

SOUTH AFRICA / JUDGMENT

Gumede and Others v Master of the High Court, Pietermaritzburg and Others (4315/2024P) [2025] ZAKZPHC 22 (26 February 2025)

[2025] ZAKZPHC 22

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Mngadi

CASE / FILE NUMBER

4315/2024P

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

Case

No: 4315/2024P

In

the matter between:

DUMISANI
ZAKHELE GUMEDE
FIRST
APPLICANT
XOLANI
MAQHAWE ZONDO N.O
SECOND APPLICANT
BONGOLWETHU
PRECIOUS NOTA N.O
THIRD
APPLICANT
AND
THE
MASTER OF THE HIGH COURT,

FIRST RESPONDENT
PIETERMARITZBURG
BONGUMUSA
JOSEPH MFEKA
SECOND
RESPONDENT
(3[...])
SOLANI
NORAH ZULU
THIRD RESPONDENT
(5[...])
SIPHO
VUSUMUZI MLUNGUNGWANA
FOURTH
RESPONDENT
(6[...])
MUZIWENKOSI
MKANENE MKWANAZI
FIFTH RESPONDENT
(7[...])
THEMBA
ERIC MSWELI
SIXTH RESPONDENT
BHEKINKOSI
COSHI MFEKAYI
SEVENTH
RESPONDENT
THEMBINKOSI
ALMON MLUNGWANA
EIGHTH
RESPONDENT
CALEB
MTHOKOZENI MSWELI
NINETH RESPONDENT
BONGINKOSI
ISHMAEL NDLOVU
TENTH
RESPONDENT
LOVENESS
SILINDILE MFEKAYI
ELEVENTH RESPONDENT
THE
MINISTER OF AGRICULTURE FORESTRY
TWELFTH
RESPONDENT
AND
FISHERIES
ORDER
1.
The application is dismissed.
2.

The appointment of trustees of Western Shores Communal Property Trust on 20 February 2024, the 2nd to 11th Respondents, is hereby reviewed and set aside.

3.

No order as to costs.

JUDGMENT

Delivered:

Mngadi J

- [1] Applicants seek to interdict and restrain the first respondent from recalling or cancelling 2nd and 3rd applicants' letters of authority as joint independent trustees of a trust and to review and set aside the appointment of second to eleventh respondents as trustees and to cancel letters of authorisation issued to them. The second to eleventh respondents oppose the application. The twelfth respondent did not take part in the litigation.
- [2] Initially the relief was sought as interim relief pending a decision to review and set aside the decision taken on 20 February 2024 to remove the second and third applicants as independent trustees of the Trust and in their place to appoint 2nd to 11th respondents as trustees of the Trust. The interim relief is no longer pursued with.
- [3] The first applicant is Dumisani Zakhele Gumede (Gumede) a major businessman. The second applicant is Xolani Maqhawe Zondo (Zondo) a major male practising attorney. The third applicant is Bongo Precious Lwethu Nota (Nota) a major female practising attorney. The Trust is Western Shores Communal Property Trust registered under number IT 1151/2010/PMB(Trust).
- [4] The first respondent is the Master of the High Court Pietermaritzburg in KwaZulu- Natal (Master). The second to eleventh respondents are the following adult persons, namely, Bongumusa Joseph Mfeka (Mfeka), Solani Norah Zulu (Zulu), Sipho Vusumuzi Mlungungwana (Mlungungwana), Muziwenkosi Mkanene Mkhwanazi (Mkhwanazi), Themba Eric Msweli (Msweli); Bhokinkosi Coshi Mfekayi (Mfekayi), Thembinkosi Almon Mlungwana (Mlungwana); Caleb Mthokozweni Msweli (Msweli II), Bonginkosi Ishmael Ndlovu (Ndlovu), and Loveness Silindile Mfekayi (Mfekayi II).
- [5] Gumede deposed to the founding affidavit and the second and third applicants filed confirmatory affidavits. Gumede states that he was a beneficiary to the Trust. He also served as a member of a working committee established by the independent trustees to assist them in their duties. The committee helps with communication and liaison between various parties in the interest of the trust. The members of the committee appointed by the beneficiaries' relevant stakeholders and role players in the affairs and the administration of the trust. Gumede says he has been instructed by most of the beneficiaries of the trust and

the independent trustees to bring the application on their behalf. He attaches a document annexure DZ 3 as minutes of the resolution taken authorising him.

[6] Gumede states that 2nd and 3rd applicants are independent trustees of the trust appointed by the first respondent in terms of s7 91) and 16(2) of the Trust Property Control Act 57 of 1988 (the Act) on 21 October 2020. He annexes letters of appointment marked DZ22.

[7] The annexure 'DZ2' states as follows:

'Letter of authority

In terms of Section 6 (1) of the Trust Property Control Act 1988 (Act 57 of 1988)

This is to certify that Bongo Precious Lwethu Nota ID No:8[...], Xolani Maqhawe Zondo ID No: 7[...] are hereby authorized to act as trustees of the Western Shores Communal Property Trust

Given under my hand at Pietermaritzburg this 21 October 2019.

Signed

Assistant Master.

[8] Gumede states that the impugned decision is recorded in a letter dated 20 February 2024. He states that the first respondent has without consultation with any interested party and due process arbitrarily and unreasonably removed the independent trustees. The removal of the independent trustees who in a period of the past four

(4) years have carried out erroneous amount of work is detrimental to the interest of the trust and beneficiaries. It is disruptive to the proper functioning of the Trust and detrimental to the relationships with various stakeholders. It undermines peace and stability among beneficiaries and creates the atmosphere of instability and restlessness. It will result in enormous waste of costs since an effort that has been directed to regulating the Trust's affairs towards holding credible elections. It leaves the Trust without any one responsible for looking after the interest of the beneficiaries and the running of the Trust leaving the trust property unprotected. The decision is fuelling factionalism amongst members. It is at a crucial stage before elections of trustees and may reasonably lead to an outbreak of violence in the communities concerned. The Trust has a history of mismanagement of trust funds and infighting about leadership. It is apparent that the first respondent met with an undisclosed group of persons in the absence of the trustees but refuses to disclose the minutes of that meeting which creates a suspicion of bias on the part of the Master's office.

[9] Gumede then refers to how the Trust was formed and the background and in fighting within the Trust. He states that on 17 October 2019, the second and third applicants were appointed as independent trustees. The appointment letter recorded their terms of reference as follows:

Attend to verify beneficiary list, look into how long the board has operated without a quorum, look into alleged mismanagement of funds of the Trust and failure to comply with the Trust deed provisions, investigate the business dealings of the Trust whether those benefits were in the interest of the majority of the beneficiaries,, facilitate election of new board of trustees, balance the books of account to reflect income and expenditure during your tenure and lodge audited financial statements of the Trust, hand over the duties of the Trustees to the new board of trustees.

[10] Gumede states that due to the effort of the 2nd and 3rd applicants the Trust is now in a position to hold free, fair and credible elections. The removal of the second and third applicants

undermines the hard work done and the effort directed towards regularising the Trust. He says the trustees coming in will start

from scratch. He then refers to the crisis that they need to attend.

[11] Gumede states that second and third applicants have furnished a number of reports to the Master reporting on their observation and updating on the progress. Some of the reports were informal, oral and over the telephone. He refers to the report they filed dated 30 July 2020 and some of their subsequent reports. The report of 12 November 2022 deals with all the terms of reference and the response, and it records that the elections of the new board of trustees can be held in three (3) months.

[12] Gumede states that the Master can only remove a trustee for reasons set of in sections 20(2) (a) b (c) of the Act. But the first respondent has not set out the provisions for the Act she relied on in taking the impugned decision. If the first respondent relied on s 20(2)(e) which is the only provision that applies which states that a trustee can be removed if he fails to perform satisfactory any duty imposed upon him by or under this Act or to comply with any lawful request of the Master, she was required to point out what the trustee failed to do, he contends.

[13]. Gumede states that the second and third applicants have made considerable headway in identifying the list of beneficiaries. He and other beneficiaries agree that elections must proceed using the current list of beneficiaries as proposed by the second and third applicants which is the resolution passed by the members in the last general meeting of members. The Master although the approval to hold an election was sought from him twelve (12) months ago has not responded. The beneficiaries and the community have lost faith in the office of the Master, and they shall not accept trustees imposed on them.

[14]. Gumede states that the current trustees have managed to comply with financials requirements and filed audited financials for their period in office. They have updated membership registers, and they are ready to facilitate the election of trustees, with current memberships the elections can be successfully held.

[15]. Gumede states that when the current trustees were appointed a timeframe was set within which to complete their duties. The Master has been extending it. On 9 November 2022 the Master extended the period to 31 March 2023. Gumede refers to a letter dated 9 Nov 2022. The letter acknowledges receipt of the status report dated 12 October 2022, requires that audited financial statements from first financial year after inception in office up to the current financial be lodged, that an extension is granted for six months from 1 October 2022 to 31 March 2023 and it advises as follows: Accordingly be advised that if you do not lodge applications for the appointment of a new board of trustees by the stipulated date and if you do not apply for further extension thereof, I shall cause an investigation in terms of section 16 (2) of TPCA before invoking provisions of section 20(2) (e) of the

Act.

[16] He states that on 15 November 2023 the first respondent by email invited the second and third applicants to a meeting scheduled for 21 November 2023 to meet with the beneficiaries of the Trust. When second and third applicants requested an agenda, the first respondent on 16 November 2023 advised that the matter pertains to their failure to fulfil their mandate as independent trustees as per terms of reference. On 20 November 2023 Nata by email advised first respondent that she was admitted in hospital and had not been released as she had hoped, and she will not be able to honour the meeting. On 21 November 2023 by email first respondent advised that the meeting proceeded in the absence of second and third applicants. She advised that the matter has been long outstanding from 2019 and due to the pressure and some complaints lodged with her office, she had to invite them on short notice and correspondence will be sent by latest 22 November 2023. On 1 December 2023 the first respondent wrote to second and third applicants as follows:

'The above letter refers. I wish to clarify that you were provided with ample time to indicate your availability for the meeting that took place on 21 November 2023. None of you made themselves available. The basis of the meeting was the fact that you and your independent have been in contact with this group of beneficiaries and the rest of beneficiaries. Your alleged list of beneficiaries which was lodged with my office has been criticised and you needed to explain how you reached that number of beneficiaries. I will not provide you with minutes of the meeting which you chose not to attend. The performance of your duties are questioned and you needed to respond at the meeting. The report that you have been sending to this office were questioned. You choose to meet after the fact which has now become a norm. I cannot allow an independent trustee who operates trusts as if he is not accountable to the Master and the beneficiaries to continue in the manner in which you are doing. You have between today and 31st to substantiate the reason why both your and Ms Nata must continue being independent trustees.

[17] On 8 January 2024 the second and third applicants wrote to the first respondent. The letter refers to a meeting held on 4 January 2024. It states that it was agreed that it was more reasonable and prudent that independent trustees continue in their functioning duties and fulfil their mandate. It refers to what is referred to key points discussed justifying extension of their terms of office and it requested the first respondent to inform them in writing the

extension of the term of office in indicating that their immediate target was to facilitate the election of the new board of trustees in cooperation with the Masters Office. On 20 February 2024 the first respondent responded. She stated that the terms of office has not been extended as per the letter dated 21 November 2023. She stated that 'you are therefore removed from office with immediate effect and you are required to return all the trust documents which are in your possession including the LOA that was issued to you on 20 October

2019. On 27 February 2024 the second and third applicants called upon the first respondent to withdraw her letter of 20 February 2024 failing which the matter shall be taken on judicial review in that the decision was tainted with bias since she had met with a Mr Ndlovu

of the Regional Land Claims Commission and a Ms Thobi Mkhize of Mondi to discuss removal of the Independent trustees, the decision was procedurally unfair in that she failed to give an opportunity to respond to the allegations, and her decision was tainted with error of law as to whether she had authority to remove the independent trustees for the reasons she set out in her response. It stated that in a nutshell the decision is tainted with ulterior motives, irrelevant considerations, failure to consider relevant

considerations, bad faith and arbitrariness, based on unauthorised or unwarranted duties of other persons, it is unreasonable in that no reasonable person would have taken such a decision.

[18]. The letter dated 27 February 2024 from the second and third applicants contends apart from what is stated above that the first respondent had made allegations against them which allegations are wrong, and they are denied. It refers to written reasons for the removal of the independent trustees. Yet the so-called written reasons referred to are not part of the papers.

[19] Gumede in a supplementary affidavit stated that on 15 April 2024 he received the copies of letters of authority indicating that first respondent had on 20 February 2024 appointed the second to twelfth respondents as trustees of the trust. He states that seven (7) of the persons appointed were previously removed as trustees of the trust by a court under case no: 10389/14P and 10999/17P and the Master due to a number of irregularities in their management of the trust properly and the failure to implement the trust deed. The first respondent appointed them without consulting with any person. Gumede then mentions what he claims done wrongly by some of the person that have been re-appointed as trustees. He says the said persons were appointed without the knowledge of the members of the trust by the Master in a clandestine manner. He contends that the decision to appoint the new trustees is reviewable on the basis of irrationality, unreasonableness and legality and the new persons must be interdicted from acting as trustees. The letters of authority of the second to eleventh respondents are dated 20 February 2024. They state that in terms of s6 (1) of the Trust Property Control Act 51 of 1988, it is certified that the named persons are authorized to act a trustee of the Trust.

- [20] The fourth, sixth to ninth respondents having sought to be joined, filed a notice to oppose. Themba Eric Msweli deposed to an opposing affidavit. He confirmed that the 11 persons were the trustees and were issued with letters of authority by the Master dated 20 February 2024. He denied that there was urgency in the matter.
- [21] Msweli gives the history of the matter stating that on 1 March 2014 elections for the members of the board of trustees were held. The Master of the High Court on 15 May 2014 declared the said elections null and void and refused to issue letters of authority. Msweli contends that the removal of 2nd and 3rd applicants on 20 February 2024 by the Master is lawful. He states that the issue of verification of beneficiaries has been going on for years. All the people who are genuine beneficiaries should have been given an opportunity to be verified and thereafter cast their votes so that the elections should not be conducted before the verification process is concluded and all the beneficiaries are known. It is premature to hold elections now.
- [22] Between the applicants and the respondents there are accusations and counter accusations that there was maladministration and or underperformance in the carrying out of the duties relating to the administration of the Trust. I have not refereed in detail to these issues. I am of the view that it is not possible to make a factual finding relating thereto on the papers and to make a decision based on it. However, in view of my view of the matter that is not necessary to arrive at a decision on this issue.
- [23] Msweli states that their appointments as interim trustees is in the interest of the beneficiaries. The previous opposing factions are working well since there is a balance and both parties feel the interest of their people are protected.
- [24] The first respondent opposes the application. Letsego Beverly Moathlodi deposed to the affidavit. She states that she is employed by the Office of the Master of the High Court in the province KwaZulu-Natal based in Pietermaritzburg. She states that as part of the terms of reference stipulated that the appointment of the trustees was for a period of six (6) months to present a report on 30 April 2020. Due to Covid 19 Pandemic an extension of time was granted. The 2nd and 3rd applicants furnished financial statements for the year 2021 and 2022, to date that of 2023 has not been delivered.
- [25] Moathlodi states section of the Act empowers the Master to appoint any party as a trustee that subsequent to their appointment the trustees are accountable to the Master. The Act empowers the Master to remove a trustee from the office if such a trustee fails to perform their duty as imposed or agreed upon. She states that 2nd and 3rd applicants' appointment as independent trustees was in line with the provisions of the Act. Since occupying the office as trustees, they had difficulties in executing their mandate. The Trust has a long history of mismanagement of trust funds and infighting within leadership. It is not demonstrated how the removal of the 2nd and 3rd applicants as trustees will destabilise the trust. The current new trustees have been appointed and have started performing their duties. The 2nd and 3rd applicants failed to furnish the Master with audited financial statements which entitles

the Master to remove a trustee that fails to satisfactorily perform any duty imposed on them. The removal of 2nd and 3rd applicants as trustees shall have little to no impact on the holding of the elections. Their removal as independent trustees is in keeping with the powers conferred on the Master.

[26] Moathlodi states the 2nd and 3rd applicants misconstrue the first respondent's decision not to extend their term as independent trustees as if there was reliance only on their failure to perform their duties satisfactorily, whereas it is based on the fact that the Master is empowered to appoint trustees, therefore, the decision not to extend the trustee's term is the prerogative of the first respondent. She states that there was no decision to remove 2nd and 3rd applicants as independent trustees rather a decision was made not to extend their term as independent trustees.

[27] The Act in s1 defines a 'trustee' to mean any person who acts as trustee by virtue of an authorisation under section 6. Section 6(1) provides that any person whose appointment as a trustee in terms of a trust instrument, section 7 or court order comes into force after commencement of this Act shall act in that capacity only if authorized hereto in writing by the Master. Section 7 provides:

'(1) If the office of the trustees cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee.

(2) When the Master considers it desirable, he may notwithstanding the provisions in the trust instrument, appoint a) co-trustee of any serving trustee any person whom he deems fit. Section 20(7)(e) provides that a trustee may at any time be removed from his office by the Master if he fails to perform satisfactorily any duty imposed upon him by or under this Act or to comply with any lawful request of the Master.

[28] Trusteeship is a quasi public office. A trustee may be removed or replaced in terms of the Act. The courts and the Master have jurisdiction to supervise the proper execution of trusts by trustees. The proper administration of trusts is a matter of public concern. Honores's South African Law of Trust 5th ed at 193 states: 'The statute expresses the occasions on which the Master has a duty to appoint broadly and simply. Two contingencies are envisaged: inability to fill the trustee's office (cannot be filled') and vacancy (becomes vacant). The precise ambit of the first expression is open to debate. The most obvious instance is where no trustee is named, and the trust instrument contains no

machinery for appointing one. But does 'cannot be filled' cover also physical and legal disability (in the sense) that the named trustee is vulnerable to immediate removal in the grounds set out in the statute. If so, situations covered would include criminal conviction, sequestration, mental illness or failure to provide security before authorisation within the stipulated time as well as death or refusal to accept appointment. A narrower construction would suggest that only the complete incapacity or disqualification of the trustee named would give the Master the duty to appoint.

- [29] The trustee's appointment derives from the trust instrument itself and not from the Master's authorisation and the authority of the trustees derives from the terms of the trust deed. The trustee carries out his duties of administering the trust under the three main principles, namely; (a) the trustee must give effect of the trust instrument, properly interpreted, as far as it is lawful and effective under the law, (b) the trustee must in the performance of his duties and exercise of power act with care, diligence and skill which can reasonably expected of a person who manage the affairs of another, and (c) except as regards questions of law, the trustee is bound to exercise an independent discretion. In *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) 908-D the court mentioned responsibilities of a trustee as to ensure that the trust functions properly, that the provisions of the trust deed are observed, including substantive and procedural requirements arising from the trust deed are observed.
- [30] The trust deed of the Trust provides in clause 1.4: 'The management of the affairs of the Trust shall be undertaken by the Trustees, who shall be responsible for implementing the terms of this Trust Deed according to its interest and purpose, and subject to any directions of the members in the form of a resolution passed at a general meeting. Election of Trustees shall take place every five (5) years at an annual general meeting of members. The Trustees shall hold office for a five (5) year term from date of the election and shall be eligible to stand for election for a second term, whereafter he or she shall retire. The following persons shall form a board of Trustees, Chairperson, Deputy Chairperson, Treasurer, Secretary, Deputy Secretary and additional members, there shall at all times not more than (9) persons serving as Trustees.
- [31] The first respondent took it upon herself to appoint 2nd and 3rd applicants as independent trustees. There are no provisions in the trust deed giving power to the Master to appoint 'Independent Trustees.' There was no court order authorising the 1st respondent to make such an appointment. The trust instrument directed how the trustees needed to be appointed. The 1st respondent does not state that it was impossible to follow the trust deed provision to appoint trustees. She took it upon herself without any directions from the court to appoint persons of her choice for a period of her choice as trustees, she purported to grant specific powers to the persons she appointed as 'terms of reference' which were not in the trust instrument. The Act has no provision granting the first respondent power to extend term of office of a trustee. The Act provides the circumstances that needed to exist for the appointment of a trustee to be made. There is no provision stating under what circumstances the extension of a term of office of a trustee can be granted. The Act provides under what circumstances a co-trustee can be appointed. A co-trustee is appointed to be a co-trustee of a serving trustee. There is no provision in the Act authorising appointment of more than two persons as trustees by the Master acting in terms of section 7(1) of the Act.
- [32] The first respondent without being so authorised by the Trust Deed or the Act or the Court then in 20 February 2024 issued letters of authority to act as trustees to second to eleventh respondents. These persons had not been appointed as trustees. She acted unlawfully. It is

conceded during the hearing by counsel for the second to eleventh respondents that the purported appointments of the respondents as trustees was not in accordance with or founded in law, so too is their authorisation to act as trustees. Counsel for the first respondent during the hearing could not justify the appointment as well as the issue of letters of authorisation to act as trustees of the second to eleventh respondents.

- [33] The second and third applicants' counsel maintained that the court was seized with the issue of their removal as independent trustees and therefore it was not a matter for the moment of how they were appointed. He argued that the second and third applicants rely on the letters authorising them to act as trustees issued by the first respondent. It follows, argued counsel, that the authorisation could not have been made if there was no appointment as trustees. Both counsel for the first respondent and for the second to eleventh respondents agreed that the second and third applicants as applicants for the relief which included to be reinstated as trustees needed to satisfy the court that they were lawfully appointed as trustees. It is clear that letters of authority to act as trustees issued to the second and third applicants by the first respondent were also not based on any appointment in terms of the Act as trustees. The first respondent rather than supporting the claims of the second and third applicants that conditions were not conducive for the holding of election of trustees in terms of the trust deed blamed them as a failure on their part to hold elections for the election of trustees as provided in the trust deed. The Act authorises the first respondent to appoint trustees if the circumstances specified in the Act exist. It is not for the persons demanding to be appointed as trustees to demand appointment. Such persons as not beneficiaries or having any other interest in the trust have no locus standi to claim to be appointed as trustees.
- [34] The appointment made by the first respondent as independent trustees of 2nd and 3rd applicants on 21 October 2019 as well as the authorisation to act as trustees were not in accordance with the law. As a result, a decision not to extend such appointments cannot be reversed. Likewise, the appointment as trustees of the 2nd to the 11th respondents on 20 February 2024 are not in accordance with the law and falls to be set aside. The first respondent is ceased with the matter. The first respondent must ensure without delay that trustees are elected as provided in the trust instrument without delay. Pending the appointment of the trustees the first respondent is ceased with the management and administration of the affairs of the Trust.
- [35] On the question of costs, the general rule is that costs follow the results. No party has achieved any real success. Each party to bear his or her own costs. No costs to be recovered from the Trust.
- [36] It is ordered as follows:
4. The application is dismissed.

5. The appointment of trustees of Western Shores Communal Property Trust on 20 February 2024, the 2nd to 11th Respondents, is hereby reviewed and set aside.
6. No order as to costs.

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