances where it opposes the relief being sought.

16.3 The Traditional Administration Trust fails to inform the Court whether any monies paid to the Traditional Administration Trust by the Community Trust is held in its bank account or other bank accounts, and there is no tender to make payment of any amounts that it received from the Community Trust, to any independent party, or to abide by the Court’s decision in such regard.

[17] Counsel for the Administrative Trust, Mr Sithole submitted inter alia the following:

17.1 the applicant by seeking an order that ninth respondent freeze and retain all monies of the Traditional Administration Trust, are seeking to “chop the leg of the messenger” which has severe financial implications and affects the administration of the Traditional Administration Trust.

17.2 The applicants cannot seek an order to close the Traditional Administration Trust account when they don’t know how much was transferred. The applicant knew the resolution was to transfer R3 000 000.00, hence they were aware of the amount that was transferred.

17.3 They are only agents and acting on behalf of the Community Trust.

17.4 The applicants have unlimited funds to litigate. They have an exterior motive and sought drastic relief. Part B has nothing to do with the Administrative Trust.

17.5 The Traditional Administration Trust is willing to declare the monies. The Court must order them to declare what was in the Traditional Administration Trust account.

F. EVALUATION

[18] The relief sought by the applicants is essentially to preserve the Community Trust's funds and to ensure the proper administration

of the affairs of the Community Trust in accordance with the Trust Object in its Trust Deed.

[19] The Traditional Administration Trust in their answering affidavit and supplementary affidavit failed to give any documentary proof and or provide any explanation of the following:

19.1 why and on what basis the Traditional Administration Trust was entitled to receive R3 000 000 from the Community Trust and why they should pay Fluxmans attorneys legal fees.

19.2 why they allege that the Traditional Administration Trust is an agent of the Community Trust.

19.3 why they allege that they were not at liberty to disclose what amount was paid into their account and what monies were transferred to Fluxmans until the Community Trust consented to the disclosure or until the Court directed them to make such disclosure.

19.4 why they failed to attach the Trust Deed from which the role of the Trustees and objectives of the Traditional Administration Trust would have become known.

19.5 No confirmation was forthcoming as to whether R3 000 000, or any part thereof, was transferred to the Traditional Administration Trust and whether R3 000 000 or any part thereof was transferred from the Traditional Administration Trust's bank account to Fluxmans.

[20] It is also common cause that notwithstanding the relief sought against the Traditional Administration Trust, on the day of the hearing, 2 November 2017, while the Court proceedings were being heard, an amount in excess of R70 000.00 was deposited into Fluxmans account from the Traditional Administration Trust.

[21] According to Mr Sithole the Traditional Administration Trust's main objection to the relief sought by the applicants is that the applicants applied for an order freezing all monies held in the Traditional Administration Trust at First National Bank which has severe financial implications and affects the administration of the Trust. He stressed the urgency in finalising this matter.

[22] This Court is sympathetic to the plight of the Traditional Administration Trust and I am of the view that it was not necessary

to freeze all monies held in the Traditional Administration Trust account as the applicants relief was solely to preserve the R3 000 000.00 which may have been transferred into Traditional Administration Trust account. The resolution that was passed by the Trustees of the Community

Trust was limited to transfer the amount of R3 000 000.00 to the Traditional Administration Trust account which was earmarked for payment to Fluxmans. Hence there was no grounds or basis for the applicants to seek an order freezing all monies held in the Traditional Administration Trust account.

[23] When I engaged counsel for the applicant, Mr Nel during his submissions to Court he conceded and agreed that the relief against

the Traditional Administration Trust could be limited to an amount up to R3 000 000.00. This concession was to a large extent relied upon and accepted by Mr Sithole in his address to Court who reiterated the unfairness of the relief sought against the Traditional Administration Trust and their willingness to disclose all amounts transferred into their account and paid out to Fluxmans and the balance remaining in the Traditional Administration Trust account as directed by the Court.

[24] Although the applicants were entitled to protect the R3 000 000.00 it over stepped its boundaries by seeking an order freezing all the funds held in the Traditional Administration Trust account. I am however of the view that had the Traditional Administration Trust taken this Court into its confidence and dealt with the issues raised in paragraph 19 supra, protracted litigation between the applicant and the Traditional Administration Trust and the consequent costs could have been

avoided.

G. COSTS

[25] In view of the foregoing, I am of the view with regards to costs that the appropriate order is to direct each party to pay their own costs..

H. ORDER

[24] In the result,

A. Refilwe Monnakgotla, (“Thirteenth Respondent”), is joined as a respondent to this application.

B. Argument in the intervention application is postponed to the same day as the hearing of Part B.

C. Pending the final determination of the relief sought in Part B of this application:

1. First National Bank (“the Ninth Respondent”) is directed to freeze and retain all monies held in the name of the Bakubung Ba Ratheo Community Trust (“the Community Trust”) with the ninth respondent, in the bank accounts with account numbers [...], [...] [...] respectively, or any other accounts held with the ninth respondent (“the Community Trust Accounts”);
2. The ninth respondent is interdicted from transferring, releasing or in any other manner dealing with the monies held in the Community Trust Accounts;

3. The ninth respondent is directed to freeze and retain all monies that were transferred from the Community Trust (during the period 12 July 2017 to 28 November 2017) and held in the name of the Bakubung Ba Ratheo Traditional Administration Trust (“the Traditional Administration Trust”) with the ninth respondent, in the bank account with account number [...] or any other accounts held with the ninth respondent (“the Traditional Administration Trust Accounts”);
4. The ninth respondent is interdicted from transferring, releasing or in any other manner dealing with the monies that were transferred from the Community Trust (during the period July 2017 to 28 November 2017) and held in the Traditional Administration Trust Accounts;
5. Jabulani Ben Gumbi (“the First Respondent”), Margaret Mapaseko Monnakgotla (“the Second Respondent”), Simon Simi Morwane (“the Third Respondent”), and Peter Motlapele Hamlet Morue (“the Fifth Respondent”) (or any other person with signing powers) are restrained and interdicted from withdrawing, transferring or dealing in any manner whatsoever with the monies in the Community Trust Accounts, held with the ninth respondent, or any other bank accounts of the Community Trust;
6. The first, second, third and fifth respondents are restrained and interdicted from withdrawing, transferring or dealing in any manner whatsoever with the monies transferred from the Community Trust to the Traditional Administration Trust’s Accounts, including but not limited to, giving instructions to withdraw, transfer or pay out such monies;
7. The first, second, third and fifth respondents are interdicted from passing, adopting and/or acting on any resolution of the Community Trust to withdraw, transfer or utilise any money from any bank account whatsoever, investment or otherwise, held in the name of, and/or for the benefit of, the Community Trust;
8. Margaret Mapaseko Monnakgotla (“the Second Respondent”) and Refilwe Monnakgotla (“the Thirteenth Respondent”), as the Trustees of the Traditional Administration Trust (or any other person with signing powers) are interdicted from withdrawing or transferring any amounts transferred from the Community Trust to the Traditional Administration Trust (during the period 12 July 2017 to 28 November 2017) and held in the Traditional Administration Trust Accounts or any other bank accounts of the Traditional Administration Trust;

9. Fluxmans Incorporated Attorneys (“the Eighth Respondent”) is directed to retain any and all monies received from the Community Trust or the Traditional Administration Trust and/or any of the respective Trustees of the two Trusts, held in the eighth respondent’s Trust Account, or any other Trust Account or Investment Account under the control and/or management of the eighth respondent as at 2 November 2017;
10. The eighth respondent is interdicted from utilising, allocating and/or transferring any of the monies received from the Community Trust and/or the Traditional Administration Trust from its Trust Account, with effect from 2 November 2017, any other Trust Account or Investment Account, to its Business Account, or any other account, or to any other person or entity;
11. The eighth respondent is interdicted from allocating and/or utilising any monies received from the Community Trust and/or the Traditional

Administration Trust which is in the eighth respondent’s Business Account as at 2 November 2017;

12. Bakubung Minerals (Pty) Ltd (“the Sixth Respondent”) is to make payment into an interest bearing trust account held in favour of the Community Trust, and administered by Bowmans, any and all amounts that are, or may become, due to the Community Trust, arising out of the Notarial Lease Agreement entered into between the Minister of Rural Development and Land Reform (“the Eleventh Respondent”), the Bakubung Ba Ratheo Community (“the First Applicant”), and the Trustees of the Community Trust;
13. The first and second respondents are directed to provide to the applicants, within 14 days of the date of this Court Order with the following:

13.1 Copies of the Letters of Authority for the Community Trust;

13.2 Copies of the Bank Statements of the Community Trust’s Bank Accounts for the period from 14 July 2014 to 28 November 2017; and

13.3 Copies of the Minutes of the Community Trust meetings for the period 1 January 2014 to 28 November 2017.

14. The third and fifth respondents are directed to provide to the applicants, within 14 days of the date of this Court Order with the

following;

14.1 Copies of the Letters of Authority for the Community Trust;

14.2 Copies of the Bank Statements of the Community Trust’s Bank Accounts for the period from 14 July 2014 to 28 November 2017;

14.3 Copies of all financial statements of the Community Trust for the period from 2014 to 2017 insofar as the financial statements exist;

14.4 Copies of the application to the Master of the High Court for the issuing of Letters of Authority to the 3 additional Trustees appointed by the 2 independent Trustees; and

14.5 Copies of the Minutes of the Community Trust meetings for the period 1 January 2017 to 28 November 2017.

15. The second and thirteenth respondents, in their capacity as the Trustees of the Traditional Administration Trust are directed to provide the applicants within 14(fourteen) days of the date of this Court Order with copies of the Bank Statements of the Traditional Administration Trust for the period 12 July 2017 to 28 November 2017.

16. The ninth respondent is directed to provide the applicants with copies of Bank Statements, for the period 1 January 2017 to 28 November 2017 of all the Community Trust's Accounts held at the ninth respondent within 30 days from 28 November 2017;

17. The applicants are granted leave to supplement the founding affidavit and/or file a supplementary founding affidavit for the purposes of Part B of the application; and

18. The costs of Part A of the application between the applicant and the respondents (save for the Trustees of the Traditional Administration

Trust) are reserved.

19. The applicant and the second respondent (Traditional Administration Trust) are to pay their own costs for Part A of the application.

N. GUTTA

JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING

: 28 NOVEMBER 2017

DATE OF

JUDGMENT

: 08 DECEMBER 2017

ADVOCATE FOR APPLICANT

: ADV NEL (SC)

ADV EKSTEEN

ADVOCATE FOR RESPONDENT

: ADV SITHOLE (TRADITIONAL ADMINISTRATION TRUST)

ADVOCATE FOR RESPONDENT

: MR VAN ROOYEN FOR 1ST, 2ND & 3RD RESPONDENT

ATTORNEYS FOR APPLICANT

: MOKHETLE ATTORNEYS

(Instructed by: FASKEN MARTINEAU)

ATTORNEYS FOR RESPONDENT

: NTSAMAI ATTORNEYS

[1] (227/2006) ZANWHC 63 (13 October 2006)

[2] 5TH Edition, Edwin Cameron et al

[3] 1934 AD 102 107

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Prepared on 10 October 2026 · Esheria