16/11/17.

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

CASE NO: 57206/2010
Not Reportable
Not of interest to other Judges

In the matter between:

MESHACK THEMBINKOSI SILINDA N.O	First Applicant
SIMEON NGOMANE N.O	Second Applicant
LAZARUS ZITHA N.O	Third Applicant

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

and

DAVID ZOMA MAKHUBELA	First Respondent
DAVID SHINGO MAKHUSHE	Second Respondent
DAVID SIBUSISO NDLOVU	Third Respondent
DUNISA MOSES SILABELA	Fourth Respondent
BOY MKHATSHWA	Fifth Respondent
GUMBENI HEATER SIBOZA	First Intervening Party
WE NGOMANE	Second Intervening Party
SR MLANGENI	Third Intervening Party
GM MAHLALELA	Fourth Intervening Party
MF SAMBO	Fifth Intervening Party
EM SAMBO	Sixth Intervening Party
DC KHOZA	Seventh Intervening Party
JS MNISI	Eighth Intervening Party
ME MABASO	Ninth Intervening Party
LA MAKAMU	Tenth Intervening Party
SB SIBIYA	Eleventh Intervening Party

JUDGMENT

MAKGOKA, J:

Introduction

[1] The applicants seek an order confirming the list of beneficiaries of the Mjejane Trust (the Trust) following a beneficiary verification process in respect of a land restituted in terms of the Restitution of Land Rights Act 22 of 1994 (the Act). The applicants are supported by the intervening parties.[1] In a counter-application, the respondents seek an order for a new verification process and the amendment of the trust deed, with ancillary orders. The counter-application is opposed by the trustees and the intervening parties.

[2] The matter has a long and acrimonious history, largely as a result of lack of clarity in the trust deed as to who is entitled to benefit from the restituted land. This led to conflicts between individuals claiming to be beneficiaries. This gave rise to

[1] On 11 March 2013 the respondents filed an application for the joinder of the persons verified as beneficiaries after 14 November 2009. The trustees opposed the joinder application, but eventually the disputed beneficiaries applied successfully to intervene as the applicants. This rendered the joinder application moot and unnecessary. Mr Gumbeni Heater Siboza and thirteen others were granted leave to join the proceedings as intervening parties on 15 November 2013 as per an order of this court.

this application, which in turn, has resulted in three substantive court orders on 12 December 2008, 15 February 2013 and 6 September 2016, which I shall refer to in the course of the judgment.

[3] The application concerns land rights of the Lugedlane community (the community) near Barberton in Mpumalanga Province. The community was forcibly removed from their land, Tenbosch and surrounding farms, in September/October 1954. Kwa-Lugedlane comprises two villages, Mangweni and Steenbok and the surrounding communal lands, spread over some 14 788 hectares. The community still resorts under the jurisdiction and authority of the Ngomane of Lugedlane traditional authority, which had maintained such jurisdiction over the community before the removals.

[4] Pursuant to a claim in terms of the Act, the land was restituted to the community. Subsequent to the restitution, a Trust was created in terms of the Trust Property Control Act 57 of 1988. The land was transferred to the Trust as a vehicle to hold the land on behalf of the community.

The parties

[5] The applicants are the trustees of the Trust. The respondents[2] are former trustees of the Trust, but who were suspended by this court on 20 May 2009. They oppose the application in their capacities as members of the community which has been dispossessed of its land. The intervening applicants represent the persons verified after the initial verification exercise, whose entitlement as beneficiaries is disputed.

The trust deed

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

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

[7] Clause 7 provides:

7.1 The Initial Beneficiaries shall be those persons as per the schedule attached hereto marked "B".

[2] It is common that: the third respondent, Mr Sibusiso David Ndlovu, died in August 2013; and the fourth respondent, Mr Dumisa Moses Silabela has withdrawn his support for the counter-application.

7.2 Application to become a beneficiary by individuals other than those listed in the schedule shall be made to the Trustees. The Trustees shall submit such applications to a general meeting of the Trust, which shall decide whether to accept or reject an application to become a beneficiary'.

The December 2008 order

[8] Annexure 'B' referred to above, could not be found. This created a need for a process to verify the rightful beneficiaries of the Trust. As a result, on 12 December 2008 the Trust, represented by its original trustees, which included the respondents, obtained an order by consent from this court in terms of which the Trust was authorised to appoint an independent consultant to carry out a beneficiary verification exercise on its behalf, and thereafter to bring an application to this court for an order confirming such beneficiaries as the lawful beneficiaries of the Trust. The independent consultant was identified in the court order as Dr AT Fischer, who was to carry out a beneficiary verification process in a manner consistent with the principles enshrined in the Act and to produce a report on the outcome of the verification process.

The suspension of the respondents as trustees

[9] On 20 May 2009 this court suspended the five respondents as trustees, and the three applicants were appointed as the interim trustees of the Trust. It is common cause that the interim trustees did not appoint Dr Fischer to undertake the verification

exercise as ordered by this court. Instead, an entity called Mhlaba Image Consulting trading as Mhlaba Image Productions CC (Mhlaba) was appointed by the trustees for that purpose. It is worth mentioning in this regard that Mhlaba is a close corporation in which the first applicant's brother, Mr Tom Silinda, is a member or has an interest.

[10] The reasons for the non-appointment of Dr. Fischer are controversial. The trustees state that they did not appoint him as the office of the Regional Land Claims Commission (the Commission) in Nelspruit 'felt' that he may be conflicted in the matter due to the fact that he had previously conducted verification exercises which were not accepted by the general membership of the community. According to the applicants, the office of the Commission was of the view that another person who had never been involved in the previous verifications be appointed, hence the appointment of Mhlaba. This is disputed by the respondents.

The Mhlaba verification exercise

[11] Be that as it may, Mhlaba proceeded with a verification exercise. And this is how it went about it. A panel of 41 elders from the community was elected to assist, each representing the affected wards as they existed before the removals. Several meetings were held from 24 September 2009 to 25 April 2010 at various venues in the area.

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

[13] Despite this, the panel proceeded to hold further verification meetings, during which members of the community were invited to check whether all the names of the qualifying beneficiaries had been properly registered. During those meetings some individuals claimed that they had been left out as they had not been available during the previous verification meetings, for various reasons. The panel resolved to set a further date to accommodate this group. Further meetings were held, culminating in the final verification meeting which took place from 23 to 25 April 2010. After these meetings, a further list of 1539 beneficiaries was added to the initial 1038, thus making the total number of the beneficiaries 2577.

[14] Pursuant to the verification exercise it undertook, Mhlaba compiled a report dated 26 July 2010 ('the Mhlaba report'). According to the report, the additional 1539 additional people were placed on the beneficiary list as a result of intimidation

and threats of violence directed at the verification panel. Mention is made in this regard of a particular group, the Mawalela group. The group, it is mentioned, complained that persons from Hectorspruit had been omitted from the initial verification exercise and the list of beneficiaries due to logistical problems.

[15] As a result of that complaint, it was agreed that a verification meeting be held in Hectorspruit. At that meeting, the Mawalela group refused to undergo the verification process and threatened to assault any person who attempted to compel them to participate in the verification exercise. The report also mentions that at subsequent meetings in Tonga from 19 to 22 February 2010, the assigned panel of elders did not arrive, citing security concerns after being threatened with violence. An interim panel was appointed from among the additional persons seeking verification.

[16] These new panel members also expressed concern to the trustees that 'the [verification] panels were allowing everyone that attended to register' and that this made it difficult to determine the rightful beneficiaries. They too, expressed fears for their safety.

[17] Under a section titled '**Threats by community members**' it is stated in the report:

'[T]here were various instances where members of the panel were threatened...These threats, most of the time, created problems where a number of people would approach us to convince the panel that they actually belong to the community. There were other instances where members of Mawelela's faction group threatened to beat the interim trustees and the verification team because they did not agree to Mawelela's proposal of using the old list and not register according to the revised terms and conditions.'

The application for the confirmation of the verified list

[18] On 5 October 2011 the trustees launched an *ex parte* application for the confirmation of the beneficiaries as described in the Mhlaba report (the confirmation application). Thus, the trustees sought the court's approval of all 2577 names identified in the report. In their application, the trustees supported the findings and recommendations of the report, in particular the verified list of beneficiaries, and prayed that the list be accepted as a 'true reflection of the households and beneficiaries' of the Trust. The trustees further submitted that based on the Mhlaba report, there was participation by all interested parties in the verification process, and that no one stood to be prejudiced by the confirmation of the beneficiary list in the report.

The intervention application and the counter-application

[19] On 1 September 2011 the respondents were granted leave to intervene as respondents in the confirmation application. They opposed the application on the

basis that most of the individuals in the Mhlaba report do not form part of the community to whom the land has been restituted. In essence, the respondents' opposition to the confirmation of the verification report was premised on two grounds, namely that the process did not comply with the court order dated 18 December 2008, and was flawed to the extent it was marred by threats of violence and intimidation.

[20] The respondents also filed a counter-application, in which they sought confirmation only of the 1038 names on the list of verified beneficiaries as the rightful beneficiaries of the Trust, as contemplated in clause 7.1 of the Trust Deed. In the alternative, the respondents sought an order for the amendment of the Trust Deed, with regard to, among others, the identification of the Lugedlane Traditional Community as the beneficiary of the Trust; the establishment and maintenance of the members register of the community; eligibility for membership of the community and dispute resolution mechanisms related thereto. The respondents further sought an ancillary order directing the trustees to convene, within 90 days, a general meeting of the Trust for the purpose of reporting on the finances and administration of the Trust and for the election of new trustees.

[21] The confirmation application and the counter-application came before this court on 6 August 2012. In its judgment handed down on 15 February 2013, the

court expressed concern about the integrity of the verification process and the governance of the trust. The following extracts from the judgment are of relevance:

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

However, I am not prepared to accept the mere *ipse dixit* of the trustees that he had agreed not carry out the obligations imposed on him by this court. But in any event, I do not consider those reasons to be sufficient to render Dr. Fischer 'conflicted', whatever that is meant to convey. That his earlier verification report was not accepted by the community does not 'conflict' him. In the end, it is not the views of the community or their wishes that guide us in complex and technical matters such as the present, but the considered and learned views of experts like Dr Fischer. Until Dr Fischer indicates in writing to this court of his inability or unavailability to carry out the mandate as set out in the court order, and duly excused, he remains obliged to assist the court where necessary. It is important for the integrity of the verification exercise be ensured before this court confirms the beneficiaries identified in that exercise. Hopefully, Dr Fischer's views and expert opinion would assist in this regard. It is in that light that I intend to direct him to comment on the verification exercise carried out by Mhlaba.'[3]

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[3] Paras 37 and 38 of the Judgment of 15 February 2013.

[22] With regard to the respondents' counter-application for confirmation of the list of 1038, and the alternative relief for the amendment of the trust deed, the court expressed a view that it would be prudent to join the additional 1539 persons as parties to the application. As a result of these considerations, the court postponed both the confirmation application and counter-application *sine die*. Costs were reserved in both applications. The following substantive orders were made:

1. The respondents were granted leave to apply, if so advised, for the joinder of the disputed beneficiaries (those verified after 14 November 2009 in terms of the Mhlaba report dated 30 August 2010) as parties to these proceedings, which application, if any, was to be launched on or before 15 March 2013;

2. Dr. AT Fischer was directed to, on or before 15 March 2013, furnish the attorneys of the trustees and of the respondents, with written comments on Mhlaba's verification report dated 30 August 2010, and in particular, whether in his opinion, the beneficiary verification exercise underpinning such report, was carried out in a manner consistent with the principles enshrined in the Act.

Developments after 15 February 2013

[23] On 17 February 2103 the respondents wrote to the trustees seeking confirmation that they would appoint Dr Fischer, and furnish him with a copy of the

court order and the Mhlaba report. In their response on 20 February 2013 the applicants stated that they would not appoint Dr Fischer as they had not been expressly directed to do so by the court. In the light of the applicants' response, the respondents undertook to instruct Dr Fischer and to cover his fees. This was communicated to the trustees in a letter dated 6 March 2013. Dr Fischer was appointed shortly thereafter and undertook to complete his report by end of April 2013.

[24] On 25 June 2013 Dr Fischer wrote to the trustees and requested a copy of the source documentation relied upon by Mhlaba for the compilation of verified beneficiaries list. In his request, Dr Fischer pointed out that in order to comment on the Mhlaba report and to express an opinion on the verification exercise, he needed to know how the verification was done. He accordingly requested the following from the trustees:

(a) The names of the panel of elders that produced the list of 1038; and the names of the panel that produced the additional list of 1539, in the event the two lists were produced by different panels;

(b) The source documentation supporting each individual verification;

(c) Both lists of 1038 and 1548 of verified beneficiaries;

(d) An electronic version of the final verification report.

[25] Dr Fischer also requested a meeting with Mhlaba. In their response on 25 June 2013, the trustees stated that they could not furnish Dr Fischer with the requested information because he had missed the 15 March 2013 deadline for the filing of his report. The trustees further stated that they could not condone the late filing of the report, and accordingly could not be of any assistance to him. As a result, Dr Fischer was unable to prepare the report envisaged in the court order, and none of the directives mentioned in the court order of 15 February 2013 have been complied with.

The intervention application

[26] Another relevant development subsequent to the order of 15 February 2013 is the application by the intervening parties. As stated already in para 1, that application was granted on an unopposed basis on 15 November 2013, in terms of which order Mr Gumbeni Heater Siboza and eleven others joined the proceedings as intervening parties. The intervening parties support the trustees' confirmation application. In addition, they rely on the evidence of a historian, Mr Mbiba, to support the confirmation application.

Application to amend the relief in the counter-application

[27] On 7 September 2015 the respondents filed an interlocutory application to amend the relief in their counter-application. That application was granted by this

court (Hughes J) on 6 September 2016, despite the opposition by the trustees. The trustees' application for leave to appeal against that order was dismissed, both by Hughes J and subsequently by the Supreme Court of Appeal on petition to it.

[28] In its amended form, the relief in the counter-application is that Dr Fischer should be appointed to carry out a fresh beneficiary verification exercise. The significance of this prayer is that whereas the respondents had initially admitted the verified list of 1038 and had sought to have that list confirmed as the true beneficiaries, they have abandoned that stance and now assert that even that list should not be confirmed.

[29] As stated earlier, the applicants had opposed the application for the amendment of the respondents' relief. Among the reasons advanced by the applicants for the opposition was that the acceptance of the 1038 families as true beneficiaries was an admission on the part of the respondents and could ordinarily, not be withdrawn. Hughes J disagreed, and held that the respondents were justified in withdrawing the admission in the circumstances.

[30] The respondents also seek an order directing the trustees, alternatively a dispute resolution entity, to convene a general meeting of the Trust for the purpose of reporting on financial and administrative matters and election of new trustees. In

addition, a substantive order is sought amending various provisions of the trust deed, including the amendment to reflect the Lugedlane traditional community members are the beneficiaries of the Trust.

Grounds for the confirmation application

[31] Now back to the confirmation application. As already stated, the trustees rely on the Mhlaba report in support of the confirmation application, in which they are supported by the intervening parties. The following submissions were made in support of the confirmation application:

(a) There was an agreement in February 2012 to accept the list of 2577;

(b) There is a real and genuine dispute of fact;

(c) The list of 1038 has been accepted by the respondents;

(d) The evidence of Mr Mbiba supports the confirmation application;

(e) The respondents had not established a proper basis to impugn the Mhlaba report.

[32] I consider these, in turn.

February 2012 'agreement'

[33] The contention here is that on 16 February 2012, a written agreement was concluded in terms of which the verified list of 2577 households was accepted as correct. It was therefore submitted the respondents are bound by the agreement under

the principle of *pacta sunt servanda*[4] as confirmed by the Constitutional Court in *Barkhuizen*.[5]

The alleged agreement is contained in what appears to be a resolution dated 16 February 2012 by the Royal House of Kwa-Lugedlane Traditional Authority. After noting some concerns in respect of how the beneficiation in the Trust is being abused, the signatories to the resolution resolved that: 'The Traditional Authority of Kwa-Lugadlane, the Inner Royal Family, the acting Chief, the former members of the Concerned Group, the Original Board of trustees and the current trustees, in conjunction with the verified beneficiaries agreed to accept the list 2577 as legitimate. All the stakeholders further agreed that 'after this present verification list that have been filed with the Master of the High Court by our *ex lege* trustees then all stakeholders will [sit] and correct whatever is construed wrong in the list of beneficiaries.' The signatories signed on behalf of all the entities they purported to represent. The first respondent signed in his capacity as the 'chairperson of the former concerned group.'

[34] In my view, there is a glaring difficulty with the trustees' reliance on this document as a cause of action. Although raised in their affidavit, it has never been

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[4] A principle of civil law signifying that agreements must be kept.
[5] *Barkhuizen v Napier* 2007 (5) 323 (CC) para 168.

held up as the trustees' cause of action for the confirmation of the Mhlaba report. It is raised as such for the first time in the written submissions of the trustees and the intervening parties. It is therefore impermissible for the trustees to seek to found a new cause of action in their written submissions. See in this regard *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 908A-C.

[35] Besides, it is doubtful whether the document constitutes a valid and binding agreement between the parties. First, none of the trustees and intervening parties are signatories to the resolution. Second, the first respondent signed it in his capacity as the chairman of a 'concerned group', and not necessarily on behalf of the community he purports to represent in these proceedings. Third, none of the other respondents are signatories to the document.

[36] What is more, the first respondent has explained under oath that he signed the resolution because he was placed under enormous and undue pressure to do so. He explains that he was not afforded time to reflect on the contents of the resolution before he signed it. That there was indeed undue pressure is borne out by the fact that subsequent to the signing of that document, there was march to his house by some members of the community, demanding that he refrain from interfering with the verification process and the affairs of the Trust. During that march, a memorandum containing thinly-veiled threats of violence against him and the

respondents' attorney, Mr Spoor, was handed up. Given all these considerations, I do not accept the submission on behalf of the trustees that the document constitute an agreement to accept the list of 2577.

Dispute of fact

[37] The dispute of fact is said to be constituted by the trustees' allegation that an agreement had been concluded that the 2577 beneficiaries must be confirmed. It is said that to the extent that the respondents are denying the existence of such agreement or that they are bound by it, a dispute of fact exists. I have already considered the nature of the document and expressed serious doubt whether it constitutes a valid and binding agreement. And if it is, it has not been relied upon as a cause of action for the confirmation of the Mhlaba report. But, in any event, the trustees' reliance on the so-called agreement does not give rise to a dispute of fact. There is simply none. The first respondent does not deny that he signed the resolution. His explanation that he was subjected to undue pressure in signing the resolution is not disputed.

[38] Referral of an application to trial is governed by Rule 6(5)(g) of the Uniform Rules of Court, which provides:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the aforegoing, it may direct that oral

evidence be heard on specific issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[39] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his or her affidavit, seriously and unambiguously addressed the fact said to be disputed. See *Wightman.*[6] It is clear from what is stated above that the allegation that there is a dispute of fact must be raised squarely in the affidavits, and not in argument.

[40] In the present case, nowhere in the affidavits is a case made out for the referral of any issue to trial or for oral evidence. The issue was raised for the first time in the trustees and intervening parties' written submissions. As Harms DP explained in *Mogami*[7] an application for the hearing of oral evidence must be made in *limine.* I therefore conclude that the issues referred to do not constitute disputes of fact, and accordingly there is nothing to refer to trial or for oral evidence.

The list of 1038 initially verified and accepted by the respondents

[41] It was submitted that the respondents had previously in their counter-application admitted that the verification of the list of 1038 beneficiaries was

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[6] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at 375F-376B.
[7] *Law Society of the Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) para 23.

properly done. On that basis they had sought that list to be confirmed. Therefore, it was submitted, they cannot now oppose the confirmation of the whole list of beneficiaries, including the 1038. That list, so was the submission, ought to be confirmed.

[42] In considering this submission, it must be borne in mind that the respondents were granted leave by Hughes J to amend the relief in their counter-application. In the affidavit supporting their application, the respondents explained at length how the admission in respect of the list of 1038 was made and why it was desirable to withdraw it. The learned judge agreed with the respondents and concluded that the admission was one that the respondents were justified to withdraw.

[43] She accordingly granted the respondents leave to withdraw the admission. As stated earlier, the applicants' leave to appeal against Hughes J's judgment was dismissed, both by the learned judge and the Supreme Court of Appeal. It is therefore not open to the applicants and the intervening parties to seek to re-argue that point. Their argument lacks merit, and it is merely mentioned only be rejected.

No basis for impugning the Mhlaba report

[44] According to counsel for the trustees and the intervening parties, the respondents have not established that the verification process does not comply with

the Act. All they did, it was argued, was to refer to a portion of the Mhlaba report which mentions violence and intimidation, without specifying the impact of such threats or violence on the verification process. Thus, there is no evidence that the list contains people who were not supposed to be beneficiaries.

[45] It was further asserted that the respondents' reliance on threats of violence, duress and undue influence to impugn the verification exercise is not borne out by the Mhlaba report. Nowhere, it was submitted, does the report indicate that there has been an inclusion of persons not entitled to be beneficiaries. In any event, counsel argued, there is evidence of threats of violence during the process which the 1038 beneficiaries were verified. Thus, as much as the respondents believe that those threats did not influence the process, it was submitted that it should be the case in respect of the process by which the additional beneficiaries were verified.

[46] I cannot accept these submissions. Earlier I had set out the contents of the Mhlaba report, in which threats of violence and intimidation impacted on the verification process. The suggestion that because the Mhlaba report does not mention that the threats of violence and intimidation influenced the verification exercise, therefore was no impact, must be rejected as disingenuous and untenable. The connection between the threats of violence and intimidation, on the one hand, and the verification process, on the other, is not only implicit, but inherent.

[47] The other argument was that the verification process before November 2009 was also marred by violence and intimidation, despite which the respondents accepted it. Accordingly, so was the argument, the respondents should accept the post November 2009 verification process, in spite of the violence and intimidation. This argument is untenable, mainly for two reasons. First, as explained earlier, the respondents have withdrawn their acceptance of the list of 1038. Second, and more fundamentally, the court is being invited to condone a tainted process.

The evidence of Mr Mbiba

[48] Mr Mbiba expresses an opinion that it would be appropriate to confirm the persons verified by Mhlaba as beneficiaries. He does not comment on the integrity of the verification undertaken by Mhlaba. He has no knowledge at all of the identities of the persons who were verified. He expresses no view as to whether, and how, any of them are legitimate beneficiaries of the Trust. Mr Mbiba's evidence makes no meaningful contribution in that regard. In the circumstances I agree with the respondents' submission that Mr Mbiba's evidence is of no assistance in determining the main issue before court.

[49] To sum up on the confirmation application. I have found no merit in any of the submissions made on behalf of the trustees and the intervening parties for the confirmation of the Mhlaba report. The integrity of the process which gave rise to

that report is seriously compromised as it was vitiated by violence and intimidation. But more importantly, the verification process was done in flagrant disregard by the trustees of the order of this court made on 12 December 2008, by not appointing Dr Fischer.

[50] On 15 February 2013 this court sought to ameliorate the situation with the hope that the objective of the order of 12 December 2008 could still be realised. Again, the trustees cocked a snook at this court's order and consciously frustrated its implementation. I recap on the conduct of the trustees. Immediately the order was made, they were requested to appoint Dr Fischer to enable him to comply with the order. The trustees refused to do so, asserting that they were not expressly ordered to appoint him. After the respondents had instructed Dr Fischer, he approached the trustees and sought certain information to enable him to comply with the order. The trustees refused to furnish him with the required information, stating that because the time period stipulated in the court for filing his comments had lapsed, they had no obligation to assist him with the requested information. As a result, the court order was frustrated.

[51] The trustees' conduct was not only disingenuous, but contemptuous. They are the custodians of the verification process. As responsible trustees, they were expected to play an active role to realise the objectives of the court order. As stated

above, the order of 15 February 2013 was meant to assist the parties in a situation brought about by the trustees' disregard of the order of 12 December 2008, in terms of which Dr Fischer was to be appointed to undertake the verification exercise. The trustees have spurned that effort. Their conduct is contemptuous, and had an application been brought for declaring them to be in contempt of court, it would have received serious consideration in the light of the now trite test established by the Supreme Court of Appeal[8] and endorsed by the Constitutional Court.[9]

[52] The pith of the trustees' request for confirmation of the list of 2577 is this: despite none of the directives of the order of 15 February 2013 having been complied with (solely as a result of their contemptuous conduct) the court should nevertheless confirm the Mhlaba report. This is absurd.

[53] In the final analysis, this court is in no better position to confirm the verification than it was when it postponed the matter on 15 February 2013. In fact, the situation is worse, with information coming to light that the source documents

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[8] In *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 12 the court held that whenever committal to prison for civil contempt is sought, the criminal standard of proof applies. The applicant must therefore prove the requisites of contempt beyond a reasonable doubt, namely (1) the order, (2) service or notice of the order; (3) non-compliance with the terms of the order; and (4) wilfulness and mala fides in the non-compliance. However, once the applicant has proved (1), (2) and (3), the respondents bear an evidentiary burden in relation to (4). Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether his non-compliance was wilful and mala fide, the applicant would have proved contempt beyond a reasonable doubt.

[9] *Pheko and others v Ekhuruleni Metropolitan Municipality* 2015 (5) SA 600 (CC) para 32.

on which the verification exercise was based, have been destroyed. It is unfathomable how, in the light of pending and on-going litigation, the trustees could destroy such relevant information. As a matter of principle and public policy, it is untenable for a litigant to elect not to comply with an order of court, and then turn to the same court by way of a *fait accompli* to achieve that which is contrary to the court order. This is what the trustees are seeking to do.

[54] For all of these reasons I am therefore not prepared to confirm the Mhlaba report. It follows that the confirmation application falls to fail.

Counter-application

[55] I turn now to the respondents' counter-application. As stated already, in their counter-application the respondents seek, in the main, a new verification process, and the amendment of the trust deed. The first prayer is sought on the same basis the respondents opposed the confirmation application, namely that the verification process was flawed and vitiated by violence and intimidation. I have exhaustively discussed this aspect. The amendment of the trust deed is premised on lack of clarity in certain of its provisions, and the perceived weaknesses in the governance of the Trust.

[56] In opposition, the trustees advanced the following arguments to the respondents' counter-application, which I also consider in turn:

(a) the respondents have no locus standi and their attorney is not authorized to act on their behalf;

(b) neither the trustees nor the court has the power to appoint Dr Fischer;

(c) the respondents have failed to set out clear criteria for the identification of beneficiaries; and

(d) a new beneficiary verification exercise is not a viable option.

The respondents' locus standi and their attorney's authority

[57] The applicants' contentions in this regard are without merit and can be disposed of summarily. With regard to Mr Spoor's authority to represent the respondents, the issue is governed by rule 7 of the Uniform Rules of Court. It provides that such challenge shall be brought shall be brought within 10 days after it has come to the attention of the disputing party that a person is acting on behalf of another. Otherwise the authority may be disputed with leave of the court 'on good cause shown.'

[58] The trustees and the intervening parties' challenge was raised for the first time in their written submissions. Mr Spoor has acted for the respondents since the filing of the respondents' answering affidavit and the counter-application in March

2012. At no stage was his authority disputed in terms of rule 7. The trustees and the intervening parties have not sought leave of the court to do so. I therefore find no basis to impugn Mr Spoor's authority.

[59] The trustees' denial of the respondents' standing is equally devoid of any merit. As stated earlier, the respondents are members of the Lugedlane community and such, the beneficiaries of the Trust. In any event, the same argument was advanced before, and rejected by, Hughes J in the amendment application. She confirmed the respondents' standing and held that they are interested parties as beneficiaries. This is also borne out by the objective facts. All of the five respondents' names appear on the list of beneficiaries verified by Mhlaba.

Neither the trustees nor the court has the power to appoint Dr Fischer

[60] The trustees and the intervening parties contended that the trustees do not have the power to appoint Dr Fischer in terms of the Act. Such power, so was the argument, vests in the Chief Land Claims Commissioner in terms of section 9 of the Act. His appointment by the trustees would therefore offend the principle of legality. It was also submitted that the court too, does not have such power. This argument conflates the power of the Commissioner before and after a land dispute has been

settled. Once a land claim has been settled, the Land Claims Commission has no role, nor further powers, as explained by the Land Claims Court in *Shongwe.*[10]

[61] But, in any event, the trustees' proposition in this regard is a startling one. The very first court order in December 2008 in terms of which Dr Fischer was to be appointed, was obtained at the instance of the then trustees. The current trustees have been in office since May 2009 and have not demurred about that order. On the contrary, they appointed Mhlaba, their preferred consultant, instead of the court-appointed one, and applied to court to confirm the former's verification list. This not only flies in the face of their argument, but also demonstrates the trustees' lack of candour. There is nothing in the Act prohibiting the appointment of an independent expert to undertake a verification exercise.

No clear criteria for the identification of beneficiaries

[62] The trustees and the intervening parties contended that the respondents have not provided a clear criteria for the identification of beneficiaries in the event of a new verification exercise being undertaken. The respondents rely on the opinion of an advocate, Mr Budlender SC dated 25 February 2005, prepared for the 'Ebenhaeser community'. He analyses the scheme of the Act and points out that it

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[10] *Shongwe N.O. and others v Regional Land Claims Commissioner: Mpumalanga*, unreported LCC 46/2009 (27 July 2012).

draws a distinction between claims by a community and by individuals. He then summarises his understanding of how individual and community claims should be handled. It is a practical summary of the mechanism of the Act. I do not see how this can be prejudicial. At best the opinion of Mr Budlender is neutral. But at least it provides a structural framework within which the verification process should be undertaken.

A new beneficiary verification exercise is not a viable option

[63] Finally, it was submitted that a new beneficiary verification exercise would be costly and, as was the case with the previous one, likely to be plagued by threats and intimidation. The order proposed by the respondents provides for the role of South African Police Service, should it become necessary. Therefore, to that extent, that risk is addressed.

[64] With regard to the cost implications of the new verification exercise, it is unfortunate it has to be. At the risk of repetition, the parties find themselves in this situation due to the obfuscatory conduct of the trustees regarding the implementation of the two court orders of 12 December 2008 and 15 February 2013. It is therefore not open to the trustees to make the cost implication an issue.

[65] It was further submitted that a new beneficiary verification exercise is not a viable option. It is said that this view finds support in the decision of this court in the judgement of 15 February 2013, where, instead of ordering a new verification, the court only directed for Dr Fischer to comment on the Mhlaba report. I have already contextualised the order of 15 February 2013 as a measure to overcome the conundrum created by the trustees' disregard of the order of 12 December 2008.

[66] With regard to the amendment of the trust deed, section 13 of the Trust Property Control Act provides:

'If a trust instrument contains any provision which brings about consequences which in the opinion of the court the founder of a trust did not contemplate or foresee and which:

(a) hampers the achievement of the objects of the founder;

(b) prejudices the interests of beneficiaries; or

(c) is in conflict with the public interest,

The court may, on application of the trustees or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which such court deems just, including an order whereby particular trust property is substituted for particular other property, or an order terminating the trust.'

[67] It is clear that the court has a wide discretion in terms of section 13. The standing of the respondents cannot be seriously disputed. They clearly are 'persons with sufficient interest'. As to the desirability of the amendment of the trust deed,

the court in the course of its judgment of 15 February 2013 made the following observations:

'In the founding affidavit in the counter-application, the respondents make some serious allegations as to the governance of the Trust, concerning possible abuse of Trust property and funds, lack of accountability and transparency etc. It is not necessary to repeat them here. Suffice it to say that there are pertinent allegations, which are met with sweeping and general denials by the trustees. That concerned me greatly. It is clear from the tumultuous history of the matter, characterised by on-going litigation, that unless proper mechanisms are put in place for proper governance of the Trust, its ills and instability will persist.'[11]

[68] These remarks are as apposite, perhaps even more so, as they were in February 2013. I am therefore satisfied that a proper case has been made for the amendment of the trust deed.

Summary

[69] To sum up, the application for the confirmation of the verification list of the 2577 as contained in the Mhlaba report should fail. The counter-application for the new verification exercise and for the amendment of the trust deed should succeed. During argument, counsel for the respondents handed up a draft order which mirrors

[11] Para 33 of the judgment of 13 February 2013.

the prayers in the amended counter-application. I intend to make that draft an order of court.

Costs

[70] There remains the issue of costs. The respondents have been successful. There is no reason why costs should not follow the result. Counsel for the respondents sought punitive costs on an attorney-and-client scale. I am not persuaded that this is warranted. As regards costs of two counsel, both the trustees and the respondents employed two, which, given the issues raised in the matter, was prudent. Costs of two counsel will therefore be ordered in respect of the respondents' costs. Regarding the costs reserved on 15 February 2013, I am of the view that none of the parties should bear those costs. The postponement was occasioned by issues of concern on both sides. I am therefore of the view that it would be fair that no costs order be made in that regard.

Order

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

1. The application for the confirmation of the verification list is dismissed;
2. The counter-application is granted, and the draft order marked 'X' attached hereto, initialed, dated and signed, is made an order of court;

3. The applicants and the intervening parties are ordered to pay the respondents' costs, jointly and severally, the one paying the others to be absolved, such costs to include costs consequent upon the employment of two counsel;
4. There is no costs order in respect of the costs reserved on 15 February 2013.

APPEARANCES:

For the Applicants:	BR Tokota SC (with him ZZ Matebese) Instructed by: Ngomane Incorporated, Pretoria
For the Respondents:	A Dodson SC (with him E Webber) Instructed by: Richard Spoor Inc., Johannesburg Brazington Shepperson & McConnel, Pretoria
For the Intervening Parties:	DT Skosana SC Instructed by: Ntabeni Attorneys, Pretoria

In the High Court of South Africa

Gauteng Division, Pretoria

16/11/2017

Case Number: 57206/2010

DATE OF HEARING: 1- 2 June 2017

BEFORE: His Lordship Mr Justice Makgoka J

In the matter between:

MESHACK THEMBINKOSI SILINDA N.O. **First Applicant**

(First Respondent in the counter-application)

SIMEON NGOMANE N.O. **Second Applicant**

(First Respondent in the counterapplication)

LAZARUS ZITHA N.O. **Third Applicant**

(Third Respondent in the counter-application)

and

DAVID ZOMA MAKHUBELA **First Respondent**

(First Applicant in the counter-application)

DAVID SHINGO MAKHUSHE **Second Respondent**

(Second Applicant in the counter-application)

DAVID SIBUSISO NDLOVU **Third Respondent**

(Third Applicant in the counter-application)

DUNISA MOSES SILABELA **Fourth Respondent**

(Fourth Applicant in the counter-application)

BOY MKHATSHWA **Fifth Respondent**

(Fifth Applicant in the counter-application)

DRAFT ORDER

HAVING considered the papers and heard counsel for the parties, the following order is made:

1. The applicants ("the Trustees") are directed to appoint Dr AT Fischer to determine the identities of, and to compile a register of, the beneficiaries of the Mjejane Trust IT 6335/04 ("the Trust"), on the following directions, terms and conditions:

   1.1. Dr Fischer shall be remunerated from the estate of the Trust at his normal or usual tariff and on the conditions on which he consults or consulted to the Commission on Restitution of Land Rights;

   1.2. The South African Police Service is directed to provide Dr Fischer with such protection as may be required for the safe completion of his task;

   1.3. Dr Fischer shall be requested by the Trust to file the register of verified beneficiaries and his report on the verification process followed by him, with the Court and the parties, within three months of date of his appointment;

   1.4. The criteria to be applied by Dr Fischer to determine whether any person is a lawful beneficiary of the Mjejane Trust are those set out in:

      1.4.1. The trust deed as amended in the manner set out below;

      1.4.2. The definition of "community" in section 1 of the Restitution of Land Rights Act 22 of 1994 ("the Act"); and

      1.4.3. In re Kranspoort Community 2000 (2) SA 124 (LCC) at paras 31-34; Prinsloo and Another v Ndebele – Ndzundza Community and Others 2005 (6) SA 114 (SCA)([2005] 3 All SA 528) at para 39 and Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 199 (CC) at paras 39-42.

2. The persons recorded in the register of beneficiaries prepared by Dr Fischer will be and are confirmed as the lawful beneficiaries of the Trust, provided that:

   2.1. Any party to these proceedings may file a substantive application for exclusion of any persons from or inclusion of any persons in the register of beneficiaries, within 30 days of the date on which the register of beneficiaries is delivered to the parties, such application to be under the above case number and on notice to the parties to these proceedings with a supporting affidavit setting out the grounds for inclusion or exclusion;

   2.2. The parties to this application through their attorneys may by agreement determine an alternative dispute resolution mechanism to that provided for in 2.1.

3. Any application or other proceedings challenging the verification as contemplated in prayer 2 will not delay the implementation of prayer 5 below and the beneficiaries for purposes of the general meeting contemplated in prayer 5 below will be the beneficiaries as determined by Dr Fischer, who are not younger than 18 years of age.

4. The provisions of the Deed of Trust of the Mjejane Trust are amended as follows:

   4.1. Clause 7 of the trust deed is substituted with the following clauses:

> "7 .1. The trust is established for the benefit of the Lugedlane Traditional Community, on whose behalf the land claim was made and for whose benefit the land was restituted to the Trust. The beneficiaries of the Trust are the members of the Lugedlane Traditional Community."
>
> 7.2. Subject to the order of the High Court in terms of which Dr Fischer established the register and the outcome of any disputes as envisaged in paragraphs 2.1 and 2.2 of that order –
>
> 7.2.1 The trustees shall maintain the register of the beneficiaries of the trust prepared by Dr Fischer;
>
> 7.2.2 The register must include the full names, contact details, residential address and date of birth of each Beneficiary;
>
> 7.2.3 A copy of such register is to be kept available, for inspection by Beneficiaries, at the office of the Lugedlane Traditional Council offices at Mangweni, Kwa-Lugedlane;

7.2.4 Applications for membership of the trust shall be considered by the trustees, provided that no applications may be considered by the trustees until after a meeting has been convened in terms of prayer 5 or 6 of the order of the High Court and trustees elected pursuant to it;

7.2.5 Eligibility for membership of the trust shall be determined by reference to the rules and customs of the Lugedlane Traditional Community and paragraph 1.4 of the order of the High Court in terms of which Dr Fischer established the register;

7.2.6. In the event that there is any subsequent dispute regarding any person's application for membership, or continued membership, of the trust, the dispute will be determined by reference to a panel of 15 elders who are members of the Lugedlane Traditional Community, who are nominated from time to time, in writing, by the 'Inkosi', alternatively the 'Libambela', of the community (which terms shall have the meanings contemplated in section 1 of the Mpumalanga Traditional Leadership and Governance Act, 2005, Act 3 of 2006);

7.2.7 Subject to clause 7.2.8, a decision of the panel of elders, contemplated in clause 7.2.4 above, shall be binding upon the Trustees of the Trust who shall amend the register accordingly;

7.2.8 Any party aggrieved by a decision of the panel of elders may declare a dispute and such dispute shall be dealt with as if it is a dispute in terms of clause 15.

7.2.9 In the event that there is any change to the register, a certified copy of the amended register is to be lodged with the Master of High Court having jurisdiction within 30 days."

4.2. Clause 2.7 of the trust deed be amended to read:

"2.7. 'The land' shall mean the properties restituted to and vested in the trust, pursuant to the settlement of the land claim made on behalf of the Lugedlane Traditional Community."

4.3. Clause 2.8 of the trust deed be amended to read:

"2.8. 'Beneficiaries' shall mean beneficiaries as determined in accordance with clause 7 below."

4.4. Clause 9 of the trust deed to be substituted by the following clause 9:

"9. A beneficiary ceases to be a beneficiary when he or she ceases to be a member of the Lugedlane Traditional Community or on death."

4.5. Clause 19.1 to be inserted to read;

"19.1. All Annual General Meetings and General Meetings of the Trust shall be held at Kwa-Lugedlane."

4.6. The numbering in clause 19 of the trust deed be corrected by changing the cross-reference to "19.5" in clause 19.4 to "19.6" and by renumbering the subparagraphs of clause 19.5 as 19.5.1 and 19.5.2, by renumbering the subparagraphs of clause 19.6 as 19.6.1 and by renumbering the second 19.6 as 19.7.

4.7. Clause 19.6.1 to be amended to read:

"19.6.1 Notices of the meeting shall be prominently displayed, at the offices of the Trust, at the office of the Lugedlane Traditional Authority, Mangweni, and Steenbok at least 3 (three) weeks prior to the date of the meeting."

4.8. Clause 19.7 to be amended by renumbering it as 19.8 and amending it to read:

"19.8 The quorum for a General or Annual General Meeting shall be at least 50% of the Beneficiaries entitled to vote, provided that if such a meeting cannot proceed by reason of the absence of quorum, the meeting shall stand adjourned to a date not less than 3 weeks hence determined by the chairperson, notice of the adjourned meeting shall again be given in terms of clause 19.6 and the persons present at the adjourned meeting shall constitute a quorum regardless of the percentage of the Beneficiaries entitled to vote that are present."

5. The Trustees are directed to convene, within 90 days of the date on which the register of beneficiaries is delivered to the parties by Dr Fischer, a General Meeting of the Trust to be convened at Mangweni, for the purpose of reporting on the finances of the Trust, including the preparation and auditing of annual financial statements and the administration of the trust and for the election of new trustees of the trust.

6. Directing that, failing the convening of a General Meeting of the Trust in terms of paragraph 5 of this order, such a meeting be convened by Tokiso Dispute Settlement ("Tokiso") under the chairpersonship of a person nominated by the chief executive officer of Tokiso, at the expense of the Trust.

7. The respondents' (applicants in the counter-application) costs are to be paid by the Trustees, including the costs of two counsel, on the attorney and client scale.

BY ORDER

THE REGISTRAR