

SOUTH AFRICA / JUDGMENT

Mmutle NO and Others v ABSA Bank Ltd and Others (UM 20/2023) [2023] ZANWHC 158 (7 September 2023) [2023] ZANWHC 158

COURT

North West High Court, Mafikeng

BEFORE

J.T. Djaje

CASE / FILE NUMBER

UM 20/2023

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

CASENO: UM 20/2023

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates:

YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

MOGOMOTSI HENDRICK MMUTLE, NO

1st Applicant

JOSEPH SERANYANE NDLOVU, NO

2nd Applicant

KAENE INNOCENT MELOMI, NO

3rd Applicant

KGOSIMODIMO REGINALD KGETSANE, NO

4th Applicant

LEBANG ERNEST NAITLHOI, NO

5th Applicant

BATLANG MIRANDA MOKGOSI, NO

6th Applicant

DAVID TSELAYABOTLHE MOLUSI, NO

7th Applicant

JEFFREY NKARABANG MADOLA, NO

8th Applicant

MOSIMANEGAPE HAROLD SEPAKO, NO

9th Applicant

LEBOGANG EMMANUEL XABA, NO

10th Applicant

GAORABAONE EMMANUEL LEUTLWETSE, NO 11th Applicant

MARIBALAND DEVELOPMENT TRUST

12th Applicant

(IT 54/2010)

And

ABSA BANK LTD

1st Respondent

MASTER OF THE HIGH COURT; MAFIKENG

2nd Respondent

KGOSI KOPANO SIMON LEKOKO

3rd Respondent

RAMPAGANE MOLEMI GERT; (N.O CHAIRPERSON) 4th Respondent

RAMASESANE OIKANYENG ZACHARIA;

5th Respondent

(N.O DEPUTY CHAIRPERSON)

MARUMOLOWA ESTHER LESEGO;

(N.O THE SECRETARY)

6th Respondent

POLENG BONTLEENG GRANNY;

(N.O DEPUTY SECRETARY)

7th Respondent

GOPANE GOEMEGONE HARRINGTON;

(N.O THE TREASURER)

8th Respondent

TSHABANG SECHOGELA HARRISON;

(N.O TRUSTEE)

9th Respondent

MOSIBOTSANG REAGISANG;(N.O TRUSTEE)

10th Respondent

TIRO SEABE PETRUS;(N.O TRUSTEE)

11th Respondent

MOSIKARE KENEILWE ALIAS;(N.O TRUSTEE) 12th Respondent

KEHALOTSE MARY KELEMILWEEMANG;

(N.O TRUSTEE)

13th Respondent

MOSWEU MPHOENTLE PATRICIA;(N.O TRUSTEE) 14th Respondent

MARUMOLOA BAATILE SHADRACK;(N.O TRUSTEE) 15th Respondent

MOLEMA KEMONNA SIMON;(N.O TRUSTEE)

16th Respondent

KGOROGOBE D SETLATSO

17th Respondent

SEFAKILE F. KELEBILE

18th Respondent

MOSIAPOA AUPANYANE KOOS

19th Respondent

GOELOSIWE MOSHE

20th Respondent

RAMPAGANE KENALEONE

21st Respondent

MOLOISI BROWN

22nd Respondent

SETLOBOGENG GOITSEONE

23rd Respondent

MOITSE IKAGENG

24th Respondent

SENNE DITIRO

25th Respondent.

MOSEKIEMANG MONNAWAPULA

26th Respondent

GADIKUTLE KEBONE

27th Respondent

KEONETHEBE TSHUPUTSE

28th Respondent

TLTATLAWANE PONATSEGHO

29th Respondent

MOGAETSNO SEADIMO

30th Respondent

MOLEFE ODIRILE

31st Respondent

LORATO MOTLADIRE

32nd Respondent

LEKGOE BEN

33rd Respondent

POLENGN BONTLENG

34th Respondent

LESANG GOPANE

35th Respondent

METSI ROBERT

36th Respondent

MOTHELESI ODINILE WILLIAM

37th Respondent

THOMAS TSHENILO REVELATION

38th Respondent

SEPAKO ONKEMETSE JOSEPHINE

39th Respondent

OJENG ELNA

40th Respondent

RAMASESANE MMEREKI ELISHA

41st Respondent

RAMPAGANE THOMAS MAPONYANE

42nd Respondent

GOPANE THUSO EZEKIEL

43rd Respondent

MOGAPI. A. MOGAPI

44th Respondent

LETEBELE BOITHELO

45th Respondent

MODUSEMANG ARCHIBALD

46th Respondent

LESEMELA BENJAMIN

47th Respondent

MOLEBATSSI GEEMANE MOSES

48th Respondent

LEKGOHE TEBELE JOSIAH

49th Respondent

MOSHAGENG.L. OBED

50th Respondent

MORWE MOOKAMI WHITE

51st Respondent

MOOKI MALACHI WELCOME

52nd Respondent

MOKGOSI OTHUSITSE GOODBOY

53rd Respondent

NTSIDI MOTHUSI

54th Respondent

LETEBELE . O. ALFRED

55th Respondent

RAMPAGANE KAISO BENJAMIN

56th Respondent

TSUMI ESTHER MATSHEDISO

57th Respondent

MOKAE KITSO AGENG

58th Respondent

MARMOLWA LESEGO

59st Respondent

TLHOMEDI MATSHEDISO ELIAS

60th Respondent

MARUMOLOA SOLOMON

61st Respondent

MONAGENG DEICK

62nd Respondent

RANKOKWADI GAONE

63rd Respondent

RABUDI THANA JOHSON

64th Respondent

MOLEMI BAKKAI WILSON

65th Respondent

MOENH MMOLOKI JAMES

66th Respondent

NCHE SHUPING

67th Respondent

KANTI DITIRO

68th Respondent

MABOTSABG REAGISENG

69th Respondent

TSHANG SECHOGELA

70th Respondent

RAMASESANE DIKANYENG

71st Respondent

GOPANE GOEME T

72nd Respondent

MOTHIBI M. TEBOGO

73rd Respondent

RAMPAGANE KESETLA REBECCA

74th Respondent

SEPAKO GABOTHUSI PETRUS

75th Respondent.

TIRO REONTSE MANA

76th Respondent

REASONS

FOR JUDGMENT

DJAJE DJP

[1] The applicants first approached this court in March 2023 for an order that the first respondent recognise the applicants as the appointed trustees of the Maribaland Development Trust. In addition, that they be granted full access to the bank account of the Trust. Initially it was only the first and second respondents who were cited in the application. The 3rd to 76th respondents were then joined after the order was granted. The order granted on 13 March 2023 was as follows:

“1. THAT: The matter is heard as an urgent application and the Applicant’s non compliance with the rules concerning the forms, time frames and service are condoned.

2. THAT: A Rule Nisi is hereby issued calling upon the Respondents or any other party who has an interest in this matter to show cause on the 4th May 2023 as to why the following order should not be made final.

2.1 First Respondent be directed to forthwith recognize and grant the Applicants (in their capacity as the trustees), as appointed on 10 November 2021, full access to the Applicant’s bank account(s), with the right to accordingly nominate and appoint account(s) signatories.

2.2 That any party who opposes this application be directed to pay the costs of this application on a scale between attorney and client.

3. THAT: Prayer 2.1 above shall operate as an interim order pending the finalisation of this matter.

4. THAT: The Applicants are directed to serve this order on the Respondents via sheriff of the court.

5. THAT: The Applicants shall widely circulate this order to the beneficiaries of the Mariba Development Trust by posting it on the community notice boards around the related villages (and village sections), at the offices of the trust, and all the farms under the control and administration of the trust.”

[2] The 3rd to 76th respondents opposed the application and sought an order that the applicants be removed as trustees. Reference to respondents in this judgment is the 3rd to 76th respondents. Their notice of motion for the counter-application was as follows:

“1. Dispensing with the Rules relating to forms, services and time periods as prescribed by the Uniform Rules of this court and directing that the matter be enrolled and heard as an urgent application in terms of Rule 6(12)

2. That the letter issued, withdrawn and reinstated by the Second Respondent recognising/ Appointing and or authorising the Applicants to act as Trustees of Mariba Land Development Trust, be and is hereby set aside and or alternatively; be and is hereby declared to be null and void ab initio.
3. That the Founding Trustees Respondents be are hereby ordered to convene an Annual General Meeting as contemplated in Clause 16 of the Constitution of the Trust or alternatively an elective meeting of beneficiaries to elect new Trustees within 30 court days of the granting of this order.
4. It is hereby ordered that the Applicants shall not be legible to be appointed as Trustees.
5. The Applicants and or anyone opposing this application be and is hereby ordered to pay the costs of this application on attorney and own client scale.”

[3] On the return date of 14 June 2023 the following order was granted:

“1. THAT: The Counter Application is hereby enrolled and heard as an urgent application in terms of Rule 6 (12).

2. THAT: The rule nisi granted on 13 March 2023 is discharged and the main application is dismissed.
3. THAT: The letter of authority issued on the 10th of November 2021, by the Second Respondent appointing and or authorising the Applicants to act as Trustees of Mariba Land Development Trust is hereby set aside.
4. THAT: The appointment of the Founding Trustees as per the letter of authority dated 26 October 2021 issued by the second Respondent remains in force until the appointment of New Trustees in terms of the Trust Deed of 12th Applicant.”

I now furnish the reasons for the above order.

- [4] The background of this matter is that the Mariba Land Development Trust was established in 2009 through a tribal resolution. The trust is governed by a Trust Deed with the community as the beneficiary of the trust. The trust property consists of land which was claimed on behalf of the community. Kgosi Kopano Lekoko is the founder of the trust. In terms of the Trust Deed, thirteen trustees were appointed by the Master of the High Court on 26 October 2012. The said trustees were to hold office for a period not exceeding twenty-four months. The first trustees were in office for a period exceeding two years due to various reasons and there was correspondence with the office of the Master in that regard.

- [5] The applicants allege that the first trustees failed to account for the activities of the trust in the years that they were trustees. As a result, they approached the Master after organising elections in the community. They were subsequently appointed as trustees in December 2021. The letters of authority were withdrawn by the Master after correspondence from the first trustees. However, the applicants continued to use the withdrawn letters to access the Trust's bank account and eventually approached court as stated herein above as the bank suspended the account.
- [6] The respondents seek an order to discharge the Rule Nisi and argued that the applicants had no locus standi.
- [7] The applicants argued that the term of office of the first trustees expired on 26 October 2014 and they failed to call a meeting for the election of new trustees. Further that they failed to give financial account of their activities to the community, being the beneficiaries of the trust. As a result of this inaction by the first trustees, the applicants grouped themselves as beneficiaries to elect new trustees in October 2021. The said trustees term of office expires in November 2023. The elections were brought to the attention of the Master for consideration and decision. The Master issued the letters of appointment dated 10 November 2021. According to the applicants, the said appointment was done in terms of section 7 the Trust Property Control Act 57 of 1988.
- [8] It is the applicants' case that the first trustees cannot be reinstated as they failed to report on the activities of the Trust. In addition, the applicants resolved to have an annual general meeting in July 2023 for the election of new trustees. As a result, the applicants argued that the Rule Nisi be confirmed and the respondents counter-application be dismissed.
- [9] In contention the respondents argued that the applicants were not duly appointed as trustees at an annual general meeting as such meeting never took place. The respondents have deposed to confirmatory affidavits to the effect that no such meeting took place. Clause 16 of the Trust Deed states how annual general meeting is to be held:

"16 Annual General Meeting

16.1 The Trustees shall hold an annual General Meeting of the Trust within

6 (six) months of the end of the financial year to which the beneficiaries shall be invited, having been given due Notice at which

meeting the Trustees shall table:

16.1.1 An annual report by the Trustees, shall provide information to all beneficiaries on all aspects of the Trust activities and projects shall be ventilated in terms of the projects of the Trust.

16.1.2 Audited financial statements of the Trust for the preceding year.

16.1.3 Any other issues which the trustees or beneficiaries feel should be reported on or discussed at such meeting.

16.1.4 The trustees shall give notice of the Annual General Meeting at least

(3) weeks prior to the siting, to the beneficiaries, stating the purpose of which the meeting is called."

[10] The applicants in their replying affidavit stated that they were not in possession of the original minutes of the annual general meeting and the resolutions that were submitted to the Master. They were as such not able to provide proof of such a meeting where they were elected as trustees. They were also not able to provide proof of the notice for the said meeting.

[11] The applicants had also argued that they were appointed in terms of section 7 of the Trust Properties Act which provides that:

"Appointment of trustee and co-trustee by Master

(1) If the office of trustee 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 of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit."

[12] In this matter the Trust Deed makes provision for the appointment of trustees in clause 15 as follows:

"[15.7] the beneficiaries have the right to remove, replace and appoint new or more Trustees at a General Meeting.

[15.8] the quorum of the general meeting shall be two thirds (2/3) of the households representing the beneficiary households and being present at the meeting.

[15.9] any resolution submitted at the meeting shall be decided by two thirds of households present at the meeting."

[13] As the Trust Deed makes provision for the appointment of trustees, the Master could not have appointed trustees in terms of section 7 but should have applied the provisions of section 6 which provides that:

"6. Authorization of trustee and security

Cases

(1) 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 authorised thereto in writing by the Master.

(2) The Master does not grant authority to the trustees in terms of this section unless-

- (a) He has furnished security to the satisfaction of the Master for the due and faithful performance of his duties as trustee; or
- (b) He has been exempted from furnishing security by a court or by the Master under subsection (3) (a) or, subject to the provisions of subsection (3) (d), in terms of a trust instrument.

Provided that where the furnishing of security is required, the Master may, pending the furnishing of security, authorize the trustee in writing to perform specified acts with regard to the trust property.

- (3) The Master may, if in his opinion there are sound reasons to do so-
 - (a) Whether or not security is required by the trust instrument (except a court order), dispense with security by a trustee;
 - (b) Reduce or cancel any security furnished;
 - (c) Order a trustee to furnish additional security;
 - (d) Order a trustee who has been exempted from furnishing security in terms of a trust instrument (except a court order) to furnish security.
- (4) If any authorization is given in terms of this section to a trustee which is a corporation, such authorization shall, subject to the provisions of the trust instrument, be given in the name of a nominee of the corporation for whose actions as trustee the corporation is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorization.”

- [14] There was clearly no compliance with the Trust Deed by the applicant. Another issue that is fatal to the case of the applicants is that there is no evidence that the first trustees were removed as trustees in terms of section 20 of the Act which provides that:

“20 Removal of trustee

- (1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interest of the trust and its beneficiaries.
- (2) A trustee may at any time be removed from his office by the Master-
 - (a) If he has been convicted in the Republic or elsewhere of any offence which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a fine; or
 - (b) If he fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested thereto or within such further period as is allowed by the Master; or

- (c) If his estate is sequestrated or liquidated or placed under judicial management; or
 - (d) If he has been declared by a competent court to be mentally ill or incapable of managing his own affairs or if he is by virtue of the Mental Health Act, 1973 (Act 18 of 1973), detained as a patient in an institution or as a State patient; or
 - (e) 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.
- (3) If a trustee authorized to act under section 6(1) is removed from his office or resigns, he shall without delay return his written authority to the Master.”
- [15] Failure by the applicants to show that the first trustees were removed as trustees is fatal to their case and is a ground for the Rule Nisi to be discharged.
- [16] The respondents in their counter-application seek an order that new trustees be elected in terms of the Trust Deed. This is to the benefit of the beneficiaries. The applicants as members of the community cannot be excluded from such an elective meeting. They are part of the beneficiaries and should participate in the election process. It was for these reasons that an order was granted.

J.T. DJAJE

ACTING JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION, MAHIEKNG

APPEARANCES

DATE OF HEARING: 14 JUNE 2023 DATE REQUEST FOR REASONS: 19 JUNE 2023 DATE OF JUDGMENT: 07 SEPTEMBER 2023 ATTORNEYS FOR THE APPLICANT: SEPHECHOLO LECHUTI LESOFE ATTORNEYS MDiHub Building 2696 James Watt Cres MAHIKENG 071052 4628 ATTORNEYS FOR 2ND RESPONDENT: THE MASTER OF HIGH COURT MAHIKENG 44 Shippard Street MAHIKENG ATTORNEYS FOR 4th -76th RESPONDENT: KGOMO ATTORNEYS INC 56 SHIPPARD STREET MAFIKENG. 2745 018 381 0495

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