

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA**

CASE NO: 1904/2023

(1) REPORTABLE:NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

DATE 19/02/2025

SIGNATURE

In the matter between:

INGRID MHLONGO

FIRST APPLICANT

JAMES KHUMALO

SECOND APPLICANT

THUTHANE ADOLPH TJIA

THIRD APPLICANT

MAJIANE EVELINE MKHANSI

FOURTH APPLICANT

SAMSON MHLONGO

FIFTH APPLICANT

FRANK MHLONGO

SIXTH

APPLICANT

and

**LISBON DEVELOPMENTS (PTY) LTD
RESPONDENT**

FIRST

**MAGIC BREAKAWAYS (PTY) LTD
RESPONDENT**

SECOND

LEGACY GROUP HOLDINGS (PTY) LTD

THIRD RESPONDENT

REGISTRAR OF DEEDS: MPUMALANGA

FOURTH RESPONDENT

**NOMSA MUHLAWURI MANYIKE
RESPONDENT**

FIFTH

MADODA ISAAC TJIA

SIXTH RESPONDENT

**THEMBA TIBANE
RESPONDENT**

SEVENTH

**THE MINISTER OF AGRICULTURE, LAND REFORM
AND RURAL DEVELOPMENT**

EIGHTH RESPONDENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 19 February 2025 at 10:00.

JUDGMENT

Mashile J

Introduction

[1] To avoid confusion, the parties shall be referred to as follows:

The First to Sixth Applicants as Applicants unless context requires mentioning their actual names:

- 1.1 The First to Third Respondents as Lisbon Developments and where necessary I will use their actual names;
- 1.2 The Fifth to Seventh Respondents as the Former Trustees unless mentioning of their actual names will accord with context;
- 1.3 Nhlangwini Trust as the Trust;
- 1.4 Nhlangwini Community as the Community;
- 1.5 The two immovable properties that are the subject matter of this judgment, as the Trust Properties.

[2] Central to this application is whether the resolution of the Former Trustees taken on 12 January 2021 and the resultant agreement of sale of land signed by them concluded with Lisbon Developments on 14 January 2021, should be declared unlawful and set aside. Once so pronounced, to direct the Registrar of Deeds to cancel deed of transfer T488/2022 in terms of section 6(2) of the Deeds Registries Act 47 of 1937 and restore ownership to the Trust. The land comprises two properties described as:

- 2.1 Portion 6 of the Farm Lisbon 297, situated in the registration division K.U, in the Mpumalanga Province, in extent 1038,4613 hectares ("Portion 6 of the Farm Lisbon") held under certificate of registered title T9256/2015 dated 25/06/15; and
- 2.2 The remainder of the Farm Lisbon 297, situated in the registration division K.U, in the Mpumalanga Province, in extent 427,0971 hectares held under Deed of Transfer T10048/2005.

[3] The grounds of the relief sought are that the Former Trustees did not have authority to resolve on the matter. As such, the ensuing agreement concluded between the parties is inexorably unlawful in that the former Trustees disregarded various mandatory provisions in the Trust Deed. The Former Trustees ignored, among others, to secure the consent of the Community ("the community") for the transfer. In the second place, they did not have the capacity to transfer land that is jointly owned by the

community unless there was compliance with the trust deed. Lisbon Developments opposes the application on the basis that, among others, registration of transfer of ownership in terms of the abstract theory of transfer has occurred. The Trustees knew and understood the consequence of the agreement that they were signing on behalf of the Trust and ordinarily therefore *pacta sunt servanda* should be observed.

Factual Matrix

[4] Following a successful land claim in terms of the Restitution of Land Rights Act 22 of 1994 by the community, the state paid R16 814 000.00 to acquire the land on behalf of the community. The Trust was registered on 16 February 2004 for purposes of receiving the land. The land was transferred to the Trust in 2005 to hold for the benefit of the land claimants, the beneficiaries of the Trust. The properties are 1465 Hectares in extent. They are situated along the banks of the Sabie River, bordering the Kruger National Park and the Sabie Sands Game Reserve.

[5] The beneficiaries of the Trust comprise 148 households. Each group includes an originally dispossessed person, if alive, and their direct descendants. Prior to restitution, the Trust properties constituted a successful commercial farming enterprise known as Lisbon Estates, growing and producing subtropical fruit. Subsequent to restitution of the land to the community, the commercial farming activities declined and ultimately collapsed. The orchards died and the farming infrastructure fell apart.

[6] The decline and the eventual dissolution of the farming enterprise since the Trust's establishment could be attributed to poor governance on the part of the various trustees of the Trust. The governance of the Trust has been typified by non-compliance with the provisions of its Trust Deed, lack of accountability, self-interest, corruption of the Former Trustees and absence of adequate financial and administrative controls. The Former Trustees, took office in 2011 promising good governance. One of their major complaints against the trustees who served office before them was that they allegedly attempted to sell the Trust Properties to an investor at a low price.

[7] The Former Trustees failed to bring about the good governance they had guaranteed. Annual Financial Statements from 2011 to 2017 record the same disclaimer to the effect that:

“The Trustees failed to keep accurate management accounts and supporting documentation since incorporation of the Trust. There is no information available to review the comparative annual financial statements and minimal information available to review the current annual financial statements.” Each statement then notes that the problem with the record-keeping did not only relate to the period before the former Trustees were appointed but also during their period of office.

[8] During 2016, the Former Trustees began a process of putting good governance in place. This brought about the adoption of the current Trust Deed and the passing of several resolutions intended to improve the quality of governance. These included resolutions to:

- 8.1 Appoint an auditor;
- 8.2 Appoint a separate firm of auditors to undertake an independent review of the Trust's affairs;
- 8.3 Engage a financial controller (a copy of this resolution is annexed as IM9);
- 8.4 Register as a taxpayer with SARS;
- 8.5 Authorise an accountant to negotiate repayment terms with creditors of the Trust; and
- 8.6 Appoint a consultant to conduct a beneficiary verification exercise.

[9] Simultaneously with the endeavour to adhere to good governance, the accounting firm, Mazars, completed Annual Financial Statements for the Trust from 2011 to 2017. Even during the sixth year, 2017, of the trustees' term of office, Mazars recorded that there was “minimal information available to review the current and prior

year annual financial statements”. It proceeded to “draw attention to the fact” that the Trust had accumulated deficits of R2 960 811, which was alarmingly higher than the deficits of R241 384 recorded in the 2011 Annual Financial Statements.

[10] Lima Rural Development Foundation, a not-for-profit Organisation specialising in rural development and land reform, was mandated to update and verify the beneficiary register that the Trust must update annually in terms of clause 13.7 of the Trust Deed. The beneficiary register had, until that juncture, not been updated in over a decade. Lima developed a careful plan to ensure that the register was updated in full compliance with the Trust Deed and was as accurate as possible. This included engaging with each Beneficiary group to correct, update, or add information that had changed since 2004 with the support of six facilitators.

[11] By December 2017, 103 of the 148 households had been updated with their information logged in an electronic database with all information required by the Trust Deed that could be updated regularly in future annual updates. The next stage was to verify the information in two ways – through considering and confirming the new register at a general meeting and through specific endorsements from each group of their own data. The Applicants allege that by February 2017, Mr Themba Tibane one of the Former Trustees (“Mr Tibane”), was no longer cooperating with Lima to assist them with the information required to prepare a register compliant with the Trust Deed. Instead, he was engaging with Lima with “a significant degree of frustration and possibly even aggression” and was obstructing their further progression. This is denied by Lisbon Developments whose counter allegation is that Tibane held the opinion that the converse was in fact true because Lima was perceived to be stalling the process.

[12] Shortly following the report aforesaid, the Former Trustees terminated the mandates of Lima and that of the current attorneys of record of the Trust. Prior to the termination of verification, Lima had successfully validated 103 out of the 148 groups and had compiled an updated register of beneficiaries with those updated details. While the Former Trustees were still enthused to ensure that renewal of the Trust occurred,

few resolutions were executed. The Trust, however, later drifted back into dysfunction. Most conspicuous and significant was the absence of verified list of beneficiaries.

[13] The Former Trustees have for the past 5 years failed to comply with any provision in the Trust Deed. This failure expressed itself as set out below:

- 13.1 No independent trustee was appointed as required by clause 5;
- 13.2 There was failure to replace deceased trustees as required in terms of clause 7;
- 13.3 A register of resolutions maintained by the trustees did not exist and no minutes of meetings were kept;
- 13.4 No proper accounting records were maintained as required by clause 9.1;
- 13.5 No annual budget was prepared and approved as required in terms of clause 9.2;
- 13.6 No annual financial reports were prepared and presented to members at an AGM as required in terms of clause 9.3;
- 13.7 The books, records and accounts of the Trust were not reviewed annually by the Auditors of the Trust, as required in terms of clause 9.4;
- 13.8 No binding rules and procedures had been determined and stipulated for the good governance of the Trust as contemplated in clause 12;
- 13.9 The register of beneficiaries was not maintained; and
- 13.10 No election was held to replace the Former Trustees before their term of office expired.

[14] The Former Trustees did as they pleased, the concept of accountability sounded completely foreign to them. They generated income for themselves and the Trust by leasing portions of the Properties to tourism operators. In consequence of the strategic geographic location of the Trust Properties, the Former Trustees have received many proposals for the development of the Trust Properties for tourism and commercial purposes. Every one of those enterprises has failed in the face of the Former Trustees' corruption, self-interest, and/or lack of capacity.

[15] The majority of the community supports developing the Trust properties in a sustainable manner that will benefit them over the long term. They accept that a commercial partnership will need to be established with a developer or developers with the money and resources to do so. However, any such agreement should be negotiated and concluded in an open and transparent fashion in close consultation with the beneficiaries and should accrue to the best advantage of the beneficiaries over the long term.

[16] The Applicants allege that in or around November 2022, rumours circulated among them that the Former Trustees had sold the Trust properties to a developer, Legacy, which they know as the developer of an adjacent upmarket resort known as Elephant Point. These claims generated considerable distress among the community members. The Former Trustees denied that they had concluded an agreement of sale in terms of which they had sold the Trust Properties. That said, they acknowledged that they had only entered into a lease agreement with Legacy Hotels and Resorts Group.

[17] To quell the speculations of the sale of the Trust Properties, Mr Madoda Isaac Tjie (“Mr Tjie”) who is also one of the Former Trustees, went so far as to provide the community with a sworn statement wherein he declared that he confirms that he knew nothing about the sale of the Trust Properties. Additionally, he maintained that he had not given anyone a power of attorney to sell them. He confirmed that he was only aware of the existence of a lease agreement between the Trust and Lisbon Developments. Mr Tjie’s efforts to allay the disquiets of the community aside, their discontentment nonetheless elicited a vain attempt to seize occupation of the property.

[18] Lisbon Developments, which had taken transfer of ownership of the Trust Properties on 25 January 2022, successfully secured an order interdicting the community from occupying them. The suspicion of the sale of the properties was confirmed in early January 2023 when the Trust was placed in possession of a copy of a Deed of Transfer. The Deed of Transfer established beyond doubt that the Trust

Properties had been sold to Lisbon Developments on 14 January 2021 for an amount of R7 500 000.00, which doubled to R15 Million due to Lisbon Developments failing to register transfer within twelve months.

[19] The community was devastated by the news of the sale of the Trust Properties especially as the sale had always been emphatically denied by the Former Trustees. The Applicants aver that the Community knew nothing about the sale, was not consulted and as such, could not have agreed. Lisbon Developments challenges these claims by the community pointing out that there were meetings of the households, which properly endorsed the sale of the properties. In any event, Lisbon Developments alleged registration of transfer of ownership had already happened such that the process had by then become irreversible.

[20] When the current attorneys of record of the Applicants came on board, they immediately enquired from the attorneys of Lisbon Developments what the terms and conditions of the sale agreement were. The attorneys of the Applicants maintained that any registration of transfer of ownership was invalid. They also requested a copy of the sale agreement and tendered reconsideration of any transaction between the Trust and Lisbon Developments after the appointment of an independent trustee. On 31 January 2023, the attorneys of the Applicants again wrote to the attorneys of Lisbon Developments requesting that they be provided with:

- 20.1 The resolution of the Former Trustees purporting to authorise Mr Tibane, to sign the power of attorney to give transfer;
- 20.2 Any record or document that could serve as corroboration that there has been a vote taken by the group representatives, the representatives of beneficiary households as defined in the Trust Deed, to approve the sale of the Trust properties to Lisbon Developments as required in terms of the provisions of clause 10 of the Trust Deed;

- 20.3 Details of all payments made by Lisbon Developments to the Trust since 1 January 2020 including those of the bank account to which the payments were made; and
- 20.4 Copy of the sale agreement.

[21] On 1 February 2023, the attorneys of Lisbon Developments wrote back and provided the following to the attorneys of the Applicants:

- 21.1 The Power of Attorney granted by Mr Tibane on which the transferring attorneys also relied to effect transfer;
- 21.2 Copy of current letters of authority;
- 21.3 Register of the group representatives of the Trust;
- 21.4 Resolution of the group representatives by which they resolved to “support and approve of the commercialisation and transfer of the Lisbon farm to a Newco” on 4 and 5 January 2021; and
- 21.5 A resolution of the Former Trustees dated 12 January 2021, which authorised Mr Tibane to “*negotiate, sign and conclude*” the sale agreement and Subscription and shareholders’ agreement on the Former Trustees’ behalf.

[22] In addition, the letter stated the following:

- 22.1 That the purchaser, Lisbon Developments, had made payment into the bank account of the Trust in the amounts below –
 - 22.1.1 R7 500 000.00 into the Trust’s banking account on 14 January 2021;
 - 22.1.2 R6 500 000.00 on 25 January 2022;
 - 22.1.3 R1 528.42 on 16 March 2022; and
 - 22.1.4 R804 471.58 to the Bushbuckridge Municipality on behalf of the Trust to secure a clearance certificate;

22.2 The attorneys of Lisbon Developments confirmed that their clients were not willing to disclose the sale agreement; and

22.3 Detailed some of the essential terms of the transaction.

[23] The attorneys of Lisbon Developments refused to furnish the attorneys of the Applicants with a copy of the sale agreement or the subscription and shareholders' agreement. They stated that their client was neither obliged nor willing to make copies of the sale and subscription and shareholders agreements available to the attorneys of the Applicants. They proceeded to say that they would, at the appropriate time and if lawfully required to do, furnish copies thereof.

[24] The Applicants state that they were unaware of the resolution of the group representatives taken on 4 and 5 January 2021 held at Huntington and Belfast Villages, respectively. They add that they, together with the other community members, do not remember any notices of general meetings ahead of those dates. They maintain that this was also the experience of James Khumalo, Majiane Eveline Mkhansi, Samson Mhlongo and Thuthane Adolph Tjia who are themselves group representatives. Constable Ngwenya who is alleged to have been part of the meetings of 4 and 5 January 2021, has deposed to an affidavit denying that he was part of such meetings where he certified the resolution. He also denies having ever utilised the police stamp outside of the Hazyview Police Station.

[25] The Applicants further allege that the resolution was compiled by Messrs Tibane and Eloff Shikaya ("Mr Shikaya") during house-to-house visits to beneficiary households. Tibane and his associates said that they were updating the personal details of group representatives for the purposes of forthcoming elections and requesting their nominations for candidates to be elected as trustees. Group representatives were asked to provide their identity numbers and cell phone number, which they then recorded in writing in a register. The person who provided the details was then asked to confirm the correctness of the details recorded in the register by signing their name in the space provided.

[26] The Applicants aver that at no time did Mr Tibane or his associates advise the persons who signed the register that by affixing their signatures, they were voting for a resolution to sell the Trust properties. They gave no indication that the register was a resolution of the group representatives authorising the trustees to sell the properties. Tjia denied signing the resolution on oath. The signature of the late Former Trustee, Ms Grace Tryphina Mokoena (“Ms Mokoena”), is disputed. A comparison of her signature on 12 January 2021 resolution and the 2017 Trust Deed looks different. It is common cause that an expert forensic examiner, Mr Cecil Greenfield (“Greenfield”), confirmed that the signature on the resolution was “probably not written by her”.

[27] The Applicants assert that the resolution of 12 January 2021 professedly authorises Mr Tibane to negotiate and conclude two agreements, the sale of the Lisbon farm to Lisbon Developments (Magic Breakaways) and the subscription and shareholders’ agreement. Once Mr Tibane has done so, the resolution empowers the legal advisor of the Trust, Mr Mculu, or any of the Former Trustees, to sign all documents and do all that is necessary to give effect to the agreements including the signature of documents for purposes of transfer of the property as it is intended in the agreement of sale. The Applicants point out that the draft agreements were not annexures to either resolution, instead, the resolutions were attached to the agreements subsequently negotiated and concluded by Messrs Tibane and Bart Dorrestein (“Mr Dorrestein”). The resolution was therefore drafted and signed after the agreements had been prepared when the converse should have been.

[28] On 8 February 2021, Mr Tibane alone, contrary to the provisions of the resolution of 12 January 2021, signed a power of attorney to pass transfer of the Trust properties to Lisbon Developments. The Trust has since 20 January 2022, when the trustees’ term of office expired in terms of Clause 5.2(i) of the Trust Deed, been without trustees and is adrift.

[29] On 2 February 2023, the attorneys of the Applicants wrote to the Master of the High Court setting out the Former Trustees' misconduct. They requested the Master to, firstly, demand an accounting from the Former Trustees and secondly, advise them that they have no authority to act. On 16 February 2023, the attorneys of the Applicants wrote to the attorneys of Lisbon Developments wherein they again asked for a copy of the sale agreement. Responding on 17 February 2023, the attorneys of Lisbon Developments reiterated that they were unwilling to disclose the sale agreement. However, they attached a copy of a letter addressed to the Former Trustees, dated 1 December 2020, outlining the terms of reference reflecting the discussions between the Former Trustees to be used in drawing up the agreements to be concluded between the Trust and Lisbon Developments.

[30] The Applicants gained sight of a development plan for the properties, which demonstrates the developers' intentions in a graphic form. From the "terms of reference" and the development plan, as the Applicants understand, the essential terms of the transaction, at least as it was conceived in 2020, include:

- 30.1 The sale agreement and a subscription and shareholder's' agreement concluded with Magic breakaways in relation to the parties' interests in the "developer" being Lisbon Developments;
- 30.2 The Trust owns, or will own, 20% of the shares in Lisbon Developments, with "a Legacy Group company" (presumably Magic breakaways) owning the balance, 80%. In principle, the Trust will own 20% of any enterprise that engages in development activities on the properties;
- 30.3 Certain parts of the properties, identified as the "residential golf and riverfront components", would be developed independently of the developer (Lisbon Developments) by the Legacy Group, and the Trust would be paid R300 000.00 in respect of every erf sold;
- 30.4 The developer would apply for the establishment of "various townships" on the properties with a view to sell the erven in those townships;

- 30.5 The developer would develop the balance of the property, which was not separately identified in the “agreement”;
- 30.6 The residential riverfront components and townships to be established may well comprise of over 200 erven;
- 30.7 There is no indication given as to how Lisbon Developments was to be capitalised or how it would be financed. It is unlikely that the Trust is in any position to contribute other than the properties.

[31] The Applicants do not know to what extent the agreements concluded between the Former Trustees and Lisbon Developments support what is in the terms of reference. Beyond the 20% stake, there is no detail on how the Trust will participate in Lisbon Developments. Additionally, the Trust has received R15 000 000.00 from Lisbon Developments. It is not contested that not a cent of the amount has been distributed to the community. Moreover, there has been no accounting to the community on how the funds were expended.

[32] Tendering confidentiality to the attorneys of Lisbon Developments, the attorneys of the Applicants again on 20 February 2023 sought access to the agreements. The Applicants now believes that most, if not all, of the funds paid by Lisbon Developments have been embezzled by the Former Trustees. The community has received various reports that the Former Trustees have been making extensive cash withdrawals from the bank account of the Trust held at Standard Bank, Hazyview branch.

[33] The Applicants now believe that the video posted by Mr Tibane on social media where he is depicted with bundles of cash constitutes the source of their concerns, that there have been unauthorised cash withdrawals from the banking account of the Trust. Numerous requests to the Former Trustees to disclose bank statements have fallen on deaf ears. Attempts by the attorneys of the Applicants to obtain the bank statements from Standard Bank have proved vain in that it would neither disclose the bank statements nor confirm that it has frozen the banking account of the Trust, as per the request contained in the letter of the attorneys of the Applicants dated 3 February 2022.

[34] The community was incensed when it learned of the sale of the Trust properties. Whatever semblance of trust that existed between them and the Former Trustees has collapsed. The Former Trustees have since November 2022, when confronted by the community, persistently denied that they had sold the properties. They did so even when they were presented with the Deed of Transfer, which represents incontrovertible evidence of the existence of the sale. In the meantime, Lisbon Developments continues to use the properties.

[35] On 18 April 2023, the application for township establishment for Lisbon Developments on the properties was considered by the Municipal Planning Tribunal. On 19 April 2023, the attorneys of the Applicants wrote to the Tribunal noting that the developer did not notify the community of the hearing despite knowing of the preparations, exchange of papers and hearing of this application. The letter implored the Tribunal not to grant the application. The tribunal granted the application, the letter urging it to the contrary notwithstanding.

[36] The Former Trustees have also refused to disclose the sale and subscription and shareholders' agreements to the community or to make available copies of the Trust's bank statements or otherwise to account for the moneys received by them. The Former Trustees have recently made several attempts to convene meetings of the group representatives to nominate and elect new trustees. These meetings took place at a Hotel in Hazyview. The community does not trust the Former Trustees to oversee a trustee nomination and election process.

[37] The community attended the meetings that were held at the Hazyview Hotel. The community was determined that the Former Trustees should provide them with specifics of the sale and to account for the R15 million paid into the bank account of the Trust. In consequence, the Trust is no longer operational. The Former Trustees have sold the properties to a private developer and have done so:

- 37.1 Without the knowledge and consent of the community;
- 37.2 Without disclosing the terms of the sale;
- 37.3 Through a closed and obscure process to which only they have been privy for a fraction of the properties' value;
- 37.4 In circumstances where there are a number of credible developers who would leap at the opportunity to partner with the Trust, to develop the properties on terms negotiated and agreed upon in a transparent and open manner; and
- 37.5 By the use of fraud and deception.

[38] As though the above was not enough, it appears highly likely that the Former Trustees have misappropriated the proceeds of the sale for themselves. They have sold the land from which the community and their ascendants were forcibly removed – land that was reclaimed and restored for the benefit of the community and its descendants. They have done so clandestinely, dishonestly and without any regard to the rights and interests of the community. It is against the above backdrop that the Applicants have decided to approach this Court for an order to set aside the sale and transfer of the Trust properties.

Assertions of the Parties

[39] The Applicants contend that the sale agreement is unlawful in that the land was held in a Trust. The Trust Property Control Act 57 of 1988 (“Act 57 of 1988”) provides that the trustees must be properly constituted in accordance with the Trust Deed, must act collectively and in line with the provisions of a Trust Deed to bind the Trust. The Applicants add that section 6(1) of Act 57 of 1988 further stipulates:

“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.”

[40] The Trust Deed prescribes that a minimum of five trustees, including an independent Trustee, must be in office. It is not contested that when the purported sale and share subscription agreements were concluded and the properties transferred to Lisbon Developments, the Trustees did not quorate as there was no independent Trustee as the Trust Deed prescribes.

[41] Over and above the lack of authority of the Trustees to bind the Trust, the transactions were contaminated by fraud.

[42] The Applicants also assert that the substance of the sale and the share subscription agreements are void for illegality as the intention of these agreements is to achieve indirectly what the Subdivision of Agricultural Land Act 70 of 1970 (“Act 70 of 1970”) forbids. The land is sold subject to the approval of the Minister – this is exactly what Act 70 of 1970 prohibits, and the jurisprudence renders such agreements invalid.

[43] The register of group representatives relied upon by Lisbon Developments and the other opposing Respondents is not the register of beneficiaries required by the Trust Deed and cannot be used to prove membership or representative status. As a result, less than the required 66% of group representatives (based on the official register of beneficiaries) signed the resolution. Furthermore, the signature and the police stamp on the resolution were obtained under false pretences, as the police officer did not witness the meetings as claimed by Lisbon Developments and the other opposing Respondents.

[44] The abstract theory of transfer applies to the intention to transfer the community’s land to Lisbon Developments. In the context of the Transfer of the land, the validity of the underlying agreement is indispensable. Thus, once such a transaction is contaminated by fraud and unlawfulness the transaction will stand to be set aside. In this case, both exceptions are met. The Trust had no intention of transferring its land in the circumstances.

[45] The reliance of Lisbon Developments on section 28(2) of the Alienation of Land Act 68 of 1981 (“Act 68 of 1981”) is misguided insofar as it seeks to justify an otherwise unlawful agreement. Section 28(2), said the Applicants, applies to formality defects under section 2(1) of the Act, not to substantive contractual invalidity or illegality. Section 28(2) cannot cure the Trustees’ lack of capacity under Act 57 of 1988, the fraud committed, or the illegality under Act 70 of 1970. Accepting the respondents’ interpretation of section 28(2) would render section 28(2) an absurd and illogical provision, validating any invalid or illegal land transaction upon payment and transfer of the property. The Applicants referred this Court to the matter of *Legator McKenna Inc and Another v Shea and Others*.¹

[46] On the contrary, Lisbon Developments argues that the abstract theory applies without any exception as asserted by the Applicants. For Lisbon Developments only two requirements must be satisfied for registration of transfer of ownership into the name of another to occur. The two requirements are delivery of the immovable property to the party intending to take transfer together with a real agreement. Both the transferor and the transferee of the immovable property must possess intentions to pass ownership and to become the owner respectively. Insofar as Lisbon Developments is concerned, the prerequisites have been discharged.

[47] Lisbon Developments asserts that there is no merit in the contention that the signature of Ms Mokoena was forged. Lisbon Developments’ attitude to this is that Ms Mokoena authorised Mr Tibane to sign on her behalf and that this was witnessed by their attorney, Mr Mculu.

[48] To the argument of the Applicants that the Former Trustees did not quorate when they signed the sale of shares and share subscription agreements in that the Trust Deed requires that there be an independent trustee, Lisbon Developments states that to the extent that Mculu had been assisting the Former Trustees, he was fulfilling the role of an independent Trustee notwithstanding that he had not been formally appointed as

¹ *Legator McKenna INC and Another v Shea and Others* 2010 (1) SA 35 (SCA).

envisaged in Act 57 of 1988. Lisbon Developments then introduces the concept of a de facto independent trustee acknowledging that Mr Mculu may not have been appointed but because he has been acting in that capacity, the court should accept that the requirement has been satisfied.

[49] Turning to the prohibition contained in section 3 of Act 70 of 1970, Lisbon Developments argues that the sale agreement provides that the Trust would sell the Trust properties to Lisbon Developments, which would in turn sell to Magic Breakaways. Magic Breakaways would take transfer on the understanding that it would simultaneously register separate titles for the residential golf/river front components and transfer the remainder of the properties back to Lisbon Developments, free of any consideration, to enable Lisbon Developments to develop the balance of the property as envisaged in clauses 1.6.1 and 1.6.3. Additionally, concludes Lisbon Developments, the transaction is not a sale of land but a donation and as such, section 3 of Act 70 of 1970 does not find application.

Issues

[50] While I have already captured the core of the issues in paragraph 1 of this judgment *supra*, I deem it important to take a step back and mention that the resolution of the Former Trustees taken on 12 January 2021 was preceded by another taken on 4 and 5 January 2021 wherein the group representatives resolved to support and approve of the commercialisation and transfer of the Lisbon farm to a Newco. The Court is tasked with the duty to decide the validity of the resolution taken on 4 and finalised on 5 January 2021.

[51] Another resolution whose validity this Court ought to determine is dated 12 January 2021 taken by the Former Trustees. This resolution authorises the Former Trustees to negotiate and conclude two agreements with Lisbon Developments (Magic Breakaways in its capacity as a Trustee of a company yet to be formed). These agreements were the sale of the farm Lisbon and the subscription and shareholders'

agreement. The Former Trustees in turn authorised one of them, Mr Tibane, to negotiate, conclude and sign on behalf of the Trust. Thereafter, Mr Mculu, a legal advisor of the Trust, or any of the other Trustees to append their signatures thereon.

Legal Framework

[52] The provisions of the Trust Deed, as the constitution and a document that governs the operation of the Trust, are significant to understand whether the conduct of the Former Trustees lived up to expectation. It is against that backdrop that I proceed to set out some of the important provisions of the Trust Deed.

[53] Clause 5.7 of the Trust Deed prescribes that: “The Independent trustee shall be an independent person with the appropriate professional qualifications, training and experience to perform their duties under this Trust Deed and to advise the Trustees in relation to matters of good governance, Trust administration and on commercial and financial matters.” Dealing with vacation of the office of a trustee, Clause 6, among others, provides that a Trustee shall vacate his office if his period of office comes to an end.

[54] Clause 8 in relevant parts lays down that:

1“8.3 A quorum shall comprise most of the Trustees;

8.4 All questions arising at meetings shall be decided by a majority of votes of the Trustees present at the meeting, unless the question so arising requires the consent of all the Trustees or the consent of anyone else in terms of this Trust Deed.

Save as otherwise provided herein, the following rules shall apply regarding meetings:

Meetings of the Trustees may be convened by the Chairperson, the Independent Trustee or any other Trustee;

Meetings shall be called on no less than 7 (seven) days’ notice in writing;

In the ordinary course the notice should specify the time and venue of the meeting, the business to be dealt with and, to the extent practicable, the draft minutes of the previous meeting and any other documents or reports that the convener deems requisite.”

[55] Clause 9 deals with the duties of the Trustees and it provides that the Trustees shall:

“9.1 Maintain proper accounting and other records of all transactions concluded by them in their capacities as such;

9.2 Prepare and approve an annual budget for the Trust, to be presented to members at the Annual General Meeting of the Trust;

9.3 Cause to be drawn as at the last day of February each year or such other date as the Trustees shall from time to time decide, an account of the administration of the Trust disclosing the Trust Fund, and all receipts and payments made to the Trust in which the Trust Fund is held or invested, to be presented to members at the Annual general Meeting of the Trust;

9.4 Procure that books and records of the Trust and the account referred to above be subjected to an independent review annually by the Auditors;

9.5 Furnish the Master with such information regarding the affairs of the Trust to which they may be entitled;

9.6 Maintain proper minutes of all meetings of Trustees and all decisions taken from time to time;

9.7 The Trustees shall refrain from holding or disposing of Trust Property for their personal benefit or for the benefit of their estates and generally shall act in a prudent and responsible manner as can be expected from persons who are in charge of the affairs of another person.”

Authority

[56] To the extent that all the Applicants are all beneficiaries, they all have a direct and substantial interest in the subject matter of this litigation. Their *locus standi*

cannot be impugned. That said, Lisbon Developments subtly but obliquely objects to the *locus standi* of the First Applicant in that her name does not form part of the listed beneficiaries. However, Lisbon Developments acknowledges that she is the daughter of the Fifth Applicant. Once that admission is conceded, her *locus standi* too cannot be contested. It was on the same basis that the Court in *Matsau and Others v Mokhobo*² concluded.

[57] Capturing the essence of the conclusion of the Court *a quo*, the Supreme Court of Appeal in *Standard Bank v July* stated as follows:³

“[2] The high court held that although as a general rule only an executor can claim on behalf of an estate, there is an exception to this principle, known as the *Beningfield* exception, which allows beneficiaries of an estate to claim where the executor will not or cannot. Dawood J considered that since the executor of the estate was himself deceased, the beneficiaries could make claims against a person who had taken transfer of immovable property when not entitled to do so. She held that the applicants had *locus standi* to make the claims...”

[58] I refer to the *July* case, *supra*, which puts it beyond hesitation that the Applicants in this matter still have *locus standi* notwithstanding that the Trustees who sold the Trust Properties are not in office anymore. If this Court concludes that the Former Trustees who negotiated, concluded and signed the agreements had no authority to do so, it will follow as a matter of course that the Applicants in this matter have *locus standi*, the fact that the Former Trustees are not in office aside.

[59] Turning to the lawfulness or unlawfulness of the agreements, it is apparent that the source of the opposing views between the parties is the question of whether the Former Trustees had authority to give Messrs Tibane and Mculu the right to negotiate, conclude and sign the sale, subscription and shareholders’ agreements. If the Applicants are correct, the Former Trustees could not have passed to Mr Tibane and/or

² *Matsau N.O. and Others v Mokhobo* [2019] ZAFSHC 150.

³ *Standard Bank v July* [2018] ZASCA 85 at para 2.

Mr Mculu or any other Former Trustee a right which they did not have. Similarly, Mr Tibane and/or Mr Mculu or any other Former Trustee could not have done the same in respect of Lisbon Developments. The converse will hold if Mr Tibane and/or Mr Mculu or any other Former Trustee had authority.

[60] The foregoing was recognised in *Van der Merwe and Another v Taylor and Others*⁴ where the Constitutional Court stated:

“At common law, ownership of property passes from one person to another when the following general requirements, amongst others, are met. First, the transferor must be capable of transferring ownership. Second, the transferee must be capable of acquiring ownership. Third, the transferor must have the intention to transfer ownership and the transferee the intention to receive ownership.”

[61] It is trite that the abstract theory applies to the registration of transfer of land in this country. Crudely, if firstly, a transferor is legally able to transfer land and the transferee is legally capable of acquiring it and secondly, there is intention to pass and receive ownership on both sides respectively, the abstract theory will have been satisfied. While that is the position, the exception is that the underlying contract must not be characterised by illegality. Should that be the case, the transaction will be rendered null and void. Thus, in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others*,⁵ the Supreme Court of Appeal held as follows:

“The old adage, *nemo plus iuris ad alium transferre potest quam ipse haberet*, as formulated by Ulpian (Digest 50.17.54), applies: no one can transfer more rights to another than he himself has (using Hiemstra and Gonin’s translation for safety’s sake). Applied to this case it means that Qu had no rights to ownership and, in the absence of the owner’s authority, he could not have transferred ownership to the first purchaser. And because the first purchaser did not become

⁴ *Van der Merwe and Another v Taylor and Others* 2007 (11) BCLR 1167 (CC); 2008 (1) SA 1 (CC) para 40.

⁵ *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* [2011] 3 All SA 173 (SCA) para 26; see also *Legator McKenna Inc and Another v Shea and Others* 2010 (1) SA 35 (SCA) para 22.

the owner it, in turn, was unable to transfer ownership to the second purchaser. All this, in my respectful view, has nothing to do with the abstract system of transfer which, in any event, is a well established principle of our law.”

[62] Section 6(1) of Act 57 of 1988 states that any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorised thereto in writing by the Master. Section 6(1) of Act 57 of 1988 must be read together with Clause 2 of the Trust Deed, which defines trustees as those persons “who are at present jointly acting as trustees, who have been appointed by the Master by virtue of Letters of Authority issued on 14 July 2014”.

Analysis

Validity of the Group Representatives’ Resolution of 5 January 2021

[63] The Trusts execute transactions through the medium of Trustees. For those transactions to have legal effect, the persons acting on behalf of the Trusts as Trustees must have been lawfully appointed in terms of the Trust Deed and properly authorised to act by the Master in terms of Act 57 of 1988. Additionally, the Trust Deed lays down the procedure to be followed when a meeting of the Trustees is envisaged. A meeting of the Trustees can be called by the chairperson or any of the Trustees. In terms of Clause 8.6.2, meetings shall be called on not less than seven days’ notice in writing. The notice should specify the time and venue, the business to be dealt with and, to the extent practicable, the draft minutes of the previous meeting and any other documents or reports that the convener deems essential. See, Clause 8.6.3 of the Trust Deed.

[64] The Applicants do not recall attending a meeting of the group representatives on 4 and 5 January 2021 during which they supported and approved the commercialisation and transfer of the Lisbon farm to a Newco. The Applicants point out that if this meeting took place, it was not convened in terms of the provisions of

the Trust Deed because they were not notified nor were they told what the meeting would be about.

[65] The recollection of the Applicants concerning the resolution of the group representatives is that the resolution was compiled by Messrs Tibane and Shikaya during their house-to-house visits to beneficiary households. They told the group representatives that they were updating the personal details of group representatives for the purposes of forthcoming elections. They asked the group representatives to nominate them as candidates to be elected as Trustees. They requested the group representatives to provide their identity numbers and cell phone numbers, which they then recorded in writing in a register. The group representatives confirmed the correctness of their particulars by appending their signatures to the document.

[66] The Applicants state that Mr Tibane or his associates did not inform the group representatives who signed the register that by so doing, they were voting for a resolution to sell the Trust Properties. It is against that background that Tjie's denial that he did not sign a resolution to sell the Trust properties must be understood. Lisbon Developments is steadfast that a meeting of the group representatives took place as alleged by them. As I understand it, whether a meeting was held on 4 and 5 January 2021, as alleged by Lisbon Developments is immaterial because it is apparent that it was not convened as contemplated in the Trust Deed. Similarly, and accepting that the group representatives signed it during house-to-house visits to household beneficiaries, it would remain invalid because it would have been obtained under false pretences and again, not in line with the Trust Deed.

[67] With the above background in mind, the group representatives could not have authorised the Former Trustees to conclude the sale and subscription and shareholders agreements because they were ignorant that by furnishing their details and signing, they were sanctioning the Former Trustees to negotiate, conclude and sign a sale and subscription and shareholders agreements. Equally, the Former Trustees in turn could not have authorised Mr Tibane to negotiate, conclude and sign the agreements. Lastly,

even if Mr Tibane's signature was accompanied by that of Mr Mculu or anyone of the Former Trustees, they could not have passed a right that they did not have to Lisbon Developments. See, the *Legator* case *supra*. What is worth noting here is that contrary to the provisions of the resolution of the group representatives, assuming that it was valid, Mr Tibane was not authorised to sign the agreements alone.

[68] Finally, on the matter of the resolution of the group representatives, Constable Ngwenya's sworn statement is extremely damning on the integrity of Messrs Mculu and Dorrestein. He denies that Mr Mculu requested him to be present at a meeting of 5 January 2021 where the group representatives of the beneficiaries signed a resolution. He further specifically denies that he was at the meeting where he stamped the "*Resolution to Support and Approve of the Commercialisation and Transfer of the Lisbon Farm to a Newco*" with two different stamps, the one being a SAPS stamp from the Hazyview Police Station, the other, a certification stamp signed by him, "D Mgwenya", with personal number 2[...] and the rank of constable.

[69] Constable Ngwenya added that he has never used the SAPS stamp outside the boundaries of the Hazyview Police Station. He stated that he uses the certification stamp solely for the purpose of certifying copies of original documents. He recalls assisting Mculu to certify a large number of documents at the Hazyview Police Station but does not remember the exact date. That said, when he did so, it was in the absence of the group representatives. He clarified that the surname on the certification stamp alleged to have been certified by him is Mgwenya, not Ngwenya.

[70] In addition, he said that the persal number 2[...] was assigned to him when he served as a Reservist with SAPS until 30 November 2020. Thereafter, he was appointed to the rank of Constable on 1 December 2020. As such, by 5 January 2021, he was a Constable with a new persal number of 7 [...], which he would have duly entered on the document on that date. The allegations of Messrs Dorrestein and Mculu on his participation at the meeting of 5 January 2021 are completely inaccurate. Constable Ngwenya's assertions are deeply disturbing because it means that he was not

at the meeting, nor are the stamps used at that meeting his. This of course raises the question whether the stamps were forged especially in view of the mistakes in the name and his persal number.

Validity of Trustees Resolution of 12 January 2021

[71] Turning to the resolution of the trustees dated 12 January 2021, it emerged that the signature of Ms Mokoena on the resolution was different from her normal signature. The conclusion of a forensic expert, Mr Greenfield, on the matter was that the signature was probably not hers. Following this revelation and confirmation by Greenfield, Messrs Tibane and Mculu belatedly strove to explain away the inconsistency in Ms Mokoena's signature. Ms Mokoena, who has since passed on, had just undergone a hip operation, was frail and her hands shaky, they said, had requested Mr Tibane to sign on her behalf.

[72] Mr Mculu confirmed having heard Ms Mokoena give the direction, noticed, and witnessed Mr Tibane sign the resolution. The excuse of Messrs Tibane and Mculu must be rejected as it is manifest that its objective is to counter the adverse finding of Greenfield on the signature of Ms Mokoena. The explanation is nonsensical because if it is correct that Ms Mokoena had requested Tibane to sign on her behalf, why was it necessary for him to imitate her signature instead of appending his own where she would have signed? Why did he pretend that it was Ms Mokoena personally who signed?

[73] The discrepancy in the signature of Ms Mokoena would have been so glaring to anyone warranting explanation especially co-trustees who often worked with her. Thus, the inference that Messrs Tibane and Mculu deliberately elected to keep silent on the signature issue is unavoidable. It was only when they noticed that it had been uncovered and brought to the surface that they came up with the above obviously contrived explanation. Why did Messrs Tibane and Mculu behave in the manner they did? The answer is unmistakable – they forged Ms Mokoena's signature.

[74] Clause 5.1 of the Trust Deed provides that the Trust shall have no more than 7 (seven) trustees and no less than 5 (five) Trustees including an independent trustee. Section 6(1) of Act 57 of 1988 is clear that a trustee appointed in terms of a Trust Deed, section 7 or a court order, shall act in that capacity only if authorised thereto in writing by the Master. In the same vein, Clause 2 of the Trust Deed describes trustees as those persons currently jointly acting as Trustees to whom the Master has issued letters of authority. The assertion that Mr Mculu has been a *de facto* independent Trustee envisaged in the Trust Deed cannot stand because the provisions of section 6(1) are expressed in peremptory terms.

[75] To the extent that it was argued on behalf of Mr Mculu that he has been capably advising the Trustees and diligently performing the duties of an independent Trustee as envisaged in Act 57 of 1988, I need point out only that the evidence of Constable Ngwenya is extremely perturbing as he has not only refuted the allegations but has shown that they are false. Additionally, the fact that Mr Mculu only proffered an explanation of the inconsistency in the signature of Mokoena after noticing that Greenfield had found that the signature was “probably not written by her” militates against the notion of an unimpeachable individual suitable to advise the trustees on matters of this nature.

[76] Perhaps I should also state that it is a conveyancing practice that when parties conclude a sale in respect of an immovable property, the purchase price is usually deposited into the trust account of the transferring attorneys until registration of transfer of ownership to the purchaser. Contrary to the foregoing, Lisbon paid the purchase price or part thereof on 14 January 2021 to the Trust, two days following the conclusion of the agreement. The purchase price was immediately thereafter withdrawn from the account of the Trust and distributed mainly between Messrs Mculu and Tibane. Needless to state that registration of transfer of ownership had not occurred at that time. Was the Trust advised by Mculu to accept payment, the practice that it is paid on the day of registration notwithstanding? If so, Mculu could not have been a suitable and

capable person to advise the Trustees. Thus, even if the notion of a *de facto* independent Trustee or that there had been substantial compliance was to be accepted, he would still not qualify.

[77] Mr Mculu was never authorised to act as an independent Trustee for the Trust as contemplated in Act 57 of 1988 and it is common cause that he does not have and never had letters of authority. The Trustees could not have had a quorum if the signature of Mokoena was forged and in circumstances where there was no independent Trustee. Act 57 of 1988 does not accommodate the notion of a *de facto* independent Trustee or substantial compliance with a Trust Deed as Lisbon Developments would have this Court believe. Accordingly, that contention is rejected as bereft of any merit.

[78] The resolution of the Trustees of 12 January 2021 would remain defective even if I accept the fallacious assertion on behalf of the Former Trustees that the letter of authority issued to him by the Master remain valid because it was never withdrawn or set aside by any court of law. Letters of authority are issued for a specific period and thereafter, they lapse and do not remain extant until withdrawn as the Former Trustees would have this Court believe. The meeting of 12 January 2021 could not have been quorate because, firstly, this Court has rejected the explanation of the discrepancy in the signature of Ms Mokoena proffered by Messrs Tibane and Mculu. Secondly, this Court has also accepted that Mr Mculu's notion of a *de facto* independent Trustee is foreign to the provisions of Act 57 of 1988. Accordingly, with or without Tibane, the meeting of 12 January 2021 did not quorate. Other than the issue of quorum, the question is whether they had authority especially in view of the invalidity of the resolution of 5 January 2021, which purported to authorise the Former Trustees to deal with the Trust properties.

[79] The object of showing the invalidity of the resolutions of the group representatives and the Former Trustees is to validate the assertion of the Applicants that both the group representatives and/or the Former Trustees and/or Mr Tibane

lacked authority to sell the Trust properties. The contention of Lisbon Developments that *pacta sunt servanda* or that ordinarily parties must be bound by the terms of the agreements they sign cannot stand. For this contention to succeed, the group representatives and the Former Trustees must have had authority. On the evidence that Lisbon Developments has levied before this Court, that conclusion is not possible.

Section 28(2) of the Alienation of Land Act 68 of 1981

[80] The section provides that “any alienation which does not comply with the provisions of section 2(1) shall in all respects be valid *ab initio* if the alienee had performed in full in terms of the deed of alienation or contract and the land in question has been transferred to the alienee”. Section 2(1) prescribes that “[n]o alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.”

[81] The approach of Lisbon Developments to this provision is that it has performed in terms of the sale agreement and registration of transfer of ownership of the Trust properties has occurred. Lisbon Developments assigns a far broader meaning to the failure to comply with the formalities of reducing the instrument to writing and have it signed by the parties or their duly chosen representatives. It is not surprising that this contention led it to the conclusion that even if the agreement was characterised by illegality, the transaction would stand. As such, the transaction is irreversible. The Applicants’ attitude is that section 28(2) applies only to contracts for the sale of land that do not comply with the formalities in section 2(1). Its objective, they argue, is not to render all agreements of contract of sale of land valid regardless of the nature of the defect in the agreement.

[82] The interpretation of the section preferred by Lisbon Developments flies in the face of what the Supreme Court of Appeal held in the *Legator McKenna Inc* case *supra*. The Applicants particularly drew the attention of this Court to how the Supreme Court of

Appeal traced and explained the origins of the provision. I cannot do better than simply quoting the Court:⁶

“[26] Succinctly stated, the rule [the *Wilken v Kohler* rule from which section 28(2) originates] provides that, if both parties to an invalid agreement had performed in full, neither party can recover his or her performance purely on the basis that the agreement was invalid. The ‘rule’ has its origin in an *obiter dictum* by Innes JA in *Wilken v Kohler* 1913 AD 135. In context, Innes JA was dealing with performance under sales of land that were invalid for want of compliance with a statute requiring the contract to be in writing. In the course of his judgment he then stated (at 144) *obiter*, as it turned out, that:

‘It by no means follows that because a court cannot enforce a contract which the law says shall have no force, it would therefore be bound to upset the result of such a contract which the parties had carried through in accordance with its terms. Suppose, for example, an . . . [oral] agreement of sale of fixed property . . ., a payment of the purchase price and due transfer of the land. Neither party would be able to upset the concluded transaction on the mere ground that . . . it was in reality an agreement to sell, invalid and unenforceable in law, but which both seller and purchaser proposed to carry out.’

[27] ...it was referred to with apparent approval by this court in *Wilkins NO v Bester* [1997] ZASCA 9 at 362F and endorsed by the legislature, specifically with reference to contracts of the sale of land, invalid for non-compliance with formalities, in s28(2) of the Alienation of Land Act 68 of 1981.”

[83] The *Legator McKenna Inc* case makes it unequivocal that section 28(1) cannot apply beyond what the legislature intended – to limit its application to contracts that do not comply with formalities such as those referred to in the section. To expand it beyond those borders would not only be anomalous but imply that failure to observe the rule of law may come with benefits. Taken to its logical conclusion, it is conceivable on the

⁶ *Legator McKenna Inc supra* para 26 and 27.

approach of Lisbon Developments that a party with no authority to sell a property can enter into such an agreement and the resultant agreement is valid on the grounds of section 28(2) of Act 68 of 1981. I agree with the Applicants that this is absurd and, I would add, would create chaos. As such, the interpretation of Lisbon Developments cannot find favour with this Court, and it is rejected as unsound and misguided.

Abstract Theory of Transfer

[84] Perhaps it is convenient to go back to what the Constitutional Court said in the *Van der Merwe* case *supra*. Was the Trust capable of transferring ownership to Lisbon Developments? The trustees through which a Trust carries out its activities must have the authority to discharge those duties. The mere fact that Constable Ngwenya denies the claims by Messrs Dorrestein and Mculu that he was at the meetings of 4 and 5 January 2021, where he used the Hazyview Police Station stamp and another to certify documents renders the resolution defective. The resolution cannot therefore be utilised as a justification to authorise the Former Trustees to negotiate, conclude and sign the sale and share subscription and shareholders' agreements disposing of the Trust properties.

[85] The group representative resolution is also defective for another reason and that is that the group representatives were not told that they were signing a resolution whose impact would be to sell the properties to Lisbon Developments ultimately. The signatures of the group representatives were obtained through false pretences. The resolution is therefore defective, making the Trust incapable of transferring ownership.

[86] Turning to the resolution of the trustees dated 12 January 2021, the Former Trustees could not have authorised Mr Tibane to negotiate, conclude and sign the sale, subscription and shareholders' agreements because that meeting did not quorate. Firstly, Mr Mculu was not authorised by the Master to act as an independent trustee. Secondly, Messrs Tibane and Mculu forged Mokoena's signature. In the circumstances, the Trust was incapable of transferring ownership under the abstract theory of transfer.

In the same manner that it was not capable of transferring ownership, the Trust could not have had the intention to pass ownership.

[87] While the abstract theory does not require the existence of a valid underlying agreement for ownership to pass, the agreement must be lawful. Here the sale agreement is unlawful because the group representatives could not have authorised the trustees to negotiate, conclude and sign the sale agreement. Similarly, the Former Trustees did not have the authority to authorise Tibane to sell the Trust properties to Lisbon Developments because the signature of Mokoena was forged. The underlying agreement is tainted by fraud.

The Subdivision of Agricultural Land Act 70 Of 1970

[88] Section 3 of Act 70 of 1970 is entitled Prohibition of certain actions regarding agricultural land. Section 3(e) and (f) prescribe that:

“Subject to the provisions of section 2 –

...

(e) (i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act No. 27 of 1956); and

(ii) no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for periods aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956;

(f) no area of jurisdiction, local area, development area, peri-urban area or other area referred to in paragraph (a) or (b) of the definition of ‘agricultural land’ in section 1, shall be established on, or enlarged so as to include, any land which is agricultural land;

...

unless the Minister has consented in writing.”

[89] Act 70 of 1970 prohibits subdivision of agricultural land unless the Minister has consented to the subdivision in writing. It is common course that the Trust properties are in terms of section 1 of Act 70 of 1970 classified as agricultural land. The prohibition contemplated in section 3 therefore applies. Lisbon Developments asserts that the sales of the Trust properties do not offend the provisions of Act 70 of 1970. It disagrees that a closer scrutiny of the sale transaction between the parties lays bare that the sale is in fact one of a sale of a portion of the Trust properties.

[90] The objective of the sale agreement, they maintain, is that the Trust will sell the Trust Properties to Lisbon Developments. Lisbon Developments will in turn sell the Trust properties to Magic Breakaways, which will take transfer on the understanding that it will simultaneously register separate titles for residential golf/river front components. Thereafter, it will transfer the remainder of the Trust properties back to Lisbon Developments free of any consideration to enable it to develop the balance of the property as envisaged in clauses 1.6.1 and 1.6.3 of the sale agreement.

[91] Understood as stated above, argues Lisbon Developments, the Trust sold the Trust Properties to Lisbon Developments on 14 January 2021. Transfer of the whole of the properties into the name of Lisbon Developments happened in 2022. It was not a portion of the trust properties that was transferred but the whole of the properties. In the circumstances, the argument that it was a portion that was sold stands to be rejected by this Court, concludes Lisbon Developments.

[92] As I understand the argument of Lisbon Developments, the first and second sales do not offend the provisions of Act 70 of 1970 because a division only occurs at the level of Magic Breakaways when it sells or donates it back to Lisbon Developments. There is no argument that Lisbon Developments acquired the properties not as a portion but as a whole. Equally, the onward sale by Lisbon Developments to Magic Breakaways was of the whole of the property. However, that is too simplistic and if this

well-thought scheme were to be countenanced, similar sham scheme designed to circumvent the application of Act 70 of 1970 would mushroom all over.

[93] Stripped of the veneer, it is manifest that the scheme is a sham. Lisbon Developments and Magic Breakaways are related. So, one is not dealing with companies that have no business relationship. The first question is why was it necessary to complicate the sale transactions – from the Trust to Lisbon Developments, from Lisbon Developments to Magic Breakaways and then back to Lisbon Developments? The answer must be that it was thought that way to avoid the application of Act 70 of 1970. Its true nature is therefore not what this Court is told by Lisbon Developments and the Former Trustees. Given the conclusion of various Courts that one ought to examine the true nature of the transaction, it is of no moment that Magic Breakaways donated it back to Lisbon Developments.

[94] It is not contested that the definition of sale in section 1 of Act 70 of 1970 includes one that is subject to a suspensive condition. The Applicants have referred this Court to the matter of *Geue and Another v Van der Lith and Another*⁷ where the Court held that agreements subject to a suspensive condition of the Minister approving a transaction are offensive to Act 70 of 1970. Clause 4 of the sale agreement is unambiguous in that the sale of the property to Magic Breakaways is subject to the suspensive condition that Lisbon Developments secures “all necessary approvals from all relevant authorities for the registration of the separate title”.

[95] Lisbon Developments is mindful of the suspensive condition in the sale because Clause 12.5 of the subscription and Shareholders’ Agreement prescribes that Lisbon Developments will be entitled to a refund of the purchase price of R15 000 000.00 plus accrued interest if it is unsuccessful to secure the approvals from all the relevant authorities in respect of the registration of the separate title. The Applicants have also alerted this Court to the decision in *Four Arrows Investments 68 v Abigail Construction*

⁷ *Geue and Another v Van der Lith and Another* 2004 (3) SA 333 (SCA) para 15 and 16.

*CC and Another*⁸ where the Court held that the objective of Act 70 of 1970 is *broader* than the prohibition of a sale of undivided agricultural land to include even advertisements of the sale of such land. The Court in the *Four Arrows Investments 68* case declared the sale agreement null and void. Given the conclusion of the court, I am bound to follow in its footsteps and declare the agreement null and void.

[96] In the result, the sale agreement:

- 96.1 Contravenes the provisions of Act 70 of 1970;
- 96.2 It is in breach of section 28(2) of Act 68 of 1981;
- 96.3 Is illegal in that it was induced by fraudulent representations;
- 96.4 The Former Trustees lacked authority to bind the Trust.

[97] Against that background, I make the following order:

1. The resolution of the Trustees of the Nhlanguwini Trust (registration number IT 1476/04) dated 12 January 2021, as well as any agreements signed by any person in terms of that resolution, are declared invalid, void, and unlawful.
2. The transfer of the fixed properties known as the remainder of the Farm Lisbon 297 registration division KU, Mpumalanga and Portion 6 of the Farm Lisbon 297 registration division KU, Mpumalanga from the Nhlanguwini Trust to the First Respondent is declared unlawful and is set aside.
3. The Fourth Respondent is directed, in terms of the provisions of section 6(2) of the Deeds Registry Act 47 of 1937, to cancel the Deed of Transfer T488/2022 within four weeks of the date of service of this order upon the Lisbon Developments and the Former Trustees.
4. Lisbon Developments and the Former Trustees are directed to pay the costs of the Applicants including costs of two Counsel, where applicable.

⁸ *Four Arrows Investments 68 v Abigail Construction CC and Another* 2016 (1) SA 257 (SCA).

B A MASHILE
JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Appearances

Counsel for the Applicant:	Adv T Ngcukaitobi SC Adv N Seme
Instructed by:	Richard Spoor Inc C/O Christo Smith Inc. Attorneys
Counsel for the 1 st , 2 nd & 3 rd Respondents:	Adv A Bishop Adv S Mathe
Instructed by:	Strauss Scher Attorneys C/O Yuanitha du Plessis Attorneys
Counsel for the 5 th , 6 th & 7 th Respondents:	Adv R Godlett Adv N Tarmohamed
Instructed by:	Mculu Inc. Attorneys C/O Yuanitha du Plessis Attorneys
Date of Judgment:	19 February 2025