

REPUBLIC OF SOUTH AFRICA IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

CASE NO: 74936/2016

In the matter between:

NATIONAL AFRICAN FEDERATED CHAMBERS

OF COMMERCE AND INDUSTRY FREE STATE

PROVINCE

First Applicant

NATIONAL AFRICAN FEDERATED CHAMBERS

OF COMMERCE AND INDUSTRY

Second Applicant

and

THE MASTER OF THE HIGH COURT

First Respondent

HESKIA DIKGANG MENTORO

Second Respondent

MORGAN SONWABO NGUBANE

Third Respondent

BAMBATHA SOLOMON KUTYUNGA

Fourth Respondent

ISHMAEL DINNA MOFOKENG	Fifth Respondent
MOSUTHU STEPHEN SHUPINYANE	Sixth Respondent
SESAMA MARGARET RAMOKONE	Seventh Respondent
JOHANNES PHALADI SANGWELA MATSOLE	Eighth Respondent
S. NGIDI	Ninth Respondent
MATSIDISO RASENYALO	Tenth Respondent
D MOTSHABI	Eleventh Respondent
KGASANE JOSEPH MASIU	Twelfth Respondent
NEO MOKHOSOA	Thirteenth Respondent

CASE NO: 12167/2019

In the matter between:

NATIONAL AFRICAN FEDERATED CHAMBERS OF COMMERCE AND INDUSTRY, FREE STATE PROVINCE	First Applicant
HESKIA DIKGANG MENTORO	Second Applicant
ISHMAEL DINNA MOFOKENG	Third Applicant
MORGAN SONWABO NGUBANI	Fourth Applicant

and

MASTER OF THE HIGH COURT, PRETORIA	First Respondent
CUNUKELO JAKKIE KONZIWE	Second Respondent
MASESE EVA MOILWA	Third Respondent
MANTSANE ANASTASIA BERENG	Fourth Respondent
GECELO THEMBEKILE EDWARD SIDUMO	Fifth Respondent
DIKELEDI MARY FATIMA MASITHELA	Sixth Respondent
TSHEPO VINCENT MATSABA	Seventh Respondent
NGAKUBANE EDWARD CHARLIE	Eighth Respondent
TSOGO INVESTMENT HOLDING COMPANY PROPRIETARY LIMITED	Ninth Respondent
NATIONAL AFRICAN FEDERATED CHAMBERS OF COMMERCE AND INDUSTRY	Tenth Respondent

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary.

The date of this judgment is deemed to be 17 June 2022.

JUDGMENT

DE VOS, J

INTRODUCTION

- [1] In this matter two review applications served before me. The first review under case number 74936/2016 ('First review'). The second review was issued under case number 12167/2019 ('Second review'). The dispute in both first and second reviews concerns the review and setting aside the Master's decisions to issue letters of authority to certain individuals authorising them to serve as trustees of the NAFCOC Free State Trust Investment ('The trust').
- [2] Adv. F Rautenbach appears for the applicants in case number 12167/2019 ('Second review') and the second to eight respondents in case number 74936/2016 ('First review') is Advocate HF Oosthuizen SC. The second applicant in the application under case number 74936/2016 ('First review') and the tenth respondent in the application under case number 12167/2019 ('Second review') is The National African Chamber of Commerce (NAFCOC).
- [3] The first respondent in the first and second reviews, is the Master of the High Court. The second respondent in the first review and the second applicant in the second review is Mr Mentoro. The first applicant in the second review is NAFCOC Free State (FS). The second to the fourth applicants in the second review collectively are referred to as the 'The Trustees' (FS) and the second respondent in the second review is Mr Konziwe. The ninth respondent in the second review is referred to as Tsogo Investment Holding Company Proprietary Limited ('Tsogo').
- [4] The crux of the first and second reviews, is for the court to judicially determine which individuals should be authorized by the Master to be appointed to act as the trustees of the NAFCOC Free State Investment Trust ('The Trust').
- [5] On the 13 of May 2018 (2018 letters of authority) were issued by the Master of the High Court authorising the second to the eighth respondents in the second review to act as the trustees of the FS trust. It is this decision that is now under review. The 3 applicants in the second review application, contends that these

appointments are indefensible as the decision was taken as a result of blatant fraud perpetrated by Konziwe, the second respondent in the second review who was the deponent in the first application on behalf of National African Federated Chambers of Commerce and Industry Free State Province, alleging that himself and other individuals were the duly elected Trustees of NAFCOG Free State, a recognised affiliate of the second appellant (first review)(NAFCOC). The second applicant (Mentoro), as well as the 3rd and 4th Applicants in the second review, denies Konziwe's allegation and claims that they are the duly elected Trustees of The Trust; That Konziwe and his cohorts, who were appointed by the Master as Trustees of the Trust, be removed and that the second to fourth applicants in the 2nd review be appointed.

NAFCOC

[6] Before dealing with the matters before me, it is necessary to deal with the establishment of NAFCOG in 1964 as a Black Economic Empowerment entity, for that purpose, a trust was created and trustees were duly appointed. This trust serves the interest of all black economic empowerment in South Africa.

6.1 In 1994 NAFCOG decided to realign itself in accordance with the country's boundaries nationally extending to 9 provinces, as well as regions/districts and local branches in line with operational sphere of municipalities. In addition, NAFCOG made further provision to allow affiliation of industries 'specific sectors' as autonomous affiliates, with own Constitutions and representative organizations from industries 'specific sectors' of the economy such as transport, manufacturing, tourism and leisure, informal traders, agriculture, construction and so on.

6.2 At that stage the sectoral organizations were already autonomous and independent, they had their own names, constitutions, logos and emblems. NAFCOG considered these affiliates from outside to be a federation of sectors, and consequently they became entitled to use their own different names as affiliates and continue to operate as independent, and/or autonomous bodies as before. As independent bodies they also had their own assets and finances as well as unique programmes of action. NAFCOG also decided, based on the new Constitution of the republic, that NAFCOG would structure and determine its provincial affiliates in each province as its divisions or branches with the proviso that all those provincial structures would be required to adopt the use and not ownership of NAFCOG name, its colours, logos and office infrastructure as well as operational resources directly or indirectly

through NAFCOG's other investment entities to be created from time to time. That was invariable practice in all provinces. It never happened that a provincial affiliate was first formed and then joined NAFCOG as member.

- 6.3 NAFCOG Free State was one of such provincial affiliates. The affiliates were respectively independent in that they could hold their own meetings, employ some staff, but they did that within the operational framework and program of the national body. They also elected office bearers in terms of the constitution of NAFCOG which ought to be recognised as (invariably happened) by the national executive committee. They were further required to appoint four of the office bearers as delegates to form part of NAFCOG Federal Council and to attend all NAFCOG's federal council meetings and other activities. An 'interrelationship' was therefore created between NAFCOG and its provincial affiliates as it appears from clause 12.2 of NAFCOG's Trust Deed which provides that 'members admitted to membership shall be entered into the province's register of members and the data from such a register shall be transferred on a quarterly basis to the national membership register at the national office.' Clause 12.2 creates an obligation on each provincial affiliate to transfer data of the constitute affiliate members (CANS) to the mother body. Those CANS had to attend periodic meetings of NAFCOG national, and had to be recognised by the National Executive Committee.
- 6.4 NAF is the business leg of NAFCOG, NAFCOG had direct financial interest in this entity who controlled different investments. NAF held in turn and as required by NAFCOG had to make annual financial allocations to each of the NAFCOG Provincial affiliates. The financial contributions amount to a few hundred thousand rand per year to serve as operational support in order to pay staff, rental, stationery expenses and so on. Over many years those allocations were the only source of money received by NAFCOG provincial affiliates to manage their affairs. NAF Hold was created in 1998 when the NAFCOG Council resolved to establish a 100% NAFCOG owned investment company. NAF Hold was created to participate in the new Black Economic Empowerment programme in order to capitalise NAFCOG affiliates. Its primary and sole objective was to act as an investment company within NAFCOG's table with the view to acquire and hold shares in various companies and businesses for the sole benefit of NAFCOG and its affiliated members/trusts.
- 6.5 A year later NAFCOG also formed the NAFCOG investment trust (IT9279/99) through which it initially owned and had 100% shareholding in NAF Hold. In 2005 and 2007 NAFCOG Council and NAF

Hold resolved to dilute the NAFCOG Investment trust in favour of NAFCOG Affiliated structures trust having a direct participation and representation in both NAF Hold shareholding and directorship.

- 6.6 This unbundling and watering down of the NAFCOG Investment Trust interest in NAF Hold, were done through the establishment of a dedicated trust for NAFCOG Affiliates. Each such trust then held a proportion of the shares in NAF Hold. Each board of trustees would be appointed strictly by the NAFCOG affiliate linked to it. All NAFCOG provincial affiliates trusts were required to carry a derivative of the name 'NAFCOG' like the NAFCOG provincial affiliates to which they were linked. As a result, NAFCOG Free State Trust was registered by the Master of the High Court.
- 6.7 NAFCOG then had a board meeting to place a long term strategy to serve business communities and address the rising unemployment in the country. NAFCOG and its affiliates focused on sustainable small, medium and metro enterprises creation as its target market.
- 6.8 The method adopted enables an affiliate the beneficial, responsible and discretionary rights to dispose of funds of an investment that becomes available to the trust by virtue of the good name, reputation and work of NAFCOG and its associated entities such as NAF Hold. The 2008 Constitution of NAFCOG expressly relates to 'NAFCOG Free State', (a provincial affiliate of NAFCOG). It expressly granted NAFCOG Free State the right to appoint trustees. It further provides that NAFCOG Free State is a beneficiary of NAFCOG. Clause 12.5 of the 2005 Constitution of NAFCOG further provides that the rights, benefits and obligations of membership were not transferrable. By necessary implication none of the rights or obligations could be transferred to a non-member as they are rights which accrued to a relevant member in his capacity as such.
- 6.9 The trust deed of NAFCOG manifests an intention to keep affiliates and the trust inside the walls of the broader structure of NAFCOG. This is confirmed by the provisions of clause 13.4 that provides that a member whose membership has been suspended or has been expelled may not use the name of NAFCOG and/or its emblem and participate in any of its structures or activities, nor may participate in any activity of any trust established by NAFCOG or its affiliates. It is therefore, the clear and undisputed intention of the constitution of NAFCOG that the benefits of using the empowerment structures of NAFCOG is reserved for itself and its members.

6.10 NAFCOG further contends that it has the right to prevent abuse of its name vis-à-vis trusts. The first applicant in the second review falsely claims that it is the affiliate of NAFCOG and that the first applicant in the second review claims to have a right to appoint trustees and for that purpose intends acquiring letters of authority from the Master. It is contended on behalf of NAFCOG that NAFCOG good name and reputation is affected by the actions of the first applicant in the second review. It is further contended that the first applicant in the second review NAFCOG Free State has chosen not to be a member of NAFCOG, is not participating in its activities as a member, did not renew its membership annually and did not make financial accountability reports available to it. NAFCOG relies on clause 6.9 of the 2008 Constitution where it is provided that NAFCOG may firstly 'co-ordinate the activities of its members' and then take action against them by suspending or terminating membership. It is contended that as soon as a membership is terminated or suspended it goes without saying that the entire right to use the rights granted by NAFCOG to its affiliated members ceases. It is further contended that NAFCOG must serve its member's interest. As NAFCOG provincial affiliates are major beneficiaries under the various schemes and receive dividend payments that creates a major source of trust income which is repetitive in nature. It is contended by NAFCOG that the first, second, third and fourth applicants in the second application to which Mentoro, Mofokeng and Ngubane belong are not elected appointees of NAFCOG Free State and act for their own benefit as beneficiaries, thereby denying the real NAFCOG affiliate in the Free State and its members to have access to certain intended benefits.

[7] In contrast, hereto the first four applicants in the second review contends that they are lawfully entitled to be appointed by the Master as trustees of the National African Federated Chambers of Commerce and Industry Free State Province.

NAFCOG FREE STATE

[8] The crux of the first and the second review is for the court to judicially determine which individuals should be authorised by the Master to act as the trustees of the NAFCOG Free State investment trust ('the trust'). The trust known as the National Federated Chambers of Commerce and Industry Free State Province was established in terms of a trust deed dated 22 February 2005 (see Annexure HN12 pages 192 to 205). The beneficiaries of the trust include NAFCOG Free State, as well as the branches and regions of NAFCOG Free State see FSRFA (page

18 paragraph 34.1). NAFCO Free State is autonomous, independent and voluntary association with its own constitution (see HM2 pages 63 to 88). The trust owns 830 redeemable non-participating preferent shares in Tsogo. (See Annexure HN10 page 183 and Annexure HN14 page 2). These shares were issued on 15 October 2010 and were redeemable on the 16th October 2017. This trust has since 2012 annually received dividends on the preferent shares, which Tsogo paid as follows into the FS Trust bank accounts of FS Trust on 25 April 2013 the sum of R1 862 775.62, on 25 April 2014 the sum of R1 732 242.90. On 15 April 2015 the sum of R1 980 027.60 (see Annexure HN 1-6B page 213 and HN 1-16C).

- 8.1 In the period since the FS trust acquired the preferent shares and received the dividends accruing to these shares, its trustees were comprised as follows; On 7 January 2010, NAFCO Free State executive committee appointed Mr Molya (the erstwhile president of NAFCO Free State) and other trustees as trustee of the trust. The other trustees included SM Ramokone, SD Mbuli, D Makatsa.....and MC Leeuw. (See Annexure HN17 page 216).
- 8.2 The Master issued letters of authority to these individuals on 9th March 2010. See Annexure HM 25 page 278. The validity of the 2010 letters of authority were never challenged.
- 8.3 On 17 March 2012 NAFCO Free State's council appointed Mr Mentoro (the second respondent in the first review and the second applicant in the second review, as the president of NAFCO Free State Executive Committee and appointed Mr Mentoro and others as the trustees of the trust. (See Annexure HN 23 to HM 24 page 279). The Master issued letters of authority to these individuals on 7 May 2012. (See Annexure HN 25 page 278). The validity of the 2008 letters of authority were never challenged.
- 8.4 On 15 May 2014 NAFCO Free State executive committee again appointed Mr Mentoro and others as trustees of the trust. (See Annexure HN 26 PAGE 279). The individuals authorised in the 2014 letters of authority were the same as the individuals authorised by the 2012 letters of authority save for Mr KJ Masiu, who passed away. The validity of the 2014 letters of authority was challenged for the first time only two years later in the first review application which application was issued on the 23rd September 2016, a few months before the significant larger redemption value of the preferent shares fell due for payment.

- 8.5 Throughout this period NAFCO Free State trust continued to be administered under the leadership of Mr Mentoro. Mr Mentoro signed all the audited financial statements of NAFCO Free State, which reflected payments of a portion of the dividends received from Tsogo to NAFCO Free State. Mr Mentoro also addressed and received correspondence in respect of the dividends from Tsogo.
- 8.6 NAFCO Free State Trust was never under the control of the individuals associated with NAFCO as applicants in the first review application comprising of 'Moloi, Konziwe and other. These individuals took no steps whatsoever to control NAFCO Free State or any of its assets nor did they take any steps to prevent Tsogo from making payments to NAFCO Free State. The only attempt made by Konziwe and Moloi to take control of the trust was by way of notice dated 31 May 2011 purporting to call a meeting of the trustees of the trust which resulted in NAFCO Free State under the chairmanship of Mr Mentoro obtained an interdict against them. See Annexure HN 22 page 270. Nothing further was heard from Konziwe, Moloi and the parallel structure that NAFCO claims they headed. See SAHR page 26 paragraph 69. There is no evidence whatsoever of any activities by the parallel structure which could indicate that a parallel structure actually exists as a voluntary association.
- 8.7 On 23 September 2016 Konziwe and his group instituted the first review to review and set aside the 2014 letters of authority to Mentoro et al and declare NAFCO Free State under the leadership of Mr Mentoro to be invalid and have no standing as such. This application is opposed.
- 8.8 Tsogo consequently obtained an order from the Free State High Court on 24 November 2016, ordering Tsogo to retain the dividends and redemption income in respect of 830 cumulative redeemable non-participating preferent shares issued to the Free State trust as well as other monies which may in future become due and payable, pending the Court's determination of the lawful trustees of the Trust (FS). The value of these 830 cumulative redeemable non-participating preferent shares amounts to an amount of approximately R35 000 000 (thirty-five million rand).
- 8.9 On 10 May 2018 the parties appeared before Khumalo J to argue the first review. Due to the fact that the court file was substantially incomplete it was postponed by agreement. Shortly thereafter on the 10 July 2018

NAFCOC Free State's attorneys ('Mr Ponoane'), (representing the Mentoro-group) received a letter from VFV Attorneys who represent NAFCOC and Mr Konziwe. (See Annexure HN 36 pages 300 to 301. The letter pointed out that the Master had issued letters of authority in 2018 and NAFCOC had accordingly abandoned prayers 4, 5 and 6 of the notice of the first review application. The 2018 letters of authority were issued to Konziwe and his cohorts.

- 8.10 The applicants in the second review only learnt about the decision of the Master by virtue of VFV Attorneys letter addressed to them informing them about the authorisation. At no time did the Master inform the applicants in the second review of its intention to take the decision or invite representation from them, as the existing beneficiaries and trustees of the trust.
- 8.11 On 12 July 2018 Mr Ponoane on behalf of the trust responded to VFV Attorneys letter expressing extreme concern that the 2018 letters of authority were issued in circumstances were 'it was, and remains legally impossible for your clients to obtain the letters of authority. Doing so it's completely at odds with the status quo ante between the parties. (See HN 37 page 302 to 305). Mr Ponoane requested various documents from VFV Attorneys and post various questions about the issuing of the 2018 letters of authority. VFV Attorneys failed to deliver or respond to this letter. (See Annexure HM 38 page 306.)
- 8.12 In ensuing months, the applicants in the second review carried out various investigations to determine how the 2018 could have been issued in spite of the Master's undertaking not to appoint Trustees until finalisation of the first review which was still pending. Mr Mentoro and the Master between 17 August 2018 and 31 October 2018. In correspondence to the Master, Mr Mentoro indicated that the issuing of the 2018 letters of authority was unlawful and called upon the Master to withdraw and rescind the 2018 letters of authority pending the outcome of the first review Mr Mentoro further called upon the Master to provide copies of all correspondence, documents and information that led the Master to take the decision. The master initially provided no response, then requested a meeting with Mr Mentoro and NAFCOC Free State and finally stated the Master was *Functus Officio*.
- 8.13 Mr Mentoro approached NAFCOC North West and NAFCOC Limpopo who had experienced similar attempts to 'highjack' their trusts. He uncovered

false documents that have been submitted to the Master in an attempt to take control of the NAFCOC North West Trust. (See Annexure HN 39 to HN 42 pages 307 to 310) and a letter from the Master to NAFCOC Limpopo agreeing to withdraw and rescind letters of authority that were procured for the NAFCOC Limpopo trust. (See Annexure HN 47 page 342 to 344.)

8.14 Mr Mentoro also wrote to NAFCOC's erstwhile attorneys to obtain copies of the documents in their possession, but this proved to be unsuccessful. (See HN 51 page 356.)

8.15 Mr Mentoro also filed a request for documents with the Master in terms of the Promotion of Access to Information Act, 2000 (Act 2 of 2000) in order to get access to the documents relating to the Master's decision but these documents were also not forthcoming. (See HN 52 page 358 and HN 54 page 370).

8.16 The applicants in the second review then instituted a second review (See SR pp 1-6) and subsequently finally obtained access to the Master's file relating to his decision. Access was only gained to the Master's file after the Master had failed to deliver the record within the time periods prescribed in Rule 53 and was threatened with an application to compel compliance. (See Annexure HN 57 page 407 to 408 and Annexure HN 58 pages 409 to 410.)

8.17 Applicants in the second review contends that these documents that the Master refused to provide throughout the previous year finally confirmed that the decision was taken as a result of fraud and is unlawful which was perpetrated as follows.

8.17.1 A letter dated 17 April 2018 was authored to the Master containing various misrepresentations including, *inter alia*, that the litigation between the parties was resolved in favour of the trustees led by Konziwe (ie. the applicants in the first review application) when this was not so and the first review remained pending.

8.17.2 Attached to this letter are various documents including *inter alia* affidavits deposed to by the second, six and eighth respondents in the second review which claimed that:

- 8.17.2.1 each individual was a trustee of the trust
- 8.17.2.2 each individual was “not aware of any Court action and/or Court documents that would prevent the Master from amending the letter of authority” (8.17.2.3) letters of authority dated 9 March 2010 were the latest and the only letters of authority of the trust.

8.18 Each of these statements were, at least to conceivable knowledge, false in that Konziwe and his cohorts were not trustees of the trust as they were not named in the 2014 letters of authority which prevailed at that time. (See annexure HM8 page 156). Konziwe was also well aware that the first review was pending. Besides deposing to the affidavits on behalf of the applicants in the first review, he attended the Court proceedings on 10 May 2018 when the learned Judge ordered the first review to be postponed *sine die*.

Konziwe deposed to an affidavit fraudulently claiming that the original authorisation was not in his possession “as the status have changed over the years and we only have copies”. (See annexure HM 170 page 152.) Konziwe knew the trustees and were in possession of the original 2014 letters of authority that Mentoro and other individuals (cited as applicants in the second review application) were duly appointed as Trustees.

8.19 It is abundantly clear from the evidence before me that the Master acted upon the strength of this information received from Konziwe and his group, along with other false documents, to issue the 2018 letters of authority. The Master did so without affording the applicants in the second review, as the beneficiary of the trust and the existing trustees - the right to make representations and acted in breach of the Master’s own undertaking. (See annexure HM31 pages 285-286) and the provisions of the Free State High Court order which required the “judicial determination” of which individuals should be authorised by the Master as the trustees of the trust. (See annexure HM11 page 164-165). It is contended by the applicants in the second review that the Master’s decision to appoint the trustees obtained by Konziwe and his co-applicants in the first review application must be reviewed and set aside. It is clear that the decision of the Master to appoint Konziwe and his co-applicants was taken as a result of blatant fraud perpetrated by Konziwe and his cohorts. It is trite that an administrative decision will be vitiated when taken as a result of fraud. See *Merafong City v Anglo Gold Ashanti*

Limited 2017 (2) SA 2011 CC par 53. The respondents in the first review who are also the applicants in the second review application confirmed that fraud was committed. It is important to note that after the respondent's in the first application filed the opposing affidavits the first application became moot. None of the applicants in the first application contested the version of the respondents in the first application and/or the applicants in the second application. The only issue remaining in the first review application is the question of costs. It is clear that due to the finding that I am going to make that the respondents in the first application are entitled to be awarded their wasted costs. When this matter was argued no real argument was put forward on behalf of the applicants in the first application to contest same. It is clear that on this uncontested ground alone this Court must interfere, intervene and declare the Master's decision as unlawful as the Court is obliged to do so and has no discretion to order otherwise (See *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014- (4) SA 179 (CC) paragraph 25 "Once a ground of review ... has been established there is no way to shy away from it". Section 172(1)(a) of the Constitutional requirements decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1) (b). Section 8 of PAJA gives detailed legislative content to the Constitution's "just and equitable remedy". See *ALLS Electoral Commission v Mhlope* 2016 (5) SA (1) CC paragraph 130.

8.20 To unravel the disputes between the different parties it is important to take note that in the founding affidavit in the first review (which was deposed to by Konziwe) on behalf of the applicants it was the contention of both NAFCOG, the second applicant in the first review and Konziwe and his cohorts that two voluntary associations existed in the Free State namely (1) The National African Federated Chambers of Commerce Free State ("NAFCOG FS") (who was cited as the first applicant in the first review and (2) a structure purporting to be NAFCOG Free State "which structure is in terms of clause 3 of the Constitution a corporate body with legal personality i.e and a universitas. (See annexure CK6 page 73 and annexure HM2 page 69.)

8.20.1 The second structure referred to is the structure operating under the chairmanship of Mr Mentoro, who is clearly NAFCOG Free State, the first applicant in the second review. Konziwe, contended that NAFCOG Free State had existed and operated" prior to 25 August 2010. In the same breath Konziwe says in the first review, that the first applicant in the first review "was established on 25 August 2010". (Compare page 12 paragraph 18.4 and paragraph 18.5). In the replying affidavit in the first

review Konziwe stated that “the crux of the case before the court is whether or not the first applicant ... is the legitimate and legal affiliate of NAFCOG” in the Free State province, or whether the parallel structure represented by the respondents (Mentoro et al) is such an affiliate thereby confirming the existence of two voluntary associations. (See page 298 paragraph 4.) Konziwe contradicted his version in the founding affidavit in the replying affidavit when he stated the following: a critical turning point in the present matter is 25 August 2010 that was a date of which, during a time of considerable strife and division within NAFCOG and its structures, the election took place of the Executive Committee of NAFCOG Free State with Mr Michael Molleyi as chairman. Mr Molleyi is firmly within the faction described in the founding affidavit as the “Mavundla faction” of which the applicants and I form a part. On that day Nafcoc Free State was re-launched in the sense that a new executive committee was elected to serve for a new term of office. At that stage (25 August 2010) ... Mr Mentoro, and Mr Mlotja both erstwhile officials of NAFCOG Free State, had already defected to a parallel structure established by the Hlongwane Faction.) (See FRRA PAGE 302.)

8.20.2 It is clear that both versions cannot be true. There is a clear difference between the establishment of the first applicant of 25 August 2010, the version in the founding affidavit) and the mere election of a new executive committee. The allegation that Mr Mentoro and Mr Mlotja had “defected to a parallel structure established by the Hlongwane faction” prior to 25 August 2010, was never mentioned in the founding affidavit and no evidence was provided. Konziwe also failed to place any facts before the Court as to when the alleged election occurred, when and by whom the parallel structure was established; and whether the parallel structure is in fact the voluntary association which existed and operated prior to 25 August 2010 and whether the parallel structure continued to exist as NAFCOG Free State (the first applicant in the second review.) To make matters worse for the applicant’s in the first review Konziwe failed to present any evidence that an alleged new executive committee of NAFCOG Free State took any step to take control and manage NAFCOG Free State. Safe to refer to “subsequent elections of the executive committee that lawfully replaced the 2010 executive” and the alleged fulfilment of “its annual affiliation requirements” without providing any details or supporting evidence of these false allegations, no evidence was provided of any activities by NAFCOG Free State under the control of the alleged new executive committee.

8.20.3 Konziwe also contradicted the allegations that “subsequent elections of executive committees” (plural) occurred by stating in the affidavit in support of the application for condonation that there has only been one

election of an executive committee since 25 August 2010, which election occurred on 18 June 2013. (See FR affidavit in support of condonation page 572 paragraph 6.) No supporting documentation of such an election was established or attached to such affidavit and such allegation is in direct conflict with a resolution by NAFCOG which indicated that the alleged election occurred in 2012 under the direct supervision and monitoring of the NAFCOG National Working Committee.” (See annexure CON4 page 601.) (See FR affidavit in support of condonation page 575 paragraph 15.1).

8.20.4 The respondents in the first review dealt comprehensively with the documentation in respect of the 25 August 2010 meetings and demonstrated that the alleged meetings were unlawfully convened and that, as a consequence, the resolutions passed at the meetings were invalid and of no force and effect. (See FR answering affidavit application for condonation page 643 paragraph 44.) Neither NAFCOG nor Konziwe has responded to the contentions in this regard and have effectively conceded that the said meetings were unlawfully convened. During argument I was specifically referred to the so-called note sent to members obviously belonging to the Konziwe group to attend a meeting on the 25th of August 2010. This document is not dated nor is it signed and was never sent to all the members and the beneficiaries belonging to the existing NAFCOG Free State Trust.

8.20.5 NAFCOG, the second applicant in the first review application contended in the answering affidavit in the second review where it is cited at the tenth respondent, that a new voluntary association was formed on 25 August 2010. NAFCOG adopted the following conflicting versions. It is alleged that NAFCOG Free State was “formally established or re-established” on 25 August 2010. (See page 587 paragraph 23.) NAFCOG also alleged that NAFCOG Free State was re-launched” on 25 August 2010 “in the sense that the new executive committee for the province was duly elected ... to serve for a new term of office. (See SRAA page 587 paragraph 24.) It appears that NAFCOG as tenth respondent in the second review takes the stance that a new voluntary association was formed on 25 August 2010. “(A) group of persons representing affiliates of NAFCOG Free State, or bodies expressing their claim to be recognised as such, were gathered on the day, and made known the decision to be represented by that executive committee, and collectively to be recognised as an affiliate under the leadership of that executive committee ... in terms of the constitution of NAFCOG”. (See SRAA page 65 paragraph 154.)

8.20.6 The version that a new voluntary association was formed in 25 August 2010 was raised as a defence to the applicants' evidence in the second review that the meetings of 25 August 2010 were not validly called and stated: "(E)ven it is correct in contending that the meetings of 25 August 2010 were not validly called in terms of the existing constitution of NAFCOG at the time, that does not assist the applicant's case. Since that time the voluntary association represented by the executive committee elected on that day (and its successors) has been recognised by NAFCOG as envisaged in the Constitution and on a number of occasions operated as an affiliate in terms of the NAFCOG constitution and renewed its subscription and affiliate annually. (See SRAA page 629 paragraph 16.)

There cannot be any doubt that this admission, read with other paragraphs of NAFCOG's answering affidavit, proves that it is NAFCOG's case that the new voluntary association was formed on 25 August 2010 and that as a consequence two voluntary associations exist – one led by Mr Montoro and another led by Konziwe. (See SRAA page 626 paragraph 156.)

[9] In the papers before me the applicants in the second review clearly proved that the documentation relied on by NAFCOG did not support its contention that a new voluntary association was formed on 25 August 2010. The notice of a special general meeting annexure GM 5 refers to a special general meeting to be held by constituent affiliate members of an existing voluntary association "NAFCOG Free State FS", which is governed by its constitution third amendment of 2010., which constitution was adopted and signed at Emnotweni on 6 May 2010." NAFCOG attempted to distance itself from this by suggesting that the reference to such a constitution was incorrect that the notice intended to refer to the 2008 constitution. (See AA page 625 paragraph 155.) This was presumably done to escape the fact that no such constitution exists. NAFCOG did not contend that a new voluntary association was formed prior to 25 August 2010, the notice clearly envisaged a meeting of the existing NAFCOG Free State.

9.1 There cannot be any doubt that the express purpose of the alleged council meeting on 25 August 2010 was to remove the executive committee of the NAFCOG Free State and to elect a new executive committee and not to form a new voluntary association.

9.2 However, to make things even worse for NAFCOG, the tenth respondent in the second review, showed that there is no proof that the individuals who attended the alleged meeting intended to and formed a new voluntary association. The minutes of the NAFCOG executive committee held on 9 September 2010 similarly do not reflect that the new voluntary

association have been formed on 25 August 2010, but rather that the NAFCO Free State executive committee had been replaced and NAFCO's executive committee "approved ... the new elected executive committee". (See annexures GM6 page 72-79.) Consisting of Molloyi, Konziwe and others and that NAFCO Free State was "relaunched".

- [10] There can only be one NAFCO Free State as properly registered in the Masters Office in the form of a trust. That entails that if there was a meeting of the duly registered trust on 25 August 2010 it must be shown that the meeting on 25 August 2010 was lawfully convened and as a consequence, the purported resolutions passed are valid and in force. I have already pointed out that no such lawfully convened meeting was held. The notice calling such meeting was unsigned and undated and not even sent to all the members. The purported removal of the executive committee and election of the new executive committee did not comply with any of the provisions of the 2008 constitution and were thus invalid and of no force and effect. Notwithstanding the allegation contained in paragraph 57 of the founding affidavit that the meeting of 25 August 2010 were invalid and no valid resolutions can as a result therefore have been passed. NAFCO failed to deal with paragraph 57 of the founding affidavit effectively conceded that the 25th August 2010 meetings were invalid.
- [11] It therefore follows that if the executive committee of NAFCO Free State was not removed. Mr Mloja remained the president of NAFCO Free State until he was succeeded by Mr Mentoro and that all further steps by NAFCO Free State, its establishment as a trust dated 22 February 2005 are under the control of the properly elected trustees of that trust until today. It is further quite clear that the beneficiaries of the tenth respondent in the second review application includes NAFCO Free State, as well as the branches and regions of NAFCO Free State.
- (12) NAFCO Free State is an autonomous and independent voluntary association with its own constitution. This trust therefore owns 830 redeemable non-participating preference shares in Tsogo. The shares were issued on 13 October 2010 and were redeemable on 16 October 2017. The trust has annually received dividends on the preference shares from the 10th respondent paid by Tsogo which was paid into the bank account of NAFCO Free State and distributed to its members. Furthermore, the applicant in the second review has proved that the dividends accruing from his shares were duly handled and distributed by its trustees appointed from time to time. The individuals authorised in the 2014 letters of authority were the same as the individuals authorised by the 2012 letters of authority. Safe for Mr Masiu who had passed away. As indicated before, the validity of the 2014 letters of authority was only challenged for the

first time two years later in the first review application, which application was issued on 23 September 2016 (ie. a few months before the significantly larger redemption value of the preference shares fell due for payment.) It is not contested that throughout the period of existence NAFCO Free State trust continued to be administered under the leadership of the different chairman's and eventually under the leadership of Mr Mentoro. Mr Mentoro signed all audited financial statements of NAFCO Free State, which reflected payments of a portion of the dividends received from Tsogo to NAFCO Free State. Mr Mentoro also addressed and received correspondence in respect of the dividends from Tsogo. Neither the trust nor NAFCO Free State was ever under the control of the individuals associated with NAFCO as the applicant in the first review application. It is further clear that these individuals never took any steps whatsoever to control NAFCO Free State or any of its assets nor did they take any steps to prevent Tsogo from making payments to NAFCO Free State. Contrast thereto there is in fact, no evidence whatsoever of any activities by the parallel structure which could indicate that the parallel structure actually exists as a voluntary association. When NAFCO (10th respondent in the second review) that exist only are registered NAFCO Free State Trust, they pleaded that NAFCO Free State was relaunched.

- [13] Based on the facts before me, there cannot be any doubt that the only lawful representatives of the National African Federated Chamber of Commerce and Industry Free State Province are Mr Mentoro, second applicant, Mofokeng, third applicant and Ngubane, the fourth applicant in the second review application. They are the duly elected executive committee of NAFCO Free State and are entitled to be reappointed to act as trustees by the Master. In conclusion it is therefore my finding that the existing executive committee, the applicants, the second third and fourth applicants in the second review are the existing executive committee of NAFCO Free State and remains in control of NAFCO Free State.

LOCUS STANDI

- [14] The next question to be determined is whether NAFCO, tenth respondent in the second review application has any standing to oppose applicant's application in the second review. The first question is whether NAFCO was legal interest in the subject matter of the first and second reviews, being the appointment of trustees of the Free State trust. In *Ras NNO v Van der Meulen* (4) SA 17 SCA paragraph (9) and further page 05/2451 the Supreme Court of Appeal held that only a beneficiary is entitled to seek the removal of the trustees of the trust. It is common cause that the beneficiaries of National African Federated Chambers of Commerce and Industry Free State province (the first applicant in the second

review) application includes each branch in the region of NAFCO Free State and any NAFCO stalwart nominated by the executive committee of NAFCO Free State and approved in writing by the trustees from time to time. (See annexure HM 12 paragraph 1.1.2.2, record page 02/166.) NAFCO the tenth respondent in the second review is a separate voluntary association and is not a beneficiary of the Free State trust. It accordingly has no legal interest in the appointment of the trustees of the trust. NAFCO submits that the *Ras* decision should be distinguished from the present application submitting that the subject matter of the second review is the appointment of the trustees of the trust and not the removal of trustees. Applicants in the second review submits that this argument is without merit. It is contended that the appointment and removal of trustees are two sides of the same coin. Applicants in the second review contends that NAFCO has no standing to oppose the second review or to seek a declarator in a counter application. The departure point of the tenth respondent's case in the second review is based on the meeting held on 25 August 2010. It is contended by the tenth respondent that at that meeting a new executive committee was elected by the affiliate and that these elected officials were subsequently recognised by NAFCO. In the same breath NAFCO concedes that it does not oppose the applicants in the second review prayer that the trustees appointed by the Master (the Konziwe group) be removed. NAFCO contends as set out in its counter application filed in response to the second review application that this court must decide the issue of the affiliate status of the two contenders. It is further contended that the first review creates a *lis pendens* in respect of the status issue in that the application to settle that issue. Notice was given that the status issue as sought in the first review is withdrawn.

- 14.1 NAFCO as tenth respondent in the second review and applicant in the declaration based its argument on their submission that the election meeting on the 25th of August 2010 was an election held by the actual legal Free State affiliate of NAFCO, and was good in law. I have already dealt with this question and held that this meeting was unlawful. It is contended that the election of the executive pursuant to this meeting was never challenged, reviewed or set aside and must therefore be deemed to be valid in law unless set aside. NAFCO, the tenth respondent in the second review raised elaborated arguments which are based on the premises that the meeting of 25 August 2010 was lawful. Due to my finding that this meeting was unlawful these arguments can be ignored. The tenth respondent's reliance on the *Oudekraal* principle, see *Oudekraal States (Pty) Ltd v City of Cape Town 2004 (6) 222 SCA* namely that: "even an unlawful administrative act is capable of producing legally valid consequences for as long as the unlawful act is not set aside" is ill founded. The *Oudekraal* principle applies to "*administrative decisions* by

an organ of state". NAFCOC, the tenth respondent in the second review, is not an organ of State.

In *Cronje v United Cricket Board of South Africa* 2001 (4) SA 13681 (T) the applicant attempted to review certain decisions of the respondent, which application was dismissed for *inter alia* the following reasons:

"The respondent is not a public body. It is a voluntary association wholly unconnected to the State. It has its origin in contract and not in statute. Its powers are contractual and not statutory. Its functions are private and not public. It is privately and not publicly funded..."

The conduct of private bodies, such as the respondent, is ordinarily governed by private law and not public law. It does not exercise public power and its conduct is accordingly not subject to the public law rules of natural justice.

In exceptional cases private bodies are vested with public powers by statute. They are then subject to the rules of public law in the exercise of those powers. Those rules may expressly or by necessary implication prescribe the manner in which their powers must be exercised. If the repository of the power does not exercise them in the prescribed way, its conduct is subject to judicial review under public law. But these consequences flow, not from the nature of the body or the impact of its conduct, but from the underlying statute."

This *dictum* was approved in *Hare v The President of National Court of Appeal NO 140, 2009 JDR 1171 (GSJ)* paragraphs 9-12. In that decision the applicant similarly attempted to review certain decisions of the sole controlling body for motorsport in South Africa. The application was dismissed on the basis that the decisions of the respondent was not subject to judicial review. Similarly, the Supreme Court of Appeal held in *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 (5) SA 457 (SCA) that the decisions of a bargaining council were not subject to review and referred with approval to the *dictum* in *Cronje*. Similarly, the decisions taken by political parties in determination of membership are not administrative action but exercises of private powers by bodies established by agreement.

14.2 Accordingly, it is my finding that NAFCOC (2nd applicant in the first review and 10th Respondent in the second review) has no *locus standi* to oppose the application of the applicants in the second review and the second, third and fourth applicants in the second review must be appointed as trustees of the first applicant in the second review.

14.3 In my view the facts of this case disclose that no valid decision was ever taken which amounts to a nullity. The steps taken by the applicant in the second review is merely to confirm their *status quo ante* and must be preserved. Any subsequent steps taken by the Master to appoint other trustees should be reviewed and set aside. In view of the decision in *Calibre Clinical Consultants*, the review of the expulsion (to which reference is made in that decision) is not a public law review. The decision is merely authority for the proposition that a person who contends that their expulsion was unlawful must challenge the expulsion in a court of law failing which the expulsion will, in the words of *Oudekraal*, be “capable of producing legally valid consequences”. The decision of *Cathcart Resident’s Association v Municipal Managers for the Amahlathi Municipality and Others* (see division case number 3667 dated 3/4/14 and *Shunmugam and Others v New Castle Local Municipality and Others*; *the National Democratic Convention v Mathew Shunmugam and Others* 2008 (2) ALLS 106 N confirmed the said legal principle and proceeded to hold as follows:

“The third respondent has done nothing for a few months short of three years to challenge the lawfulness of the termination of his membership of the applicant. He must be taken to have accepted it and, whatever doubts may arise as to the legal pedigree of the decision, it must be accepted as having legally valid consequences until it is set aside.”

14.4 In the present case the applicants in the second review application were unaware of the meeting held on 25 August 2010. They only became aware on 9 May 2018 of that fact a few years later. They took steps to rectify the position, firstly to obtain information that was refused until such time they obtained enough information to institute the second review application. During argument on 15 and 17th of June 2020 which was heard by an Acting Judge of this division who subsequently failed to give judgement, NAFCOC, tenth respondent in the second review’s counsel conceded that the purpose of the meeting on 10 May 2010 was to elect a new executive committee for NAFCOC Free State and that a new voluntary association was not established at the meeting. (See pages 07/91-07/93.) In view of the fact that there is no indication of an intention to establish a new voluntary association, this concession was properly made. I have already said that the appointment of the new executive committee was invalid because the meeting was not properly called, the notice was undated and unsigned. There was also no compliance with the rules of natural justice. Clause 22.1.8 of NAVCOC’s Free State constitution at the time provided for the removal of an executive committee member “by resolution duly passed by their counsel after a hearing of the matter has been held by the counsel.” (See page 02/702). This did not happen. Clause 23.3 of NNAFCOC’s Free State constitution at the time moreover provided that the president can only be removed on “a resolution adopted by two thirds majority of all the council members present at the meeting of the counsel specially convened for that purpose. (See page 02/704) which similarly did not happen. The

contention of paragraph 44.1 of the note that the alleged attendance by the majority of constitute affiliate members implies that the meeting was validly called falls to be rejected on the following factual and legal grounds:

- (1) the applicants in the second review in their founding affidavit, stated that the Chairperson of NAFTO, the president of NAFSEC and the secretary of Lejweleputswa region were not even aware of the meeting which, implies that there is no evidence to support the contention that the majority of the constituent affiliate members attended the meeting.
- (2) non-compliance with the provisions of NAFSOC Free State's Constitution in respect of the calling of meetings can only be cured by unanimous consent and not by majority consent.

- 14.5 Furthermore, the contentions in paragraphs 18.1, 24 and 47 of the note that the meeting was not a meeting of NAFSOC Free State but of the so-called "*recognised affiliate*" (the alleged voluntary association under the control of Konziwe and his cohorts) is in conflict with NAFSOC's version in its answering affidavit (tenth respondent):

"That the Free State Affiliate of NAFSOC had to be formally established or re-established under the auspices of NAFSOC...

"25. At that stage (25 August 2010) ... Mr Mentoro, and a Mr Mlotja, both erstwhile officials of NAFSOC Free State, had already defected to a parallel structure established by the Hlonwane faction..."

The content of the notice indicated that the purpose of the meeting was to adopt a no-confidence resolution in the existing executive committee of NAFSOC Free State, including Mr Mloja (the predecessor of Mr Mentoro), and to elect a new executive committee. Therefore, the new version must be rejected. The meeting was clearly intended to be a meeting of NAFSOC Free State.

- 14.6 It follows that NAFSOC did not recognise a new voluntary association as its affiliate on 9 September 2010 but that it merely approved "NAFSOC Free State affiliate's new elected executive committee", as indicated in the minutes of the NAFSOC executive committee meeting. (See annexure GM6 page 02/736). The approval of the new executive committee clearly had no legal effect in view of the fact that the election of such committee was invalid. This is confirmed by the fact that Konziwe and his group took no further steps to implement the decisions of the meeting. It is further corroborated by the fact that the applicants in the first

review (the Konziwe group) does not oppose the applicants in the second review's application that the present trustees of NAFCO Free State must be removed.

- [15] In the alternative to the above argument tenth respondent in the second review, NAFCO in its answering affidavit which is also the founding affidavit for purposes of the counter application, contends that its constitution constitutes a reciprocal set of obligations between itself and its members. (see paragraph 129 page 629.) That a member cannot continue to enjoy the benefits of membership without complying with each reciprocal obligation, notably to pay membership fees. That the legal relationship between NAFCO and its members can be determined as set out in clause 12.6 and 12.7 of its constitution in the event of non-payment for sixty days of the due date of each membership fee (clause 13.4) which provides that "a member on suspension or expulsion shall immediately cease to hold himself as a NAFCO member and/or affiliate. And so also cease to use the name NAFCO and/or its emblem and shall cease to participate in any activity and/or structure of NAFCO including any trust or company established by NAFCO and its affiliates whilst this suspension or expulsion is in force." It is contended that under the circumstances the first applicant in the second review is not a member of an affiliate of NAFCO and has no *locus standi* to bring the main application. This argument must fail and must be rejected on the following factual and legal grounds. In view of the fact that there was at all times only one NAFCO affiliate in the Free State it follows that NAFCO recognised NAFCO Free State as its affiliate on 9 September 2010. NAFCO, the tenth respondent in the second review fails to distinguish between the NAFCO Free State's leadership and the acknowledgement of NAFCO Free State.

- (16) NAFCO is not a party to the trust deed and it is not entitled to decide who the beneficiaries of the trust are and effectively substitute one beneficiary for the other. Even if NAFCO Free State is no longer acknowledged by NAFCO as its affiliate in the Free State (which is not conceded by the applicant in the second review) it does not imply that it is no longer a beneficiary of the trust. There can only be one NAFCO Free State which was validly created as set out in the trust deed and as registered by the Master.

- [16.1) NAFCO's reliance on the quasi-contract of the NAFCO constitution as referred to in the founding affidavit for purposes of the counter application is based that its constitution constitutes a reciprocal set of obligations between itself and its members. Practical consideration sometimes requires a voluntary association to establish affiliated associations. In these instances the hierarchy structure develops from a

central association. On the other hand, independent associations in a particular sphere may deem it expedient to regulate those matters of common concern to them on a regional provincial or national basis. Whichever way the hierarchy structure develops the status and *locus standi* in ... and of interaction between the constituent associations will be determined by the provisions of the respective constitutions or by the central association's constitution as the case may be. See LAWSA 2nd edition vol. 1 paragraph 624.

- (16.2) In my view NAFCO Free State enjoys a separate legal personality as a voluntary association, therefore only NAFCO Free State as the voluntary association, is capable of being recognised by NAFCO. The composition of NAFCO's Free State executive committee which does not enjoy separate legal personality, is irrelevant for purposes of an affiliation with NAFCO. NAFCO, cannot as it attempts to do, recognise a set of individuals comprising an executive committee as opposed to the voluntary association itself. NAFCO cannot fully recognise a group of individuals as it seeks to do, which individuals, in any event, did not dissolve or form a new executive committee of NAFCO Free State.
- (16.3) Whether or not Konziwe validly dissolved and re-launched NAFCO Free State's executive committee is therefore irrelevant to whether or not NAFCO Free State is a recognised affiliate of NAFCO, which is common sense. NAFCO Free State, accordingly is and remains an affiliate of NAFCO. It could never have been the intention of the founder and the initial trustees that NAFCO, which is a separate voluntary association from NAFCO Free State, and not a party to the trust deed or the beneficiary of the trust would have the power to effectively decide who the beneficiaries of the trust from time to time would be. NAFCO's interpretation of the trust deed is to the effect that removal of "recognition by NAFCO of an affiliate sectoral member implies that such voluntary association ceases to be a NAFCO affiliate" within the meaning of clause 1.1.2.8 and thus ceases to be a beneficiary of the trust in terms of clause 1.1.2.2.1 is wrong and could result in an absurdity and potential destruction of the trust. NAFCO has failed to identify any voluntarily association in existence that complies with the definition of "NAFCO affiliate" as NAFCO interprets it. NAFCO's interpretation introduces a

fundamentally uncertainty into the validity of the trust and trust deed and is thus insensible, un-business like and should be rejected. See in this regard *Natal Joint Municipality Pension Fund v Endumenu Municipality* 2012 (4) SA 593 SCA paragraph 18. In the circumstances NAFCOC's argument that the first applicant in the second review application is not a member or affiliate of NAFCOC and has no *locus standi* to bring the main application must fail. In my view there is no basis for this Court to grant prayer 3 of the counter-application and accordingly the counter-application should therefore be dismissed with costs including the cost of two counsel.

- (16.4) From the evidence before me there is no proof that the legal relationship between NAFCOC and NAFCOC Free State was ever terminated. Only one voluntary association existed throughout known as National African Federated Chambers of Commerce and Industry Free State Province. On NAFCOC's own version this voluntary association is still a member of NAFCOC. Clauses 12.6 and 12.7 of NAFCOC's constitution read with clause 13.4 which provides that a member on suspension or expulsion shall immediately cease to hold himself as a NAFCOC member and/or affiliate and shall also cease to use the name NAFCOC and/or its emblem and shall cease to participate in any activity and/or structure of NAFCOC, including any trust or company established by NAFCOC and its affiliates whilst the suspension or expulsion is in force" is therefore inapplicable to the present set of facts. This inference is confirmed by the provisions of clause 24.2.2 of NAFCOC's constitution which defines an affiliated sectoral member as including "any branch or district/regional or provincial or commercial or industry sector determined and recognised by the national executive committee from time to time ..." It is common cause that the association NAFCOC Free State affiliation/membership was never suspended nor was the association expelled.
- (16.5) On NAFCOC's own version NAFCOC executive committee adopted a resolution on 21 January 2020 that "the recognised affiliate is hereby, in confirmation of passed acts in recognition by NAFCOC, once again determined and recognised as envisaged in clause 24.2.2 of the Constitution of NAFCOC as a legal and valid provincial affiliate member of the Free State province, with all the rights intended thereon. And, to the extent necessary, such affiliation of the recognised affiliate is hereby rectified with retrospective effect to 9 September 2010."

17. In conclusion it is my finding that the grounds of review of the 2018 letters of authority, as referred to in the second review application, and the answering affidavits in the first review applications, namely that the decision was procedurally unfair and was taken as a result of fraud, which relief is not opposed by NAFCOG, has been proved on a balance of probabilities. It follows that the remedy which is sought by the applicants in the second review application, declaring that the trustees appointed as set out therein, are lawfully appointed trustees of the trust and directing the Master to issue letters of authority to the trustees must be granted.
18. I am also satisfied that condonation should be granted to the applicants in the second review for the late institution of the second review. The second review was only a few days late and the applicants were severely hampered to obtain information from both the Master and NAFCOG. Based on the facts set out herein condonation should be granted and the 180 day period for the institution of this application is extended to 22 February 2019.
19. After argument was heard on 30 May 2022 and before judgment was handed down, the Court was informed that the third applicant in the second review has passed away and therefore does not form part of the application anymore. The deceased is to be substituted by Kedineete Dorcas Motshabi who was duly elected to be appointed as a Trustee.

Costs:

The applicants in the second review application does not seek a costs order against the first applicant in the first review. The reasons being that NAFCOG Free State was cited as applicant in the first review application is not properly before the Court as Konziwe lacks the authority to bring the application on its behalf. There is further no evidence that the “parallel structure” of Konziwe and his cohorts actually exists as a voluntary association. Konziwe lacked the requisite authority to bring the first review on NAFCOG Free State’s behalf. In my view the signatory to the resolution annexed to the founding affidavit marked CK1 (see FR annexure CK1) Konziwe, Berent, Mloja, Matsaba, E Charlie and GE Didumo, along with NAFCOG should be ordered to pay the costs of the first review to the respondent in the first review.

In relation to the second review, the applicants in the second review demonstrated that they are entitled to the relief sought in the Notice of Motion and they should accordingly be granted the costs including the costs upon the employment of two counsel.

Lastly there cannot be any doubt that NAFCOG is not entitled to the relief sought in the counter-application, which stand to be dismissed with costs including the costs of two counsel.

Therefor having read the papers and having heard counsel for the parties it is ordered that:

In application 74936/2016:

(1) The application is dismissed with costs as well as the costs reserved on 10 May 2018 by Khumalo J, when the matter was postponed, including the costs of two counsels, such costs to be paid by the second applicant and the persons whose signatures appear on the document annexed to the founding affidavit marked "CK1", namely, CJ Konziwe, MA Bereng, EM Moilwa, TV Matsaba, E Charlie and GE Sidumo, the one paying the other to be absolved.

In application 12167/2019:

(1) The 180-day time period for the institution of this application is extended to 22 February 2019 and the applicants' delay in instituting this application is condoned.

(2) The decision taken by the first respondent on 30 May 2018 to issue letters of authority to the second to eighth respondents authorising them to act as trustees of the NAFCOG Free State Investment Trust (IT: 1885/05) ("the decision" and "the trust" respectively) are reviewed and set aside.

(3) It is declared that the second applicant (Heskia Dikgang Mentoro), the fourth applicant (Morgan Sonwabo Ngubani) and Kedineetse Dorcas Motshabi are the lawfully appointed trustees of the trust.

- (4) The first respondent is directed to issue letters of authority to the second applicant (Heskia Dikgang Mentoro), the fourth applicant (Morgan Sonwabo Ngubani) and Kedineetse Dorcas Motshabi authorising them to act as trustees of the trust.
- (5) The first to eight and tenth respondents are ordered to pay the costs of the application, including the costs of two counsel, the one paying the other to be absolved.
- (6) The tenth respondent's counter-application is dismissed with costs, including the costs of two counsel.
- (7) The costs in paragraphs 5 and 6 to include the costs of the hearing on 15 and 17 June 2020.

HJ DE VOS
JUDGE OF THE HIGH COURT