

SOUTH AFRICA / JUDGMENT

## Makgoba and Others v Ledwaba NO and Others (054/2018) [2018] ZASCA 181 (4 December 2018)

[2018] ZASCA 181

COURT

Supreme Court of Appeal

BEFORE

Seriti, Wallis, Swain, Mocumie, Rogers

CASE / FILE NUMBER

054/2018

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 054/2018

In the matter between:

THUPANE JOSEPH MAKGOBA FIRST

APPELLANT

TFHIGO FRANS MAGOELE SECOND APPELLANT

GRACE MAHLODI MASHABA THIRD

APPELLANT

MOTLOKWA SUZAN MOJAPELO FOURTH

APPELLANT

SAMUEL MASETLA FIFTH

APPELLANT

JOSEPH MOTSWI SIXTH

APPELLANT

MOTLATSO IVY MAGOELE SEVENTH

APPELLANT

MANTILA RONNY HLOKWA EIGHTH

APPELLANT

AJITA SIMON ASITI NINTH

APPELLANT

THETELE JOSEPH MALATJI TENTH

APPELLANT

REFILWE IRENE LETSOALO ELEVENTH

APPELLANT

MATLOU JAQUELINE MAKGOBA TWELFTH

APPELLANT

MAKGOBA ASSET MANAGEMENT (PTY) LTD THIRTEENTH

APPELLANT

And

MAPONYA LAZARUS LEDWABA NO FIRST

RESPONDENT

GISELA STOLS N.O. SECOND

RESPONDENT

THE MASTER OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA THIRD

RESPONDENT

THE MINISTER FOR RURAL DEVELOPMENT

AND LAND REFORM FOURTH

RESPONDENT

PROVINCIAL SHARED SERVICES CENTRE OF

THE DEPARTMENT OF RURAL DEVELOPMENT

AND LAND REORM, LIMPOPO PROVINCE FIFTH

RESPONDENT

THE REGIONAL LAND CLAIMS COMMISSIONER,

LIMPOPO PROVINCE SIXTH

RESPONDENT

THE MAMPHOKU MAKGOBA COMMUNITY'S

STEERING COMMITTEE SEVENTH

RESPONDENT

Neutral citation: Makgoba & others v Ledwaba NO & others (054/2018)

[2018] ZASCA 181 (04 December 2018)

Coram: Seriti, Wallis, Swain and Mocumie JJA and Rogers AJA

Heard: 15 November 2018

Delivered: 04 December 2018

Summary: Trust – period of office of Trustees expiring – no longer Trustees – election of new Trustees – election of new Trustees – appointment of further beneficiaries.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Makgoka J sitting as court of first instance):

1. The appeal is upheld to the extent that the order of the court a quo is replaced with what follows in paragraphs 2 to 7 below.
2. It is declared that the first to twelfth appellants' term of office as trustees terminated with effect from 26 June 2013, and any subsequent letters of authority issued to the first to twelfth appellants, to date of this order are set aside.
3. The first and second respondents are to convene and hold a general meeting of the Trust within 60 calendar days of date of this order for the purpose of nominating and appointing a new Board of Trustees, which will not include the first, second and third applicants,[1] who are ineligible to stand for election.
4. Only those beneficiaries who appear on the list of 603 beneficiaries (Annexure A14, record, pp196-225) are entitled to attend and vote at the general meeting ordered in paragraph 3 above.
5. All the parties will use their best endeavours to advertise the general meeting referred to in paragraph 3 above to ensure that all 603 beneficiaries receive notice of the general meeting.

6. The nomination and appointment of a new Board of Trustees at the general meeting referred to in paragraph 3 above will take place in accordance with the relevant provisions of the Trust Deed.
7. The newly appointed Board of Trustees shall within 60 calendar days of date of their appointment, after the elections and receipt of letters of authority, convene a general meeting to appoint further beneficiaries, who are not part of the list of 603 beneficiaries, as contemplated in clause 5.2 of the Trust Deed, which general meeting shall be conducted with the oversight of the Master and the Department of Rural Development and Land Reform.
8. The appellants to pay the costs of this appeal.

Mocumie JA (Seriti, Wallis and Swain JJA and Rogers AJA concurring)

- [1] This is an appeal by the first to the twelfth appellants against the order of the Gauteng Division of the High Court, Pretoria (the court a quo) setting aside the decision of the third respondent, the Master of the High Court, Pretoria, (the Master), to remove the trustees of Mamphoku Makgoba Community Trust (Trust Registration No IT8699/2004) (the Trust). The parties were ordered to pay own costs. Not satisfied with the order of the court a quo, the appellants unsuccessfully applied for leave to appeal to the court a quo. This appeal is before us with the leave of this Court. The primary question in this appeal was whether the court a quo was entitled to order the immediate resignation of the appellants as trustees of the Trust after reinstating them. As will be seen, this assumed secondary significance.
- [2] The appellants were members of the Board of Trustees of the Trust until the expiry of their term of office on 26 June 2013 pursuant to clause 6.4 of the Trust Deed. Nonetheless they continued in office until their removal by the Master on 22 February 2017. The deponent to the founding affidavit, Mr Thupane Joseph Makgoba, was the chairperson. The respondents were respectively; two independent

trustees appointed by the Master (first and second respondents), the Master (third respondent), the Minister of Rural Development and Land Reform (fourth respondent), the Provincial Shared centre-Department of Rural Development and Land Reform (fifth respondent), the Regional Land Claims Commission (sixth respondent) and the Mamphoku Makgoba Community's Steering Committee (seventh respondent) also known as the Makgoba Transfer Committee or the Makgoba Youth Committee or the Makgoba Beneficiaries Committee. The third to sixth respondent are cited for their interest in the matter.

- [3] The major challenges in advancing the objects of the Trust in favour of the community were as follows; allegations of maladministration of the Trust properties by the initial trustees, dissatisfaction amongst the intended beneficiaries with the failure of the initial trustees to hold Annual General Meetings to elect new trustees who would identify and verify members of the Trust who had an interest in and would be entitled to vote on issues related to the Trust. All these allegations have been compounded by the appellants holding onto power

despite the existence of a final court order made on 24 November 2015 declaring that their term of office had expired by effluxion of time at the end of what was the three years maximum period for holding trusteeship as provided for in clause 6.4 of the Trust Deed. There was no appeal against that order.

- [4] In brief, the facts of this matter which are common cause between the parties are as follows. Prior to 2004 the Makgoba community lodged a number of land claims with the Land Claims Commission in terms of the Restitution of Land Rights Act 22 of 1994 over land consisting of 39 farms located in the Magoebaskloof area in the Limpopo province. In order to facilitate the transfer of and the housing of the properties (farms) to be transferred pursuant to the various land claims, to receive transfer of the said farms and hold them for and on behalf of the beneficiaries and to generally facilitate the development of the said farms in the interests of the beneficiaries of the Trust, on 9 September 2004 the Trust was established and registered.[2] The Trust Deed sets out the identities of the initial trustees and beneficiaries. Although the Trust was created in 2004, the initial

trustees did not have any assets to manage until around 2008/2009 when the properties forming the subject matter of the land claims

were transferred into the name of the Trust. Pursuant to the General Meeting of the Trust held on 16 August 2015, it was resolved that a company under the name of Makgoba Asset Management (Pty) Ltd (MAM) be registered and incorporated under the Companies Act 71 of 2008 with the purpose of leasing all the property owned by the Trust by way of a 40 years notarial lease at an initial rental of R550 000 per year for the first four years with annual increments thereafter. MAM in turn subleases and manages such properties on behalf of the Trust. All profits derived by MAM accrue to the Trust. The Trust is represented by the 1st and 10th appellant on the board of MAM.

- [5] Sometime in 2013 the seventh respondent brought an urgent application in the high court complaining about the appellants' conduct. The application was struck off the roll for lack of urgency.
- [6] In 2015, the seventh respondent brought another application. On 24 November 2015 after hearing all parties, Mabuse J granted an order which reads:

'It is hereby declared that the term of office of the current Board of Trustees that was elected on 27 June 2010 and whose election was subsequently confirmed by the Master of the High Court on 27 October 2010 expired by effluxion of time at the end of a period of three years reckoned from 27 June 2010.'

- [7] Notwithstanding the order, the appellants continued in office. They failed to hold the prescribed general meetings to account to the beneficiaries on the finances of the Trust and to pay out dividends equally to all the beneficiaries as set out in clause 9.2 of the Trust Deed. [3] They refused to relinquish their positions as the Trust Deed prescribed in clause 6.4[4] apparently on the basis of a contention that the termination of their office did not take effect until replacement trustees were elected at an annual general meeting which they alleged

were made impossible to convene by the seventh respondent and its members. The Master intervened and asked the trustees to account by requesting documents from them. The Master's endeavours did not succeed. She was not satisfied with the response and decided to exercise her powers under s 20(2) (e) of the Trust Property Control Act 57, 1988 (the Act). She removed all the appellants including the second and third respondents from their office in a letter dated 22 February 2017.

[8] The appellants did not accept this but approached the high court on an urgent basis. According to the Notice of Motion they sought an order in the following terms:

'1. The rules relating to forms, notice and time periods are dispensed with and this application is heard as an urgent application as provided for in Rule 6(12) of the Uniform Rules of Court;

2. The decision of the Third Respondent taken on 22 February 2017 to remove the 1st – 12th Applicants as trustees of the Mamphoku Makgoba Community Trust [Trust Registration No. IT8699/2004] ("The Trust) in terms of section 20(2)(e) of the Trust Property Control Act 57 of 1988 ("the TPC") is set aside in terms of section 23 of the TPC, alternatively is reviewed and set aside in terms of section 23 of the TPC, read together with the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");

3. The 1st – 12th Applicants are hereby reinstated as trustees of the Trust;

4. The 1st – 12th Applicants and the 1st and 2nd Respondents ("the trustees") are directed to convene a meeting of the board of trustees of the Trust within 10 (ten) days of date of this order to verify and

finalise the register of beneficiaries of the Trust by:

4.1. including the 455 beneficiaries identified in 2008/2009 with the assistance of the 4th – 6th Respondents ("the initial 455 beneficiaries") in such register:

4.2. including in such register those additional beneficiaries which were appointed at the general meeting of the Trust held on 26 August 2012 ("the Trust's additional beneficiaries") whose names also appear on the further register of beneficiaries produced by the 4th – 6th Respondents during or about January/February 2016, which contains the names of 603 beneficiaries (which includes the 455 initial beneficiaries);

5. The trustees are directed, within 30 (thirty) days of the meeting of the board of trustees provided for in paragraph 4 above, to convene a general meeting of the Trust in order to nominate and vote on the appointment of a new board of trustees, at which meeting only those beneficiaries whose names appear on the verified and finalised list as produced at the meeting provided for in paragraph 4 above may attend and vote;

6. In the alternative to paragraphs 4 and 5 above, the trustees are directed to convene a general meeting of the Trust in order to nominate and vote on a new board of trustees, at which general meeting only the initial 455 beneficiaries may attend and vote,

together with the additional trust beneficiaries which were added to the initial register of beneficiaries at the general meeting of the Trust held on 26 August 2012;

7. In the further alternative to paragraphs 4 – 7 above, the trustees are directed to convene a general meeting of the Trust

within 30 (thirty) days in order to nominate and vote on a new board of trustees, at which general meeting only the initial 455

beneficiaries may attend and vote;

8. In the further alternative to paragraphs 4 – 7 above, this Court gives directions to the trustees as to the holding of a general meeting of the Trust to appoint a new board of trustees, which directions will include which beneficiaries may attend such meeting and may vote at such meeting;

9. The Applicants are directed to pay the costs of this application;

10. In the alternative to paragraph 9 above and only in the event of any of the Respondents opposing the relief sought, that such Respondent be directed to pay the costs of this application jointly and severally with any other opposing Respondent;

11. The Applicants are granted further and/or alternative relief.'

[9] After hearing the parties, in motion proceedings, Makgoka J, based on differing draft orders of the competing parties, granted the following order:

'1. The decision of the third respondent (the Master) taken on 22 February 2017 to remove the first to twelfth applicants as trustees

of the Mamphoku Makgoba Community Trust (the Trust) in terms of section 20(2) of the Trust Property Control Act 57 of 1998 is set

aside;

2. The first to twelfth applicants are reinstated as trustees of the trust and the Master is directed to issue new letter of authority

evidencing such reinstatement;

3. Upon receipt of the letter of authority referred to above, the first to twelfth applicants shall each resign with immediate effect as trustees;

4. The Master is directed to consider the appointment of three further independent trustees for the interim period until the general meeting of the Trust is held;

5. The first to twelfth applicants are obliged to co-operate in good faith with the new trustees to hand over the records of the Trust in preparation of the general meeting of the Trust;

6. The Trust will have a further verification meeting on 22 April 2017 at which meeting the 603 beneficiaries reflected in annexure  
*“A14” annexed to the applicant’s founding affidavit, will be entitled to verify further beneficiaries in accordance with clause 5.2 of the Trust Deed; (emphasis added.)*
  7. The general meeting of the Trust will be held on 22 May 2017 at a time and venue to be determined by the trustees, which meeting shall be attended by all beneficiaries verified and confirmed in the verification meeting on 22 April 2017 referred to above;
  8. All the parties will use their best endeavours to advertise the general meeting to ensure that all beneficiaries receive notice of the general meeting;
  9. At the general meeting referred to above, the beneficiaries will nominate and vote for a new board of trustees, which will not include the first, second and third applicants, who are ineligible to stand for re-election;
  10. The nomination and appointment of a new board of trustees at the general meeting of 22 May 2017 will take place in accordance with the relevant provisions of the Trust Deed;
  11. Each party is directed to pay its own costs.’
- [10] In this Court, the appellants conceded that their term of office had come to an end. They also accepted that we should give an order to the effect that new trustees should be appointed and first and second respondents attend to this. The only remaining issue, thus, was whether, before new trustees could be appointed, there had to be a verification meeting as per para 6 of the order of Makgoka J. Some paragraphs of that order are superfluous and to the extent necessary will be amended accordingly in the order that will follow hereafter.
- [11] As alluded to above the parties presented this Court with a draft order in which, on a single aspect, they presented two alternatives.

For completeness it is convenient to quote the draft order as a whole. It reads:

‘Alternative 1

The newly appointed board of trustees shall, as soon as possible after the election, convene a general meeting to appoint further

beneficiaries, who are not part of the list of 603 beneficiaries, as contemplated in clause 5.2 of the Trust Deed, which general meeting shall be conducted with the oversight of the Master and the Department of Rural Development and Land Reform.

Alternative 2

After the election of the new Board of Trustees, the first and second respondents shall remain as independent trustees solely for the purpose of conducting a verification exercise of beneficiaries who do not form part of the list of 603 beneficiaries.

7.1. The independent trustees will commence the verification process within thirty days of the election of the trustees.

7.2. This verification exercise will be conducted under the oversight of the Master and the Department of Rural Development and Land Reform.

7.3. For the purposes of ensuring the independence of the verification exercise, the newly elected trustees will not take part in the new verification exercise.

7.4. Upon conclusion of the verification exercise, the independent trustees shall convene a special general meeting at which the

existing beneficiaries shall vote on the approval or rejection of each newly identified beneficiary as contemplated by clause 5.3 of the Trust Deed.

7.5. Upon completion of the election contemplated in paragraph 7.4 above, the independent trustees shall present a fresh register of beneficiaries to the Trust, the Master, and the Department of Rural Development and Land Reform.

7.6. The letters of authority granted to the independent trustees will terminate upon completion of the final register of beneficiaries.”

[12] In the light of what the first and seventh respondents proposed in the draft order (ie the 2nd alternative) it necessary to say something about the powers of a court to make orders in terms of s 23 of the Act. Section 23 of the Act provides:

‘Any person who feels aggrieved by an authorization, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under this Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit.’

(Emphasis added).

[13] Reverting to the proposal of the respondents under the 2nd alternative, the court a quo heard this matter in motion proceedings

and granted the order on the basis of the draft orders presented by the parties. By the nature of motion proceedings, the court a quo, did not deal with the merits and or evidence, as none other than by way of the affidavits where there were factual disputes, was presented. Consequently, there are no merits or evidence before us on which this Court can justifiably invoke s 23 as prompted by both counsel for the respondents. In other words, there are no merits or evidence to link to any order which this Court may deem fit. In simpler terms, there is no legal foundation on which this argument can be sustained. It was not raised before the hearing of this appeal to enable the other parties to address it - which can be prejudicial, judging, from amongst others, the accusations the parties have levelled against each other and what the Master termed ‘mistrust’ which had come between the parties over six years of the existence of the Trust.

[14] Clause 5 of the Trust Deed which deals with the process by which trustees shall be elected by beneficiaries reads as follows:

‘5.1. The initial Beneficiaries shall be those persons as per list attached hereto marked “C”.

5.2. Further Beneficiaries shall be appointed by the incumbent Beneficiaries in a General Meeting called for that purpose in terms of paragraph 15 hereof.

5.3. The appointment of new Beneficiaries must meet with the approval of at least two thirds (2/3) majority of the total number of Beneficiaries entitled to vote.

5.4. The full particulars of all Beneficiaries shall be entered into a Register kept for that purpose at the offices of the Trust on the Farm.’

This is a clear indication that this Court is not empowered to act outside this process. It was accepted by all the parties that if this Court was not empowered to grant an order in the terms of the 2nd alternative, we should nonetheless direct the new trustees to hold meetings for the purposes of appointing further beneficiaries.

[15] Besides, on a procedural point, this proposal will not withstand scrutiny. When the appellants applied for leave to appeal the specified paragraphs of the order of the court a quo they were not satisfied with, the respondents opposed leave to appeal then, they also opposed leave to appeal in this Court. In both instances they did so without any demur of a counter appeal. They are thus non-suited to raise it now in this Court.

[16] It is clear from what is set out above that the Trust under the administration of the appellants has been dysfunctional and has for more than six years not served the needs of the beneficiaries it was created for and the community at large. The appellants abdicated their fiduciary responsibility and had to be removed from their office of trusteeship to allow new trustees to be elected and run the Trust as it befits their office. To allow their continued presence in the office of the Trust would perpetuate the Trust being improperly administered and will be detrimental of the welfare of the beneficiaries, contrary to the provisions of clause 6.4 of the Trust Deed and the existing order of Mabuse J.

[17] The issue of costs. Counsel for the appellants submitted that the appellants were partially successful and therefore entitled to their costs. He proposed that each party pay its own costs. Both counsel for the respondents argued to the contrary. First, if this Court agreed with the removal of the appellants, as was argued that it should from the onset, it would in substance confirm the decision of the Master which the appellants did not agree with and had unsuccessfully challenged in the high court before Mabuse J and in the court a quo. Thus the respondents would be successful and entitled to their costs. Second, it was submitted that this Court has to take into account the fact that, upon the order of the court a quo reinstating them, and being well aware of the second leg of the order of the court a quo that they should immediately thereafter resign, the respondents rushed to the Master to be

re-appointed as trustees. The appellants relentlessly persisted with that point on leave to appeal to this Court and in this Court. They only abandoned it on the morning of the hearing of the appeal in this Court during argument. This Court should censure such conduct in the strongest terms through a punitive cost order against them. I agree with the respondents in principle on the costs, but not on the punitive costs.

[18] In the result, the following order was granted:

3. The first and second respondents are to convene and hold a general meeting of the Trust within 60 calendar days of date of this order for the purpose of nominating and appointing a new Board of Trustees, which will not include the first, second and third applicants, who are ineligible to stand for election.

B C Mocumie

Judge of Appeal

Appearances:

For Appellants: A G South SC

Instructed by:

Thomas & Swanepoel Inc. c/o Delport Vanden Berg, Pretoria

Symington De Kok, Bloemfontein

For First Respondent: M Sibanda

Instructed by:

Richard Spoor Attorneys, Johannesburg

Webbers Attorneys, Bloemfontein

For Seventh Respondent: V. M. Magwane

Molaba Attorneys, Pretoria North

Rampai Attorneys, Bloemfontein

[1] The three applicants referred to in this paragraph are same three appellants in this appeal.

[2] The establishment and registration of the Trust was published in Government Notice No 26496 dated 2 July 2004 as amended for the

restitution of land rights, attached to the papers as Annexure A.

[3] Clause 9.2 reads: 'To pay over to the Beneficiaries their equitable dividends from profits accrued as a result of the farming activities on the Farms, all Beneficiaries receiving equal dividends.'

[4] Clause 6.4 provides: ‘...a trustee shall hold office for a period of no longer than 3 (THREE) years upon which he shall resign.’

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Prepared on 12 October 2026 · Esheria