



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: 16141/2023

In the matter between:

MBONGINKOSI ALOIS GUMEDE

FIRST APPLICANT

SBONISIWE PRECIOUS GUMEDE

SECOND APPLICANT

and

**MASTER OF THE HIGH COURT,
PIETERMARITZBURG**

FIRST RESPONDENT

PHILLIP BANDLO GUMEDE

SECOND RESPONDENT

SABELO GOODMAN GUMEDE

THIRD RESPONDENT

THUTHUKANI DOBE

FOURTH RESPONDENT

SICELO DERRICK GUMEDE

FIFTH RESPONDENT

QAPHELISANI OBED KHUZWAYO

SIXTH RESPONDENT

**THE REGIONAL LAND CLAIMS
COMMISSIONER, KWAZULU-NATAL**

SEVENTH RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date for hand down is deemed to be 14 JUNE 2024 (Friday) at 14:45.

ORDER

In the result, I make the following order:

1. The application is adjourned sine die;
 2. The applicants are granted leave to supplement their papers regarding the relevant provision(s) of the Trust Property Control Act on which their case is founded;
 3. The respondents are granted leave to file an answering affidavit, if necessary;
 4. The applicants are liable for the wasted costs for the day (9 May 2024) on a party and party scale, limited to Scale C.
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JUDGMENT

Chetty J

[1] On 27 October 2023, an application was brought by the applicants, who live under the chieftainship of the Gumede household¹ and contend to be members of the Makhosi-khosi Communal Property Trust (the 'Trust') established pursuant to the transfer of immovable property in terms of the Restitution of Land Rights Act 22 of 1994 in the Ilembe District of the KwaDukuza local municipality. In the application they seek urgent relief against the Master of the High Court, that her decision to appoint of a five-member task team, following a community meeting on 10 June 2023, be declared invalid, unlawful, without force and effect, and be set aside. The five members against whom relief is sought are those who are cited as the second to sixth respondents. As appears from their answering affidavit, they were appointed trustees

¹ The respondents dispute the claim of the first applicant, contending that he is not the biological nor adopted son of Sopotshu Gumede, or that he is a beneficiary, and that he has no *locus standi* to bring the application. Various other allegations are levelled against the second applicant in contesting her *locus standi*. It is not necessary to deal with these contentions in light of the decision that I have reached and in light of an application being made to strike out such allegations.

for their broad range of skill sets and leadership abilities, ostensibly to ensure that the objectives of the trust are achieved.²

[2] The notice of motion includes various orders sought as interim relief, including the decision of the Master to appoint the second to the sixth respondents as interim trustees in terms of s 6(1) of the Trust Property Control Act 57 of 1988 (the ‘Trust Act’), as well as the Letters of Authority issued to the second to sixth respondents be declared invalid, without force and effect and set aside. The legislative provision relied on by the applicants assumes particular importance for the decision reached in this matter. In place of the interim trustees, the applicants seek that the Master appoints a ‘fit and proper independent person’ to act as interim trustee and to assume immediate control of the affairs of the trust. In addition, the applicants seek to interdict the affected respondents from managing the affairs of the trust and from carrying out any exercise designed to verify or admit new members to the trust.

[3] An interim order, by consent, restraining the first to the sixth respondents from accessing the business account of the trust, admitting new members, and acting on the authorisation of the Master in terms of the appointment on 20 June 2023, was issued on 8 November 2023.

[4] It bears noting that the Master does not oppose this application — which is strenuously opposed by the interim trustees. The Master filed a report, the salient aspects of which read as follows:

‘. . . I took the impugned decision to appoint the 2nd – 6th respondents as interim trustees from 23 June 2023 to 20 June 2024.³ The letter of authority and the terms of reference are attached marked as annexure “A”. The reason for my removal of the independent trustees at the time was the matter had been long outstanding since their appointment in office and that their appointment was nothing but a means to ensure that the trust does not ever return to the

² The second respondent has over twenty years’ experience in the fitting and engineering sector and land sustainability issues, having obtained an N2 qualification from the Swinton Technical College in 2007; the third respondent has a Bachelor of Education degree with an economics background with over 10 years’ experience; the fourth respondent has a Master’s degree in Development Studies and plays an active role in the Qwabe-Enkwenwezini Traditional Council; fifth respondent is a qualified Chartered Account, currently employed as a finance manager at a large insurance company and the sixth respondent holds a doctorate in Leadership, Management and Policy Development from UKZN.

³ Date as inserted in the Master’s report incorrectly reads 23 June 2023 to 20 June 2023.

claimants. The efforts, which the independent trustees had tried to implement, did not bear any fruits except that the beneficiaries were actually not benefitting anything from the trust. Further extension for the appointment of the Independent Trustees was no longer justifie[d]. The legislature's intention with the restitution of the land to the claimants was surely to ensure that the beneficiaries of this land enjoy it fully and that it is kept in good condition from generation to generation.'

[5] Attached to the Master's report, dated 6 November 2023, are the letters of authority issued in terms of s6(1) of the Act as well as a letter addressed to the Makhosi Khosi Community Trust dated 20 June 2023. The letter confirms the appointment of the Interim Trustees to look into the administration of the Trust and to furnish the Master with a report of the past expenditure of the Trust, including the disposal of trust property. In addition, the interim trustees were tasked with verifying and updating the beneficiary list, lodging financial reports, and audited statements, and holding elections for the appointment of a new board before 19 June 2024. Of significance is that the letter clearly states in the heading (in bold font) that the appointment of the trustees is made in terms of s 7(1) and 16(1) of the Trust Act.

[6] The present application, it was contended by the counsel for the applicants, is brought in terms of s 23 of the Trust Act. Counsel for the respondents, however, argued that the proper procedure that the applicants should have followed ought to have taken the form of a review in terms of Rule 53. This latter contention cannot be sustained in light of the Supreme Court of Appeal's judgment in *Fesi and Another v Trustees Elect of the Ndabeni Communal Property Trust*.⁴ In *Fesi*, the court squarely addressed this issue, stating:

'... They contended that the proper procedure would have been for the respondents to launch an application in terms of PAJA and in accordance with Rule 53 of the Uniform Rules, to review and set aside the decision by the Master to not issue the letters of authority. In this regard it was contended on behalf of the Master that the principle set out in the decision of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) should apply, namely, that the Master's decision remains valid until set aside by way of review.

[54] Section 23 of the Act on which the respondents based their application in the court below provides as follows:

⁴ *Fesi and Another v Trustees Elect of the Ndabeni Communal Property Trust* [2018] ZASCA 33; [2018] 2 All SA 617 (SCA) at para 53 - 54

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

This kind of review is dealt with by Professor Hoexter⁵ under the heading ‘Special statutory review’ (at 113) as distinct from a PAJA and other types of review. She points out that this is sometimes a wider power than ordinary review and thus more akin to an appeal but that it might well be narrower with the court being confined to particular grounds of review or particular remedies. It would, of course, depend on the relevant statutory provisions. In *Nel & another NNO v The Master (ABSA Bank Ltd & others intervening)* 2005 (1) SA 276 (SCA), para 22-23, this court, with reference to *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111, discussed statutory reviews of the kind in question and endorsed Professor Hoexter’s exposition. In *Honoré* at 191, para 119, the authors, in dealing with the power of the court when there is a challenge in terms of the Act in relation to the Master’s *appointment* of trustees point out, with reference to s 23, that the terminology of that section makes it plain that the court may consider that disputed issue anew.⁶ At para 154 (page 251) of *Honoré*, the learned authors note that *all* the Master’s decisions in terms of the Act are subject to reassessment by the court. They go on (page 252), to state that s 23 makes it plain that the substantive justification for any action by the Master may be scrutinised. They also state the following:

“[T]he substantive justification for any action by the Master may be scrutinised. The applicant will in other words not have to establish that the Master committed a reviewable irregularity but only that there are grounds for the court to substitute a decision it considers better. The court is expressly empowered “to consider the merits” of the matter, to take evidence “and to make any order it deems fit”. This goes further than the entitlement to administrative justice now embodied in statute under the Constitution.”.’

[7] I am satisfied that the application is properly before the court, as a review under s 23 of the Trust Act. The point of contention by the respondents must fail.

[8] The overarching purpose of the application, as set out in the applicants founding affidavit, is to set aside or ‘invalidate’ the decision of the Master to appoint the second to sixth respondents as interim trustees. As referred to above, that decision is attacked from various angles including the attendees of the meeting at which the

⁵ C Hoexter *Administrative Law in South Africa* 2 ed (2012).

⁶ Cf *Shenker v the Master* 1936 AD 136. In *Honoré* the authors note that that decision is in direct contrast with the provisions of the Act.

decision was taken to appoint interim trustees, defective notice of the meeting, and that the procedure to appoint the trustees was a variance with numerous provisions of the trust instrument.

[9] As stated earlier, the applicants case is largely premised on the grounds that the Master acted in terms of the wrong statutory provisions when she appointed the interim trustees in terms of s 6(1) of the Trust Act, that such appointment was at variance with the provisions of the trust deed and that the appointments be set aside. Throughout its papers and indeed in its heads of argument, the applicant makes repeated reference to the appointments being made in terms of s 6(1) of the Trust Act. In the founding affidavit, the applicants say that on 20 June 2023 the Master, of her own accord and unbeknown to members of the Trust, appointed five members to the Interim Task Team ‘acting in terms of section 6(1) of the Act’.

[10] The averment that the Master acted in terms of s 6(1) is repeated at different points in the founding affidavit where the applicants state that an appointment in terms of this section, being s 6(1), is predicated on three possible scenarios: (a) where a trustee is elected in terms of the trust deed; (b) where an appointment has been made in terms of s 7 or; (c) where the court appoints a trustee.⁷ The founding affidavit then proceeds to say without equivocation that the “Master neither acted in terms of s7(1) of the Act nor was she complying with any court order which so appointed the respondents.” Later in the founding affidavit, it is stated that the Master “should have invoked her s7(1) powers and appoint a fit and proper independent person to act”. The applicant proceeds to state that the Master did not make the appointment in terms of s7(1).

⁷ The averment that the Master appointed interim trustees on 20 June 2023 whilst acting in terms of s6(1) is persisted with throughout the Heads of Argument. This is made unequivocally clear where at para 32 of the Heads the following is stated:

‘It is respectfully submitted that, in the circumstances, the Master acted under a wrong empowering provision when she appointed interim trustees (the 2nd – 6th respondents) in terms of 6(1) instead of s7(1) of the Act, hence she committed an error of law.’

Relying on *Selati v Master of the High Court and Another* (3343/2019) [2020] ZALMPPHC 50 (19 May 2020) where the Master commits an error of law, the applicants submitted that in the result the appointment and the letters of authority issued by the Master must be set aside. Further reliance was placed on *Moshoeshoe v Master of the High Court N.N.O and Others* (3981/2022) [2023] ZAGPJHC 1134 (5 October 2023) where it was held that “invoking a wrong empowering provision to locate an administrator’s ability to act or decide will be vested with nullity.”

[11] As I have understood the applicant's case throughout, the applicants contend that the Master made an error of law by appointing the interim trustees by acting in terms of s7(1). She ought to have acted in terms of s 6(1) of the Trust Act and followed the provisions of the trust deed when deciding on the criteria of persons to be appointed as trustees. The primary thrust of the applicant's case is that the Master flouted the provisions of the trust deed by not appointing trustees in accordance with the provisions of the trust instrument.

[12] The applicants also attached to their papers the unreported judgment in *P B Gumede and others v Khan NO and others*⁸ in which arguments similar to those advanced by the applicants in the present matter were raised therein. Bezuidenhout AJ (as she then was) considered the provisions of the Makhosi Khosi Communal Property Trust (the same which serves before me) and the argument that the Master was obliged to act in terms of s 7(1) of the Trust Act when appointing independent trustees in the absence of a provision in the trust instrument. The learned judge concluded that the proviso of the trust deed relied on by the applicants in that case did not assist them. The provisions of Clause 14.15 of the Trust Deed refer to a 'duly convened General Meeting of Members shall have the right at any time to remove or substitute a trustee as it may deem appropriate...'. (my underlining.). It was correctly pointed out by the court that that particular clause deals with the removal of a trustee, whereas then (as in the present case) one is dealing with the appointment of independent trustees. In those circumstances, it was held that as long as the Master appointed the trustees in accordance with the Act, there could be no complaint.

[13] I have referred to the above judgment not to delve into the merits of the dispute before me, but solely to indicate that the applicants, at the time when they launched this application, must have been aware of the basis on which Bezuidenhout AJ arrived at her decision, and in particular those aspects of the judgment relating to the Master's powers under s 7(1) of the Act in relation to the provisions of the trust deed. It would also have been abundantly clear to the applicants once they were in possession of the answering affidavit, that the respondents contend that the Master acted in terms of s

⁸ *P B Gumede and others v Khan NO and others* (4454/2020P) 12 February 2021.

7(1) when she appointed the second to the sixth respondents, as the terms of the independent trustees who had been in their positions for several years, had come to an end by effluxion of time.⁹ On that basis, the respondents contend that the office of the trustee became vacant and after consultation with interested parties, the Master appointed the second to sixth respondents as interim trustees.

[14] It was contended by the respondents that the appointments were consistent with the provisions of s7(1) of the Trust Act. s 6(1) of the Trust Act is the authorising section, enabling the trustee to carry out his or her mandate.¹⁰ The respondents therefor persist in their view that the appointments were not made in terms of the Trust Deed, but pursuant to the Master's powers in terms of s 7(1). The applicants' persisted in their contention that s 6(1) was the operative provision, and accord to the respondents they were misplaced, and based their challenge an incorrect assumption. This was partly due to the applicants not having first obtained the record before they engaged in litigation. The respondents contend that had the applicants done so, they would have realised that the appointments were made in accordance with s 7(1) and not s 6(1). In that event, the present application may never have materialised.

[15] This brings me to the about turn by the applicants to what has been stated in their founding affidavit and their replying affidavits. At the hearing of the matter, the applicant's counsel conceded that s 6(1) of the Trust Act was, in fact, the 'appointing' or 'authorising' provision for the trustees to act and that the Master acted in terms of s 7(1) when she appointed the second to sixth respondents as interim trustees. At this point, counsel for the respondents submitted that the proper course for the applicants would be to withdraw their application and tender the respondent's costs, as the case which the respondents had come to meet is one in which the applicants contended that the Master improperly and unlawfully exercised powers in terms of s6(1) in

⁹ Section 7 of the Act reads as follows:

'(1) If the office of trustee cannot be filled or becomes vacant, the Master shall, in the absence of any provision in the trust instrument, after consultation with so many interested parties as he may deem necessary, appoint any person as trustee.

(2) When the Master considers it desirable, he may, notwithstanding the provisions of the trust instrument, appoint as co-trustee of any serving trustee any person whom he deems fit.'

¹⁰ Section 6(1) reads as follows:

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

appointing the interim trustees. That position is fundamentally altered by the applicants' concession, despite the respondents pointing out from inception that the Master had acted in terms of s 7(1).

[16] The respondents relied on *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others*¹¹ in support of the contention that the applicants case had fundamentally changed and that it was not competent for them to make out a new case in argument, let alone such case not having been made at all on affidavit. In *Swissborough Diamond Mines* it was held that—

'It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* 1972 (1) SA 464 (D) it was stated at 469C--E that

"where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.".'

[17] It follows that an applicant must accordingly raise the issues upon which it would seek to rely in its founding affidavit by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof.¹² The well-established principles are that a party in motion proceedings may advance a legal argument in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged. In motion proceedings, the parties' affidavits constitute both their pleadings and their evidence. A litigant must plead his cause of

¹¹ *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others* 1999 (2) SA 279 (T) at 323F – 325B.

¹² See *Heckroodt NO v Gamiet* 1959 (4) SA 244 (T); *Van Rensburg v Van Rensburg en Andere* 1963 (1) SA 505 (A).

action or defence with at least such clarity and precision as is reasonably necessary to alert his opponent to the case he has to meet.¹³

[18] Upon being confronted with the argument that the applicant was essentially making out a new case for the first time and seeking to rely on a statutory premise which was not made out in its founding or replying papers, counsel for the applicant sought to rely on *Barkhuizen v Napier*¹⁴ that it was entitled to raise a point of law, albeit for the first time in argument. Although counsel was unable to refer me to the critical aspect in the judgment, I assume that what counsel had in mind was the reference to what Zondo J stated to be the following:

‘The mere fact that a point of law is raised for the first time on appeal is not in itself sufficient reason for refusing to consider it. If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the other party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise where, for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved. It would similarly be unfair to the other party if the law point and all its ramifications were not canvassed and investigated at trial.’

[19] The critical points referred to by Zondo CJ are whether the issue is covered by the pleadings and whether the consideration of the issue by the appeal court would involve unfairness to the other party. Apart from *Barkhuizen* referring to a point raised for the first time on appeal, the question is whether it results in unfairness and prejudice.¹⁵ The problem that confronts the applicants, in my view, is that the factual premise of their case is that the appointment of the independent trustees was made in terms of s 6(1) of the Trust Act. They now change their case to contend that the challenge is one under section 7(1). In my view, this involves a fundamental change in the case which they wish to advance.¹⁶

[20] The respondents do not accept the change in approach, for reasons either of prejudice or unfairness. However, it also places the Court at a disadvantage in that

¹³*National Director of Public Prosecutions v Phillips and Others* 2002 (1) BCLR 41 (W).

¹⁴*Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) .

¹⁵*Naude and Another v Fraser* [1998] ZASCA 56; 1998 (4) SA 539 at 558 B-C.

¹⁶*Poseidon Ships Agencies (Pty) Ltd v African Coaling & Exporting Co (Durban) (Pty) Ltd* 1980 1 SA 313 (D).

where matters are placed on the roll as opposed motions, they involve a significant amount of time dedicated to preparation and consideration and independent research of the arguments set out in the Heads. In this case, even in the Heads, the applicant gives no indication that they concede that the appointment of the trustees was made in terms of s 7(1). The situation can be contrasted to that of an administrator who deliberately relies on an incorrect statutory power for his or her actions, resulting in the action being null and void.¹⁷

[21] After considering the factual basis under which the applicants have launched their application and their attack against the decision of the Master as having acted under an incorrect statutory premise, the subsequent capitulation that the Master indeed acted under the correct statutory provision must mean that the applicant should have either requested that the matter be postponed to allow for the applicants to amend their papers and bring them in line with the argument they sought to advance. The other alternative would have been to withdraw the application and tender the respondent's costs. It did neither but persisted in relying on a different statutory provision to argue its cases on a factual premise that was designed to accommodate its challenge to appointments made under s 6(1) rather than s 7(1).

[22] In determining an appropriate remedy, I have considered that other courts have generally taken a nuanced approach to the issue of mis-reliance on legal provisions or changing legal arguments. While not encouraged, such change is not always fatal to a case. Relevant considerations include whether the mis-reliance was inadvertent or deliberate as in *Minister of Education v Harris*¹⁸ where the inadvertent mis-reliance was treated more leniently. In addition, there is the existence of a correct alternative

¹⁷ See *Minister of Education v Harris* [2001] ZACC 25, 2001 (4) SA 1297 (CC) where the court considered the validity of a notice in which the Minister of Education issued determining the age requirement for admission to a 'school'. The debate centred on whether this notice was applicable only to public schools. In addition, it was contended further that "the fact that the Minister had mistakenly purported to exercise his powers under section 3(4) of the National Policy Act rather than correctly under section 5(4) of the Schools Act, did not mean that the notice was as a consequence ultra vires." The Court then referred to the decision in *Latib v Administrator, Transvaal* 1969 (3) SA 186 (T) in which different subsections of an Ordinance empowered the declaration of public roads over farmland on the one hand and municipal land on the other, but the notice had referred to only one of the relevant subsections. The proposed public road was to traverse both farmland and land falling within a municipal area. The Administrator contended that this was due to an oversight. The Court reasoned that even if this was so, it would not result in the notice becoming a nullity.

¹⁸ *Minister of Education v Harris* fn 17.

provision, as noted in *Latib v Administrator, Transvaal*.¹⁹ The court should consider fairness to the opposing party, including whether they have had sufficient opportunity to address new arguments; the timing of the change in argument; and whether it could be characterized as “trial by ambush”.

[23] In my view, the granting of an order, in the exercise of my discretion, to adjourn the determination of the merits of the application, is a more equitable outcome than the dismissal of the application. In this way, the applicant has the opportunity to properly assess the merits, in light of the concession that the Master’s appointment was made in terms of s 7(1), and the potential success of the new arguments. Similarly, the respondents will have the opportunity to respond, should any new argument arise.

[24] The decision of the court to postpone a determination of the merits is solely a result of the change of approach by the applicants. The respondent came to meet the case which had been made out on the papers. In my view, the respondents should be entitled to the wasted costs for the day.

[25] In the result, I make the following order :

- 1 The application is adjourned *sine die*;
- 2 The applicants are granted leave to supplement their papers regarding the relevant provision(s) of the Trust Property Control Act on which their case is founded;
- 3 The respondents are granted leave to file an answering affidavit, if necessary;
- 4 The applicants are liable for the wasted costs for the day (9 May 2024) on a party and party scale, limited to Scale C.


M R CHETTY

Judge of the High Court

¹⁹ *Latib v Administrator, Transvaal* 1969 (3) SA 186 (T).

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