

SOUTH AFRICA / JUDGMENT

Mfeka and Others v Nkawana and Others (AR33/2019) [2020] ZAKZPHC 6 (28 February 2020) [2020] ZAKZPHC 6

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Bezuidenhout, Madondo, Moodley

CASE / FILE NUMBER

AR33/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

CASE

NO: AR33/2019

In

the matter between:

RAYMOND
HLENGWA MFEKA
First Appellant
CYNTHIA
PHUMZILE MBUYAZI
Second Appellant
THE
BHANGAZI COMMUNITY TRUST
Third Appellant
and
GUMEDE
EPHRAIM NKAWANA
First Respondent
SITHOLE
MBULALENI THWALULU
Second
Respondent
MBUYAZI
MHLUPHEKI
Third Respondent

THE
MASTER OF THE HIGH COURT, PIETERMARITZBURG
Fourth Respondent

Coram: Bezuidenhout AJ with Madondo DJP et Moodley J concurring
Heard: 29 November 2019
Delivered: 28 February 2020
O
R D E R
On
appeal from: Pietermaritzburg High Court (Sishi J sitting as court of
first instance):
(a)
The appeal is struck from the roll with costs;
(b)
The trustee, Mr Raymond Hlengwa Mfeka, who brought the appeal
proceedings without authority
to do so, is to pay the costs in his
personal capacity.

JUDGMENT

Bezuidenhout AJ

- [1] This matter involves the Bhangazi Community, who, historically was a group of people who once lived in the area of the St Lucia Estuary. During the 1950's, the erstwhile government commenced with evictions and forced removals of the members of the community who lived in this area, in order to give effect to plans to establish a conservation area and to convert other areas into pine and gum plantations.
- [2] The St Lucia Wetlands Park (as it was previously known) was accordingly established as a conservation area, and in 1999 it was declared a world heritage site.
- [3] The communities who had been dispossessed of their land rights, filed a claim for restitution, as they were able to do after the enactment of the Restitution of Land Rights Act.
[1]
- [4] Ultimately, the claim was settled around September 1999 on the basis of a financial settlement with certain ongoing benefits and, in addition, the Bhangazi Community was awarded a five hectare plot of land situated on the south-eastern shore of Lake Bhangazi, which was intended for the creation of a cultural centre and museum to inter alia, commemorate the community's ancestors.

- [5] Following the settlement of the land claim, a memorandum of understanding was concluded between the community and the KwaZulu-Natal Nature Conservation Board, in terms of which the community would, inter alia, receive a community levy from the Conservation Board.
- [6] These funds would be managed by a trust, which ultimately lead to the registration of the Bhangazi Community Trust ('the trust') with the Master of the High Court, Pietermaritzburg (the fourth Respondent) under registration number IT736/2001/PMB.
- [7] Membership of the trust is regulated by clause 7.2 of the trust deed, in terms of which 'each original household shall be entitled to register only one of their number as a member'. In terms of the

settlement agreement concluded between the Bhangazi Community and the government, there would at all times only be 556 members, as 556 beneficiary families were identified, and listed in an annexure to the settlement agreement. Each household would accordingly be entitled to have one member listed as a member, and where such member dies, it was expected of the family to inform the trustees in order for a new member from that particular household to have his/her name entered on the list of members.

- [8] The first to third respondents, being the first to third applicants in the court a quo (hereafter referred to as 'the three beneficiaries'), brought an application in their capacities as members and bona fide beneficiaries of the trust. They sought drastic and far-reaching relief as a result of various complaints against the trustees of the trust, as well as relief against the Master of the High Court (third respondent in the court a quo and fourth respondent before this court). The complaints included, inter alia:
 - (a) The trustees had failed to maintain the required number of trustees, which in accordance with clause 12.3 of the trust deed, requires that there shall at all times be not less than seven and not more than twenty persons serving as trustees. At the time of the bringing of the application, there were only two trustees remaining from the original sixteen appointed at the inception of the trust. The two remaining trustees were the first and second respondents in the court a quo and are now the first and second appellants before us (hereafter referred to as 'the remaining trustees');
 - (b) The remaining trustees had failed to maintain the membership register since the inception of the trust. In terms of clause 8.1 of the trust deed, it shall be the responsibility of the trustees to establish and maintain a membership register;
 - (c) The remaining trustees had failed to submit audited annual financial statements since the inception of the trust in 2001 and also failed to provide the beneficiaries with such financial statements despite being requested to do so. Clause 20.2 of the trust deed states that:

‘The trustees shall ensure that the trust keeps proper books of account, financial statements (including capital and revenue accounts) shall be prepared at least once a year... Such books of account and financial statements shall be audited and certified in a customary manner by an independent practicing Chartered Accountant.’

(d) The Master failed to respond to various requests which were intended to ascertain whether the remaining trustees had submitted annual financial statements.

[9] The three beneficiaries claimed the following relief in their notice of motion:

‘1. That the First and Second Respondent be and hereby removed as the Trustees for the time being of the Bhangazi Community Trust. (sic)

2. That the First and Second Respondent be and hereby ordered to surrender the Letters of Authority issued to them by the Third Respondent. (sic)

3. That the First and Second Respondents be and hereby ordered to submit all documents in their possession including Financial Statements from the inception of the Trust to date hereof to the Third Respondent, within 5 days of the Order of this Court. (sic)

4. That the Third Respondent be and hereby ordered to institute a forensic investigation into the affairs of the Fourth Respondent within 30 days of the order of this Court. (sic)

5. That the accounts of the Fourth Respondent be and hereby frozen with an immediate effect. (sic)

6. That the accounts of the First and Second Respondents’ entities, if any which do business with the iSimangaliso Wetlands Park be and hereby frozen with immediate effect. (sic)

7. That the Third Respondent be and hereby directed to appoint an Interim Board to carry out the functions of the Trustees of the Fourth Respondent in terms of the Trust Deed. (sic)

8. That the interim Board be and hereby shall be given the powers to appoint an independent company; and that both the interim Board and the appointed independent company be given the function of updating the existing beneficiary list within one month of the date of the Order of the Honourable Court.

9. That the costs of the appointed independent company and the Interim Board shall be borne by the Fourth Respondent.

10. That a progress report on the investigation sanctioned by the Third Respondent should be filed by the Third Respondent with this Honourable Court and served on the Applicants’ attorneys within one month of the Order of this Court.

11. That a Final Report on the investigation sanctioned by the Third Respondent should be filed with this Honourable Court and served on the Applicants’ attorneys with in THREE (3) months of the Order of this Court.

12. That the Applicants shall be entitled to file their response to the Final Report within one month after it has been served upon the Applicant's attorneys.
 13. That the Interim Board should call an elective Annual General Meeting, after the completion of the updating of the existing Beneficiary List, and assist the Beneficiaries with the elections of the new Board of Trustees of the Fourth Respondent which elections shall take place under the auspices of the Independent Electoral Committee (IEC).
 14. That the Interim Board shall be released from the administration of the Fourth Respondent once the Beneficiaries of the Fourth Respondent are of the opinion that the Fourth Respondent is in a state of good order.
 15. That the costs of this application shall be borne by the Third Respondent, and the First and Second Respondents, shall only be liable for the costs of this application in their personal capacities jointly and severally the one paying the other to be absolved, with the Third Respondent only in the event of them opposing this application.
 16. Further and/or alternative relief'
- [10] The remaining trustees opposed the application, mainly on the grounds that:
- (a) The relief sought was unnecessary;
 - (b) That the relief sought included drastic orders which amounted to structural relief or a supervisory order, and that this case was not one in which it would be appropriate relief;
 - (c) Certain aspects of the structural relief contemplated were incompetent;
 - (d) If the relief sought was granted, there would be in existence two conflicting orders of court (referring to another order made on 11 February 2017 under case number 6293/2016P).
- [11] Sishi J, in the court a quo, made the following order (which is now the subject of this appeal):
- '1. That the first and second respondents are hereby removed as the trustees for the time being of the Bhangazi Community Trust with immediate effect.
2. That the first and second respondents are ordered to surrender the Letters of Authority issued to them by the third respondent.
 3. That the first and second respondents are ordered to submit all documents in their possession including financial statements from the inception of the trust to date hereof to the third respondent, within 10 days of the order of this court.
 4. That the third respondent is ordered to institute a forensic investigation into the affairs of the fourth respondent within 30 days of the order of this court.

5. That the Gold Business Account number 62029175834 of the fourth respondent held at First National Bank Mtubatuba branch, and all other bank accounts in the name of the fourth respondent are hereby frozen with immediate effect.
 6. That the accounts of the first and second respondents' entities, if any which do business with the iSimangaliso Wetlands Park be and hereby frozen with immediate effect.
 7. That the third respondent is directed to appoint an interim board to carry out the functions of the trustees of the fourth respondent in terms of the trust deed within 15 days of the date of this order.
 8. That the interim board be and hereby shall be given the powers to appoint an independent company; and that both the interim board and the appointed independent company be given the function of updating the existing beneficiary list within one month of the order of this court.
 9. That the costs of the appointed independent company and the interim board shall be borne by the fourth respondent.
 10. That a preliminary report on the investigation sanctioned by the third respondent should be filed by the third respondent with this honourable court and served on the applicants' attorneys within three (3) months of the order of this court.
 11. That a further progress report on the investigation sanctioned by the third respondent should be filed with this honourable court and served on the applicants' attorneys with in six (6) months of the order of this court.
 12. Any of the parties may at that stage approach the court on the same papers, supplemented as necessary, for further directions, if so advised.
 13. That the interim board should call an elective Annual General Meeting, after the completion of the updating of the existing beneficiary list, and assist the beneficiaries with the elections of the new board of trustees of the fourth respondent.
 14. That the interim board shall be released from the administration of the fourth respondent once the third respondent is of the opinion that the fourth respondent is in a state of good order.
 15. That the costs of this application shall be borne by the fourth respondent.'
- [12] Before us on appeal, counsel for the remaining trustee (the second appellant having passed away before the hearing of the appeal) raised various issues in argument as well as in his heads of argument, in respect of which it was submitted the court a quo erred as follows:
- (a) The order made by Sishi J was in conflict with the order granted under case number 6293/2016P, specifically with reference to paragraph 1 of the aforementioned order which dealt with the removal of the remaining trustees;

- (b) The relief claimed and granted, was drastic in nature, and the applicants seeking such relief were only three beneficiaries out of a possible 556 beneficiaries, and none of the other beneficiaries had ever approached the court or the Master with complaints regarding the administration of the trust;
- (c) The complaints raised by the three beneficiaries regarding the administration of the trust were effectively refuted by the trustees in their papers;
- (d) Some of the relief granted amounted to structural relief, as it included an order that the Master had to file a progress report within one month of that court's order, and thereafter file a final report within three months of the court's order, which relief was not appropriate in the present matter;
- (e) The Master cannot be ordered to initiate a forensic investigation into the affairs of a trust, as, in terms of s 16(2) of The Trust Property Control Act ('the Act'),^[2] it is within the Master's discretion to 'cause an investigation to be carried out'. The Master cannot be ordered to do so simply on the application by discontented beneficiaries;
- (f) The removal of a trustee from office by the court should only be done if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries, and in the present case there was no basis for such removal.

[13] All of these issues are however academic, as a result of an issue raised by the three beneficiaries before the court a quo and on appeal, namely: that the remaining trustees did not have the legal authority to oppose the application. From that it would follow that the remaining trustees also had no legal authority to appeal to this court. This issue would also be relevant with reference to the alleged conflicting order in case number 6293/2016P made on 11 February 2017, which was referred to herein above in paragraphs 10 and 12.

[14] At the time of the bringing of the application, there were only two of the original remaining trustees left. Clause 12.3 of the trust deed states that: 'There shall at all times be not less than seven and not more than twenty persons serving as Trustees.'

[15] The remaining trustees denied that there were only two trustees left, and alleged that four persons were elected as trustees during 2009, a further person was co-opted by a resolution of trustees during April 2012, and another person was co-opted in 2016. Apparently, a letter was written on 6 May 2016 to the Master to request an amended letter of authority in respect of the eight persons referred to in the letter, who had either been elected or co-opted as trustees. Apparently, no response was received.

[16] These new trustees were referred to as de facto trustees, as they had not yet received letters of authority. Section 6(1) of the Act provides that:

'Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master.'

[17] Sishi J found that as the two remaining trustees were the only lawfully appointed trustees remaining, a number of clauses in the trust deed, in addition to clause 12.3 referred to hereinabove, could never be fulfilled.

[18] The most important clause was perhaps clause 15.3, in terms of which the quorum necessary for the transaction of any business of the board of trustees was four trustees.

[19] In his heads of argument, counsel for the three remaining beneficiaries referred us to the decision of *Land and Agricultural Bank of South Africa v Parker & others*[3] where Cameron JA (as he then was) said the following:

‘. . .It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act. Who the trustees are, their number, how they are appointed, and under what circumstances they have power to bind the trust estate are matters defined in the trust deed, which is the trust’s constitutive charter. Outside its provisions the trust estate cannot be bound.

[11] It follows that a provision requiring that a specified minimum number of trustees must hold office is a capacity-defining condition. It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.’ (references omitted)

[20] In *Parker*, the full court was faced with the situation where the trust’s legal standing and the lack thereof, was only raised after argument had been concluded and the full court had already prepared its judgment wherein it was going to allow the trust’s appeal. A memorandum was placed before it which contained submissions on the issue of legal standing, and which the court refused to entertain because it was submitted informally, irregularly and without consent. The bank subsequently appealed to the Supreme Court of Appeal. Cameron JA was of the view that the bank was entitled to raise the issue of the trust’s standing as a litigant at any stage ‘even when, after argument before the Full Court, it became clear that the appeal was likely to succeed on the two-trustee argument.’[4]

[21] Consequently, the order of the full court (which found in favour of the trust) was substituted with an order striking the appeal off the roll, as none of the actions of the trust during the relevant period were validly taken.

[22] At the hearing of the matter before us, counsel for the three beneficiaries persisted with his argument that the so called *de facto* trustees could not bind the trust. He was briefly referred by myself to the views expressed in *Honoré’s South African Law of Trusts*,[5] where the following was said:

‘It was accordingly held in *Simplex v Van der Merwe* that trustees appointed in terms of a trust deed who had accepted appointment as such, but whom the Master had not yet granted

statutory authority to act in that capacity, could not validly conclude a contract so as to bind the trust.’ (references

omitted)

[23] In contrast to the aforementioned, these authors however made reference on page 221 to the case of *Watt v Sea Plant Products Bpk & others*[6] where a:

‘. . . plaintiff [had] issued summons against the trustees before the Master had authorized them to act in that capacity. The court held that s 6 meant only that “a trustee may not, prior to authorization, acquire rights for, or contractually incur liabilities on behalf of the trust”. The provision did not regulate the trustee’s legal capacity to be sued . . . nor an authorized trustee’s liability for a wrongful act in concluding the affairs of the trust.’

[24] Counsel for the beneficiaries however maintained his view that the trust cannot be bound by the remaining trustees’ actions.

[25] Counsel for the remaining trustees aligned himself with the views expressed in *Honoré*, and submitted that although the trust cannot be contractually bound by the actions of the remaining trustees, it does not mean that it cannot make decisions. He did not address us on the *Parker* decision. When confronted with the fact that the Act did not provide for de facto trustees, he nonetheless persisted with his argument, and added that it was practical and realistic to allow the trust to function with the co called de facto trustees in place.

[26] Neither counsel appearing before us referred to the decision of *Lupacchini NO & another v Minister of Safety and Security*[7] where *Nugent JA* discussed the issue of unauthorised trustees commencing legal proceedings on behalf of a trust. Reference was made to the *Parker* decision in which a court action, brought at the instance of trustees whose number fell short of the minimum required by the trust deed, was held to be a nullity.[8]

[27] In *Lupacchini*, the court a quo had relied on the decision of *Watt v Sea Plant Products Bpk* (supra) as quoted hereinabove from *Honoré* in coming to its decision.

[28] *Nugent JA*, after discussing and analysing the various cases, as well as section (6)(1) of the Act, came to the following conclusion:[9]

‘[22] I regret that I can find no indications that legal proceedings commenced by unauthorised trustees were intended to be valid. On the contrary, the indications seem to me all to point the other way. Unless it were to be the case that all transactions performed in conflict with the section are to be treated as valid – which clearly cannot be the case, because otherwise the Act would be altogether ineffective – then I find nothing to distinguish its effect on legal proceedings. Indeed, it would seem to me that the case is even stronger for finding legal proceedings to be a nullity. . . .

[23] . . .The section makes it clear that a trustee may not act in that capacity at all without the requisite authorisation. . . Parker makes it clear that legal proceedings commenced by persons who lack capacity to act for the trust are a nullity. . . .’

[29] Lupacchini was also referred to by a full bench in the matter of Hyde Construction CC v Deuchar Family Trust & others[10] where Rogers J said the following:

‘[39] . . .The focus of attention in Lupacchini was not on this aspect but on whether Ms Conradie was a trustee when the proceedings were instituted, even though letters of authority had not yet been issued to her. . . The Supreme Court of Appeal upheld the decision of the full bench that action by a purported trustee who has not received letters of authority in terms of s 6(1) of the Trust Property Control Act is invalid, approving in this respect the decisions in Simplex (Pty) Ltd v Van der Merwe and Others NNO 1996

(1) SA 111 (W) and Van der Merwe v Van der Merwe en Andere 2000

(2) SA 519 (C). The result was that, at the time the proceedings were instituted, there was only one trustee and the trust was thus incapable of acting altogether.’

[30] The practical implications are therefore as follows:

(a) The remaining trustees did not have legal standing as litigants to oppose the application or to file affidavits;

(b) The remaining trustees did not have legal standing as litigants to institute and prosecute this appeal.

[31] As far as case number 6293/2016P is concerned, and the relief granted therein, it was brought by different applicants against the remaining trustees, who likewise opposed the application, instituted a counter application, and consented to an order, without having the required legal standing to do so.

[32] In dealing with the issue of costs, it is clear that the three beneficiaries raised the issue of the trustees’ lack of legal authority from the outset, and despite this, the remaining trustees persisted in opposing the matter and launching this appeal. There is no reason why the trust should be saddled with the costs of this appeal, and therefore this burden will be borne by the remaining trustee.

[33] The following order is accordingly granted:

BEZUIDENHOUT AJ

MADONDO DJP

MOODLEY J

APPEARANCES:

DATE OF HEARING:

29 November 2019

DATE OF JUDGMENT:

28 February 2020

Appearances

For the appellants

: Adv PJ Blomkamp SC

Instructed by

:

Llewellyn Cain Attorneys

20 Marwick Road

Upper Prestbury

Pietermaritzburg

For the First, Second and Third Respondents : Mr MH Mzila

Instructed by

: Mzila HM Incorporated

7 Connaught Road

For the Fourth Respondent

: No appearance

[1] Restitution of Land Rights Act 22 of 1994.

[2] Trust Property Control Act 57 of 1988.

[3] Land and Agricultural Bank of South Africa v Parker and others 2005 (2) SA 77 (SCA) paras 10-11.

[4] Ibid para 44.

[5] Cameron, de Waal, Wunsh, Solomon & Kahn Honoré's South African Law of Trusts 5 ed (2015) at 220.

[6] Watt v Sea Plant Products Bpk & others [1998] 4 All SA 109 (C).

[7] Lupacchini NO & another v Minister of Safety and Security 2010 (6) SA 457 (SCA).

[8] Ibid para 2.

[9] Lupacchini paras 22-23.

[10] Hyde Construction CC v Deuchar Family Trust & others 2015

(5) SA 388 (WCC) para 39.

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