

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

15/2/2013

CASE NO: 57206/2010

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	2013.02.15
	DATE
	SIGNATURE

In the matter between:

MESHACK THEMBINKOSI SILINDA N.O

First Applicant

SIMEON NGOMANE N.O

Second Applicant

LAZARUS ZITHA N.O

Third Applicant

(In their capacities as Trustees of the Mjejane Trust IT 6335/04)

and

DAVID ZOMA MAKHUBELA

First Respondent

DAVID SHINGO MAKHUSHE

Second Respondent

DAVID SUBUSISO NDLOVU

Third Respondent

DUNISA MOSES SILABELA

Fourth Respondent

BOY MKHATSHWA

Fifth Respondent

J U D G M E N T

MAKGOKA, J:

[1] This judgment has taken inordinately long to deliver. A combination of factors, including personal circumstances, contributed to this. Those factors have been discussed with, and appreciated by, the Judge President. I regret any inconvenience caused to the parties by the delay.

[2] The issue in this application is the identity of the rightful beneficiaries of a land restituted in terms of the Restitution of Land Rights Act 22 of 1994. The applicants, who are the trustees of the Mjejane Trust (the Trust), seek confirmation of a verification list of beneficiaries of the Trust. The application concerns land rights of the Lugedlane community (the community) near Barberton in Mpumalanga Province.

[3] The community was forcibly removed from their land, Tenbosch and surrounding farms, in September/October 1954. Kwa-Lugedlane comprises two villages, Mangweni and Steenbok and the surrounding communal lands, spread over some 14 788 hectares. The community still resorts under the jurisdiction and authority of the Ngomane of Lugedlane traditional authority, which had maintained such jurisdiction over the community before the removals. Pursuant to a claim in terms of the Restitution of Land Rights Act 22 of 1994, the land was restituted to the community.

[4] Subsequent to the restitution, a Trust was created. The land was transferred to the Trust as a vehicle to hold the land on behalf of the community. The applicants are the trustees of the Trust. On 12 December 2008 Sentinel Corporate Fiduciary Services (Pty) Ltd and other persons, were appointed as trustees by this court. On

20 May 2009 this court suspended some of the initial trustees, and appointed the three applicants were appointed as interim trustees of the Trust by this court.

[5] The relevant clauses of the Trust Deed with regard to the beneficiaries are not particularly helpful in identifying who the beneficiaries of the Trust are. Clause 2.8 defines the beneficiaries as follows:

'Beneficiaries shall collectively mean those persons as per list attached hereto marked 'B' as well as those persons appointed as Beneficiaries in terms of this Trust Deed, membership vesting in the individuals and not households.'

Clause 7 provides:

- 7.1 The Initial Beneficiaries shall be those persons as per the schedule attached hereto marked "B".
- 7.2 Application to become a beneficiary by individuals other than those listed in the schedule shall be made to the Trustees. The Trustees shall submit such applications to a general meeting of the Trust, which shall decide whether to accept or reject an application to become a beneficiary'.

[6] Annexure 'B' referred to above, was controversial and created a need for a process to verify the individuals who would be the rightful beneficiaries of the Trust. As a result, on 12 December 2008 the Trust sought, and obtained, an order from this court in terms of which it was authorised to appoint an independent consultant to carry out a beneficiary verification exercise on its behalf, and thereafter to bring an application to this court for an order confirming such beneficiaries to be the lawful beneficiaries of the Trust. The independent consultant was identified in the court order as Dr AT Fischer.

[7] It is common cause that the verification exercise was not undertaken by Dr Fischer, as ordered by this court. Instead, an entity called Mhlaba Image Consulting (Mhlaba) was appointed by the trustees for that purpose. The reasons for the non-appointment of Dr. Fischer are controversial. The trustees state that they did not appoint him as the office of the Regional Land Claims Commission in Nelspruit 'felt' that he may be conflicted in the matter due to the fact that he had previously conducted verifications of the beneficiaries of the Trust which were not accepted by the general membership of the community.

[8] The office of the Commission was of the view that another person who had never been involved in the previous verifications be appointed, hence the appointment of Mhlaba. This is disputed by the respondents. Procedurally, the trustees should have sought leave from this court to vary the court order as regards the identity of the consultant. However, as it would be clear later, nothing really turns on this aspect. Mhlaba undertook a verification exercise and compiled a report dated 26 July 2010 ('Mhlaba report').

[9] On 5 October 2011 the trustees launched an *ex parte* application for the confirmation of the beneficiaries as described in the Mhlaba report. The first to fifth respondents, on 1 September 2011, successfully intervened in the *ex parte* application to oppose such confirmation, and brought a counter-application. In order to avoid confusion resulting from the counter-application, I refer to the applicants in the main application as 'the trustees' and to the respondents (the applicants in the counter-application) simply as 'the respondents'.

[10] The respondents oppose the confirmation of the beneficiaries as identified in the Mhlaba report on the basis that most of the individuals in the report do not form part of the community to whom the land has been restituted. In their counter-application, the respondents seek confirmation of a limited list of 1038 families, initially identified by Mhlaba. In the alternative, they seek amendments to the Trust Deed in order to allow for appropriate verification processes of members of the community in future. The relief sought by the respondents in the counter-application is opposed by the trustees.

Condonation

[11] At the outset, I should consider the respondents' application for late filing of their answering affidavit in the main application, as well as their counter-application. The respondents delivered their answering affidavit, and their counter-application, almost 6 months out of time. They seek condonation therefor, in a substantive application, which is opposed by the applicants. Despite not condoning the respondents' late delivery of their answering affidavit and counter-application, the applicants have delivered a conditional replying affidavit in the main application, and an answering affidavit in the counter-application respectively. This, they made it very clear, was by no means a concession that the above should be accepted by the court. They remain opposed to the admission of both.

[12] The background to the condonation application is this. Leave to intervene, as stated already, was granted to the respondents on 1 September 2011. On 8 September 2011, in compliance with the court order granting leave to intervene, the applicants furnished the respondents with a copy of the confirmation

application, together with a list of the beneficiaries verified in the Mhlaba report. In that letter, the respondents were requested to deliver their answering affidavit within 15 days from the date of receipt of the letter. There was no response to the letter.

I may mention *en passant* that the order granting leave to intervene did not set the time-frame for the respondents to deliver their answering affidavit. I will revert to this aspect later in the judgment.

[13] On 24 February 2012 the trustees' attorneys served the respondents' attorneys with a notice of set down, enrolling the matter for hearing on 12 April 2012. On 6 March 2012 the respondents delivered their answering affidavit in the confirmation application. On 14 March 2012 the trustees delivered a notice in terms of Rule 30 of the Uniform Rules of Court, in which the applicants raised the issue of the late delivery of those papers without an application for condonation. The respondents were given 15 days from the date of the notice – that is up to 5 April 2012, to remedy the cause of the complaint. The application for condonation was only served on 11 April 2012, without any explanation for the delay.

[14] The affidavit in support of the condonation application had been deposed to by Mr. Richard Spoor, the respondents' attorney of record. Mr. Spoor proffers the following reasons for the late delivery of the answering affidavit: (a) it was difficult for him to prioritise finalization of the papers for financial reasons (he is acting *pro bono* on behalf of the respondents) and that the papers are 'prolix and difficult', as a result of which he had to fit in this non-fee paying work in between fee-paying work (b) he had sought advice from senior counsel whom he could not 'rush' as he was also

doing it *pro bono*. For this reason, counsel took some time before he gave furnished advice.

[15] In answer to the second reason, the applicants disputed that the advocate mentioned by Mr. Spoor ever gave any opinion in this matter, but in another matter during 2005, and totally unrelated to the present matter. The applicants in fact, attached a copy of that written opinion. In reply, Mr. Spoor admitted that, but explained that that opinion, 'formed part of the advice that he (the advocate) gave me', and that he discussed the matter on 'numerous occasions over the period while I was drafting the answering papers and grappling with the legal issues'.

[16] Counsel for the applicants, in their written submissions and orally, strongly criticised Mr. Spoor's explanation, submitting that the explanation amounted to an admission that he (Mr. Spoor) had tried to mislead the court and urged me quite forcefully, to visit such conduct with a punitive costs order, to demonstrate the court's displeasure. As to the first ground, counsel pointed out that Mr. Spoor knew fully well when he accepted instructions that he was not to receive remuneration for the work, and could not use that to justify non-compliance with the rules of this court.

[17] The above points are well-taken. Simply put, the explanation by Mr. Spoor is unconvincing, and was correctly criticised by the applicants' counsel. Mr. Spoor should not have accepted instructions in the first place if he was not certain that he would give proper attention to the matter. Once a practitioner has accepted instructions, whether *pro bono* or for remuneration, he or she is under an abiding duty to the client, to execute the mandate promptly and with reasonable skill.

Anything short of that could, in suitable circumstances, render a practitioner's conduct justiciable by his or her regulatory professional body.

[18] Having said that, I bear in mind that lack of proper explanation is not the only consideration. There are other factors to be considered, too, to determine whether condonation should be granted or not. See in this regard *Federated Employers Insurance CO Ltd v McKenzie* 1969 (3) SA 360 (A), where the following apposite remarks were made at 362G-H:

'In consideration petitions for condonation under Rule 13, the factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice... The cogency of any such factor will vary according to the circumstances, including the particular rule infringed'

[19] In the present case, I am of the view that lack of proper explanation is far outweighed by the other factors. The delay was not too inordinate. In addition, the case is clearly of considerable importance, not only to the parties, but to the broader public, as it concerns a constitutionally-mandated land restitution process. The respondents' case (both in the opposition to the confirmation of the verification report and in the counter-application) is not a hopeless or a frivolous one. The court is not inconvenienced as all sets of affidavits are before court, and therefore a need for a postponement does not arise. It is furthermore essential for the administration of justice that this matter be decided having taken into consideration all the views of interested parties. As would appear later when I consider the verification process was marred by violence and intimidation, and the exclusion of the respondent's

answering papers, and deciding the matter only on the trustees' application, is likely to cause further instability in the community. While not condoning the use of violence, one has to adopt a sensible and pragmatic approach, given the emotive nature of land ownership in the country.

[20] I am therefore satisfied, and find, that condonation should be granted, respectively, for the late filing of the respondents' answering affidavit in the confirmation application, and the respondents' counter-application. That brings me to the merits of the applicants' confirmation application and the respondents' counter-application, which I consider in turn.

The confirmation application

[21] As stated in earlier, the trustees did not appoint Dr. Fischer, as directed by the court order, but Mhlaba, for the reasons fully set out in para [7] above. In their application, the trustees support the findings and recommendations of the Mhlaba report, in particular the verified list of beneficiaries, and pray that the list be accepted as a 'true reflection of the households and beneficiaries' of the Trust. Accordingly, they seek this court's order confirming the list as reflecting the rightful beneficiaries of the Trust. The trustees further submit that based on the Mhlaba report, there was participation by all interested parties in the verification process, and that no one stood to be prejudiced by the confirmation of the beneficiary list in the Mhlaba report.

[22] The respondents' opposition to the confirmation of the verification report is premised on two grounds that (a) process did not comply with the court order dated 18 December 2008 (b) the process was flawed.

[23] Before I deal with the contentions of the parties, it is prudent to set out how Mhlaba went about the verification process, and what I consider to be the salient and relevant features of the Mhlaba report. A panel of 41 elders from the community was elected to assist with the verification exercise, representing each of the affected wards as they existed before the removals. Several meetings were held from 24 September 2009 to 25 April 2010 at various venues in the area. There were a number of challenges, e.g. threats of violence against panel members, lack of co-operation among community representatives, factionalism, etc. As a result, the process was far from being perfect.

[24] The meetings held on 13 and 14 November 2009, bear particular relevance to the dispute between the parties. It is on the day that the panel identified and registered a total of 1038 families as the legitimate beneficiaries of the Trust. The respondents were satisfied with that list and declared that there should be no further verification meetings as, according to them, all the affected beneficiaries had registered. The panel therefore produced an interim list of verified beneficiaries with a total of 1038 families.

[25] Despite this, the panel proceeded to hold further verification meetings, during which members of the community were invited to check whether all the names of the qualifying beneficiaries had been properly registered. During these meetings some people claimed that they had been left out as they had not been available during the previous verification meetings, for various reasons. The panel resolved to set a further date to accommodate this group. Further meetings were held, culminating in

the final verification meeting which took place from 23-25 April 2010. After these meetings, a further list of 1539 beneficiaries was added to the initial 1038.

[26] In summary, the Mhlaba report identified a total of 2577 households to be true beneficiaries of the Trust. Of this, the respondents allege that only 1038 families should be confirmed as the initial beneficiaries of the Trust. The trustees seek the court's approval of all 2577 households. This is the nub of the dispute between the parties. The respondents therefore contest the legitimacy of the additional 1539 who were added to the initial list of 1038 referred to above. I turn now to consider the respondents' two grounds of opposition to the confirmation of the verified list.

Non-compliance with the court order

[27] The respondents, very correctly, contend that the trustees were not entitled to merely substitute Dr. Fischer of their own volition without seeking a variation of the court order. Having said that, I am not inclined to set aside the appointment of Mhlaba, and disregard its report, for three main reasons. First, the respondents have not applied for the setting aside of the appointment of Mhlaba. It could equally be argued that the trustees themselves were enjoined to seek condonation for their unilateral substitution of Dr. At Fischer with Mhlaba. That may be so, but the objective reality is that Mhlaba has compiled a report, with which both sets of adversaries agree (the list of 1032).

[28] Second, and flowing from the first, the respondents, on the contrary, seek, in their counter-application, confirmation of a portion of the beneficiaries verified by Mhlaba, i.e the initial list of 1038. In short, the respondents cannot, on the one hand,

seek to impugn the Mhlaba report (in their opposition to the confirmation application) and on the other, seek to rely on a portion thereof, (in their counter-application).

The one position necessarily negates the other. The respondents cannot probate and approbate at the same time. What is stated above, applies with equal force, to the respondents' remaining complaints that the verification process was flawed due to threats and intimidation; and that the brains behind Mhlaba Image Consulting is a brother to one of the trustees, therefore resulting in an alleged conflict of interest.

[30] Third, it would not be in the interest of the community and the Trust to do so, especially from a costs point of view.

[31] The remarks made above, are by no means to be regarded as condonation of the applicants' conduct of simply ignoring an order of this court on the basis of the say so of an unnamed person in the office of the regional Land Claims Commissioner. The remarks should be read with, and are subject to what is stated below in paras [37] and [38].

The respondents' counter-application

[32] The respondents' counter-application seeks in the main, confirmation that the 1038 families on the interim list of verified beneficiaries, referred to in the Mhlaba report, are the initial beneficiaries of the Trust, as contemplated in clause 7.1 of the Trust Deed. In the alternative, the respondents seek an order directing that the provisions of the Trust Deed be amended in very far-reaching respects, with regard to, among others, the identification of the Lugedlane Traditional Community as the beneficiary of the Trust; the establishment and maintenance of the members register

of the community; eligibility for membership of the community and dispute resolution mechanisms related thereto. The respondents further seek an order directing the trustees to convene, within 90 days, a general meeting of the Trust for the purpose of reporting on the finances and administration of the Trust and for the election of new trustees of the Trust.

[33] In the founding affidavit in the counter-application, the respondents make some serious allegations as to the governance of the Trust, concerning possible abuse of Trust property and funds, lack of accountability and transparency etc. It is not necessary to repeat them here. Suffice it to say that there are pertinent allegations, which are met with sweeping and general denials by the trustees. That concerned me greatly. It is clear from the tumultuous history of the matter, characterised by on-going litigation, that unless proper mechanisms are put in place for proper governance of the Trust, its ills and instability will persist.

[34] The applicants' make a point in support of the confirmation application that the verification process of beneficiaries to Trusts of this nature is an on-going process and anyone may submit themselves for verification as soon as information comes to hand to prove his claim. The applicants do not say by whom and how, would such potential beneficiaries be verified. Would they have to approach this court, and if so, would that be on a case to case basis? The upshot of my concerns is that there does not seem to be mechanisms in place to deal with these issues in a structured manner.

[35] In my view, that stems from the ambiguous provisions of the Trust Deed. That aspect should be rectified. This is where I find merit in the respondents' alternative claim in their counter-application that the Trust Deed be amended in certain respects. The applicants have contended, and I agree, that the rights of the beneficiaries who have been verified as such are likely to be affected adversely. As such they have a direct and substantial interest in the outcome of the litigation. The applicants accordingly raised a point of non-joinder of those individuals.

[36] Having considered all the aspects of the two competing applications before me, I come to the conclusions set out below.

The confirmation application

[37] With regard to the trustees' application for confirmation, I am not prepared, at least for now, to confirm the list of beneficiaries contained in the Mhlaba report, for the simple reason that I have not been assured that the verification process underpinning that list, was carried out in a manner consistent with the principles enshrined in the Restitution of Land Rights Act 22 of 1994, as postulated in the court order. The trustees themselves do not make any assertion in that direction in their confirmation application. I need Dr Fischer, who was commissioned by the court for this purpose, to express a view in this regard I am mindful of the reasons furnished by the trustees for not appointing him.

[38] However, I am not prepared to accept the mere *ipse dixit* of the trustees that he had agreed not carry out the obligations imposed on him by this court. But in any event, I do not consider those reasons to be sufficient to render Dr. Fischer

'conflicted', whatever that is meant to convey. That his earlier verification report was not accepted by the community does not 'conflict' him. In the end, it is not the views of the community or their wishes that guide us in complex and technical matters such as the present, but the considered and learned views of experts like Dr Fischer. Until Dr Fischer indicates in writing to this court of his inability or unavailability to carry out the mandate as set out in the court order, and duly excused, he remains obliged to assist the court where necessary. It is important for the integrity of the verification exercise be ensured before this court confirms the beneficiaries identified in that exercise. Hopefully, Dr Fischer's views and expert opinion would assist in this regard. It is in that light that I intend to direct him to comment on the verification exercise carried out by Mhlaba.

The respondents' counter-application

[39] Given what I stated in paras [37] and [38] above, I am similarly not prepared, at least for now, to grant prayer 1 of the respondents' counter-application (confirmation of the list of 1038 in the Mhlaba report). For reasons set out in para [] above, the the alternate relief (amendment of the Trust) should also be postponed to allow the proper joinder of the disputed beneficiaries.

[40] Costs, for both the confirmation application and the counter-application should be reserved.

[41] In the result the following order is made:

1. Condonation is granted for late filing of the respondents' answering affidavit in the confirmation application and the respondents' counter-application, respectively;
2. The trustees' confirmation application and the respondents' counter-application are, respectively, postponed *sine die*;
3. The respondents are granted leave to apply, if so advised, for the joinder of the disputed beneficiaries (those verified after 14 November 2009 in terms of the Mhlaba report dated 30 August 2010) as parties to these proceedings, which application, if any, shall be launched on or before 15 March 2013;
4. In the event the respondents launching the application referred to in (3) the application shall be served on the disputed beneficiaries by displaying the the application prominently at the following places:
 - 4.1 the offices of the Trust
 - 4.2 the office of the Lugedlane Traditional Authority, Mangweni and Steenbook.
5. Dr. At Fischer is directed to, on or before 15 March 2013, furnish the attorneys of the trustees and of the respondents, with written comments on Mhlaba's verification report dated 30 August 2010, and in particular, whether in his opinion, the beneficiary verification exercise underpinning such report, was carried out in a manner consistent with the principles enshrined in the Restitution of Land Rights Act, 22 of 1994;

6. In the event of the respondents not launching the application referred to in (3) above, any of the parties may enrol the two applications for hearing upon the expiry of twenty (20) court days of 15 March 2013;
7. The parties are all entitled to supplement their respective papers, to the extent necessary as may be occasioned by either the application envisaged in (3) above, or by the comments of Dr. Fischer as envisaged in (5) above;
8. The costs in the confirmation application and in the counter-application are reserved.



TM MAKGOKA
JUDGE OF THE HIGH COURT

DATE OF HEARING : 6 AUGUST 2012

JUDGMENT DELIVERED : 15 FEBRUARY 2013

FOR THE APPLICANTS : ADV. B R TOKOTA SC, WITH ADV Z Z MATEBESE

INSTRUCTED BY : S. NGOMANE INC., PRETORIA

FOR THE RESPONDENTS : MR. R SPOOR (ATTORNEY)
(Heads of argument drafted by Adv A Bester)

INSTRUCTED BY : RICHARD SPOOR ATTORNEY C/O BRAZINGTON
SHEPPERSON & MC CONNEL ATTORNEYS, PRETORIA