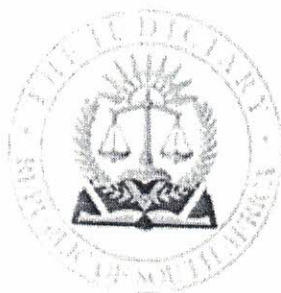


IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 90356/16

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. YES
	9/05/2019 DATE <i>[Signature]</i> SIGNATURE

WELLINGTON ZAMANI MATHEBULA

RICHARD MANGALISO NGOMANE

SURPRISE WELCOME NTIMANE

KAIZER MESHACK KHUMALO

SIPHO ORANCE MKHWANAZI

FRANK SOLLY MBUNGELA

RULANI HARRIET MAWELA

THUYANI SOUL DLAMINI

1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

4TH APPLICANT

5TH APPLICANT

6TH APPLICANT

7TH APPLICANT

8TH APPLICANT

And

THE NWANDLAMHARI COMMUNAL PROPERTY ASSOCIATION

THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM

THE DIRECTOR GENERAL FOR THE DEPARTMENT OF RURAL

DEVELOPMENT AND LAND REFORM

THE CHIEF LAND CLAIMS COMMISSIONER

REGIONAL LAND CLAIMS COMMISSIONER MPUMALANGA PROVINCE

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

JUDGMENT

KHUMALO J

[1] The Applicants are a group of individuals that contend to be part of the claimant beneficiaries from the communities of Mhlanganisweni and Mavhuraka who in 2013 successfully lodged claims in terms of the Restitution of Land Rights Act 22 of 1994 over land in around the Sabie Sand Region, Ehlanzeni District Municipality, in Mpumalanga, historically known to indigenous owners by the name of Nwandlamharhi. The two communities jointly adopted a Constitution in terms of which they jointly created in accordance with the provisions of s 8 (3) of the Communal Property Associations Act 28 of 1996 ("the Act"), a legal entity namely the N'wandlamhari Communal Property Association (NCPA) through which all the claimant beneficiaries were members and all the restored land claimed in the area historically known as the Nwandlamharhi, was to be received, held, owned and managed for the benefit of the claimant beneficiaries and for their future generations. The NCPA therefore holds the property for the benefit of these communities.

[2] In terms of clause 9 of the NCPA adopted Constitution, the initial properties were to be restored to the claimants subject to the present use of the land as an eco-tourism destination, that includes the Mala Mala Game Reserve. The land was therefore not to be used directly by the members of the association. The benefits derived from such ownership **was to be distributed equally or be used in projects that benefit their members equally**. The rights of members to be exercised subject to the land use rules and **distribution policies as determined by the NCPA in general meetings from time to time**.

[3] Members of the Association were to be dealt with in such a manner as **to ensure that all members receive the same or similar benefits and that any arbitrary distinction or unfair discrimination shall be avoided**; see clause 7.3.

[4] **Distribution of funds for community projects, bursaries or any other valid cause were to be made strictly in terms of written policies approved by the general meeting**, and were to contain provisions that promote substantive equality; see clause 7.5

[5] The management and operation of the affairs of the NCPA was to be effected by or conferred on the Executive Committee (EC) subject to the provisions of the adopted Constitution.

[6] The Applicants are bringing this application **under s 13 (1) of the Act** in their own individual interest as member beneficiaries of the NCPA, against the **NCPA, the 1st Respondent**, citing also the Minister of Rural Development and Land Reform as the **2nd Respondent** (referred to as "the Minister" or "the Department"), the **Director General for the Department of Rural Development and Land Reform ("DG" or Director General)** as the **3rd**

Respondent, the Chief Land Claims Commissioner (“**The Chief LCC**”) as the 4th Respondent, the Regional Land Claims Commissioner Mpumalanga Province (“**The RLCC**”) as the 5th Respondent and Gillian Du Plessis Incorporated, the attorney who acted for these communities in their settled land claims, who is alleged to be **still holding the NCPA funds in her Trust Account** cited as the 6th Respondent (“**The attorney**”). They are seeking relief from the court in the following order:

- [6.1] that the **NCPA is placed under the administration** of the Director General;
- [6.2] The NCPA be and is hereby ordered to submit all documents in their possession including financial records to the Director General, within 5 days of the order of this court;
- [6.3] The Director General be and is hereby ordered to **institute a forensic investigation (fact finding mission) into the affairs of the NCPA** within 30 days of the order of the Court; clause 22.4
- [6.4] The Director General be and is hereby directed **to undertake and complete the functions of the NCPA**. The functions should include the conclusion of the **verification of all beneficiaries and distribution of financial statements to the Applicants. (the verified beneficiaries)**
- [6.5] The Director General should **conduct an investigation regarding the dispute between the beneficiaries and the executive members** of the NCPA. The investigation should be concluded within 6 months of the order of this court;
- [6.6] a progress report on the (forensic) investigation compiled by the Director General should be filed with this court and served on the Applicants within 3 months of the order of this court.
- [6.7] That a final report compiled by the Director General should be finalised with this court and served on the Applicants within 6 months of the order of this court.
- [6.8] The Applicants shall be entitled to file their response to the final report compiled by the Director General within one month after it has been served upon the Applicants.
- [6.9] That the Director General **should assist the beneficiaries of the NCPA to prepare for the Annual General Meeting and the elections of the new executive members of the NCPA;**
- [6.10] That the NCPA should be released from the administration of the Director General once the Director General and the beneficiaries of the NCPA are of the opinion that the NCPA is in a state of good order.
- [6.11] That the 6th Respondent be and is hereby ordered to **furnish records of the NCPA’s monies held in their Trust Account to the Director General** within 30 days from the order of this Honourable Court;

[6.12] That the 6th Respondent be and is hereby interdicted from releasing any monies that belong to the NCPA which are held in their Trust Account with immediate effect. *The money that is there is to cover fees

[6.13] That the Director General **will give direction as to all monies to be received on behalf of the NCPA** from the date of the order of this Honourable Court. *

[6.14] The NCPA to pay the costs of this Application.

[6.15] That anyone of the Respondents that opposes the Application should be ordered to pay the costs on an attorney and own client scale together with the NCPA, jointly and severally, the one paying the other to be absolved.

[7] No order is sought against the 2nd, 4th, and 5th Respondents that is, the Minister, the Chief LCC as well as the Regional LCC. They are said to be cited only because of the interest they might have in the relief sought. The matter was initially opposed by the 1st and 3rd Respondent. However only the 1st Respondent has filed papers in opposition.

[8] The Applicants have all together signed a resolution under the auspices of the concerned group committee of 8 in terms of which the 1st Applicant, Zamani Mathebula, is authorised to depose to the Founding Affidavit on behalf of the other 7 Applicants. The group alleges to also bring this Application in their own individual interests as beneficiaries of Nwandlamhari CPA in terms of s 38 (c) and (d) of the Constitution. Whilst claimant beneficiaries of the land Nwandlamwhari consists of more than nine hundred (900) people.

[9] The basis of the Applicants' Application is stated to be that the NCPA Executive Committee (EC) has failed to follow the provisions of the NCPA Constitution in that in 2015, **there (3) members of the EC were removed unlawfully and more than 20 months after the removal, the removed members have not been replaced, which has resulted in a conflict amongst the beneficiaries and the EC members and sown division and alienated the beneficiaries of the NCPA; as a result of that:**

[9.1] Meetings of beneficiaries called by the EC are poorly attended as the beneficiaries have lost interest and confidence in the EC. **Due to lack of obtaining the requisite quorums the decisions that the EC have taken are not binding.** There is a high tension within members and the beneficiaries that might possibly result in bloodshed.

[9.2] **The EC have since their election to the office in 2013 failed to complete their task of verifying the beneficiaries annually.**

[9.3] The EC have not complied with the provisions of **clause 7.3** of the Constitution in that they have been **distributing the funds to a few verified beneficiaries of the NCPA at the expense of the majority of the other beneficiaries who are yet to be verified.** Some members who had been verified but seem to be sympathising with the concerned group have not received any distributions. They are said to have been told in no uncertain terms by the Treasurer to go and collect their distributions from the concerned group.

[9.4] It is also not clear where the funds are distributed from and the basis of those distributions, as according to their knowledge **the NCPA does not have a bank account. The EC has failed to ensure, inter alia, that banking account is opened in the name of the NCPA.** The distributions are also not in conformity with clause 7.5 cause as far as they are aware there has not been a general meeting to approve the distribution of the funds.

[9.5] **The EC undertook a trip to China without any community resolution and the expenditure of the trip has not been explained nor accounted for** to the beneficiaries by the Treasurer of the NCPA. The NCPA's executive members act arbitrarily and do whatever they please. They have divided the beneficiaries along tribal lines.

[9.6] **Since 2013, no financial statements have been prepared annually. And they are not aware of any financial statements that were submitted to the receiver of revenue.** The EC are obliged in terms of the Constitution to prepare financial statements annually and also to submit statements to receiver of revenue. They are also aware as the majority of the beneficiaries that **an auditor has not been appointed as clause 4.2.3 of the constitution provides.**

[9.7] The NCPA has become dysfunctional and has therefore failed to adhere to its duties and responsibilities in terms of the Constitution. **There has been a gross maladministration of the resources of the NCPA by the executive members which has resulted in the squandering of funds and as a result they are obliged to take the necessary steps to ensure that this practice is curbed with immediate effect.**

[9.8] They fill duty bound to curb the unauthorised and illegal activities of the executive members of the NCPA. **During 2015 they have approached the EC to raise their concerns and dissatisfaction by the way it was conducting the affairs of the NCPA.** The EC displayed arrogance and pomposity and refused to listen to them or to meet with them apparent that it did not want to have a meaningful communication with them. After failing on numerous occasions to set up a meeting they sent a letter to the secretary of the EC requesting a meeting. They received a response that the EC was not prepared to meet with them because they are not a recognised structure even though they were beneficiaries and were entitled to call a meeting with the EC.

[9.9] Failing that they escalated the matter to the 5th Respondent to intervene in the maladministration of the EC, there was no response to the request. They then approached the Minister requesting an urgent meeting, which led to a meeting being called by the Minister which was attended by his delegation but the **EC did not attend the meeting.** Instead 15 individuals who referred to themselves as landowners stormed the meeting. **The meeting proceeded between the Applicants and the Minister's delegation.** The Minister called a follow up meeting. The EC again did not attend the meeting, instead the same group of 15 was in attendance. Certain resolutions were taken in the meeting inter alia, that:

[9.10.1] The Minister would delay his intervention in the affair of the NCPA **only after the AGM which was scheduled for October 2016 fails to yield the desired results.**

[9.10.2] Only the claimants whose names appear in the list which the Minister used to settle the claim should attend the AGM.

[9.10.3] The NCPA must submit Audited Financial Statements at the said AGM, failing which, the Minister will institute a forensic audit.

[9.10.4] The Regional Land Claims Commissioner will assist the NCPA in coordinating the said AGM.

[9.10.5] The office of the Minister will be responsible for the payment of the costs towards the completion of the verification of all the claimants who had not been verified.

[9.11] None of the resolutions that were taken were implemented. Instead, the same group went out and confused some claimants telling them that the Minister has disbanded the NCPA's EC and that they were going to organise themselves into a formal committee.

[9.12] **There were two other attempts to hold an AGM in 2016** and they both failed which resulted in the Department of Rural Development and Land Reform appointing a mediator to facilitate a conciliatory meeting. The report and its recommendations were finalised and submitted to the Department but the Department did not take any corrective measures/action. Thereafter in October 2016 the Applicants wrote a letter to the 3rd Respondent seeking its urgent intervention and got no response. Hence they have proceeded with this action.

[10] The Applicants allege that their rights of ownership and enjoyment of the property are violated by the EC and they are treated as non-owners of the properties. **Their Constitutional right to equality and human dignity is violated by the continued denial of their right of ownership and security of tenure.**

[11] The Applicants allege to seek their relief as interested parties being beneficiary claimants whose rights have been violated, based on s 11 (1), s 13 (1) of the Communal Property Association No 28 of 1996, for the NCPA to be placed under administration since the NCPA and its EC have failed to meet their obligations, inter alia, to **verify beneficiaries lists, submit the financial records and statements and have paid some of the beneficiaries despite the fact that the verification has not been completed.**

Answering Affidavit

[12] In its Answering Affidavit deposed to by Johan Mthabane, the Chairman of the NPAC's EC indicated that the Applicants are a few disgruntled people from the community. The 1st Applicant, Millington Zamani Mathebula ("Mathebula"), is the former EC member (elected in 2013) who with its chairperson Perry Sambo and two others vacated office by resignation in 2015, although he now alleges that they have been unlawfully removed. The other six (6) Applicants, that is 2nd to 7th Applicant, are part of those that have not yet been verified as members of the NCPA and their status as members of the NCPA remains uncertain. Mthabane questions their sincerity and allege that they are acting in their own self-interests.

[13] According to Mthabine, the real problem was with the former EC and arose due to a purported contract that Mathebula, Sambo and two other former members of the EC signed in March 2012 with a company called INT Capital without the knowledge or authorisation of the NCPA or EC, nor was the broad community aware. The gist of the agreement was that the Land Claims benefits were compromised as the contract with INT Capital, a company with no experience in the business of eco-tourism was given a permanent right to act as the preferred agent in the business affairs of the NCPA and to receive completely unwarranted commission of 5% of the total value of the land /amount that was to be received by the claimants in terms of the Restitution of Land Rights Act, on such receipt, without any authority. The four who lacked the experience acted without legal or independent commercial advice before entering into the agreement. The four of them form part of the disgruntled group that is led by the Applicants that was also in the meeting where a resolution is alleged to have been taken to embark on these proceedings.

[14] The company surfaced as soon as a portion of the claim was settled in 2013, even though it played no role in the success of the claims. **It is now involved in an ongoing litigation against the NCPA claiming an amount of R50 Million as commission.** The four initially offered to resign and later withdrew the offer. It took the offices of the Minister and the Chief Land Claims Commissioner to ensure through several interventions that ostensibly voluntary resignation of the four does take place. The allegations therefore that they were unlawfully removed are completely untrue. They had entered into reckless commercial agreements without authority.

[15] Since their resignations they have been making public defamatory statements about the EC of the NCPA and **about their legal representative alleging that the lawyers misled them about the land claim process that is why they had made alternative arrangements to ensure the success of the claim.**

[16] In respect of the elections of the NCPA EC, he affirms that they indeed held in **October 2016 under the supervision of the Department of Rural Development and Land Reform Minister and more particularly the officials in the Mpumalanga office of the Department whereupon a new EC was elected.** Due to the animosity created by the Applicants the elections took place under strict scrutiny of very senior members of the Department including a senior legal advisor and in absolute compliance with the letter of the law and the Constitution of the NCPA. **Only persons who have been verified during the land claim process to be members could vote.**

[17] Mthabine alleges that the verification process of members within the community is an ongoing process which is complex and time consuming. The Constitution of the NCPA makes very clear provision for membership entitlements and keeping of the membership register as in **clause 3.9 and 3.10 as well as clause 8.1 and 8.2.** It therefore denies that there is any substance in any of the allegations that the EC is not properly elected or instituted. The elections occurred exactly 3 years after the 1st election as per clause 11.8. of the Constitution. Also although they are aware that complaints have been made to the Minister they are not privy to the content thereof.

[18] On the allegations by the Applicants that a meeting took place on 17 September 2019, although he accepts that it might have taken place he is not sure of the details. However the Annexure marked BHA 4 annexed as proof of attendance of this meeting is not the attendance

register of that meeting as some of the signatories thereto have filed affidavits denying that they were part of the meeting. They attest to the signatures being collected from house to house and the dates also do not correlate. The meeting was on 17 September 2016 but the documents are signed on 15 September 2016. The first three signatories on the document are also the signatories to the March 2012 agreement with INT Capital.

[19] He notes that although the Applicants had lodged spurious complaints with the Department, apart from the fact that the factual allegations are false the Applicants have not taken any step to address the issues in terms of the democratic structures of the NCPA. Also unmerited allegations are made towards the Department and its officials. Some of the officials are unnecessarily joined like the 4th and 5th Respondent as their functions do not fall within the purview of the Land Claims Court. Their role came to an end after the settlement of the land claim.

[20] He confirms that members of the CPA as well as the broader communities around Sabi Sand Game Reserve are generally poor people. He agrees that the NCPA was specifically created to address these issues within the financial realities of the post settlement agreements. The post settlement agreements were subject to vigorous processes to ensure that the members of the community received the maximum benefit from the land claims. **The Department enlisted leading experts to negotiate the commercial aspects of the agreement and to train community members in the governance of the various structures involved. Two dividend distributions of R10 000 and R60 000 per family have already been made on 27 June 2015 and September 2016 respectively, overseen by the NCPA's legal representative in terms of information verified by the Department.** The payment included to the families of the 1st and 8th Applicants. **Both were approved by general meeting of verified members.** The relevant resolutions attached. (JM1 and JM2)

[21] **Furthermore that further distributions are planned for the community, subject to certain community projects that have been identified to receive financial priority in 2017.** For example the design and construction of a community hall and related structures to benefit the community as a whole and make income for the NCPA members. The NCPA has also created a commercial arm called Mondzo (Pty) Ltd, which will be capitalised subject to conditions which the Department may lay down involving the community in commercial activities of the region, more specifically the eco-tourism industry for which the region is famous. The community receives substantial rental for their land utilised as a game reserve business, a sum of R500 000.00 per month. They also have a share in the business and share in the resultant profits. The NCPA has also embarked on a long term project of establishing a new lodge in the Sabi Sand Game Reserve. The details of the agreements signed in respect of the land claim are all public knowledge posted also on the website which development will cost in the region of R80 Million and will be funded by the community's business partners. He contends that allegations that the community has not benefitted from this land claim are simply false.

[22] He confirms that in the first election in 2013, 15 members were accordingly elected to the EC. The chairperson as already indicated had to resign for the sake of clean governance and not forced to resign. Also not true that the positions of the EC members who resigned were not filled.

[23] In response to the allegation regarding the failure to fill the vacancies of those who resigned he said it is completely false as **the position of chairperson was first provisionally filled by Mr Willie Mkansi and the EC was quorate at all times and the resignation of the three did not constitutionally affect the constitutional compliant governance of the CPA.** The Department was always aware of the problems created by the 4 members and would not have tolerated any Constitutional crises in the NCPA and made sure that they complied with the letter of the law especially because the restoration of the Mala Mala Game Reserve received a lot of publicity. **The Committee members were subjected to extensive orientation by professionals in the field of governance, commercial activity and the like for more than a year. It was also during that time that money paid over as rental was paid to the trust account of their attorney an arrangement that was approved by the Department to ensure that the community only take direct control of the finances once the committee was properly qualified to do so, and after all registration had been finalised with SARS.** Calculations of in respect of all taxes that was complicated had to take place first. These have now been made and **the NCPA has produced all the required annual audited financials.** Which will be produced during trial as well.

[24] **On the question of verification he stated that there were persons that have made unfounded claims to membership of the organisation, and considering substantial financial benefits received by the members of the NCPA, this aspect is very closely monitored by the NCPA in conjunction with the Department.** The membership disputes are dealt with in terms of the processes provided in the Constitution and the **Department is busy with an ongoing process of verification.** They are also aware of people who have threatened litigation on the issue of membership and have been advised that certain declaratory orders may have to be sought from the Land Claims Court in that regard. However that issue is not related to this matter.

[25] The allegations that the meetings called by the EC not attended is said not to be true. The EC besides the AGM tries to meet with the community on three (3) further occasions every year. These meetings have all been very well attended. The beneficiaries being extremely active in the meetings and activities of the NCPA. **The only problem that he is aware of relates to the fact that many of the people who claim to be members have expressed unhappiness with the progress in the member verification procedures.** Minutes of the meetings will be compiled and produced for the purpose of the hearing.

[26] He says there are absolutely no disputes within the verified beneficiaries. There are however disgruntled members **such as the deponent** as well as unverified members who have expressed their unhappiness, they are the ones who must follow Constitutional and peaceful processes. Responding to allegations of failure to annually verify the members since elections in 2013 and distributing only to the few that has been verified to the detriment of the majority that has not been verified. Also to not distributing to those verified who sympathise with the concerned group, he said the allegations are misleading as the dispute in respect of membership relates to the 2013 events. It concerns the verification of the membership of the constituent communities, namely Mhlanganisweni and Mavhuraka communities. As far as the Mhlanganisweni community is concerned, he said the NCPA is dealing with the verification issues strictly in terms of the Constitution and that of Mavhuraka still has to first happen in terms of the Restitution of Land Rights Act. Should there be any specific issues that cannot be resolved by extra curial methods the disputes will be referred to the Land Claims Court which

is the appropriate forum to determine who is entitled to benefits that derive from a specific land claim in terms of the Restitution Act. Which is fairly common within land claims communities, there being specific mechanisms in which they are dealt with.

[27] He confirms that distribution has not been made to those who have not been verified as that would be illegal and expose the NCPA and the EC to charges of misappropriation of funds. The distributions have been strictly monitored by the Department precisely for the fact that there are multitudes of claims against the financial benefits which the community receives. He denies that there are verified members who have not received any distribution. If true the members would have simply gone to court and enforce their right to equal share of the distribution. The 1st and 8th Applicants families got their distribution.

[28] He says the verification of the Mavhuraka community members is a complex process conducted by expert historians and anthropologists who investigates the family histories of the members of the community taking a number of years. Their community the Mhlanganisweni community verification took about three (3) years which culminated in a final verification list being compiled in 2009. It is clear from the allegations of the Applicants that the Department undertook to be responsible for the costs of the verification and there has been discussions in that regard. It also has been clear all this time to all those familiar with how the process is conducted that the first verification of the membership of the community is done by the Department and the Land Claims Commission. It is absolutely unrealistic to expect of communities who are generally poor, to conduct such complex social investigations. As a result this processes are done by the Chief Land Claims Commissioner and the Regional Land Claims Commission for purposes of preparation and presentation of land claims to the Land Claims Court.

[29] He also denies that the NCPA does not have a bank account but that it has one at Standard Bank. The rental payments were paid into the attorneys trust account for a particular reason being agreed between the EC and the Department that be the arrangement until all the complex vat and income tax had been sorted out.

[30] They have dealt with their accounts transparently and produced all three audited financial statements as required of them. The trip to China was reported at various meetings and occurred at the instance of the Ministry (the Minister and his Department) due to the fact that China has implemented very successful rural development programmes. All the expenses were paid by the Department except for a month daily stipends for the executives which were paid from the NCPA funds. The funds totalled R20 000.00 per individual.

[31] The EC has appointed an accounting firm and an auditor's firm and the relevant documents annexed. Mr Derek Mthabane is no longer the treasurer having resigned from that position and Ms Slyvia Tonga is now the treasurer. The NCPA documents with accurate information on the financial transactions are kept by either Ms Tonga or the Secretary.

[32] He denies that there were any engagements relating to the dysfunctional of the EC or the NCPA in general. What happened is that the First Applicant spoke at such meetings defaming the executive members and legal representatives by making false statements as to why the four resigned alleging that they were purportedly forced into entering into

agreement with INT Capital alleging that the NCPA EC and their legal representative made false statements to the officials of the Regional Land Claims Commissioner and the Department. By the 31 October 2015 it was obvious that the disgruntled group was holding its own meetings which they as the EC were not going to attend.

[33] Regarding the letters sent to the 5th Respondent with no response he says the 5th Respondent was well aware that it was dealing with disgruntled former members of the NCPA EC and that the campaign they were embarking on was simply vexatious. Each and every activity of the NCPA was monitored by the Department and happened subject to supervision of expert who assist communities with their institutional arrangements.

[34] Mthabine accuses the Applicants of trying to create all kinds of parallel and alternative structures for the Nhwandlamarhi CPA which attempts have led into creation of bizarre type of advisory committees and committees of affected parties and the like. They have on various occasions placed on record that such structures are completely unlawful and have no role to play in the affairs of the NCPA which must be conducted strictly in terms of the Constitution and its applicable laws. There is no basis for the creation of the concerned group or the social cohesion subcommittee other than the subcommittees that are provided for within the context of the NCPA and its community liaising structures.

[35] He was not aware who the Applicants are referring to who stormed in their meetings but indicated that they were not going to attend meetings of these parallel structures that were formed against the provisions of the Constitution. As NCPA members they could not attend these meetings and their legal representatives informed all and sundry that they will not participate in activities that are not structured mediation or proper adjudication of issues of individuals who believe that they have some entitlement to the benefits being received by the NCPA. He also does not know what Mathebula is talking about but it is obvious that he and his group **were informed by the Minister that the regular AGM meeting was going to be in October 2016 and that only members that have been verified who appear in his membership register list could attend the meeting to can vote.** Nothing else could be lawful. **The AGM did take place under strict supervision of multitudes of departmental officials. It went on regularly and a new EC was elected in terms of the lawful requirements laid down by the Department and which follows from the ordinary requirements of the law and he is the Chairperson of the EC that was elected.**

[36] With regard to the mediation Mathabine says all that happened was that certain people who claimed that they were entitled to attend the AGM as well as **disgruntled ex EC** made allegations that the AGMs were not regularly held when such allegations had actually no substance. He says he has been advised that the report of **Georghiades and Associates** contains all the misleading and uninformed factual allegations which were peddled by a range of individuals and is not confirmed under oath, does not state what procedures were followed to obtain the facts and clearly never involved any interviews with the EC members or their legal representatives. The allegations seems to be reliant on the say so of the persons whom he refers who claimed to be entitled to benefits of the NCPA or the disgruntled previous members of the EC. At no stage was the NCPA asked to deal with all the aspects raised as wild speculations allegations. All their documents are readily available and they would have given them to any bona fide enquirer. He regarded it as disappointing that the Applicants are not first required to send a proper letter of demand to the NCPA, nor required to obtain any

documentation through the provisions of PAIA no 2 of 2000. Instead the present application was served without any pre-curial process.

[37] Mthabine pointed out that the beneficiaries of the NCPA are its verified members in terms of the processes conducted and overseen by the Department. He denies that the rights of any the Applicants or any of the members of the NCPA had been violated and denies that the NCPA affairs had been conducted in a non-transparent manner. **He denies that there is any basis for placing the NCPA under administration and argues that if the issue is the refusal of the Director General to place the NCPA under administration then such refusal should be dealt with by way of review proceedings in terms of PAJA no 3 of 2000.** He also denies that the Applicants are entitled to any of the relief whatsoever. And allege that their legal representative has always made the documents available both to the community and to the general republic by way of publishing information on their website. The money is held by their attorney in trust and by virtue of the agreement of mandate as well as an understanding with the Department and it is dealt with in terms of the lawful instructions that it receives from client. The monies are soon to be transferred to the bank account of the NCPA. The NCPA is also obliged to settle by law invoices and lawful claims from its service providers. An order that prohibits lawful payments will be an extreme violation of basic principles of good governance. In fact it will make the NCPA vulnerable to liquidation proceedings.

[38] Mthabine submits that the Application to be frivolous and vexatious and not deserve to be treated with any sympathy.

Replying Affidavit

[39] The Applicants have now in reply to the allegations in the Answering affidavit, also added new allegations to make a case for the relief sought. Notwithstanding the applicable rule of the Uniform Rules of the High Court: see Erasmus "The Superior Court that a full cause of action and the substantiating facts are to be divulged in full in the Founding Affidavit. A case cannot be made in the Replying Affidavit. The Applicants' Replying Affidavit was further considerably delayed. Although the Answering Affidavit was received by the Applicants correspondent attorney on 10 April 2017, in the Applicants' Replying Affidavit Mathebula avers that the Answering Affidavit was received by the instructing attorney only on 26 April 2017, without explaining why. The Applicants the only served their Replying Affidavit on the Applicants' attorneys on 7 February 2018 and filed on 14 March 2018. Delivery thereof that was supposed to be within 10 days after receipt of the Answering Affidavit was therefore delayed by ten (10) months and consisted of 142 pages, adding to the already voluminous papers. At the commencement of the hearing the Application consisted of more than 700 pages. This is a matter that fell in the Special Motion Court by all definition. At the time of receipt of the Answering Affidavit that consisted of 353 pages, the application papers exceeded the limit of 500 pages set in the practise manual, which signalled its validation for enrolment in the Special Motion Roll. There is no justification why the matter was enrolled on a normal roll. Applicants' condonation application for the delayed Replying Affidavit together with the Respondent's Application to file a Further Affidavit in response to the Replying Affidavit was granted only on the basis of the interest of justice not much on what was submitted on paper as by Applicants own admissions even though they had delayed meeting with their attorney, they had already consulted with him by 1 July 2017, but the Affidavit was served only in the following year, six (6) months thereafter.

[40] On the onset the Applicants pointed out that the NCPA EC failed to implement the resolution taken in the general meeting of 23 November 2014 which was that all verifications must be completed within six months from the date of the AGM. **Allegedly the exercise would have made sure that all those beneficiaries that were left out in the list that was submitted to Parliament on the basis of which the land was purchased for the beneficiaries, were included. The legitimate beneficiaries being those that appeared in the list submitted by the office of the Ministry.** They allege that the beneficiaries whose benefit the land was purchased by the state are those whose names appear in that list. They were left out of the list presented to Parliament due to the urgency in which the list was compiled. Which led to the resolution on the 23rd November 2014 that the beneficiaries be verified within six (6) months.

[41] He alleges that a small group with a large representation in the NCPA EC displayed a tendency of wanting to exclude a large number of families which made up the beneficiary list, claiming that they are the rightful owners of the Mala Mala land claim, delayed and frustrated the process of finalising the verification of all the beneficiaries. It is to this group that funds distributions of R10 000 and R60 000 respectively were made to the exclusion of the larger group. This group is said to be pulling all the stops to make sure that the verification of the larger group of the claimant community is delayed. They use the large groups being not verified as beneficiaries of the NCPA to exclude them from benefitting. Some of the people that benefitted from the R10 000 and R60 000 distributions do not appear in the verified beneficiary list which was used by the Government when the claimed land was restored to the claimant community. The list that Mthibane alleges to have been approved for distribution of the R60 000.00 is in breach of the NCPA Constitution in that it was never approved by the duly elected Chairman. Considering also the number of beneficiaries on the Final list that was submitted to parliament as approved verified list to buy the land, very few families have been verified which makes it irrational to distribute funds to some to the exclusion of the majority of the land claimants. **It is not clear if the EC followed any kind of policy when distributing as some members received the initial R10 000.00 distributions but were omitted in the list which were allocated R60 000.00.** The 3rd Respondent was included in the initial R10 000.00 but excluded on the second distribution because he had started in exposing the dysfunctional NCPA Executive.

[42] He alleges that Mthabane the deponent to the Answering Affidavit is not the Chairperson of the NCPA's EC and not part of any of the legitimate structures but his brother Derrick Mthabane is known to be the treasurer. Mthabane formed a clique and called for a secret meeting where they elected themselves into the executive position in the CPA EC after the Applicants have approached the High Court for an interdict against the EC's action of looting the NCPA resources. Some of the members of the sitting EC were never invited to the AGM that supposedly replaced the EC including Boysen Mkansi ("Mkansi") who was supposed to be the duly elected acting Chairperson at the time. He was excluded because he is considered not to be part of the group that claims to be the owners of the Mala Mala land claim. To get off the hook they fronted a few members who now act in the EC of which Johan Mthabane claims to be the Chairperson.

[43] It is said that no elective meeting was ever convened by Mkansi the acting chairperson of the NCPA EC therefore the structure that Mthabane claims elected him to the position could not have been legally constituted. The NCPA Constitution on clause 8.9 to 8.12 outlines the

election procedure which states that the elections must be conducted according to the electoral system that is to be adopted in the AGM which was not the case. The organisational developer of the NCPA has not presented any such system which neither the EC nor the AGM approved or adopted nor to consider the Applicants' presentation documents to the Minister of Rural Development and Land Reform. The EC in which Mthabine claims to be the Chairperson was not properly constituted in terms of the NCPA Constitution and therefore, his position as Chairman cannot be legitimised.

[44] He also alleges that the structures Mavhuraka and the Mhlanganisweni do not exist anymore after the establishment of the Nwandlamharhi CPA, therefore reference thereto misleading.

[45] When considering that the letter of appointment of the Auditors is dated 7 May 2015 and their letter of acceptance is dated 4 December 2014, all the submitted financial documents are false and fabricated. He says Mthabine says that the elective AGM only took place in October 2016 when he was elected as Chairperson. He has lied under oath as he is used as a stooge by his friends who are **avoiding answering to their allegations of mismanagement and embezzlement of funds. The NCPA has failed to enclose the Notice of the Elective AGM, the meetings and the attendance register which took place on 22 October 2016.**

[46] **The Auditor's report was finalised on 16 October 2016 apparently before the AGM that he claims elected him. The meeting allegedly held on 22 October 2016.** There was no AGM that appointed the auditors as it is provided in the CPA Constitution, especially the appointment of A2A Kopano Incorporated. Its alleged that it is not clear when the audited statements were signed and therefore the authenticity as well as their veracity of same cannot be confirmed and alluded to evidence proving veracity thereof to be led during trial. However these are motion proceedings.

[47] He indicates that Sambo denies all the allegation relating to him by Mthabine and has also filed an affidavit in that regard.

[48] Regarding the verification of the Mavhuraka claimants the Applicants allege they constitute the majority of the disposed members of the claimant communities that on two occasions two different organisations were enlisted to verify them. On those two occasions the process of verifying the beneficiaries commenced, but was later abandoned by the NCPA EC. They regard as very upsetting that the NCPA would state that the verification process is complex, which they deny, whilst it had on two occasions thwarted the completion of the verification exercise since the NCPA was registered more than three (3) years ago. There was a deadline resolved at the 2014 AGM to finalise verifications by June 2015. In 2016 a company was appointed to verify the group. They say Mthabeni is sowing divisions by singling out Mhlanganisweni as his own community from Nwandlamhari and not referring to it as former Mhlanganisweni.

[49] They argue that the definition of members in accordance with s 3.9 as referred to by Mthabine includes **any person who is not registered as a member of the association, but who is entitled to be a member, by virtue thereof the Applicants and all other persons who were originally dispossessed or descendants thereof qualify to be members of the NCPA.** He argues that clause 7 of the NCPA provides that the power of the Association and the EC

shall be interpreted and implemented at all times in accordance with the overriding principle of fairness and equity. By proceeding with the distribution of benefits while knowing that the majority of the members of the claimant community were yet to be verified is directly in contravention of the spirit of the principle of equity as it is provided by clause 7 of the NCPA Constitution.

[50] They allege that all Applicants are legitimate Nwandlamhari CPA members, as their names appeared on the beneficiary list (NW1) submitted by the Ministry to parliament as proof of the list of beneficiaries for whom the restored land was bought by the state when the highly publicised land claim was settled. They were however left out when the EC unilaterally decided to prematurely distribute the benefits. The deponent Mathebula says that he is the legitimate member of the NCPA therefore entitled to take the NCPA to court when they flout the Constitution. They tried to engage the NCPA EC on numerous occasions in vain. Thereafter they approached the offices of 2nd to 5th Respondent and their only redress left was to seek the aid of the Honourable Court. At one stage the Minister undertook to assist the NCPA to speed up the verification of the rest of the members and to pay the costs thereof. Also appointing a mediator whose recommendations they failed to follow.

[51] On the banking account it argues that three years after the NCPA has been formed the NCPA funds are still kept in the Attorney's bank account which is a breach of the NCPA Constitution, clause 21.5 which requires that all monies received on behalf of the Association which have not been invested shall immediately upon receipt be deposited in the name of the NCPA with a bank registered in terms of the Banks Act. The NCPA is in collusion with the Attorneys. They question how the financial statements were prepared if the funds were still in the Attorney's trust account.

[52] Applicants point out that the NCPA has not included the list of beneficiaries that were paid the R10 000 distributions on 27 June 2015. They deny allegations by Mthabine that Mathebula and the 8th Respondent, Dlamini received any of the two distributions. Mathebula denies having a bank account with Standard Bank. They allege that amid tremendous pressure on the part of the vast number of the land restitution claimants that the NCPA EC should stop any distribution until such time that all the claimants had been verified, the EC proceeded nevertheless with the distributions in order to protect their personal interest, to the exclusion of the majority of the members of the claimant community from the former Mavhuraka section. After acknowledging that the majority of the beneficiaries are not benefitting, Mthabine proceeded to distribute monies to those who are close to them. This has exacerbated the polarisation of the claimants along tribal lines.

[53] They allege to be hearing for the first time about the building of the community hall and other developments by the NCPA as it did not report to the community members who are the owners of the NCPA property which would necessitate a resolution which could give rise to such earmarked projects. He said they were geared to benefit only a few individuals. He has failed to bring **the court into its confidence by omitting to explain who is involved in the so called arm and their respective relationship to one another**. There are no particulars of how the Sabi Sand Game Reserve was going to be funded.

[54] The Applicants deny that Mr Sambo and the three others were replaced in accordance with clause 11.9 and insist that the vacancies have not been filled. During one of the AGM meetings it was reported that three people have been co-opted to the top six to assist, namely

Elly Mokoena, to assist the acting Chairperson, Mr Mhlanga Mike, to assist the secretariat desk and Mrs Thoko Themba to assist the Treasurer's desk, as the plan was to establish a finance committee.

[55] Mathebula says he is not aware of any problems created by him and has never been called to a meeting or heard from the NCPA informing him of any wrong doing. He also not in dispute with the fact that the Nwandlamhari land claim has attracted public attention.

[56] The Applicants argue that if the funds to date are still lying in the Trust account after so many years and there has been movement of large sums of money without the authority and knowledge of the beneficiaries that in itself is enough ground for the NCPA to be placed under administration as it is clear that it cannot handle its affairs, take direct control of its financing, let alone the administration action of opening a bank account. In essence the NCPA is under the administration of its attorneys. Which is not permissible by the Act.

[57] They also argue that if it can take three (3) years for the EC to register with SARS than they are not fit and proper to handle the day to day affairs of the CPA.

[58] They persist in their allegations that there is growing helplessness on the part of the majority of the beneficiaries, the attendance at the AGM meetings been negatively affected such as that of 13 February 2016 and 9 April 2016 were disrupted by members who were led by Mthabine. Mthabine have taken over from his blood brother Derrick Mthabine who was running the affairs of the CPA and had succeeded in sidelining the then Chairperson who was later forced to resign. They allege that the running of the NCPA has been turned into a family affair and the court should force the Director General to take over and intervene. They noted that there are no confirmatory affidavit from the other members of the EC to confirm the allegations made by Mthabine.

[59] Mathebula alleges that on or about 9 April 2016 Mthabine's brother attacked a government official who was then protected by the applicants and escorted safely out of the AGM meeting. On 15 April 2016 in another meeting of the beneficiaries Mathebula alleges to have been singled out and attacked by the security personnel and NCPA beneficiaries, physically assaulted and thrown outside the gate of the venue where the meeting was held. This happened in the presence of the NCPA attorney and her Counsel that led to him opening a case.

[60] They say Mthabine is the one who questioned the NCPA about the trip to China and there was no resolution about the use of the funds. He disputes the legitimacy of the Committee led by Mthabine.

[61] They point out that a meeting was held facilitated by the Chief Land Claims Commissioner at Kruger Gate Protea wherein it was resolved that a joint committee should be formed consisting of representatives from the Concerned group and the social cohesion committee respectively and that the same committee should report to the CLCC' office on a quarterly basis. They have approached the 5th Respondent who had ignored all their pleas.

[62] They allege that Mthabine and his group are responsible for the violent actions in all the AGM meetings which were disrupted claiming that their group was the legitimate one, provoking those not yet verified. They have written to the Department's provincial office after they realise that the NCPA has become dysfunctional.

[63] They dispute that the NCPA EC complied with the resolutions of 9 September 2016 and have noticed that Mthabine acknowledges that Applicants met with the Ministry on that day when he was leading the group that stormed into the meeting with the Minister's delegation before he could claim his fictitious chairperson position. Mthabine also has no authority to answer for the Director General.

Further Affidavit by 1st Respondent, Replying to Applicant's Replying Affidavit

[64] The NCPA in its Further Affidavit in response to the Applicant's Replying Affidavit which I had also allowed in the interest of justice, responded mainly to the allegation of verification of the beneficiaries which in my assessment is one of the major contention between the parties. **It was pointed out on behalf of the NCPA that the Director General has embarked on the new verification process from May 2018 which was due to be completed in July / August 2018 after which all verified members will be entitled to benefits which is the Applicant's main basis of the Application.** This will also determine the *locus standi* of some of the Applicants. The Affidavit was therefore suggestive of a postponement of the Application sine die.

[65] The NCPA argues that there are a lot of factual disputes incapable of resolution on the papers which the Applicants should have foreseen that these factual disputes would develop. The Applicants have, in their papers also alluded to the matter going to trial and certain evidence and certain documents going to be divulged and or produced during trial, quite evident that the Applicants acknowledge that the application cannot succeed in Application proceedings.

[66] **With regard to verification he points out that Mathebula was one of the EC member that failed to implement the 23 November 2014 resolution that all verifications be completed within six months from the date of the AGM and therefore cannot put the blame on the current EC.**

[67] With regard to the list that was presented to parliament by the Ministry he argues that it was never communicated to and adopted by the community and is merely a list formulated by the Director General.

[68] Mthabine insists that a new committee was duly elected and attached the Notice of the AGM held on 22 October 2016 as well as the Agenda. He disputes Applicants allegation of that he was elected by his cronies in a secret meeting.

[69] He denies that there was a verified list of beneficiaries when the land claims were settled. He points out that at a recent meeting arranged by the Director General to discuss the verification process the Applicants disrupted the meeting in such a way that it could not continue. They simply are disrupting the process of verification. They also disrupted the AGM that was to be held in February 2018 that it could just not start.

[70] He points out that the auditor's report was finalised before the AGM on 22 October 2016 and they do prepare financials irrespective of where the funds are held. The funds were with NCPA attorney who also is subject to regular audit by the law society in respect of funds that are held in Trust. When the attorney held all the funds of the NCPA in his trust account she only paid expenditures on the specific instructions of the previous and current EC.

[71] He denies that any person who is not registered as a member of the association who is entitled to be a member qualifies to be a member. He points out that that is the reason why there is verification. You can be a member beneficiary of the NCPA after going through verification. He also denies that the fact that the Applicants appeared on the beneficiary list necessarily entitles them to verification and to be members of the CPA.

[72] On the benefits distributed he states that the initial distribution was done by Willie Mkansi and the second one approved by him as a duly elected chairperson. He denies that any benefits were prematurely distributed. He reiterates that the 1st and 8th Applicants were paid into an account chosen by the Applicant's families, not directly to their individual personal accounts.

[73] He indicated that most monies that were held in the Trust account of the attorney have been transferred to the NCPA account and the amount left is to cover legal fees. He denies that there is movement of large sums of money without the authority and knowledge of the NCPA. All payments made were approved by the duly elected EC of the NCPA. The attorney was never in direct control of the NCPA funds.

[74] The meetings were arranged but disrupted by the Applicants specifically that of February 2018.

[75] The commercial arm and funding of the development is all above board and was not mentioned in the Founding Affidavit.

[76] According to Mthabine, Mathebula is well aware of reasons why he is no longer a member of the EC which is as a result of his involvement in the action bought by INT Capital and fails to deal with the matter in his reply.

[77] He submitted that the current EC was only elected in October 2016 since then a bank account has been opened and the bulk of the funds transferred in January 2017 and SARS issues resolved. On the contrary when Mathebula was part of the previous EC they failed to perform all these tasks, which he is not blaming them since the process was complex until the new EC finally managed to resolve these issues.

[78] He points out that from the claimant community, there are hundreds of members that are listed that have already been verified and others that are awaiting verification. They are not represented by the eight Applicants.

[79] Mthabine denies that him or his brother or any member of the current EC was ever involved in an attack on any government official or Mathebula. He agrees that Mathebula was indeed removed from a meeting by the security personnel as he was disruptive. He denies that Mathebula was ever attacked or assaulted or that he has ever stormed into any meeting held by the Applicants with or without the advisors from the Ministry or any invasion on 9 September 2016. He denies that the EC of the NCPA failed to perform its fiduciary duties.

[80] He reiterates that all verified families received benefits and those who did not where free to bring that to their attention and they needed to update banking details before any payments are made. Such payments are made to the family elder/s, not directly to the Applicants. He denies that any verified families were not paid or that Ntimane has exposed the rot in the NCPA EC.

[81] He pointed out that Du Plessis, the attorney acts on behalf of the NCPA. He denies that the fact that the 8 Applicants are disgruntled that precludes Du Plessis from acting on behalf of NCPA. He reiterates that the verification resolution was problematic and the current EC is trying to sort it out. He does not agree that he is not fit and proper to lead the NCPA as Applicants allegations are bold, vague, speculative and unsubstantiated.

Factual disputes

[82] There are several disputes of facts as it has been pointed out by the Respondent. The principles applicable to the determination of relevant facts when affidavits contain factual disputes in instances where final relief is sought on motion proceedings are as set out in the Plascon Evans Rule which simply obliges that the disputed issues be determined on Respondent's factual allegations; see *Plascon – Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623(A) at 634-635D where it was stated that:

"...where there is a dispute as to the facts a final interdict should only be granted in notice motions proceedings if the facts as stated by the respondent together with the admitted facts in the Applicant's affidavits justify such an order....where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

[83] In *Soffiantini v Mould* [1956] 4 All SA 171 [E] 175; 1956 (4) SA 150 [E] 154E-H the following approach was outlined:

"A bare denial of Applicant's material averments cannot be regarded as sufficient to "defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary investigation...and to ascertain whether the denials are not fictitious intended merely to delay the hearings.

[84] It is further encouraged that the court must necessarily make a robust, common sense approach to a dispute of motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it would be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over fastidious approach to a dispute raised in the affidavits; *Prinsloo v Shaw*, 1938 AD 570.

[85] In *Fakie No v CCIH Systems Pty Ltd* 2006 (40 SA 326 (SCA) para 55 it was held that: Applicants must live with consequences of their affidavits read for their own sake:

"That conflicting affidavits are not a suitable means for determining disputes of facts has been doctrine in this court or more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit a non-virtuous Respondent to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago this court determined that a judge should not allow a Respondent to raise fictitious disputes of facts to delay the hearing of a matter or deny the Applicant an order.

There had to be a bona fide dispute of fact on a material matter” This means an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand without recourse to oral evidence. In *Plascon Evans the court Paints Limited v Van Riebeeck Paints* this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real genuine or bona fide dispute of fact but also allegations or denials that are far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, many not of the busy motion courts in the country might cease functioning. But the limits remain, and however robust court may be inclined to be, a Respondent’s version can be rejected in motion proceedings only if it is fictitious or so far-fetched and clearly untenable that it can confidently be said, on the papers alone that it is demonstrably and clearly unworthy of credence.”

Issues to be decided

[86] The issues to be decided mainly, are whether or not the Applicants have made a case for the NCPA to be placed under the administration of the Director General, having been able to show that the NCPA cannot meet its obligations and whether NCPA has contravened the provisions of its Constitution that it would under the circumstances be just and equitable for it to be placed under administration

[87] if not, if a case has been made for:

[87.1] the order of its financial affairs to be investigated, through the institution of a forensic investigation by the Director General;

[87.2] for the functions of the NCPA EC to be undertaken and completed by the Director General including the conclusion of the verification of all beneficiaries and distribution of financial statements to the Applicants.

[87.4] the Director General to conduct an investigation regarding the dispute between the beneficiaries and the executive members of the NCPA.

Legal Framework

[88] The affairs of the NCPA including the use and distribution of its funds are governed by the Communal Property Act no 28 of 1996 (the Act) and its Constitution and managed through its duly elected Executive Committee. The Applicants allege that the NCPA has failed to meet certain obligations in contravention of the Act and the Constitution and must therefore be placed under administration of the Director General, who will take over the functions of the EC. Section 13 of the Act reads:

‘A division of the Supreme Court or the Magistrate Court having jurisdiction in respect of the area in which the property of the association is situated, may, on application made by the Director General, an association or provisional association or any member thereof, or any other interested person, place the association or provisional association under the administration of the Director General or grant a liquidation order in respect of an association or provisional association, because of

insolvency or maladministration or any other cause is unwilling or unable to pay its debts or **is unable to meet its obligations, or where it would otherwise be just and equitable in the circumstances.'** (my emphasis)

[89] A court (either a division of the Supreme Court or Magistrate Court) that has jurisdiction in respect of the area in which the property of the Association is situated, may be the one, that on application, places the Association under administration of the Director General. In this instance the property is situated in the area of Mpumalanga, the Mbombela Court would have had jurisdiction at the time of institution of the Application.

[90] The NCPA's obligations are, in terms of the Act inter alia, to receive, hold, own and manage for the benefit of the claimant beneficiaries and for their future generations all the restored land. In terms of clause 9.1, the land restored will not be used directly by the members of the Association. However the benefits derived from such ownership must be distributed equally or be used in projects that benefit the members equally.

[91] Clause 11 of the NCPA Constitution provides that 'the day to day functions and duties conferred on the Executive Committee shall be undertaken subject to the provisions of the Constitution. The NCPA will be deemed to be unable to meet its obligations if it has failed to adhere to the precincts of the Constitution.

[92] Committee members shall have the fiduciary responsibilities in relation to the association and its member, and shall exercise their powers in the best interests of all the members of the association, without any advantage to themselves in comparison with other members who are similarly placed; see s 9 (1) (e) (vi) of the Act.

[93] In terms of clause 11.10 of the Constitution, the EC is tasked with the compilation and maintenance of a complete membership register of every individual who is a member of the Association as well as their dependants.

[94] In terms of clause 9.10 the presence of the name of any member in the register shall be prima facie proof of membership of the Association, and conversely, the absence of any member's name in the register shall be prima facie proof that such person does not have any right to membership in the Association. The onus of proving otherwise shall vest with the person seeking rectification of the register.

[95] On disputes regarding the right of other persons to be members of the Association its provided that such disputes shall be tabled at a general meeting, and failing to be resolved shall be dealt with in the manner provided for in the preceding subsections

[96] Section 11 of the Act provides:

(1) An association or provisional association registered under this Act shall, at the prescribed times, furnish prescribed documents and information to the Director-

General in order to enable him or her to monitor compliance with the provisions of the relevant constitution and this Act.

(2) The Director-General may undertake an inspection of the affairs of an association or provisional association.

Analysis

[97] The key contention raised by the Applicants is the administration of the affairs of the NCPA by the EC which according to the Founding Affidavit was dysfunctional but noticeably the criticism did not include a challenge of the EC's legitimacy. Applicants have alleged that **the EC since their election to the office in 2013 failed to complete their tasks. It all started when the (3) members of the EC were removed unlawfully and not been replaced which has resulted in a conflict amongst the beneficiaries and the EC members.**

[98] Vacancies in the EC arising any time as a result of death, disqualification, resignation or removal or for any other reason, a new committee member shall be elected during the next general meeting. The remaining Committee members shall be entitled to function until a new member is appointed; see clause 11.9.

[99] It is common cause that the composition of the EC has undergone several changes since the establishment of the NCPA. It is also common cause that the initial EC that was elected at the formation of the NCPA in 2013 prior to the 23 November 2014 AGM was marred by a few resignation of its members which included also Mathebula the 1st Applicant, its Chairperson Perry Sambo and two other members, who all allegedly align themselves with the Applicants being the first 4 signatories to their attendance register in their 15 or 17 September 2016 meeting. The Applicants allege that the resignation of the 4 EC members was an unlawful removal which led to the initial tension between the NCPA EC and the Applicants. In addition that the removal left a vacuum in the EC that remained unfilled for 20 months affecting the EC's functionality and its operations, as a result the EC became dysfunctional. The Applicants however afterwards conceded that apparently the vacancies were subsequently filled by an acting Chairperson Mkansi, secretary and 3 others in key positions which included a co-option of namely, Elly Mokoena, to assist the acting Chairperson, Mr Mhlanga Mike, to assist the secretariat desk and Mrs Thoko Themba to assist the Treasurer's desk, planning to establish a finance committee. It therefore seems the perceived vacuum did not exist.

[100] The NCPA's response was that the reason for Mathebula and the three other EC members' resignation had something to do with an agreement they concluded, signing away and therefore compromising the benefits of the claimants from the restored land to a private company INT Capital without any authority from any of the structures, which they failed to divulge until the land claimants reached a settlement. The commission was payable to INT Capital upon settlement of the claim before it has rendered any services. The company had neither assisted the claimants in the proceedings on settlement nor was it involved in the action. It only surfaced when the settlement was reached. It is indicated that the company has now sued the NCPA for a commission of R50 Million which is 5% of the value of the

settlement. A copy of agreement indicating the terms and conditions thereof signed by Mathebula and the 3 others has been attached. **This is evidently an abuse of power and reckless management of the affairs of the NCPA without authority.** The allegations therefore that they were unlawfully removed are evidently carries no weight.

[101] The Applicants have failed to respond to these allegations, notwithstanding Mathebula being the deponent to the Applicants' Replying Affidavit and being directly implicated. He said absolutely nothing to refute the allegations or challenge the existence of the contract or litigation, even though the facts were known to him. The issue on the alleged cause of the tension between the Applicants and the EC would therefore have to be resolved on Respondents undisputed factual allegations. The resignation of the Applicant and three others is therefore deemed to have been as a result of the reasons stated by Mthabine on behalf of the NCPA. The purpose of the existence of the Act being as set out in its preamble 'to ensure that such institutions are established and managed in a manner which is non-discriminatory, equitable and democratic and that such institutions be accountable to their members; **and to ensure that members of such institutions are protected against abuse of power by other members,**' The credibility of the context within which Mathebula alleges the tension and confrontations to have arisen is therefore questionable. It is obvious that the Applicants' invectives manifested from the time of their resignation in June 2015 under the cloud of the INT Capital saga.

[102] Applicants have alleged in support of their contention that the EC could not meet its obligations that the EC's failed to open a NCPA bank account as is required by clause 4.27 of the NCPA Constitution. The latter is modelled from section 9(1) (e) (iii) of the Act that stipulates that all the cash of the association shall be deposited in an account opened in the name of the association with a bank registered in terms of the Banks Act, 1993 (Act No. 94 of 1990), or a mutual bank registered in terms of the Mutual Banks Act 1993 (Act No. 124 of 1999, or with the Post Office Savings Bank contemplated in s 52 of the Post Office Act, 1958 (Act No. 44 of 1958), or such other institution as may be approved by the Director –General. The Applicants complain that the EC in contravention of the Constitution and the Act has instead of opening an account let the money remain in the control of the attorneys and spent it from the trust account.

[103] In the minutes of the AGM that was held on 23 November 2014 it is indicated that the NCPA members resolved that the moneys will be kept in the account of the attorneys and will remain there until the NCPA bank account and an investment account are opened in December 2014 upon which all the monies in the trust account was to be transferred. It is common cause that Mathebula and Sambo were EC members at the time. They failed to open the account by December 2014 or anytime thereafter until June 2015 when they resigned nor was the bank account opened under Mkansi during the transient period. It was until after the election of the October 2016 EC members that finally there was compliance. The present EC rectified the situation and met its obligations. Following that, it has been confirmed that all the funds that were in the trust account had been transferred to the NCPA Standard Bank account by January 2017. According to Mthabine only funds that are to cover legal costs are left in the account. The failure to open the bank account cannot therefore be blamed on the present EC nor can it impute any maladministration of funds. The attorneys as well cannot be blamed for having secured the funds in the trust account until the NCPA has opened its own

account, especially as the amounts are kept separate in a trust account and as highlighted by the Mthabine, such an account is subject to audit and monitored in terms of the law society rules as long as its identity is clearly indicated.

[104] The Applicants have also raised the issue of the appointment of the auditors, which issue is part of issues that were also there since the establishment of the NCPA during the EC of Mathebula and recognized at the 1st AGM on 23 November 2014. It however appears the Mathebula EC was overwhelmed and could not meet any of the planned activities and commitments or resolutions. Even though Mathebula was part of the EC at the time he does not offer any explanation why the obligations could not be fulfilled. Instead he removes himself from the problem and blames just the EC even though the issue was prevailing during his time and blames the present EC for everything. Like opening a bank account and the appointment of auditors. In his replying affidavit he defers to Sambo who was the chairperson at the time to respond to those issues. During Mathebula's time no auditors were appointed nor was there any indications in the minutes of the meetings held that there was a plan to appoint auditors by a certain period, although the requirement is alluded to. Notwithstanding that they were required to account for all the monies that they were receiving and spending after taking office in 2013. Mthabine has indicated that the 2016 EC subsequently managed to obtain financial statements from their auditors and such have been made available for scrutiny by the members. They were prepared to avail the statements for scrutiny.

[105] It is however in the same vein shocking that the Ministry or the Director General did not insist in their monitoring of the affairs of the NCPA to appraise how the capital and the land was being used and insist that the NCPA obtain audited financial statements that set out the NCPA ECs' treatment of community funds since 2013. It is obvious that the issue was approached halfheartedly by the members of the former EC but also recklessly by the Director General whose duty it is to monitor and inspect the affairs of the CPAs, Since the financial records of the association are supposed to be subjected to an annual independent verification, as approved by the Director General; see s 9 (e) (ii). The statements are now said to be available it is imperative that they be submitted for scrutiny and assessment by the NCPA members and the Director General upon which a decision can be made if a forensic investigation is necessary. As the instigation of a forensic audit might prove a mammoth task that might deplete the resources of the NCPA and will have to be taken in a meeting in terms of the Constitution.

[106] Since it is the relief also sought from the court that the Director General assist the beneficiaries with the preparations for the elective AGM in the very near future, some of these decision can be delayed until the AGM when the decision can be made by the electorate in terms of the Constitution which by then it would be expected will include the members that were excluded due to the delayed verification process. The elections should fairly be held after the finalization of the verification process so that they can be inclusive of all those that are justifiable beneficiaries in terms of the Restoration of the Land Act. The members are also to be furnished with copies of the financial statements that has been issued by the auditors to date, before the elections, so that they can make an informed decision with regard to the decision to initiate a forensic audit of the NCPA.

[107] The Applicants have also made an allegation on the distribution of the benefits by the the EC which is in essence is that the distribution was premature as the verification of the members was not yet finalised with most of the members of the Mavhuraka community not yet verified. Also such distribution not to have been effected in terms of the NCPA Constitution which the EC was bound to follow. It is alleged that nobody knows what process the EC followed. It is common cause that the verification as at time of the institution of the proceedings was not yet finalised. During the hearing the court was advised that the verification process has been embarked upon by the Director General's office and was to be finalised in a few months. The distribution of the benefits was also common cause that it was only to the members that have been verified. There was no proper policy with regard to a distribution of benefits that was to take place before the verification is finalised, especially as to how the other members that might be later verified who have been on the original list of members all along but would have lost on an opportunity to benefit because of the delay in their verification were going to be accommodated.

[108] I am mindful that the decision to consider the initial distribution of R10 000 (ten thousand rand) was before the period of the existing EC but during the period between the resignation of the first EC of Sambo which the 1st Applicant Mathebula was part of, and the transient EC with the acting Chairperson Mkansi in control. The present EC cannot be shouldered with the responsibility. The EC of Sambo should be held accountable for the distribution as is alleged by the NCPA. It was during the final days of the 4 executive committee members that includes Mathebula.

[109] From the minutes of the AGM of 23 Nov 2014 it is obvious that the intention of the NCPA was to speed up the process of verification and only then was the distribution going to take place, which was a clearheaded valid consideration. The plan was to finalise verification that was indicated to be ongoing by June 2015. It was also indicated in the minutes and activity report that the first benefit distribution was to be effected by June and July 2015. According to the Applicants the EC failed to fulfil the undertaking on the finalisation of the verification of members but nevertheless proceeded with distributions on June 2015. It is not indicated whether or not the midterm Special General Meeting in June 2015 did materialise and if a policy to be applied in the distribution was established, a key function of the EC which required the approval of the AGM. The minutes reported on the intention to do so after final verification has been finalised. Neither Mathebula or Sambo sheds lights on what influenced the decision to proceed with the distribution even though verification was not finalised.

[110] The distribution was consequently done contrary to the decision and planning of the AGM. However the responsibility cannot be put on the shoulders of the present EC as at the time the NCPA was under the control of the first elected EC or transient EC. The distribution was in breach of the NCPA Constitution, the Act and the resolution taken at the 2014 AGM. Clause 7.3 provides that members of the Association shall be dealt with in such a manner as to ensure that all members receive the same or similar benefits and that any arbitrary distinction or unfair discrimination shall be avoided. For that reason, the finalisation of the verification process has become critical for the situation to be rectified; see s 9 (E) (iii).

[100] It is thus a fact that those who are members and were not verified at the time, who would have been positively verified if verification was finalized would have been unfairly

excluded from the distributions not because of their doing, but due to failure of the EC or Director General to finalise the process in time. In that case distribution when others have not yet been verified is certainly contrary to justness. As a result no further distributions are to be effected until a proper policy is developed that is accommodative of the errors of the NCPA EC. It is imperative that the Director General and the present EC together oversee the finalization of verification process. It is expected that it should have been finalized by now. It means before any further distributions are made to beneficiaries a compensatory payment to the beneficiaries whose verification was delayed but finally verified be considered.

[111] It goes the same with the second distribution effected on September 2016, it was also not implemented as per terms of the provision of the law or the Constitution. Verification of the majority of those who were recognized as part of the land claimants, that includes amongst others, the community of Mavhuraka was still not finalized. The distribution as a result was again done unfairly and discriminatorily. The situation justifies the call for serious urgent measures to be embarked upon to redress the situation. Mkansi was supposedly the acting chairperson since it was during the transient period. Mthabine however says he approved the payments which could not be as he was not yet elected. According to him he was elected on 22 October 2016. It is also disconcerting to realize that it was at the time when the acting Mkansi and the EC Chairperson was aware that elections were expected to take place in a month's time. I am not convinced that the Applicants were not aware of the impending elections on 22 October 2016 as they have indicated in their own words that at the time they resolved with the delegation from the Minister's office that any further action would await the elective AGM on 22 October 2016. However that does not justify the distribution before finalization of the verifications.

[112] It is also concerning to realize that even though this is one of the most important responsibility that our nation is saddled with the recognition of the rights of our indigenous people to ownership of their previously repossessed land, the government fails to comprehend that monitoring and training of the structures that are set up until the claimants are equipped with the necessary skills to take total control is a role the government will have to continuously play. The court has therefore seen it necessary that judicial oversight should be exercised in this instance that requires some of the orders to be made.

[113] The Applicants have also accused the NCPA EC of gross violations or maladministration of the resources of the NCPA by the executive members which has resulted in the squandering of funds and as a result obliged them to take the necessary steps. The allegations have not been substantiated with any further evidence except for the distribution of the benefits that has occurred discriminatorily without any proven resolution or policy adopted by the members. The two payments as indicated happened during the period of the initial EC and the second one during the transient EC. As it is the period that elections are supposed to take place, it is not necessary that all the affairs of the NCPA be placed under administration which in any case lies with the courts located in the Mpumalanga area. If the verification process has been finalised the Director General can proceed with the arrangements for the AGM.

[114] Under the circumstances I make the following order:

[1] The Application to **place the NCPA under the administration** of the Director General is dismissed:

[2] Prayer 2 is granted in that the NCPA is hereby ordered to submit all documents in their possession including financial records to the Director General, **and also to be distributed to its membership** within 30 days of the order of this court **disseminated by publishing the statements on their website as well and a notice published on their availability either on their website or by request.**

[3] The Director General is hereby directed **to release the results of the verification process that it embarked on and was to be completed by July / August 2018 within 30 days of this order.** If such verification is not finalised the Director General is ordered to finalise the verification of all beneficiaries within 30 days of this order and furnish the Applicants and the NCPA members with a copy of the report within 15 days of such completion.

[4] That the Director General **should soon after the release of the report on the verification process assist the beneficiaries of the NCPA to prepare for the Annual General Meeting and the elections of the new executive committee members of the NCPA within 60 days of the order of the court.**

[5] The decision to **institute a forensic investigation into the affairs of the NCPA** is deferred to the elective AGM, that is to be held in terms of the Constitution within 60 days of the order of the Court with the assistance of the Director General;

[6] The Director General should **conduct an investigation regarding the dispute between the beneficiaries and the executive members** of the NCPA. The investigation should be concluded within 6 months of the order of this court;

[7] a progress report on the investigation compiled by the Director General should be served on the Applicants and NCPA members by publication on the website within 3 months of the order of this court.

[8] That the **6th Respondent be and is hereby ordered to furnish records of the NCPA's monies that was held in their Trust Account to the Director General** within 30 days from the order of this Court;

[9] That the Director General **will give direction as to all monies to be received on behalf of the NCPA** from the date of the order of this Honourable Court which will be banked in the NCPA bank account. *

[10] No order as to costs.



N V KHUMALO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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