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

Case no: 15832/2024P

In the matter between:

**MOSES MJABULELENI NTOMBELA
THEMBOKWAKHE PHINIAS NTOMBELA
THEMBINKOSI PAULO NTENGA
SIZAKELE NTOMBELA
NTOMBIKHONA Z. KHONYILE
NTOMBIZONKE SIBONGILE MKHWANAZI
DINGENI MILDRED MTHIMKHULU
XOLANI SIZWE NTOMBELA**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT
SIXTH APPLICANT
SEVENTH APPLICANT
EIGHTH APPLICANT**

and

**MASTER OF THE HIGH COURT:
PIETERMARITZBURG
FUNDISIWE GUGULETHU DLAMINI
(ID NO: 7[...])
HOWARD MARTIN FELIX
(ID NO: 7[...])
FIRST NATIONAL BANK**

**FIRST RESPONDENT
SECOND RESPONDENT

THIRD RESPONDENT

FOURTH RESPONDENT**

ORDER

1. The third respondent's non-compliance with the court order of 13 May 2025 is hereby condoned.
 2. Condonation for the late filing of the first respondent heads of argument and practice note is granted.
 3. The rule *nisi* issued on 30 October 2024 is hereby discharged.
 4. The applicants and first respondent must carry their own cost. The first respondent is to pay the costs of the third respondent, on scale C.
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JUDGMENT

Marion AJ

Introduction

[1] On 30 October 2024 Khuzwayo AJ granted an urgent rule *nisi*, with interim relief, at the instance of the applicants (the rule). The matter stands opposed by the first and third respondents (the respondents) and to determine whether the rule should be confirmed. Mr *Sibisi* appeared on behalf of the first to eighth applicants (the applicants) whilst Mr *Sibeko* appeared on behalf of the first respondent (the Master) and Ms *Van Reenen* appeared on behalf of the third respondent.

[2] The rule *nisi* reads as follows:

'1 ... calling upon the abovementioned respondents and any other interested party to show cause, if any, on or before the 13th day of February 2025 at 09h30 or so soon thereafter as counsel may be heard why an order should not be granted in the following terms:

- 1.1. The appointment of the second and third respondents as trustees of Kwaziqongwana Community Trust is set aside.
- 1.2. The second and third respondents are ordered to cease acting as trustees of the Kwaziqongwana Community Trust and relinquish their powers in the bank accounts of the Kwaziqongwana Community Trust held by the fourth respondent.
- 1.3. The first respondent is directed to authorise and immediately register the names of the first to eighth applicants as the trustees of the Kwaziqongwana Community Trust within seven (7) days of the date of this order.
- 1.4. The first respondent is directed to issue amended Letters of Authority in favour of the first to the eighth applicants in terms of Section 6(1) of the Trust Property Control Act, 1988 (Act 57 of 1998).
- 1.5. It is hereby declared that the first applicant is the founder and trustee of Kwaziqongwana Community Trust.
- 1.6. It is declared that the second to eighth applicants are lawfully elected trustees of the Kwaziqongwana Community Trust.
- 1.7. The first, second and third respondents are directed to pay the costs of this application, on an attorney and client scale; and
- 1.8. The fourth respondent is directed to immediately facilitate and allow the designated trustees of the Kwaziqongwana Community Trust to operate its bank accounts.
2. The orders in paragraphs, 1.1, 1.2, 1.3 and 1.4 hereinabove, apply as an interim order, with immediate effect pending final determination of this application.'

Preliminary challenges

[3] The Master brought a condonation application for the late filing of their heads of argument and practice note. The applicants opposed this application. The applicants conceded in court that the purpose of heads of argument and a practice note is for the convenience of the court. The Master submitted that the applicants' heads of argument was not served on the state attorney, and this contributed to the delay in the Master filing timeously. I found that, it was in the interest of justice as well as in the interest of the Kwaziqongwana Community Trust (the Trust) and the community, to grant the application for condonation, which I duly did.

[4] The third respondent made an application for the condonation of his non-compliance with the court order of 13 May 2025 taken by consent. The third respondent was ordered in terms thereof to deliver his heads of arguments and practice notes on or before 11 July 2025. The third respondent did not comply as his appointment as an independent trustee was set aside after the rule *nisi* being granted on 30 October 2024, and he ceased acting as a trustee. Ms *Van Reenen* submitted that it was on this basis that the third respondent would not participate in these proceedings. Mr *Sibisi* had no objections to the non-participation of the third respondent. However, he stated that he would still be seeking confirmation of the rule against the second and third respondents. This was due to the possibility that the Master may still appoint the second and third respondents as trustees of the Trust. The third respondent he argued, opposed the initial urgent application which was fully ventilated in court prior to the interim rule being granted. Mr *Sibisi* stated that on the basis that the third respondent purported to act 'with the blessing' of the Master, should the rule be confirmed, the Master ought to pay for the third respondent's costs. Mr *Sibisi* argued that if the third respondent did not oppose the matter, they would not be in the position of arguing the current matter. The third respondent submitted that he acted on the oral instructions of the Master to oppose this matter. He was appointed as an independent trustee at the time of the institution of this application and had obtained insight and knowledge surrounding the issues of the Trust. The third respondent argued that it was his duty to disclose such information to the court. The issue of these costs will be addressed later in my judgment and only become relevant if the rule is confirmed.

Background

[5] During apartheid the Kwaziqongwana Community was dispossessed of rights to their land in terms of racially discriminatory laws. In 1998, a claim for restitution was launched against the Minister of Rural Development and Land Reform, which claim was accepted and the government purchased and restored portions of claimed land to the community. The Trust was formed and registered to administer the restored land for the benefit of the community. The applicants are members of the Trust which is established in terms of the trust deed for the benefit of its members under the Trust Property Control

Act 57 of 1988. The first applicant, Moses Mjabuleleni Ntombela, is the founder of the Trust and an *ex officio* member of the Trust. The trust owns 100% shareholding in Mkhwetha Trading (Pty) Ltd. The Trust partners with Mondi South Africa (Pty) Ltd from which it derives financial benefits for rentals and services rendered.

[6] Clause 13 of the Trust deed sets out the process for the election of the trustees and the relevant passages read as follows:¹

‘Clause 13.1.1 Election of Trustees shall take place every five (5) years at an annual general meeting of members.

...

Clause 13.1.3 Trustees shall hold office for a five (5) year term from date of election and shall be eligible to stand for election for a second term, whereafter he or she shall retire...

There shall at all times be not more than nine persons serving as trustees’.

Main challenges

[7] The following main challenges have been identified to be determined:

- (a) Have the applicants satisfied the requirements for a final interdict in order to satisfy the requirements for confirmation of the rule *nisi*?
- (b) Have the respondents proved their rights so that the rule *nisi* is discharged and the interim interdict dismissed?
- (c) Has the Master acted unlawfully in appointing the respondents as independent trustees?

The onus is on the applicants to satisfy the requirements for a final interdict to satisfy the requirements for confirmation of the rule *nisi*.

Mootness

[8] At the outset the court sought clarity from the applicants regarding the order prayed for in the final order. Mr *Sibisi* contended that prayers 1.1 and 1.2 were moot. It was common cause that the second and third respondents were no longer trustees of the Trust. The applicants agreed that prayers 1.3 and 1.4 had already taken place. The

¹ Pages 11-14 of the Trust Deed on pages 63-66 of the index.

applicants were registered as trustees and issued with Letters of Authority in terms of s 6(1) of the Trust Property Control Act 57 of 1988. The applicants agreed that prayer 1.5 was not in dispute and that the first applicant was the founder and trustee of the Trust. Mr *Sibisi* stated that prayer 1.6 had already happened and that the first to eighth applicants were declared to be lawfully elected trustees of the Trust. The applicants agreed that prayer 1.8 was dealt with and that the applicants were allowed to operate the Trust's bank accounts. In terms of prayer 1.7 the applicants had handed up a draft order seeking costs to be paid by the Master; to include costs of counsel on scale C. Mr *Sibisi* argued that if the rule was discharged, the Master will be at liberty to engage in conduct that will adversely affect the trust and the beneficiaries. He further stated that the applicants were not trying to limit or undermine the statutory powers of the Master.

[9] The Master stated that the second respondent was no longer an interim trustee. The third respondent was also no longer a trustee, as his appointment was set aside. Mr *Sibeko* submitted that in light of this any decision by the court was academic and would have no practical effect. He argued that the Master had at all times exercised his statutory powers in appointing the third respondent as an interim trustee. He went on to state that the court cannot interfere with the Master's executive authority to appoint two independent trustees where no wrongdoing or illegality has been placed before the court, by the applicants. The Master argued that the applicants sought a declaratory order in prayer 1.6 that was impermissible and unconstitutional. The court cannot declare the Master's conduct to be unlawful. Mr *Sibeko* handed up a draft order praying for the rule to be discharged with each party to pay his or her own cost. Prayer three of the order was to direct the first respondent to appoint an independent trustee together with the founder of the Trust as interim trustees within five days of the order. Prayer four stated that the appointed interim trustees would be ordered to facilitate an elective conference of the trustees in terms of clause 13 of the Trust on or before 13 October 2025.

The law

[10] In *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others*² the court stated that a matter that is moot falls outside the jurisdiction of the court unless the interests of justice demand otherwise.

[11] The Constitutional Court in *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others*³ gave some guidelines on the subject of mootness and stated:

[46] It is clear from the factual circumstances that this matter is moot. However, this is not the end of the inquiry. The central question for consideration is: whether it is in the interests of justice to grant leave to appeal, notwithstanding the mootness. A consideration of this Court's approach to mootness is necessary at this juncture, followed by an application of the various factors to the current matter.

[47] Mootness is when a matter "no longer presents an existing or live controversy". The doctrine is based on the notion that judicial resources ought to be utilised efficiently and should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are "abstract, academic or hypothetical".

[48] This Court has held that it is axiomatic that "mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require". This Court "has discretionary power to entertain even admittedly moot issues".

[49] Where there are two conflicting judgments by different courts, especially where an appeal court's outcome has binding implications for future matters, it weighs in favour of entertaining a moot matter.

[50] Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include:

- (a) whether any order which it may make will have some practical effect either on the parties or on others;
- (b) the nature and extent of the practical effect that any possible order might have;
- (c) the importance of the issue;
- (d) the complexity of the issue;

² *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1996] ZACC 23; 1997 (3) SA 514 (CC).

³ *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC).

- (e) the fullness or otherwise of the arguments advanced; and
- (f) resolving the disputes between different courts.’ (Footnotes omitted.)

[12] In *President of the Republic of South Africa v Democratic Alliance and Others*⁴ the court stated:

‘[17] ... But, this court has the discretionary power to entertain even admittedly moot issues. In *Langeberg* we said that we have —

‘a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require.’

[18] And in *Shuttleworth* we said —

‘to the extent that it may be argued that this dispute is moot . . . this court has a discretion whether to hear the matter. Mootness does not, in and of itself, bar this court from hearing this dispute. Instead, it is the interests of justice that dictate whether we should hear the matter.’ (Footnotes omitted.)

Accordingly, a court may dismiss an application which has no practical effect or result. The court is reaffirming the principle that matters that are moot should only be heard if the interests of justice so require. The court has to establish whether a live controversy continues to persist.

[13] In a recent judgment, *Minister of Tourism and Others v Afriforum NPC and Another*,⁵ the Constitutional Court stated as follows:

‘A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court’s decision or which would be resolved by a court’s decision. A case is also moot when a court’s decision would be of academic interest only.’

Analysis

[14] On the applicants own versions 1.1 and 1.2 are moot as the second and third respondents are no longer trustees of the Trust. Prayers 1.3 and 1.4 have already taken

⁴ *President of the Republic of South Africa v Democratic Alliance and Others* [2019] ZACC 35; 2020 (1) SA 428 (CC).

⁵ *Minister of Tourism and Others v Afriforum NPC and Another* [2023] ZACC 7; 2023 (6) BCLR 752 (CC) para 23.

place by the first respondent and the applicants are registered as trustees and have been issued with amended letters of authority. Prayer 1.5 is common cause and is not in dispute. The first applicant is the co-founder and trustee of the Trust. Prayer 1.6 has taken place. Prayer 1.8 has been dealt with and there is no opposition from the fourth respondent.

[15] This matter began with a set of facts that resulted in an interim interdict being granted against the Master on an urgent basis. I am of the view, that due to subsequent events and the passage of time the need to resolve these issues, became unnecessary. Mr *Sibisi* argued that the rule must be confirmed as the Master may re-appoint the second and third respondent. I find this argument to be speculative. The applicants may have been entitled to the interim relief at the time that there were live issues. However, confirming the rule, will have the effect of limiting the Master's statutory powers, which this court cannot do without going into the merits of the matter. The confirmation of the rule *nisi* will serve no enforceable purpose.

[16] The court has a discretion to decide whether to delve into the merits of the matter if the interest of justice so require. The third respondent on instructions from the Master opposed this matter for the court to have the Master's version before it. In my view, the third respondent acted with the Master's consent and in the interest of justice. I am further of the view that this court does not have the authority to curtail the statutory powers of the Master, unless it is clear to the court that the Master acted unlawfully. The Master appointed two independent trustees to investigate and resolve the issues of the Trust. There were allegations of mismanagement of the Trust and questions raised regarding the lawfulness of the elective process, which resulted in the appointment of certain trustees. In my view, the interests of justice do not require me to decide on whether the Master acted with lawful authority to appoint the second and third respondent as independent trustees. What is clear to me is that there is no existing controversy to pronounce upon. The main relief became moot through the passage of time and the merits of the matter are accordingly no longer justiciable.

Costs

[17] The facts and circumstances of the case demanded that the first and third respondent partake in the litigation. The third respondent defended the actions of the Master. The applicants argued that but for the third respondent's initial opposition to this matter, the matter would not have ensued to this point. During arguments both the applicants,' first and third respondents' counsels agreed that the third respondent should not be mulcted with costs. In any event, the third respondent was no longer a trustee at the time of this hearing and did not actively participate in the final stage of the proceeding.

[18] It is trite that the determination of costs is in the discretion of the judge. This discretion must always be exercised judicially.⁶ The applicants have not succeeded in this application; however, this is not on the merits itself. The issue of costs must be addressed from the perspective that no order on the merits is granted. It would be unfair and inequitable to order the applicants to pay the costs of any party. The third respondent acted on the instructions of the Master in opposing the matter on an urgent basis to avoid any delay. The third respondent had a substantial interest in the matter as well as knowledge of the matter as he was a trustee at the time of the institution of this application. In my view, it would be just if the Master was ordered to pay the costs of the third respondent.

[19] In the circumstances, I grant the following order:

1. The third respondent's non-compliance with the court order of 13 May 2025 is hereby condoned.
2. Condonation for the late filing of the first respondent heads of argument and practice note is granted.
3. The rule *nisi* issued on 30 October 2024 is hereby discharged.
4. The applicants and first respondent must carry their own cost. The first respondent is to pay the costs of the third respondent, on scale C.

⁶ *Kruger Bros & Wasserman v Ruskin* 1918 AD 63.

MARION AJ

Date of hearing: 07 August 2025

Date of judgment: 10 February 2026

APPEARANCES

For the applicant: Mr M Sibisi
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For the first respondent: Mr V Sibeko
Instructed By: State Attorney

For the third respondent: Ms Van Reenen
Instructed By: State attorney