IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

(1)	REPORTABLE: no
(2)	OF INTEREST TO OTHER JUDGES: no
(3)	REVISED.

SIGNATURE [signature] DATE: 18 May 2022

CASE NUMBER: LCC89/2019B

In the matter between:

THE N'WANDLAMHARI COMMUNAL PROPERTY ASSOCIATION	FIRST APPLICANT
MHLANGANISWENI COMMUNITY	SECOND APPLICANT

and

DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	FIRST RESPONDENT
DIRECTOR GENERAL: DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	SECOND RESPONDENT
MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT	THIRD RESPONDENT

In re:

THE N'WANDLAMHARI COMMUNAL PROPERTY ASSOCIATION	FIRST PLAINTIFF
MHLANGANISWENI COMMUNITY	SECOND PLAINTIFF

And

MILLINGTON ZAMANI MATHEBULA	FIRST DEFENDANT
RICHARD MANGALISO NGOMANE	THIRD DEFENDANT
SURPRISE WELCOME NTIMANE	FOURTH DEFENDANT
KAIZER MESHACK KHUMALO	FIFTH DEFENDANT
SIPHO ORANCE MKHWANAZI	SIXTH DEFENDANT
FRANK SOLLY BHUNGELA	SEVENTH DEFENDANT
RULANI HARRIET MAWELA	
THUYANI SOUL DLAMINI	EIGHTH DEFENDANT
MAVHURAKA COMMUNITY	NINTH DEFENDANT
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	TENTH DEFENDANT
DIRECTOR GENERAL: DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	ELEVENTH DEFENDANT
THE CHIEF LAND CLAIMS COMMISSONER: COMMISSION ON RESTITUTION OF LAND RIGHTS	TWELFTH DEFENDANT
REGIONAL LAND CLAIMS COMMISSONER: MPUMALANGA PROVINCE	THIRTEENTH DEFENDANT

AND

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In the matter between:

THE N'WANDLAMHARI COMMUNAL PROPERTY ASSOCIATION	FIRST PLAINTIFF

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REGIONAL LAND CLAIMS COMMISSONER: MPUMALANGA PROVINCE	THIRTEENTH DEFENDANT

JUDGMENT

COWEN J

[1] The proceedings before me are a sequel to the case colloquially known as the MalaMala land claim. The MalaMala land claim was apparently settled in 2014 when the State purchased, for some R1.1 billion, the property on which the world renowned eco-tourism MalaMala Game Reserve is situated, and restored it to land claimants.[1] The property is currently owned by the N'Wandlamhari Communal Property Association (NCPA), which, according to the papers before me, owns 9 land parcels in Mpumalanga Province collectively referred to as the MalaMala land.[2] Unfortunately, the land claim, which holds immense redressive potential on the critical issue of land restitution,[3] remains mired with controversy as these proceedings (and other recent High Court proceedings) reveal.

[2] This judgment contains my decision in two related proceedings. The first is a decision in an urgent application (LCC89B/2019) in which the Applicants seek an interim interdict pending the determination of a main action (LCC89/2019). The interim interdict, if granted, would restrain the holding of an Annual General Meeting of the NCPA called in December 2021 to elect a new Executive Committee. It would operate pending the determination, in the main action, of

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[1] The settlement came in the wake of a decision of this Court in 2012, ruling that it was not feasible for the property to be restored to the land claimants: see Mhlanganisweni Community v Minister of Rural Development and Land Reform and others [2012] ZALCC 7. The land claimants then sought to appeal, initially in the Supreme Court of Appeal (SCA) (which refused leave) and then in the Constitutional Court. The Constitutional Court set the matter down for hearing on both leave to appeal and the merits of the appeal but those proceedings did not proceed given the settlement.

[2] Remainder of the Farm Eyrefield No 343, Portion 1 of the Farm Eyrefield No 343, the Farm MalaMala No 341, Remainder of the Farm MalaMala No 359, Portion 1 of the Farm Flockfield No 361, the Farm Flockfield No 414, Portion 7 (a portion of portion 5) of the Farm Toulon No 383, Remaining Extent of the Farm Charleston No 378 and Portion 1 of the Farm Charleston No 378

[3] See Madlanga J's remarks in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) at para [1] and Mhlantla J's remarks in *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* [2019] ZACC 10; 2019 (5) BCLR 619 (CC); 2019 (6) SA 568 (CC) at paras [1], [65] and [66].

who is entitled to benefit from the NCPA and the MalaMala land – and ultimately to vote. The second is a decision on certain *in limine* points in the main action.[4] I deal with them in the same judgment due to overlapping factual and legal issues.

[3] The two Applicants in the urgent application are the two Plaintiffs in the main action. They are, respectively, the NCPA and the Mhlanganisweni Community, and I refer to them either as such or, where appropriate to the context, as the Applicants or the Plaintiffs. The Mhlanganisweni Community is the name the Plaintiffs use to describe the land claimants of the MalaMala land, being a group of claimants and not the name of an indigenous community.

[4] In the main action, the Plaintiffs have approached this Court for declaratory relief concerning who is entitled to be a member of the NCPA and to share in the benefits from the MalaMala land. A dispute has arisen because it is not only the members of the Mhlanganisweni Community who are entitled to receive such benefits under the NCPA Constitution but also members of a community known as the Mavhuraka Community, which, the Plaintiffs allege, did not lodge land claims in respect of the MalaMala land and are not entitled to benefit from the settlement.

[5] The Defendants in the main action include the Mavhuraka Community (the Ninth Defendant) and certain individuals who are part of the Mavhuraka Community (the First to Eighth Defendants). They also include various State Defendants including the Minister of Agriculture, Rural Development and Land

[4] Mr Sibusiso Dlamini is the assessor appointed and sitting with me in the main action. Mr Dlamini did not sit with me in the urgent application, his agreement is reflected accordingly.

Reform (the Minister or Tenth Defendant), the Director-General: Department of Agriculture, Rural Development and Land Reform (the DG or Eleventh Defendant), the Chief Land Claims Commissioner of the Commission on Restitution of Land Rights (the Commissioner or Twelfth Defendant) and the Regional Land Claims Commissioner, Mpumalanga Province (the Regional Commissioner or Thirteenth Defendant).

[6] A notable feature of these proceedings is that when the MalaMala land claim was settled, it appears that no written settlement agreement was concluded in terms of section 14(3) or section 42D of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). The relevant facts and their legal consequences are to be traversed in the main action. According to the Plaintiffs' Statement of Claim, while the matter was pending before the Constitutional Court and prior to it being heard in that Court, the Minister filed an affidavit indicating that the government was willing to purchase the MalaMala land on behalf of the Mhlanganisweni Community and indicating that the parties should seek to settle the Mhlanganisweni claims in respect of the MalaMala land.[5] Negotiations over the Mhlanganisweni claims in respect of the MalaMala land began and included the Chief Land Claims Commissioner, the Minister's legal representatives, the Commission's legal representatives, the landowners and the Mhlanganisweni Community's legal representatives, and it was agreed that the Department would purchase the MalaMala land for the Mhlanganisweni Community from the then MalaMala landowners for a total amount of approximately R1.1 billion.[6] On 3 September 2013, the then MalaMala landowners and the Department –

[5] Paragraph 30.
[6] Paragraphs 32 and 33.

duly represented by Mr Lebjane Maphutha – allegedly concluded an agreement of sale for the MalaMala land, in terms of which it was agreed, *inter alia*, that the Department would purchase the MalaMala land from the landowners for a purchase price of R1 011 989 328.00, and the MalaMala land would be transferred to a legal entity representing the Mhlanganisweni Community. According to the Plaintiffs, matters took a turn when the NCPA was formed on 19 October 2013. In this regard, it is alleged that "[w]hen the CPA was formed, the Mhlanganisweni Community was informed by the relevant officials representing the Department that the Mavhuraka Community would be part of the CPA." The inclusion of the Mavhuraka Community in the CPA, it is said, "was imposed on the Mhlanganisweni Community without the Mhlanganisweni Community's informed consent thereto being sought or obtained."[7]

[7] According to the First to Ninth Defendants' plea, various claims were consolidated into a single claim in the name of the Mhlanganisweni community.[8] They allege, amongst other things, that the Mhlanganisweni Community ceased to exist when the NCPA was formed, and the NCPA Constitution now governs the legal position. According to the Minister and the DG, who are also defending the action, both the Mhlanganisweni Community and Mavhuraka Community are recognised as beneficiaries of the NCPA Constitution, and members of both successfully lodged claims (in 2013) under the Restitution Act over land in the Sabie Sand Region historically known to indigenous owners by the name of Nwandlamhari, and which land the NCPA was formed to hold.[9] Both communities jointly adopted the NCPA Constitution, creating the NCPA,

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[7] Paragraphs 37 and 37A.
[8] Plea, para 1.1.
[9] Plea, para 13.1.

they say. The Commissioner and the Regional Commissioner plead too, amongst other things, that the Mavhuraka Community is part of the group of people intended to benefit from the NCPA Constitution and that the members of the Mhlanganisweni Community are not the only persons who lodged land claims in respect of the MalaMala land[10] or who have been identified as beneficiaries pursuant to the provisions of the NCPA Constitution.[11]

[8] According to the NCPA Constitution:

"(a) The claimant communities of Mhlanganisweni and Mavhuraka joined to adopt the NCPA Constitution (Preamble);

(b) The NCPA owns and manages the MalaMala land, and any other land restored to or granted to or acquired by the NCPA in future and any other property of whatever nature granted to, donated to or acquired by the NCPA (Clause 3.2);

(c) The main objective of the Association is to acquire, own, hold and manage the restored land, or any other land, in common for the members of the Association (Clause 5.1);

(d) Qualification for membership of the NCPA shall be limited to members of the households and their descendants who form part of the groups of people that were dispossessed of rights in land within the lands traditionally known as N'wandlamhari, being the land in and around the area known today as the Sabie Sand Game Reserve (Clause 8.1)."

[9] The main action was initially set down for hearing before me on 14 February 2022. However, in the urgent application, instituted on 27 January 2022, the

[10] Plea, paras 3.2 and 6.2.
[11] Plea, paras 10 and 12.

Applicants approached this Court seeking an interim interdict to restrain the Department, the DG and the Minister from convening an Annual General Meeting of the NCPA called for February 2022, pending the determination of the main action. There are three Respondents against whom relief is sought in the urgent application – all State Respondents – being the Department of Agriculture, Land Reform and Rural Development (the Department), the DG and the Minister.

[10] The deponent to the founding affidavit in the urgent application is the current Chairperson of the Executive Committee of the NCPA, Mr Johan Mthabine. Mr Mthabine explains that the Annual General Meeting was to be held in three parts, on 5, 12 and 19 February 2022. The Department issued three notices to members of the Mhlanganisweni and Mavhuraka Communities to that effect in December 2021. On 5 February 2022, there were to be two agenda items: 1. Reporting, and 2. Voting Process. On 12 February 2022, the sole agenda item was the nomination of candidates and preparation of secret ballot papers. On 19 February 2022, the sole agenda item was the election of the executive committee for the NCPA. It can thus be inferred that the primary purpose of the February AGM was to elect a new executive committee and I refer to it hereafter as the February AGM. The notices were issued in circumstances where there was full knowledge that the main action was imminent. On 14 January 2022, the Applicants' attorneys wrote to the State Respondents requesting clarity whether the February AGM would only involve current NCPA members, stated at this stage to still constitute only members of the Mhlanganisweni Community. If so, the Applicants tendered their full co-

operation. If not, legal action was foreshadowed. There was no response and in those circumstances the Applicants instituted the urgent application.

[11] On 4 February 2022, the Acting Judge President of this Court, Meer AJP, made the following order in terms of Rule 30(7) of the Rules of this Court:

> "Pending the resolution of the urgent application, the scheduled meetings of 5, 12 and 19 February 2022 of the NCPA, notice of which was given by the [Department} on 23 December 2021, shall not proceed."

That order remains in place pending my decision in the urgent application, in other words in the order I make below.

[12] The urgent application was argued before me on 10 February 2022. Ms Barnes SC (with her Mr Musandiwa) appeared for the Applicants and Mr Ogunronbi (with him Ms Matondo) appeared for the State Respondents. There was no appearance for the First to Ninth Defendants, who did not participate in the proceedings. The Applicants seek to interdict the meetings on two bases. The first is that the meetings trench on the issues to be determined in the main action set down for hearing on 14 February 2022 and the Applicants accordingly seek to preserve the status quo and protect the integrity of the proceedings in the main action. The second is that the Department was not entitled to call an AGM on behalf of the NCPA at all, a submission that is advanced based on the requirements for calling a General Meeting set out in Clause 15.1 of the NCPA Constitution.[12]

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[12] See below at para [35].

[13] The State Respondents seek to defend the urgent application on various bases. The deponent to their answering affidavit is Mr David Moffett, the Acting Chief Director: Mpumalanga Provincial Shared Service Centre of the Department. Mr Moffett pleads, amongst other things, that this Court does not have jurisdiction to entertain the urgent application because in nature it concerns the application of the Communal Property Association Act 28 of 1996 (the CPA Act) and the NCPA Constitution, which, they say, does not fall under the jurisdiction of this Court.[13] The State contends too that there is a legal duty on the Department to convene the February AGM in terms of a court order granted by the Gauteng Division of the High Court in *Mathebula and others v the NCPA*[14] and pursuant to the CPA Act. The State Respondents submit further that there is insufficient connection between the relief sought in the urgent application for interim relief and the main action: the relief sought is, in substance, final relief. But, they say the Applicants have satisfied neither the requirements for a final nor an interim interdict, but in any event, they say that the *status quo* that should be preserved at this stage, if any, is one that entails that both the Mhlanganisweni and Mavhuraka Communities benefit from the NCPA and the MalaMala land. Importantly, Mr Moffett says that as a matter of fact, the NCPA verified beneficiaries include persons from both communities, pursuant to a process that was finally approved at a "verification adoption conference duly held on 12 December 2020." He says further that the Department called the AGM on the request of in excess of 100 beneficiaries of the NCPA.

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[13] Para 10.5 of the answering affidavit.
[14] (90356/16) [2019] ZAGPPHC 201 (May 2019) (the Mathebula application).

[14] In reply, the Applicants contend amongst other things that as matters stand, any recently verified member of the Mavhuraka Community is yet to become a member of the NCPA, a process which can only legally ensue at a duly called AGM under the NCPA Constitution, which has not yet occurred. Accordingly, they say, only members of the Mhlanganisweni Community are members of the NCPA. Those who called for the February AGM to be convened are not members of the NCPA, they say, and in any event, the Department has no right or power to convene an AGM as it sought to do.

[15] Ultimately the main action could not proceed on 14 February 2022 but it was agreed that certain *in limine* points would be argued upfront. The *in limine* points in the main action were argued before me (and my assessor Mr Dlamini) on 28 February 2022. Ms Barnes SC and Mr Ogunronbi, with their respective juniors, appeared again for their clients, in this instance the Plaintiffs and the Tenth and Eleventh Defendants respectively. Mr Malatji appeared for the First to Ninth Defendants and Mr Majozi (with him Ms Marule) appeared for the Twelfth and Thirteenth Defendants.

[16] There are three *in limine* points:

(a) Whether this Court has jurisdiction to entertain the main action;

(b) Whether the issues raised in the main action are res judicata in light of the decision and order in the Mathebula application.

(c) Whether the main action should have been brought by way of review proceedings.

[17] When reserving judgment on the *in limine* points, I indicated that I would consider my decision in both proceedings and deliver judgment simultaneously. In the meantime, the order of Meer AJP of 4 February 2022 restraining the holding of the February AGM would stand.

The Mathebula application

[18] The *Mathebula* application features in both the urgent application and the *in limine* proceedings and I accordingly briefly set out what it entailed. It was instituted in the Gauteng Division of the High Court by the First to Eighth Defendants during 2016. It was instituted against the NCPA,[15] the Minister,[16] the DG,[17] the Commissioner,[18] the Regional Commissioner[19] and Gilfillian du Plessis Inc Attorneys.[20] The Mhlanganisweni Community was apparently not cited as a separate party. While wide-ranging relief was sought in those proceedings, they revolved centrally on section 13(1) of the CPA Act, which empowers a relevant High Court or Magistrates Court to place a CPA under the administration of the DG in certain circumstances.[21] The first prayer sought in

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[15] As First Respondent.
[16] As Second Respondent.
[17] As Third Respondent.
[18] As Fourth Respondent.
[19] As Fifth Respondent.
[20] As Sixth Respondent, being the attorneys who acted in the land claims and who was alleged to be holding NCPA funds in Trust.
[21] The following relief was sought: (1) An order placing the NCPA under administration of the DG; (2) An order that the NCPA submit all documents in their possession, including financial records to the DG, within 5 days of the order of this court; (3) An order directing the DG to institute a forensic investigation (fact finding mission) into the affairs of the NCPA within 30 days of the order; (4) An order directing the DG to undertake and complete the functions of the NCPA. The functions should include the conclusion of the verification of all beneficiaries and distribution of financial statements to the Applicants. (the verified beneficiaries); (5) An order that the DG conduct an investigation regarding the dispute between the beneficiaries and the executive members of the NCPA to be concluded within 6 months of the order; (6) an order that the DG file a progress report on the (forensic) Investigation within 3 months of the order; (7) an order that the DG finalise the report within 6 months of the order; (8) an order authorising the Applicants to respond to the report within one month; (9) an order directing the DG to assist the beneficiaries of the NCPA to prepare for the Annual General Meeting and elections of the new executive

the notice of motion was an order placing the NCPA under the administration of the DG and various ancilliary relief was claimed pursuant to section 13(2) of the CPA Act.[22] That relief was not granted. However, it appears that certain relief was also pursued, and ultimately granted, in terms of section 11(1) of the CPA Act and the NCPA Constitution. Section 11 concerns the DG's duties to monitor a CPA's compliance with the relevant Constitution and the CPA Act.

[19] On 9 May 2019, Judge Khumalo delivered her judgment and order. The substantive parts of her order read as follows, and I highlight paragraphs [4] and [5] in bold:

> "[1] The Application to place the NCPA under the administration of the Director General is dismissed;
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> [2] Prayer 2 is granted in that the NCPA is hereby ordered to submit all documents in their possession including financial records to the Director-General, and also to be distributed to its membership within 30 days of the order of this court disseminated by publishing the statements on their website as well as a notice published on their availability either on their website or by request.
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> [3] The Director General is hereby directed to release the results of the verification process that it embarked on and was to be completed by July / August 2018 within 30 days of this order. If such verification is not finalised the Director General is ordered to finalise the verification of all beneficiaries within 30 days of this order and furnish the Applicants and the NCPA members with a copy of the report within 15 days of such completion.

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members; (10) An order directing that the NCPA be released from the administration of the DG once the DG and the beneficiaries of the NCPA are of the opinion that the NCPA is in a state of good order; (11) an order directing the 6th Respondent to furnish records of the NCPA's monies held in their Trust Account to the DG within 30 days of the order; (12) an order interdicting the 6th Respondent from releasing any monies that belong to the NCPA which are held in their Trust Account with immediate effect; (13) an order directing the DG to give direction as to all monies to be received on behalf of the NCPA from the date of the order of this Honourable Court.

[22] Section 13(2) provides: that the DG "shall, pursuant to an administration order referred to in subsection (1), have such powers to manage the affairs of the association or provisional association as the Court, subject to the provisions of this Act, may determine."

[4] That the Director General should soon after the release of the report on the verification process assist the beneficiaries of the NCPA to prepare for the Annual General Meeting and the elections of the new executive committee members of the NCPA within 60 days of the order of the court.

[5] The decision to institute a forensic investigation into the affairs of the NCPA is deferred to the elective AGM, that is to be held in terms of the Constitution within 60 days of the order of the Court with the assistance of the Director General.

[6] The Director General should conduct an investigation regarding the dispute between the beneficiaries and the executive members of the NCPA. The investigation should be concluded within 6 months of the order of this Court.

[7] A progress report on the investigation compiled by the Director General should be served on the Applicants and NCPA members by publication on the website within 3 months of the order of this Court.

[8] That the 6th Respondent be and is hereby ordered to furnish records of the NCPA's monies that was held in their Trust Account to the Director-General within 30 days from the order of this Court;

[9] That the Director General will give direction as to all monies to be received on behalf of the NCPA from the date of the order of this Honourable Court which will be banked in the NCPA bank account.

[10] No order as to costs."

[20] On 24 February 2020, Judge Khumalo dismissed an application for leave to appeal. However, on 2 October 2020, the SCA granted leave to appeal to the Full Court of the Gauteng Division of the High Court, Pretoria in respect of paragraphs 2, 8 and 9 of the order. That appeal is pending.

[21] An important part of the reasoning in the judgment appears from paragraph [106] in which it is explained that certain decisions in respect of which relief was sought (such as to embark on a forensic investigation) could be delayed to an AGM for the membership to make "in the very near future". Importantly, it was

contemplated that all persons entitled to be members of the NCPA under the Constitution, whether part of the Mhlanganisweni Community or the Mavhuraka Community, would be verified at that stage. In this regard, an important underlying dispute that gave rise to the proceedings in the first place was a failure to finalise verification of persons entitled to be members who were members of the Mavhuraka Community.

The jurisdiction of this Court

[22] This Court derives its judicial authority from statutes and its powers are circumscribed thereby.[23] As regards subject-matter jurisdiction, section 22(1) confers exclusive jurisdiction on this Court, amongst other things:

"(a) to determine a right to restitution of any right in land in accordance with the Restitution Act (section 22(1)(a));

(b) to determine any matter involving the validity, enforceability, interpretation or implementation of an agreement contemplated in section 14(3), unless the agreement provides otherwise (section 22(1)(Ce))."

Jurisdiction in the main action

[23] The Plaintiffs rely mainly on section 22(1)(a) and section 22(1)(Ce) of the Restitution Act to invoke this Court's subject-matter jurisdiction in the main

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[23] *Mamahule Communal Property Association and Others v Minister of Rural Development and Land Reform* [2017] ZACC 12; 2017 (7) BCLR 830 (CC) (Mamahule) at para [12]; *Macassar Land Claims Committee v Maccsand CC and Another* [2016] ZASCA 167; [2017] 2 All SA 17 (SCA); 2017 (4) SA 1 (SCA) at para [5].

action.[24] The Defendants, in short, submit that this Court no longer has the jurisdiction to determine who has the right to restitution in accordance with the Restitution Act as the underlying land claim is settled and the relationship between the parties, and their respective entitlements, is now governed by the terms of the NCPA Constitution. Disputes arising in connection therewith – as arise in the main action - are matters that fall outside of the jurisdiction of this Court, so the argument continued.

[24] Determining whether this Court has jurisdiction in the main action depends on the nature of the cause in the main action and whether it falls within section 22. In this regard, this Court must give the statement of claim any interpretation it can reasonably bear.[25] The task is somewhat complicated by the manner in which the orders sought are framed in the Plaintiffs' Statement of Claim. Specifically, the orders sought refer to this Court determining entitlement to membership of the NCPA, terminology which, at first blush, may suggest that what is in issue is an interpretation and application of the NCPA Constitution. But that is not the only way reasonably to understand the pleadings and Ms Barnes confirmed that this would be a mistaken interpretation.[26] Rather, the Court is being asked to determine antecedent questions, which may be related in this case: Who is entitled to benefit from the Mhlanganisweni land claim under the Restitution Act and who is to benefit from the resultant settlement itself. These are the issues, the Plaintiffs say, that underlie the ongoing disputes in the NCPA and their determination by this Court will ultimately inform

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[24] The Courts' remedial powers in terms of section 35 are also invoked.
[25] This is the test used on exception and is apposite here. See Erasmus Superior Court Practice, Vol 2, D1-294.
[26] The Applicants deal with this in the replying affidavit too.

the future of the NCPA and its membership: if need be further legal proceedings relating to the terms or status of the NCPA Constitution may ensue.

[25] In my view, determination of these related antecedent questions, and accordingly the main action, fall comfortably within this Court's jurisdiction and the pleadings can reasonably be interpreted in this way. The existence of the NCPA Constitution may have various legal consequences, but it does not, in my view, deprive the Court of jurisdiction in the main action.

Jurisdiction in the urgent application

[26] The parties agreed that had I concluded that this Court did not have jurisdiction in the main action, it would follow that there is no power or jurisdiction in the urgent application. In this regard, this Court's power or jurisdiction to decide the urgent application depends on whether the powers or jurisdiction sought to be invoked fall within section 22(2) of the Restitution Act, which provides:

> "(2) Subject to Chapter 8 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have –
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> (a) all such powers in relation to matters falling within its jurisdiction as are possessed by a High Court having jurisdiction in civil proceedings at the place where the land in question is situated, including the powers of a High Court in relation to any contempt of the Court;
> (b) all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts;
> (c) the power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so."

[27] In the founding affidavit, the Applicants contend that the main action will determine whether or the extent to which members of the Mavhuraka Community are entitled to benefit from the NCPA and the MalaMala land and thus, in turn, to participate in any AGM that is called. They say that if the February AGM is permitted to proceed as contemplated, in other words, including persons from the broader Mavhuraka Community, the relief sought in the main action would be defeated or compromised because it would mean that disqualified persons would, in the meantime, participate in the governance of the NCPA including its elective process. Viewed in this way this Court would, in my view, have the power to entertain the urgent application under section 22(2)(b) of the Restitution Act.[27]

[28] Moreover, even though the legality of the February 2022 AGM is not directly in issue in the main action, there is a sufficient connection where interim interdictory relief is sought on the basis that only lawful electoral processes are pursued while the main action is pending. The convening of an electoral AGM invariably has the capacity to alter the leadership of the very body in respect of which entitlement to membership, and thus ultimately to participate in governance is in issue. Moreover, this is ensuing during the course of litigation specifically intended to resolve membership disputes. On this latter issue, the evidence before me shows that a change in leadership may result in the NCPA terminating the litigation itself.[28] Thus, on the specific facts of this case, the

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[27] Mamahule, supra n 23 at paras [13] to [17] esp [16]. *Nchabeleng v Phasha* [1997] 4 All SA 158 (LCC) at paras [4] and [5]. *Masondo and others v Woerman* 1999(12) BCLR 1446 (LCC) at paras [96] and [97].

[28] Answering affidavit, paras [69] to [74] read with Annexure AA2 and AA4.

lawfulness of such an electoral process, and accordingly the February AGM, may thus materially impact upon the main action itself for this reason too.

[29] In any event, subject to the requirements of the interests of justice, section 22(2)(c) would confer on this Court the power to decide the issues pleaded in the urgent application regarding whether the February AGM was duly called under the NCPA Constitution. While that is not an issue that is ordinarily within the jurisdiction of this Court, it is reasonably incidental both to the issues in the main action and the main issues raised in the urgent application. The question that arises, however, is whether it is in the interests of justice to assert a power to determine whether the February AGM has been called in accordance with the NCPA Constitution in view of the order in the Mathebula application. The specific difficulty the Applicants face is that unless the relief sought is restricted to enable a lawful AGM to proceed pursuant to the order of Judge Khumalo, the effect of an order sought from this Court may be to prohibit what another Court has ordered must occur. At least absent a temporary stay of the part of Judge Khumalo's order that requires an AGM to be convened, it is difficult to see how the interests of justice would be served should this Court assert jurisdiction over an issue if its order would conflict with an existing order granted by the Court that ordinarily has jurisdiction over the subject matter.

[30] In order to address this difficulty, Ms Barnes submitted that, in the absence of any temporary stay sought from the North Gauteng High Court, this Court should not make any interim order that would serve to prevent compliance with the order of Judge Khumalo. Any order granted should thus be appropriately restricted to ensure no conflict with that order, specifically as regards paragraphs [4] and [5]. Accordingly, I emphasise that nothing in this judgment

should be construed as preventing compliance with the order of Judge Khumalo in the Mathebula application. On the contrary, that order, unless stayed or duly reversed, must be obeyed.

The urgent application

[31] The Applicants' entitlement to relief against the State Respondents in the urgent application turns on whether they have met the requirements for an interdict. The requirements for interim relief in this Court are well-established,[29] being

> "a) that the right which is the subject matter of the main action and which the applicant seeks to protect is clear or, if not clear, is *prima facie* established though open to some doubt;
> b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim interdict is not granted and he ultimately succeeds in establishing his right (it is implicit in this requirement that the harm apprehended must be the consequences of an actual or threatened interference with the right referred to in (a);
> c) that the balance of convenience favours the granting of interim relief; and
> d) that the Applicant has no other remedy."

[32] In applying these principles this Court follows the approach expounded in *American Cyanamid Co v Ethican Ltd.*[30] That approach departs from a rigid approach of a 'strong prima facie right' and emphasises flexibility and the importance of the balance of convenience criterion. The Court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious

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[29] *Chief Nchabeleng v Chief Phasha*, supra, at paras [6] to [18].
[30] [1975] 1 All ER 504 (HL).

question to be tried. As this Court held in *Macassar Land Claims Committee v Maccsand CC*[31]:

> "According to this approach, where the grant of the interim interdict results in significant inconvenience for the respondent, a higher standard of proof is required of the applicant under the 'serious question to be tried' criterion. Conversely, where the inconvenience to the respondent is insignificant, a lesser standard of proof may be accepted."

[33] In my view, the applicants have met the test for both an interim interdict against the State actors and a final interdict.[32]

[34] First, I am satisfied that on the papers before me, a clear right is established, breach of which is imminent if not already committed: in short, it is established that the February AGM has been unlawfully called by the Department.

[35] Clause 15.1 of the NCPA Constitution regulates convening a General Meeting. It was common cause in the urgent application that this includes the AGM.[33] Clause 15.1 reads as follows:

> "15.1 General Meetings of members may be convened at any time on the requisition of:
>
> 15.1.1 The Chairperson of the Executive Committee;
>
> 15.1.2 Any six (6) Executive Committee members; or

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[31] [2003] ZALCC 21 at page 14.

[32] The latter being a clear right, an injury committed or reasonably apprehended and no alternative satisfactory remedy. Where final relief is sought, findings of fact are to be made in accordance with the principles articulated in *Plascon-Evans Paints v Van Riebeeck Paints* 1984(3) 623 (A) at 634H-635C and *Wightman t/a JW Construction v Headfour (Pty) Ltd and another* 2008(3) SA 371 (SCA) para [13].

[33] Clause 3.7 of the NCPA Constitution defines General meeting as follows: 'unless specified to be either an annual, ordinary or extraordinary general meeting, shall mean any general meeting unless the context clearly indicates a specific type of general meeting.'

15.1.3 100 (one hundred) members of the Association who sign a written request and hand it to the Chairperson."

[36] On the evidence before me, it is clear that the February AGM was not convened on the requisition of either Chairperson of the Executive Committee or six members of the Executive Committee. The State Respondents, rather, sought to rely on Clause 15.1.3 contending that the AGM was requested by in excess of 100 members of the NCPA.

[37] There are at least two difficulties with this contention. First, even assuming that 100 members of the NCPA requested the AGM to be convened, that request was at no stage handed to the Chairperson of the Executive Committee, who in turn did not then convene the AGM, with the assistance of the Department or otherwise. Indeed, the Chairperson explains that he was unaware of any request to convene the AGM.

[38] Secondly, I am unable to conclude on the affidavits before me that the State Respondents have demonstrated that the request to the Department that an AGM be convened was made by 100 members of the NCPA. In this regard, the State Respondents allege that the Department called the AGM but that the decision to call it was that of the NCPA itself, including verified members of both the Mavhuraka Community and the Mhlanganisweni Community. Reliance is placed on the outcome of what are described in the answering affidavits as special general meetings of the NCPA. In this regard, the State Respondents have furnished evidence that in excess of 100 persons who attended a meeting on 9 October 2021 at Lillydale Community Hall resolved to request the Department to assist beneficiaries to convene and conduct an AGM. Signed

minutes of that meeting are supplied together with its attendance register. On 30 November 2021, the Acting Chief Director: Mpumalanga Provincial Shares Service Centre, Mr S Njoni confirming that the Department had granted the request. The State Respondents also supply minutes of a further meeting convened on 11 December 2021 (with the attendance register) at which it was resolved that "the interim committee must, in conjunction with the [Department], continue with the good work of preparing for the elective AGM."

[39] The difficulty with the State Respondent's reliance on these resolutions is that they presuppose that what had been convened was in fact a meeting of NCPA beneficiaries. In this regard, Mr Moffett explains that that the Department did in fact finalise the verification process contemplated by the order of Judge Khumalo. He says:

> "The verification process has since been completed by the Department with a verification adoption conference duly held on 12 December 2020. I attach hereto a copy of the internal departmental memorandum on the verification, as annexure AA1."

In reply, the Applicants contend that the current members of the NCPA are those adopted in terms of the verification process concluded in 2009 which includes members of only the Mhlanganisweni Community and that additional members from the verification process conducted in 2019 are yet to be adopted as members of the NCPA. That they say, can only ensue via an AGM called in terms of the NCPA Constitution with the current members of the NCPA agreeing thereto. That they say has not yet happened.

[40] Although Mr Moffett alleges that the verification adoption conference was "duly held" on 12 December 2020, this is not demonstrated and the document supplied to support this does not bear this out. The internal departmental memorandum is addressed to Mr Jeff Sebape as the Director of Communal Property Institutions and contains a recommendation that he "notes the status report on the functionality of the NCPA since the CPA's verification was updated / re-verified" and "approves and updates the membership list / register of the NCPA as adopted by majority (quorum forming) the members of the aforesaid CPA on the 12th of December 2020." It is supplied without its supporting annexures and is, moreover, not signed by the Director. However, at least at face value, the document suggests that its authors understood the meeting convened on 12 December 2020 was a meeting of 're-verified' beneficiaries, in other words those regarded by the Department as entitled to membership. The difficulty the State Respondents face is that they have not placed any evidence before me upon which I can conclude that the persons who resolved in October 2021 to request the Department to convene the February AGM were in fact then members of the NCPA. Whatever the duties of the NCPA may be to admit persons entitled to membership,[34] the procedures of the NCPA Constitution for admission of members must be observed.[35] Given the absence of evidence to conclude that those who resolved to request the February AGM were NCPA members, it is neither necessary nor desirable for me to make any findings about precisely how that process must unfold under the NCPA Constitution, nor who the current members in fact are. I emphasise that I accordingly make no

[34] Clause 8 regulates membership of the association.
[35] Clause 8.3 and Clause 8.4 deal with applications for membership, for example.

finding on whether any members of the Mavhuraka Community are currently members of the NCPA, nor what process had to be followed to confer membership.

[41] The remaining requirements for an interdict, either interim or final, have been met. There is no alternative satisfactory remedy but to approach a Court for relief to stop the Department from calling an unlawful meeting. As for the balance of convenience, the consequence of Ms Barnes' concession that the relief should not, absent a stay, conflict with the order of Judge Khumalo, is that a lawfully called AGM pursuant to her order can ensue at least absent a temporary stay of that order. Once that is so, it is difficult to see that the State Respondents would suffer any material inconvenience if the relief is granted. The interests of the members of the Mavhuraka Community are, moreover, protected. On the other hand, the inconvenience and prejudice that flows from an unlawfully called electoral meeting of a CPA can be serious not least as it can result in chaotic and illegitimate governance of a CPA that is embroiled in litigation about the very issue of membership. The main action can, furthermore, be affected. Legality must prevail in governance processes of CPA's, not least when there is an internal dispute being litigated concerning membership.

[42] Accordingly, I am of the view that the Applicants are entitled to an order restraining the Department from convening the February AGM because, on the evidence before me, it was unlawfully called. I make no decision at this stage on whether an interim interdict should be granted on the basis set out in paragraph [27] above. That issue may, if necessary, be further ventilated in

the event that a temporary stay of the relevant parts of the order of Judge Khumalo (or other appropriate relief) is sought and obtained.

[43] I have dealt with the issue of jurisdiction above. In this section, I deal with the two remaining preliminary points in the main action: whether a plea of *res judicata* should be upheld and whether the Applicants should have instituted review proceedings.

The remaining preliminary points in the main action

Res judicata

[44] The first issue is whether the issues raised in the main action are *res judicata* in light of the decision and order in the *Mathebula* application.[36] A plea of *res judicata* rests on three elements: being that "the same cause of action between the same parties has been litigated to finality i.e. the same relief has been sought or granted."[37] As will appear from my above analysis of the Mathebula application and the nature of the cause in the main action, the plea cannot be sustained – the cause of action is quite different in each matter. Moreover, the Mhlanganisweni Community does not appear to have been cited in the Mathebula application, at least independently of the NCPA.

Is a review necessary?

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[36] This is raised by the First to Ninth Defendants in paragraph [2] of their plea and by the Tenth and Eleventh Defendants in paragraph [1] to [5] of their plea.

[37] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2021] ZASCA 89; [2021] 3 All SA 686 (SCA); 2022 (2) SA 355 (SCA) at para [30].

[45] The second remaining preliminary issue is whether the main action should have been brought by way of review proceedings and whether, absent a review, it is competent.[38] At its core, the complaint amounts to a contention that the Applicants, in substance, seek to impugn the decision to "consolidate" the various claims (and thereby include the Mavhuraka Community into the NCPA), but have neither challenged those decisions nor have they impugned the NCPA Constitution. In the absence of a review, the relief, they say, is incompetent. In my view, this complaint is similarly misconceived. Even if the Applicants have a cause of action for review, which I need not decide, this does not deprive them of other causes of action they may have. In this case, they are pursuing declaratory relief aimed, in effect, at clarifying who is entitled to benefit from the land claim and the settlement. In arriving at this conclusion, I am mindful, as indicated during the hearing, that the question whether this Court should exercise its discretion to grant declaratory relief in the face of the NCPA Constitution and in the absence of any competent review of related decisions may be raised at trial.

Costs

[46] This Court only grants costs in special circumstances. I am of the view that costs in the urgent application should be reserved and dealt with together with costs in the main action. The issue of jurisdiction in the main action was, in some measure, dealt with on the request of the Court albeit in circumstances where the issue arose in the urgent application and was related thereto. The

[38] First to ninth defendants' plea, para [5].

parties should carry their own costs in dealing with the issue of jurisdiction in the main action. As for the special pleas, I am of the view that the Applicants are entitled to their costs in the special pleas as raised by the State Respondents.[39]

Order in LCC89B/2019

[47] I make the following order in the urgent application.

(a) The provisions regarding service requirements and time periods in the Land Claims Court are dispensed with.

(b) The First to Third Respondents are restrained from taking steps to hold and from holding the AGM meetings scheduled for 5 February 2022, 12 February 2022 and 19 February 2022.

(c) The Applicants are granted leave to approach the Court on the same papers supplemented where necessary for further relief.

(d) Costs are reserved for determination in the main action.

Order in LCC89/2019

[49] I make the following order in LC89/2019, the main action.

(1) The First to Ninth, and Tenth to Eleventh Defendants' pleas of *res judicata* are dismissed.

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[39] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

(2) The Tenth to Eleventh Defendants shall pay the Applicants' costs incurred in respect its plea of *res judicata* on a party and party scale.

(3) The First to Ninth Defendants' plea regarding whether the proceedings should have been brought by way of review is dismissed, with no order as to costs.

(4) The main action is to proceed on its merits on dates to be arranged with the Registrar.

COWEN J

JUDGE

Land Claims Court

I agree (in re LCC89/2019)

S B DLAMINI

Assessor LCC89/2019

Appearances:

For the Applicants in the urgent application and the Plaintiffs in the main action: Ms H Barnes SC and Mr M Musandiwa instructed by Malatji and Co Attorneys.

For the State Respondents in the urgent applicant and the Tenth and Eleventh Defendants in the main action: Mr S Ogunronbi and Ms Z Matondo instructed by the State Attorney.

For the First to Ninth Defendants in the main action: Mr Malatji instructed by GW Mahele Attorneys

For the Twelfth and Thirteenth Defendants in the main action: Mr Majozi and Ms C Marule instructed by the State Attorney.