THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no.: 411/2017 & 412/2017

In the matter between:

FIKISWA FESI **FIRST APPELLANT**

MASTER OF THE WESTERN CAPE HIGH COURT,
CAPE TOWN **SECOND APPELLANT**

and

THE TRUSTEES ELECT OF THE NDABENI COMMUNAL
PROPERTY TRUST (IT 1056/98) **RESPONDENT**

Neutral Citation: *Fesi v Ndabeni Communal Property Trust* (411/2017 & 412/2017) [2018] ZASCA 33 (27 March 2018).

Coram: Navsa, Swain and Mbha JJA and Pillay D and Schippers AJJA

Heard: 26 February 2018

Delivered: 27 March 2018

Summary: Trust : whether persons elected as trustees of a trust established to administer and develop property received as a result of a land restitution claim properly appointed in terms of the trust deed : whether Master correct in refusing to issue letters of authority : provisions of Trust Property Control Act 57 of 1988 and Master's supervisory role discussed : discussion of concerns by Master, the responsible Minister and the Land Claims Commissioner, regarding disposal of the trust property and the need to meet constitutional objectives in relation to land restitution : Master, Minister and Land Claims Commissioner commended for being rightly concerned about propriety of election of trustees and disposal of trust property : whether persons elected acted in fiduciary manner : conduct of attorney criticised : importance of land restitution reiterated.

ORDER

On appeal from: Western Cape Division, Cape Town (Nuku J sitting as court of first instance).

The following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the court below is set aside and substituted as follows:

'1.The application is dismissed with costs including the costs of two counsel where so employed.'

JUDGMENT

Navsa JA (Swain and Mbha JJA and Pillay D and Schippers AJJA concurring):

[1] This is an appeal against an order by the Western Cape Division of the High Court, Cape Town, in terms of which the second appellant, the Master of the Western Cape High Court, Cape Town (the Master), was directed to issue letters of authority authorising the six respondents to act as trustees of the Ndabeni Communal Property Trust IT 1056/98 (the trust). The Master, the first appellant, Ms Fikiswa Fesi, the Western Cape Regional Land Claims Commissioner (the Commissioner) and the Minister of Rural Development and Land Reform (the Minister),[1] were ordered to pay their costs. The appeal is before us with the leave of the court below. The primary question in this appeal is whether, on the evidence before the court below, the six respondents were entitled to the order directing the Master to issue the letters of authority. The background, including the socio-economic, socio-political and constitutional context, is set out hereafter.

[2] At the heart of the present appeal and without doubt the cause of the present and related litigation is land granted to a community as part of a statutory land restitution process. Land restitution and access to land by scores of our people, or

[1] The Commissioner and the Minister were the third and fourth respondents in the court below and participated in those proceedings. They did not, however, participate in the present appeal.

rather the lack of it, has recently received increasing public attention. There is a growing sense that unless and until we as a nation deal decisively with the unequal ownership of land that is the legacy of our historically racially divided society, there will be no enduring peace and the Constitution will be reduced to a mere written document. The grand apartheid design was such that prime land in South Africa was reserved for the white populace and black people were consigned to housing in backwaters, mostly without freehold title, from which they principally served the needs of white society.

[3] Section 25(4)*(a)* of the Constitution, recognising the injustices of the past, affirms our commitment as a nation to land restitution and reform. Section 25(5) provides:

'The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.'

Section 25(7) of the Constitution reads:

'A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.'

[4] The Restitution of Land Rights Act 22 of 1994 (the Restitution Act) is a measure to achieve the Constitutional objectives referred to in the preceding paragraph. The long title of that Act reads as follows:

'To provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith.'

[5] Returning to the facts of the present case. During 1997 a land claim was lodged with the Land Claims Commission in terms of the Restitution Act,[2] seeking

[2] The Land Claims Commission was established in terms of s 4 of the Restitution Act. Section 4(3) of the Restitution Act provides:
'The Commission shall consist of a Chief Land Claims Commissioner appointed by the Minister, after inviting nominations from the general public, a Deputy Land Claims Commissioner similarly appointed and as many regional land claims commissioners as may be appointed by the Minister.'
The third respondent, the Western Cape Regional Land Claims Commissioner is one such commissioner.

restoration of erf 24176 Maitland, in the district of Goodwood, Cape Town, Western Cape on behalf of the Ndabeni Community (the community). This was land that had previously been occupied by the community before they were forcefully removed between 1927 and 1936 from Maitland and relocated to Langa, under apartheid legislation. In 1942 the land in question, 54.8 hectares in extent, was transferred in its entirety to the City Council of Cape Town, which subsequently subdivided it and sold off various portions. When the community lodged its land claim it was no longer feasible for government to restore the land from which the community had been removed.

[6] On 13 October 2001, after an extensive process, the Government of the Republic represented by a number of different ministries,[3] settled the community's land claim and concluded a settlement agreement with the trust, established in terms of a trust deed, which was notarially executed on 16 February 1998. The trust was created to serve the interests of the claimant community and in contemplation of a successful land claim. It was subsequently essential to and required by the settlement agreement. The settlement agreement gave the trust the right to take transfer of state land in Maitland, Cape Town of approximately 54.8 hectares (the property) for the benefit of the community. The trust became the registered owner of the property in 2004. The community members dispossessed of their land and/or their descendants have since then not reaped any benefits from the transfer of the property. As will become apparent, the community has after two decades found the promise of land restitution and attendant benefits hollow.

[7] In terms of clause 15.2 of the trust deed there should at all times be not less than six trustees in office. The primary issue in this dispute is whether the six respondents were entitled to assume office as trustees of the trust, having been elected to that office at a meeting convened for that purpose. This raises the central question: whether the six respondents were properly elected in terms of the trust deed by persons entitled to vote. Simply put, the legality of the election of the respondents to the office of trustee is in dispute. There are also questions about

[3] (i) The Department of Land Affairs;
(ii) The Department of Defence (including the South African National Defence Force);
(iii) The Department of Provincial and Local Government; and
(iv) The Department of Public Works.

whether the conduct of the respondents, described later in this judgment, in relation to the property, precluded the order granted by the court below.

[8] I pause to record that the late Mr Gilbert Fesi, the father of the first appellant, is recorded in the trust deed as the initial donor. In resisting the order sought by the six respondents in the court below, Ms Fesi asserted that because of her family involvement in the history of the Ndabeni community, she was well placed to set out the relevant facts in relation to the present dispute.

[9] Unsurprisingly, because of the value of the property, which is located fairly close to the Cape Town City Centre, and the potentially lucrative attendant benefits, the trust has had a long and troubled history, stretching back to 1998. For example, it appears that an amount of approximately R5 million transferred to the trust in 2002 as a restitution discretionary grant by the State, to give effect to the envisaged development of the land for the benefit of the community, was not accounted for by the trustees then in office.

[10] A major challenge encountered in advancing the objects of the trust in favour of the community has been to identify and verify members of the trust who have an interest in and are entitled to be heard and to vote on issues related to the trust. It is necessary at this stage to note that the settlement agreement in terms of which the State awarded the property to the trust describes the 'Ndabeni Community', which the award of the land intended to benefit, as follows:

'The community comprising those persons, including their direct descendants, who are the surviving members, and legal successors to the deceased members, of the community that was formerly resident at Ndabeni, and dispossessed of its rights in land in the circumstances indicated above, including "the spouse or partner in a customary union of any such person whether or not such customary union has been registered", as contemplated by the provision of the Act, subject to the verification process envisaged by clause 10.2.'

[11] Clause 10.2 of the agreement reads as follows:

'The aforegoing Grants shall be accorded due priority, and shall be otherwise subject to the normal terms and conditions applicable thereto, including the conclusion of any such Transfer of Funds Agreements, Financial Administration Agreements, and other Financial

and Implementation Agreements, as may be applicable in these circumstances; and subject further to the implementation of a mutually acceptable verification process to identify eligible Households and Members of the Community. If for any reason the Parties are unable to agree upon the terms and conditions of any such Agreements as are referred to above, then any of such Parties shall be entitled to apply to Court for directions and an Order to determine the matter in issue.'

[12] Clauses 12.1 and 12.3, which are significant, provide:

'Upon fulfilment of the Condition Precedent stipulated in clause 5,[4] the terms of this Agreement shall constitute a full and final settlement of the Community's Restitution Claim. Accordingly, the COMMUNITY TRUST, duly mandated as aforesaid, does hereby:

12.1 *warrant and undertake* that all eligible persons who may have timeously lodged restitution claims with the Commission in respect of rights in the land described in paragraph B of the Preamble to this Agreement, whether in respect of land, cash compensation, or other equitable redress, shall be or become entitled to be members, and as such, contingent beneficiaries, of the COMMUNITY TRUST; and

. . . .

12.3 *confirm its commitment* to admit to membership of the COMMUNITY TRUST, all eligible persons who make application for membership by no later than a final closing date, which shall be a date no earlier than such as may be agreed between the Trustees and the Commission as fair and reasonable; subject however to any contrary Order or binding direction upon the Trustees, arising from the exercise of the continuing jurisdiction referred to in clause 13 hereunder.'[5] (My emphasis.)

[13] It was thus prospectively incumbent on the trust to ensure that all members entitled to the benefits of the land awarded in terms of the settlement agreement, were afforded the opportunity to participate in the affairs of the trust and to vote on

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[4] Clause 5 records, under the title 'FULFILMENT OF CONDITION PRECEDENT', that the agreement was due to be confirmed and adopted by resolution passed at a general meeting of the members of the trust in the manner dictated by the trust deed.

[5] Clause 13 reads as follows:

'The implementation of this Agreement; and issues involving the meaning and effect of its terms; and other matters arising therefrom or incidental thereto, remain subject to the mandate, powers and jurisdiction of the Minister of Agriculture and Land Affairs, the Commission, the Chief Land Claims Commissioner, and the Court, respectively, as may be contemplated by statute or common law.'

A further relevant clause of the trust deed is clause 11.1, the material parts of which provide:

'The Parties agree to co-operate and to render each other mutual assistance within the ambit of this Agreement, in order to facilitate communication and promote the successful implementation of this Agreement according to its intent and purpose. With a view to achieving these shared objectives, it is proposed to establish a Liaison Committee, which shall include representatives of the Trust and of the various Departments concerned, including the SANDF. . .'

matters in relation thereto. I note that the settlement agreement contemplates the continued involvement of the Commission in identifying and verifying community members entitled to participate in the affairs of the community.

[14] I now turn to the relevant provisions of the trust deed. Significantly, clause 4.1 of the trust deed sets out the trust's 'main objective' as being 'to hold property in common for the benefit of its members'. Clause 4.3 sets out the following as one of the trust's objects:

'To acquire, hold, develop, improve and administer for the benefit of its Members, and the persons eligible to become Members from time to time, the various rights, assets and interests constituting the Trust Fund.'

The trust's principal asset is the land referred to above and the prescribed object has to be seen in the light thereof.

[15] Clause 4.4 of the trust deed provides that the trust must admit as members 'those natural and juristic persons who from time to time become eligible to acquire Membership in terms of the provisions of Clause 8'. Clause 3 of the trust deed defines 'Members' as follows:

'[T]hose natural and juristic persons as may from time to time be admitted to Membership, upon application, and in accordance with the provisions of Clause 8.'

[16] Clause 8 reads as follows:

'8.1 Membership of the TRUST shall be divided into Two (2) categories, namely:

8.1.1 Institutional Membership; and

8.1.2 Individual Membership.

8.2 Membership of the TRUST shall be conferred, on application therefor, upon the following persons:

8.2.1 All natural persons (Individual Members) whose names are recorded on Schedule One; and

8.2.2 Any other natural or juristic person, Institutional Member whom the TRUSTEES are reasonably satisfied is entitled to participate in an award or settlement in respect of or relating to the Ndabeni Land, under the Restitution of Land Rights Act 1994.'

Clause 10 obliges the trust to establish and maintain a register of members. The clauses set out in this and the two preceding paragraphs are consonant with the warranties set out in the settlement agreement and referred to in para 12 above.

[17] Clause 15 of the deed deals with the appointment and tenure of trustees. Clause 15.1 provides for an initial interim board of trustees. Clause 15.2 reads as follows:

'At the first Annual General Meeting, the Initial Interim Board of TRUSTEES shall resign, and the Members (both Individual and Institutional) shall elect a new Board, comprising at least Six (6) TRUSTEES, which new Board shall serve until the second Annual General Meeting after registration of this TRUST DEED, when the whole of that Board shall resign; the intention being that each Board elected to office after the Initial Interim Board, shall serve for a period of One (1) year, and that there should at all times be not less than Six (6) TRUSTEES in office.'

Clause 15. 4 permits retiring trustees to stand for re-election.

[18] Since the inception of the trust there appears to have been a succession of boards of trustees, ostensibly elected annually. It is common cause that the respondents were appointed trustees in August 2015, after the failure of the prior board to convene an annual general meeting to enable a new board of trustees to be elected. In the period from the inception of the trust to 2015 various community membership lists were prepared. The first, at the instance of the Minister and the Commissioner. At the time that the land claim was lodged, 587 members were listed as claimants. That list was verified by the Commission and confirmed by the Land Claims Court. Subsequently the 587 members were grouped into 249 households. The intention appears to have been for trustees to resort to a template provided by the Commission. A link was then to be established between originally displaced occupants and their children and grandchildren. It was the intention of the Minister's department upon verification by trustees to approach the Land Claims Court to confirm the list of members. The six respondents, as advised by their attorneys, appear to draw a distinction between, on the one hand, originally displaced members of the community who are still alive and, on the other, surviving members of households of original members who have since passed away. The former being considered being members and the latter beneficiaries. Suffice to say that the trust deed makes no such distinction. This is evident when one has regard to clause 8 set out in para 16 above.

[19] Before the process referred to in the preceding paragraph could be completed, the Master appointed an interim board of trustees during the first half of 2015 to facilitate the election of a new board of trustees. The six respondents were elected at a meeting convened for that purpose. The legality of the election was called into question by a number of persons. The Master allowed a period of time for a court challenge to be launched. When that was not forthcoming, the Master, on 12 August 2015, issued letters of authority to the six respondents. It is necessary to note that in her answering affidavit in the present litigation, Ms Fesi questioned how the six respondents, who are not members of the community and were thus not entitled to be present at and participate in the meeting of members, could be elected. The response to this in the replying affidavit on behalf of the six respondents is as follows:

'[I]t is not so that none of the Applicants are members of the Trust. However, it is irrelevant whether or not they are Members of the Trust as the Trust Deed does not require a trustee to be a member of the Trust.'

It is clear that the respondents, in seeking the order set out in para 1 above, did not declare which of them were *not* members of the community and further, did not provide any explanation of how they are connected to and did not say how or when they became involved in the affairs of the community.

[20] It is common cause that challenges in verifying a full register of community members entitled to participate in the affairs of the trust has bedevilled progress in relation to advancing its objects. It is accepted by the respondents that at the time of the meeting at which they were elected, such a verified register had not been finalised. This is evident from para 21 of their founding affidavit, which also sets out their view concerning an interpretation of membership in relation to the trust deed. The paragraph reads as follows:

'After their appointment in August 2015 as trustees of the Trust, the Applicants made it their business to put the affairs of the Trust in order with the view to using the Property of the Trust for the benefit of its Members and Beneficiaries in accordance with the objects of the Trust set out in clause 4 of the Trust Deed. As stated in paragraph 16 above, for ease of reference I refer in this affidavit to the beneficiary households/families holding under and represented by each registered Member of the Trust as "Beneficiaries". I point out, however that in terms of the Trust Deed such Beneficiaries are not true beneficiaries as understood in

trust law, as the true beneficiaries in that context of the Trust are its registered Members. All benefits of the Trust must flow to its registered Members and they then have the responsibility to ensure that the Beneficiaries holding under them share fairly in such benefits. I point out further that the Membership Register of the Members of the Trust lists 437 Members of the Trust. The Applicants estimate that there may be as many as between three and five thousand Beneficiaries holding under the Members of the Trust. It is for this reason that the Trust Deed and the Settlement Agreement provide for Beneficiaries (i.e. family groups/households) represented by a Member, being either the eldest person of such family group/household or the person nominated by the Beneficiaries of that family group/household to represent them as the Member of the Trust, as it would be an administrative and financial nightmare for the trustees of the Trust to deal individually with all of the Beneficiaries. As it is, it is very difficult to administer the 437 Members and to do so in accordance with the requirements of the Trust Deed. This difficulty has contributed significantly to the failure to date of the trustees to achieve materially the object of the Trust.'

[21] Later in the founding affidavit, the following was stated on behalf of the six respondents:

'22.3 On the advice of ENSafrica and with their assistance, the Applicants proceeded to prepare the consolidated Membership Register of the Members of the Trust referred to in paragraph 15 above, Annexure MM3 hereto. In this regard I point to the following:

22.3.1 clause 8 of the Trust Deed provides for the Individual Membership of all natural persons listed on Schedule 1 to the Trust Deed (275 names) and "any *other natural or juristic* person . . . whom the Trustees are reasonably satisfied is entitled to participate in an award or settlement in respect of or relating to the Ndabeni land, under the Restitution of Land Rights Act, 1994". Clause 8 also provides for Institutional Membership, which Membership is held by two churches.

22.3.2 pursuant to the land claims process referred to in paragraph 15 above, the State, represented by the Third and Fourth Respondents, instructed third parties to do a verification of the Members of the Trust. This resulted in a document that has become known as the 587 list.

22.3.3 in the years thereafter the Third and Fourth Respondents also produced a 244 list and a 142 list of Members and the Applicants;

22.3.4 in their capacities as trustees of the Trust and in accordance with clause 8.2.2 of the Trust Deed, the Applicants as the trustees produced a 30 list;

22.3.5 all of these lists are more fully described in the attached Memorandum (Annexure MM2).

22.4 The Applicants found that the aforesaid lists contained numerous outdated entries, duplications and anomalies. They accordingly went to great lengths with ENSafrica to produce the Membership Register, a copy of which was forwarded to the Third and Fourth Respondents on 2 August 2016 and which is attached hereto as Annexure MM3. In their correspondence with the Applicants and the Trust, the Third and Fourth Respondents objected to the process followed by the trustees in the compilation of the Membership Register. Initially, the Third and Fourth Respondents said that it was their prerogative and right to compile a membership register of the Members of the Trust. In its letter of 1 September 2016 to ENSafrica, Annexure MM6 hereto, the Fourth Respondent, however, required of the Applicants (in paragraph 11 of that letter) to "*meet* with the Commission and discuss a process that will result in a process that is transparent, fair, inclusive and credible" as far as the compilation of a Register of Members of the Trust is concerned. At paragraph 15 of that letter the Fourth Respondent further stated that it will request the First Respondent to "*suspend* issuing a Letter of Authority to the 'Trustees' pending the finalisation of the Members of the Trust in a manner compliant with the Trust Deed read with the Settlement Agreement and the Restitution of Land Rights Act, 1994". In other words, the Fourth Respondent objected to the issuing of a letter of authority to the Applicants pending finalisation of a register of Members of the Trust. However, it required of the Applicants, even though they are not trustees, to engage in that process with the Third and Fourth Respondents and by implication envisaged the Trust remaining without trustees until the Third and Fourth Respondents have reached agreement with the Applicants (who in fact have no status or right to reach such agreement, as they are not yet trustees) regarding the Register of Members.' (Emphasis in original.)

[22] On 17 August 2015, within days of the issue of the letters of authority by the Master, referred to in para 19 above, the six respondents concluded the first of a series of written agreements, which involved Abacus Asset Management Proprietary Limited (Abacus), a property developer. Its name was later changed to Abacus Holdings Proprietary Limited. Compositely, the agreements provided for the sale of the property to a joint venture company, Wingfield Development Company (Pty) Ltd (Devco), of which Abacus and the trust would hold 74 per cent and 26 per cent of the issued shares, respectively. I note with alarm, that in terms of a commission agreement dated 22 June 2016, the trustees agreed to pay an amount of R4 million to an individual named Kent Kihl, a Swedish citizen, as commission for assisting the trust 'in entering into the [t]ransaction by introducing the [t]rust to Abacus and Devco

and being the effective cause thereof'. How and why it was necessary for the 'introduction' and for payment of R4 million as commission to someone living in Sweden is not explained.

[23] It is common cause that at the time of the approach to the court below for the order referred to at the commencement of this judgment, the six respondents were receiving a monthly stipend of R5000 from Abacus and were also in receipt of financial assistance from the company to enable them to conduct the business of the trust. Furthermore, Abacus 'assisted' the respondents to rent an office after having furnished it. Abacus also paid transport, venue and catering costs related to the holding of meetings of the trust.

[24] The six respondents sold the property to Devco for R106 million. It is necessary to note that in 2006 the trust had an offer for the property in the amount of R600 million, plus a 26 per cent share in a development company. It appears that due to the uncertainties surrounding the composition of the trust and its dysfunctional nature, that offer was withdrawn. In 2012 the Minister's department obtained an *independent* valuation of the land, which set the value of the land at R214 million as at 24 July 2012. According to the six respondents they obtained valuations from Rand Merchant Bank and Nedbank in the amounts of R103 million and R110 million. Nedbank was at that stage envisaged to finance the purchase of the property. The respondents and Abacus agreed to use the mean of the two valuations. There is no effective response in reply by the six respondents to the following assertions by the Commission and the Minister in their opposing affidavit in relation to the valuation of the land:

'[T]he Trustees did not obtain any independent valuations which could have yielded a better price if they were authorised to undertake negotiations to sell the land.'

It bears repeating that at least one of the banks that supplied the valuations had initially agreed to fund the transaction.

[25] The transfer of the property to Devco did not proceed due to challenges to the legality of the conclusion of the agreements disposing of the property, not only by Ms Fesi and the Master, but also by the Commissioner and the Minister, who all

have an interest in seeing that land restitution in South Africa meet statutory and constitutional objectives.

[26] In the period since they were issued with letters of authority in August 2015, the respondents' attorney engaged with the Minister, the Commission and the Master concerning the verification of membership of the community, and about complaints by community members as to how the trust was being administered and about the disposal of the property. The Minister and the Commissioner disagreed with the process followed by the respondents in completing and verifying a membership register. They took the view that the trust deed and the settlement agreement had not been followed. Furthermore, they were adamant that persons who attended meetings at material times in relation to the business conducted by the respondents, were not all verified members and that there were many persons entitled to be members who were not on the list used by the respondents.

[27] If regard is had to the letters of authority issued by the Master in August 2015, the respondents' prior term of office, in accordance with the trust deed, would have expired during August 2016. By that time there were still ongoing discussions concerning the verification of members. That notwithstanding, the respondents scheduled a meeting for the election of a new board of trustees. It was held on 7 August 2016. According to the respondents, since 49 members were present and a further 22 were represented by proxies, the meeting was quorate as the trust deed provides that at least 50 per cent of members or 10 per cent of members reflected in the register of members, whichever is the lesser, meets the quorum requirements set by the trust deed. The Minister, the Commissioner and the Master adopted the position set out in the preceding paragraph.

[28] The respondents appear to have held another meeting on 16 September 2016, purportedly to authorise the disposal of the property to Devco. This is more akin to a ratification, since, it will be recalled that the agreements disposing of the property were signed in August 2015, shortly after the respondents took office when the Master issued letters of authority. Since this was a meeting of special significance, authorising the disposal of the only significant asset of the trust,

which was the very reason for its existence, it could only rightly have been discussed at a special general meeting. Clause 19.3 of the trust deed reads as follows:

'A Special General Meeting shall be convened on not less than Fourteen (14) days' prior written notice, and such Notice shall contain the reason for the Meeting and the nature of the business to be transacted.'

There is no indication that the meeting of 16 September 2016 was called in the manner required by the trust deed nor indeed is there any indication that the respondents considered that it ought to have been dealt with in that manner.

[29] As these events unfolded, the Minister called on the Master to suspend issuing letters of authority, pending the resolution of the problems related to the verification of members. On 16 September 2016 the Master responded to the Minister's letter calling for the suspension in the following terms:

'From the letter dated 29 July 2016 by ENSafrica, it appears that the trustees went to considerable lengths to go through a verification process to identify eligible members of the community. It, however, appears that the Land Claims Commission want a cohesive/mutually agreeable process.

Kindly be advised that unless an agreement is reached on the verification process by 30 September 2016 (as proposed by the Chief Land Claims Commission in the letter dated 19 August 2016 – attached) the Master shall consider appointing the six newly elected trustees. The Trust cannot function without trustees in office to administer the Trust properly and address the needs of the community.

Both the Chief Land Claims Commission and ENS are expected to report back to the Master by no later than 7 October 2016 and provide a timeframe for the process to be concluded.'

[30] In a letter dated 19 September 2016 the respondents' attorney wrote to the Master as follows:

'We trust that you will also understand that to avoid the Trust remaining without fully authorised trustees, the trustees would expect to be issued with full Letters of Authority after 30 September 2016, whether or not the required verification process has been completed, but subject to them having engaged in good faith with the Land Claims Commission for such purpose.'

The respondents' attorney undertook on their behalf to engage with the Land Claims Commission and the Minister to finalise the verification process.

[31] A further letter was sent to the Master by the respondents' attorney on 23 September 2016, in which the following appears:

'Finally, we respectfully submit that the Trustees and the Land Claims Commission have reached agreement on the verification process to be followed by them, as required in your letter of 16 September 2016. We submit further that there is accordingly no reason to delay issuing a full Letter of Authority to the Trustees to enable them to continue with the performance of their obligations as Trustees of the abovementioned Trust. We accordingly look forward to receiving your confirmation that you will now issue the Letter of Authority.'

It is common cause that a process was agreed between the Master, the Minister and the respondents regarding the way forward so as to be inclusive and consultative in finalising a truly authentic list of members.

[32] On 3 October 2016 Ms Fesi caused a summons to be issued in terms of which she contested the validity of the appointment of the respondents, stretching back to their previous appointment in 2015. She made serious allegations concerning the manner in which the respondents conducted the affairs of the trust and about the disposal of the property. She charged that they had acted illegally and adverse to the interests of the community. The issues raised in the summons are similar to the ones raised in the present litigation.

[33] The Master, faced with the summons and having regard to the complaints received from interested parties concerning the actions of the respondents, took the view that the dispute should now be adjudicated by a court of law and declined to issue the letters of authority. In the answering affidavit on behalf of the Master it is stated that the Master viewed the matter as being sub judice. The master intended to appoint independent trustees in terms of the Trust Property Control Act 57 of 1988 (the Act) to administer the affairs of the trust until the dispute was determined by a court. This was conveyed to the respondents' attorney in a letter dated 13 October 2016.

[34] A further exchange of correspondence between the attorney acting for the respondents and the Master yielded no results. The respondents then decided to launch the application in the court below seeking the order set out in para 1 above. The Master, Ms Fesi, the Minister and the Commissioner all opposed the order

sought by the respondents. The Minister and the Commissioner also launched a counter-application seeking the following relief:

'1. That Abacus Holdings (Pty) Ltd (Reg No 2008/014442/07) and Abacus Development Company (Pty) Ltd, be joined to these proceedings;

2. Declaring the sale agreement between the Ndabeni Communal Property Trust and [Devco], including all related ancillary contracts, void *ab initio*;

3. Directing the manner in which the verification process be completed;

4. Directing that the properly appointed Trustees of the Ndabeni Communal Property Trust comply with clause 30.1.1 of the Trust Deed to have the Trust designated a *"similar entity"* for purposes of the Communal Property Associations Act, No 28 of 1996.'

[35] The respondents took the view that the Master, the Minister and the Commissioner were acting unreasonably in requiring them to undertake an exhaustive interactive process to verify membership without providing financial support to that end. They asserted that the trust could not be left without trustees and, having been duly elected at a meeting convened for that purpose, they were entitled to the order sought. They contended that for this reason the matter was urgent. Furthermore, they pointed to the threat of illegal occupation of the property and explained that arrears for rates and taxes were accumulating and that the agreement for the disposal of the property had to be protected, lest the other parties to the agreement withdrew from the transaction. These justifications for the urgent approach to court must be seen against the common cause fact that the trust had been dysfunctional for more than a decade and that in effect little had changed, save for the precipitous conclusion of the agreement with Devco for the disposal of the property.

[36] The Minister, the Master, the Commissioner and Ms Fesi all disputed the legality of the election of the respondents. As stated above the Minister and the Commissioner submitted that the respondents drew a distinction between members and beneficiaries which they disagreed with. The six respondents reduced the original list of 587 referred to above to 437 members. The Commission and the Minister were unwilling to accept the list as they considered that the proper process for verification of membership had not been followed. They also wanted to be certain that family representatives had proper authorisation from each member of the

families they purported to represent. All the more so, since the respondents' preliminary membership list contained only the names of the oldest living descendants, which was not consistent with the trust deed or the settlement agreement.

[37] As stated earlier, it is undisputed that following a directive by the Master, it was agreed between the Commissioner, the Minister and the attorney representing the respondent that a mutually acceptable verification process had to be agreed and followed. The respondents asserted that because a process had been agreed, there could be no impediment to the letters of authority being issued by the Master. The Minister, the Commissioner, the Master and Ms Fesi were adamant that since the verification of members was the biggest obstacle to real progress in achieving the objectives of the trust and protecting the interests of members, it was imperative that until that was done, there could be no proper elections and that an issue such as the disposal of the property, even assuming it to be permissible, could not be undertaken.

[38] As already alluded to, Ms Fesi went further and challenged the legality of the appointment of the respondents in 2015 and pointed to the action which she instituted against the respondents in which all of the issues raised in this litigation are in focus. Although all those who contested the relief sought by the respondents referred to the matter being sub judice because of Ms Fesi's summons, what appears to have been intended by them was that there was pending litigation in relation to the dispute. They all submitted that the disposal of the property was in contravention of the settlement agreement and the trust deed. It was contended that the holding of the property and its development for the benefit of the community was the sole object of the trust and that its disposal effectively nullified the continued existence of the trust. They asserted that the respondents, who refer to themselves as trustees elect, were too close to Abacus. In this regard they referred to the stipend paid to the respondents and the fact that Abacus is paying their legal fees and other expenses. They contended that this precluded the trustees elect 'from exercising the independence required from trustees acting in a fiduciary capacity'.

[39] The replying affidavit of Mr Nkululeko Michael Mguga, one of the respondents, who described himself as the chairman of the trustees-elect, in relation to the legality of the election process in terms of which the six respondents were elected, is especially instructive. The material part of his evidence describing the voting process set out below was not, as will become apparent, dealt with by the court below

'14.2 [T]he Members and Proxies were clearly identifiable as such, as they had been given coloured stickers.

14.3 Initially the voting process went smoothly, as the Members and Proxies made their way up to the voting station from their respective designated seating areas.

. . . .

14.5 However, as the voting process continued, the Attendees became restless and anxious to conclude the voting process. At that time, the designated officials were also overwhelmed by more people entering the venue and could no longer control the registration of each person at the entrance to the AGM (as was initially done at the AGM).

14.6 I believe that towards the end of the voting process, certain people who had signed the Attendance Register, but who were not on the Membership Register were allowed to vote without being entitled to do so.'

As to the outcome of the voting process, he, inter alia, said the following:

'15.4 The Trustees have identified a number of people who were allowed to vote at the AGM, but who were not eligible voters as they are neither Members nor Proxies. This, however, does not in my submission invalidate the voting process as a whole, as notwithstanding the invalidity of certain votes, the remaining votes cast were all in favour of the Trustees and were validly cast by Members or Proxies.'

He concluded as follows:

'16.1 The voting process involved certain problems relating to the control of the Attendees who were allowed to vote which stemmed from the large number of Attendees present at the AGM, as has been experienced in the past when meetings have been convened by the Trustees. However, in my submission, there were sufficient checks and balances put in place to ensure that the voting process was not compromised in its entirety. The Auditor and the independent observer have given similar accounts of the events that took place at the AGM, as have been previously provided to the Master, and both were satisfied with the voting process which took place at AGM and the validity of the election of the Trustees.

16.2 I submit that the quorum of Members and their Proxies, as required in terms of clause 21.6.1 of the Deed, was present and therefore the AGM and the proceedings which took place at the AGM were valid in terms of the Deed.

16.3 The voting process and the election of Trustees were valid in terms of the Deed and in line with the wishes of the Members and Proxies.'

[40] What is set out in this paragraph is important insofar as the conduct of the respondents and their attorney in relation to the affairs of the trust is concerned. It is also an aspect to which I will revert. At this stage it is necessary to record the following: First, in their founding affidavit, the respondents were adamant that their attorneys have been acting for them at arm's length and on a professional and fee-paying basis. They go on to say the following:

'However, due to the fact that the Trust has no funds, ENSafrica have allowed the Trust and its trustees credit for the payment of the legal costs incurred by the Trust with ENSafrica. The Trust and its trustees would not have been able to engage and perform the activities referred to in this paragraph 22 without the substantial legal and financial assistance of ENSafrica.'

Second, it is clear that the respondents' attorneys have been of assistance to the respondents in the compilation of a list of members of the community and, as pointed out above, were engaged in discussions that resulted in an agreed process with the Minister, the Commission and the Master as to verification. As stated earlier, the attorneys proceeded to launch the application in the court below, notwithstanding the fact that there was no verified list of members. Third, despite the fact that the verification process had not been completed, we were informed from the bar about the following common cause facts: The respondents' attorneys assisted them in an application to evict unlawful occupants from the property and; the legal costs in relation thereto was in an amount of R900 000, for the account of the trust. Whilst this appeal was pending, the respondents' attorneys, applied for the sequestration of the trust on the basis of the fee of R900 000 allegedly due to them and served the application on one of the respondents. This is truly an astonishing aspect on which I will comment further later.

[41] There does not appear on the face of it to be a prohibition, in terms of the settlement agreement or otherwise, against the disposal of the property, provided that it is effected in accordance with the informed and properly expressed view of the community. It is necessary at this stage to consider how government, through the Minister, saw the object of the settlement of the land claim. Government was rightly

concerned with the pain caused to the community by historical dispossession and was intent on seeing prime land being occupied by black families who had been so dispossessed. At paras 37.1 and 37.3 of the opposing affidavit on behalf of the Commissioner and the Minister, the following appears:

'37.1 The Minister saw the Ndabeni land claim as an opportunity to set in motion a visionary process that promoted an integrated and sustainable, transformed post-apartheid City of Cape Town, bearing in mind that the Ndabeni community occupied approximately 54.8 hectares of land within the City, before being forcibly removed to the outer limits of the City. Consequently, the award of prime strategic land within the Cape Town metropole was considered to make enormous inroads into the still existing apartheid spatial planning of the City;

. . . .

37.3 Whilst the pattern of having African people live out at the outer reaches of the City of Cape Town is still visible today, the Minister took the view that by allowing African people to gain access to a land parcel which is close to the City, employment opportunities, services and transport routes, the face of Cape Town will be radically altered. Moreover, the Minister was aware that the land parcel has enormous development potential, whether used for residential, industrial, commercial or entertainment purposes. It was therefore fitting that such an opportunity be afforded to the claimants, as it will give effect to a city that represents a more cosmopolitan and integrated feel.'

[42] I turn to deal with the judgment of the court below. At the outset, the court below (Nuku J) criticised the Master, the Minister and the Commissioner's application for condonation for the late filing of their answering affidavits. Nuku J referred to the reasons for the late filing:[6]

(i) the matter is complex;

(ii) the matter is very important;

(iii) the officials who had to consult with the legal representatives were not available;

(iv) the applicants will not suffer any prejudice;

(v) the failure to introduce the affidavit will result in the members of the trust being deprived of their Constitutional right to enjoy the land awarded to them; and

(vi) there are good prospects of successfully opposing the application.

After doing so, the court below went on to state the following:[7]

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[6] In para 6 of the judgment.

[7] Paras 10 and 11 of the judgment in the court below.

'The first respondent gave no explanation at all for the late filing of the answering affidavit but instead she associated herself with the third and fourth respondent's application. The reasons advanced by the third and fourth respondents have no bearing at all on the first respondent who had previously issued Letters of Authority to various persons to act as trustees of the Trust.

The reasons advanced by the third and fourth respondents for the failure to file the answering affidavit timeously are hopelessly inadequate. The third and fourth respondents blame their legal representatives for the delay as the legal representatives had to acquaint themselves with a considerable amount of documentation. Notably, this is not confirmed by any of the third and fourth respondent's legal representatives. The delay is also blamed on unnamed officials who had to commute from Pretoria to consult. Once again, no affidavit is filed by any of the said officials . . . .'

Notwithstanding his stated reservations, Nuku J proceeded to hear the parties' submission on the merits of the application.

[43] Adjudicating the merits, Nuku J said the following about the allegations made by the Master against the respondents concerning complaints made to that office:[8]

'The first respondent refers vaguely and without any details to allegations of corruption, intimidation and improper administration of the Trust without disclosing the names of the persons who have lodged these complaints nor any confirmatory affidavits from them. The only person who appears to have done something about her unhappiness with regard to the conduct of the applicants is the second respondent, and this is dealt with when dealing with her basis for opposing the application.'

[44] The court below rejected the submission on behalf of Ms Fesi that such members of the trust as could be identified had to be joined as parties to the litigation. It did so on the following basis:[9]

'There is no merit in the submission that the applicants should have joined the members of the Trust. The issue that the applicants have approached the Court with is narrow and concerns the directions issued by the first respondent. The second respondent provides no basis why the members of the Trust should be joined and I cannot find any.'

[8] Para 20.
[9] Para 22.

[45] In para 23 of the judgment the court below took the view that the agreements in terms of which the property was disposed of were concluded when the respondents were holders of letters of authority. It went on to state:

'The second respondent has instituted proceedings in which she seeks, *inter alia*, an order declaring the agreement entered into between the trustees of the Trust and Abacus invalid, and this matter is still pending before this Court. These are the proceedings which presumably resulted in the first respondent deciding not to issue the Letters of Authority initially, as she regarded the matter *sub judice*. The fact that an action has been instituted to impeach one of the transactions that the trustees concluded cannot and does not, on its own, disqualify them from holding office as trustees. Until the agreement has been declared void by a competent Court of law, or is cancelled by any of the parties to the agreement, it remains binding on the Trust. An intention by the applicants to execute contracts concluded by the Trust with third parties cannot be a basis for the first respondent refusing to issue Letters of Authority to the applicants.'

[46] Insofar as the elections of the respondents in 2016 was concerned, the court below said the following:[10]

'The second respondent's challenge to the election of the applicants is based on her understanding that an annual general meeting of the Trust can only be viewed as duly constituted if notices have been given to all members as required by the Trust Deed. Clause 21.2 of the Trust Deed states that: "*The* notice convening meetings shall be in writing and may be given in such manner as the Board of Trustees may from time to time deem appropriate; . . ." . In his affidavit, Mr Mguga states that the required notice was given to the members. The second respondent does not assert that she never received the notice nor does she provide details of the members of the Trust who did not receive the notice of the annual general meeting.'

Later, in para 34, the court below said:

'Although there was some correspondence exchanged between the first respondent and the applicants and/or their legal representatives, the first respondent never questioned compliance with the Trust Deed in relation to the election of the applicants. It is only during these proceedings that the third and fourth respondents seek to impugn the elections, and in doing so, they can only rely on the version of the applicants, as the deponent to the third and fourth respondents' answering affidavit has no first-hand information relating to the annual general meeting in which the applicants were elected.'

[10] Para 24.

[47] In respect of the assertion by the parties opposing the relief sought by the respondents, namely that the meeting at which they were elected was not quorate, the court below said:[11]

'The third and fourth respondents challenge the election of the applicants on the basis that the meeting, at which the applicants did not have the *quorum*, in that there were less than 50 members of the Trust present at the meeting. The Trust Deed defines members as "those natural and juristic persons as may from time to time be admitted to Membership, upon application, and in accordance with the provisions of clause 8". Clause 8.2 of the Trust Deed provides that "Membership of the Trust shall be conferred, on application therefor, upon the following persons . . . [A]ny other natural or juristic person [Institutional Member] whom the trustees are reasonably satisfied is entitled to participate in an award or settlement in respect of or relating to the Ndabeni land, under the Restitution of Land Rights Act, 1994". It is thus clear that the admission of members to the Trust was envisaged to be an ongoing process, and that the trustees have the power to admit persons as members upon being reasonably satisfied that the said persons are entitled to participate in the award. Mr Mguga, in his affidavit, states that the meeting was attended by 69 members, and the response by the third and fourth respondents is that they do not know who these individuals are and whether these individuals were verified in terms of the mutually agreed verification process. That the third and fourth respondents have no knowledge of the members referred to by Mr Mguga must mean that this Court only has Mr Mguga's version that 69 members attended the meeting and voted for the election of the applicants.'

[48] In dealing with the assertions that the respondents, in disposing of the property to Devco, acted improperly in that they were faced with a conflict of interests and could not execute their fiduciary duties, the court below said the following:[12]

'The conflict of interest relates to the remuneration that the applicants have been receiving from Abacus. These payments are, to say the least, questionable under the circumstances as the payment thereof appears to be an incentive to the applicants to facilitate the execution of the agreements entered into between the Trust and Abacus. These payments, however, do not disqualify the applicants from holding office as trustees. The second respondent, as do other members of the Trust, have remedies against the applicants in respect of these payments.'

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[11] Para 35.
[12] Para 26.

[49] In relation to the question of the verification of membership the court below concluded as follows:[13]

'The issue of the verification of the members is an ongoing process that will have an impact on the members' register. The verification of the members of the Trust has not been finalised and as such, there cannot be an accurate members' register before the process is finalised.'

[50] The court took the view that the decision by the Master not to appoint the respondents was administrative action as contemplated in s 1 of the Promotion of Administrative Justice Act 3 of 2000. Nuku J observed that the respondents had not taken that decision on review but went on to hold as follows:[14]

'To insist on the applicants proceeding by way of review in the face of patent unlawfulness would be defeating the provisions of section 23 of the Act. In any event, that would be insisting on form over substance. The appointment of the trustees is subject to the supervision of the Court.'

[51] He concluded as follows:[15]

'In the circumstances of this case, it is clear that the first respondent, when approached by the applicants for Letters of Authority, concerned herself with matters that were not relevant for the purposes of issuing the Letters of Authority. The issue of issuing Letters of Authority is not something that requires some experience and/or expertise. In fact, the first respondent had initially indicated her willingness to consider the issuing of the Letters of Authority to the applicants until she became aware of the action brought by the second respondent. She had initially indicated her intention to abide the decision of this Court when the applicants instituted these proceedings until she changed her stance for reasons that are difficult to understand. This Court is in as good a position as the first respondent to make the decision regarding the issuing of the Letters of Authority.

The Trust has been without trustees for a period of just over six months, and such a state of affairs is undesirable. The interests of the beneficiaries have been put on hold as a result of the vacuum which has been created by the first respondent's refusal to issue the Letters of Authority. In my view, the applicants were justified in bringing the application on an urgent basis.'

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[13] Para 27.
[14] Para 36.
[15] Paras 37 and 38.

[52] Nuku J made an order directing the Master to issue letters of authority to the respondents and ordered the opposing parties to pay their costs. It is against that order and the conclusions leading up to it that the present appeal by the Master and Ms Fesi is directed. It is necessary to record that although the Minister and the Commissioner participated quite vigorously in the court below, they regrettably did not participate in the appeal.

[53] Before us, both Ms Fesi and the Master, in their heads of argument submitted, at the outset, that the respondents were not entitled to approach the court for an order compelling the Master to issue letters of authority. They contended that the proper procedure would have been for the respondents to launch an application in terms of PAJA and in accordance with Rule 53 of the Uniform Rules, to review and set aside the decision by the Master to not issue the letters of authority. In this regard it was contended on behalf of the Master that the principle set out in the decision of this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA) should apply, namely, that the Master's decision remains valid until set aside by way of review.

[54] Section 23 of the Act on which the respondents based their application in the court below provides as follows:

'Any person who feels aggrieved by an authorization, appointment or removal of a trustee by the Master or by any decision, order or direction of the Master made or issued under this Act, may apply to the court for relief, and the court shall have the power to consider the merits of any such matter, to take evidence and to make any order it deems fit.'

This kind of review is dealt with by Professor Hoexter[16] under the heading 'Special statutory review' (at 113) as distinct from a PAJA and other types of review.[17] She points out that this is sometimes a wider power than ordinary review and thus more akin to an appeal but that it might well be narrower with the court being confined to particular grounds of review or particular remedies. It would, of course, depend on the relevant statutory provisions. In *Nel & another NNO v The Master (ABSA Bank Ltd & others intervening)* 2005 (1) SA 276 (SCA), para 22-23, this court, with reference to *Johannesburg Consolidated Investment Co v Johannesburg Town*

[16] C Hoexter *Administrative Law in South Africa* 2 ed (2012).
[17] See 112-114 for a discussion of types of review in South African law.

Council 1903 TS 111, discussed statutory reviews of the kind in question and endorsed Professor Hoexter's exposition. In Honoré at 191, para 119, the authors, in dealing with the power of the court when there is a challenge in terms of the Act in relation to the Master's *appointment* of trustees point out, with reference to s 23, that the terminology of that section makes it plain that the court may consider that disputed issue anew.[18] At para 154 (page 251) of Honoré, the learned authors note that *all* the Master's decisions in terms of the Act are subject to reassessment by the court. They go on (page 252), to state that s 23 makes it plain that the substantive justification for any action by the Master may be scrutinised. They also state the following:

'[T]he substantive justification for any action by the Master may be scrutinised. The applicant will in other words not have to establish that the Master committed a reviewable irregularity but only that there are grounds for the court to substitute a decision it considers better. The court is expressly empowered "to consider the merits" of the matter, to take evidence "and to make any order it deems fit". This goes further than the entitlement to administrative justice now embodied in statute under the Constitution.'

[55] The respondents were entitled to approach the court for relief in terms of s 23 of the Act on the basis set out in the preceding paragraph. No practical purpose is served debating whether Rule 53 or Rule 6 of the Uniform Rules ought to have been employed, the essential question is whether relevant and sufficient facts were before the court enabling it to adjudicate the claim for relief. In this regard see *Rampa en andere v Rektor, Tshiya Onderwyskollege en andere* 1986 (1) 424 (O) at 429G-H. See also Harms *Civil Procedure in the Magistrates' Court* 2017 SI 42. As will become evident, in the present case the necessary facts were before the court to enable the respondents' claim for relief and the grounds of opposition, with reference to the relevant statutory provisions, to be adjudicated.

[56] I now address the reasoning of the court below and whether the conclusions arrived at were correct. A starting point is to consider the office of trustee and the supervisory powers and obligations of the Master in terms of the Act. First, for proper accession to the office of trustee the following conditions must be fulfilled:

[18] Cf *Shenker v the Master* 1936 AD 136. In Honoré the authors note that that decision is in direct contrast with the provisions of the Act.

(i) appointment in a lawful manner;
(ii) proper qualification on the part of the trustee;
(iii) acceptance of the office; and
(iv) written authorization by the Master.[19]

[57] In Honoré *South African Law of Trusts*, the learned authors point out that the public law dimension of trusts emerges clearly from the court's control over the performance by trustees of their duties in terms of the Act which also gives the Master of the High Court extensive supervisory powers over the office of trustee.[20] They also deal with the administrative and substantive aspects of the powers of the Master. Amongst the substantive provisions are those in terms of which the Master can call upon trustees to account for the administration and disposal of trust property, to deliver books and documents and to answer questions put by the Master. Furthermore, the Master is empowered in terms of the Act to launch investigations into the trustee's administration and disposal of trust property.[21] In appropriate circumstances, the Master may apply for a court order to direct trustees to comply with a request by the Master or with any duty or for the removal of a trustee.[22]

[58] As to the first requirement set out in para 56 above, namely the lawful appointment of a trustee, it must at the outset be noted that the office of trustee is created by a trust instrument and is to be filled as specified in the trust instrument, or by the Master, or by the court. In *Metequity Ltd & another v NWN Properties Ltd & others* 1998 (2) SA 554 (T) at 557G-H the following appears:

'A trustee is defined as any person who acts as trustee by virtue of an authorisation under section 6. That section envisages in section 6(1) that the Master's authorisation to act as trustee is granted to persons appointed as trustees in a trust instrument, by the Master or by the court. The office of trustee is therefore created by the trust instrument and filled thereby or by the Master or the court. The Trust Property Control Act, however, as a regulatory and

[19] In this regard, see Cameron *Honoré's South African Law of Trusts* 5 ed 2002 para 110 at 179. See also s 6(1) of the Trust Property Control Act which provides that a person can act as a trustee only if authorised thereto in writing by the Master.
[20] *Op cit* para 111 at 180.
[21] See also s 16 of the Trust Property Control Act 57 of 1988.
[22] See ss 19 and 20 of the Act.

control measure, provides in section 6 that such existing trustee shall not act without authorisation by the Master.'

[59] In terms of the trust deed in the present case, trustees are to be elected at successive annual general meetings. Notices are required in terms of clause 22.1, to be delivered 'to all Members either personally or by prepaid registered post, addressed to the last known address notified by such person to the Trust; or in such other manner as may be deemed appropriate by the Board'. A quorum is stated to be the lesser of 50 members or 10 per cent of the members reflected in the membership register from time to time.

[60] It is clear from what is set out earlier that the trust has a history of being dysfunctional and has for more than a decade not served the needs of the community. Against that background, and considering the importance of ensuring compliance with the constitutional objectives of land restitution, and with the best interests of the community at heart, the determination of the Minister, the Commissioner and the Master to ensure that the trust deed was complied with and that the membership list was verified to enable the trust to be functional and effective in the interests of the community, is easily understood. The attitude of the Minister and the Commissioner is all the more justifiable if regard is had to clauses 11.1 and 13 of the settlement agreement, referred to above,[23] which provide for their continued involvement. Their insistence that the verification process be concluded in order for the trust deed and the settlement agreement to be complied with is in accordance with the general principles of trust law that a trust should not be allowed to fail for want of a trustee/trustees.[24] Simply put, the objective was to ensure the appointment of trustees in accordance with the trust deed so as to ensure that the objectives of the trust were met.

[61] At this stage it is necessary, for a better and proper appreciation of the highly emotive question of land restitution and reform and the related concerns of the Minister and the Commissioner regarding the disposal of the property, to have regard to what is set out by the Constitutional Court in *Land Access Movement of*

[23] See note 4 infra.
[24] See Honoré, *ibid* para 122 at 201.

South Africa & others v Chairperson of the National Council of Provinces & others 2016 (5) SAA 635 (CC) para 1, which reads:

'This matter concerns the painful, emotive subject of colonial and apartheid era land dispossession. A subject that – despite the democratic government's efforts at resolution through the Restitution of Land Rights Act (Restitution Act) – continues to plague South Africa's politico-legal landscape. To those who personally experienced the forced removals and those who – instead of inheriting the illegitimately wrestled land – inherited the pain of loss of homes or property, the dispossession are not merely colonial and apartheid era memories. They continue to be post-apartheid realities. And it is understandable why that should be so. At the risk of being presumptuous, here was the upshot: the ejection from homes; the forcible loss of properties; severing from kin, friends and neighbours; the wrenching of those affected from their beloved connection to place and community; immeasurable emotional and psychological trauma; and the searing bitterness of it all. Concomitant to this was an untold assault upon the dignity of those at the receiving end of this distressing treatment. The continuing post-apartheid realities of land dispossession are more so in the case of those who are yet to enjoy the fruits of restitution or equitable redress in terms of the Restitution Act.' (Footnotes omitted.)

It is also imperative that the duties of the trustees in relation to the affairs of the trust and especially in relation to the disposal of the property be seen against that background.

[62] It is common cause that the agreed verification process referred to above had not been followed through to an acceptable conclusion. It is baffling that the respondents' attorney, despite having engaged in lengthy discussions concerning the verification process and finally agreeing to a process to that end, rushed off to court on an urgent basis to seek the relief ultimately granted by the court below. The explanation that the trust had to be urgently functional to deal with arrears in rates and the threat of unlawful invasion appears to be a smokescreen for what compellingly appears to be the motivation for the approach to court, namely, the hasty sale of the property to Devco. The dysfunctional history of the trust was used as a cover for the urgent approach to court. As pointed out, these problems have been extant for more than a decade. Furthermore, the attitude of the respondents and their attorney, namely that since a verification process had been agreed there was thus no impediment to the letters of authority being issued is, simply postulated, putting the cart before the horse.

[63] Absent a verified list, notices in the terms set out in para 59 above, could not be given to all the members entitled to receive them. An annual general meeting could thus not be properly convened and a quorum could certainly not rightly be determined. The problem was compounded by the chaotic nature of the meeting as described by the chairperson of the respondents in para 39 above. It follows inexorably that the respondents could not possibly have been validly elected in accordance with the trust deed. It is clear from the Master's opposing affidavit that after summons was served, the Master's primary concern was whether the respondents were properly elected. That question is one of legality rather than discretion. From what is set out above, it is clear that a letter of authorisation from the Master could only follow upon appointment in accordance with the trust deed.

[64] The Master was also rightly concerned about the pending litigation initiated by Ms Fesi's summons, which included questions concerning the propriety of their election, the legality of the disposal of the property, and whether the respondents conducted themselves in a fiduciary manner. It is necessary, briefly, to have regard to the meeting convened during September 2016, referred to in para 28 above, where the respondents decided to ratify the decision to dispose of the property. Although the property was sold during the prior tenure of the respondents, no special notice appears to have been given of the intended disposal of the property. In the absence of a satisfactory verification process, such notices could hardly have been given to all the members entitled thereto. The purported ratification meeting was held at a time when letters of authority had not been issued and the resolution passed at the instance of the respondents appears on the face of it to be of no force and effect. Written authorisation by the Master in terms of s 6 of the Act is a precondition to trustees acting in that capacity. In Honoré the learned authors state the following in para 131 at 219:

'The language of the section is empathic: someone appointed as trustee "shall act in that capacity only if authorized thereto in writing by the Master".'

Further, at 220, the authors state:

'It was accordingly held in *Simplex v Van der Merwe* that trustees appointed in terms of a trust deed who had accepted appointment as such, but whom the Master had not yet granted statutory authority to act in that capacity, could not validly conclude a contract so as

to bind the trust. Acts performed without the Master's written authorization were null and void, could not be cured retrospectively by the trustees themselves, after receiving authorization, or by the Master or the court. The court pointed out that the whole scheme of the Act "is to provide a manner in which the Master can supervise trustees in the administration of trusts properly and s 6(1) is essential to that purpose". By placing a bar on trustees from acting as such until properly authorized "the Act endeavours to ensure that trustees can only act as such if they comply with the Act. This ensures that the trust deed is lodged with the Master and that security, if necessary, is lodged" before trustees start binding the trust property.' (Footnotes omitted.)

[65] The court below did not approach the matter on the basis set out above. It began with an unjustified criticism of the late filing of the application for condonation for the late filing of affidavits on the part of the Minister and the Commissioner. The issues related to the trust, about which the respondents all complained, were factually complex and of public importance and the history of the matter had to be pieced together and consultations, of necessity, had to take place. The explanations proffered by the Minister and the Commissioner were not wholly inadequate.

[66] The court below erred in being too readily dismissive of the Master's concerns, following upon complaints about the conduct of the trustees in relation to the disposal of the property. Furthermore, the court below ought to have been more attuned to the interests of all the members of the community. The contention on behalf of the appellants, that as many community members as could be located ought to have been joined in the proceedings in the court below, was not without merit. The court's acceptance of Mr Mguga's statement, in his affidavit, that the required notice was given to community members of the meeting at which the respondents were elected was too readily accepted as being sufficient.

[67] The court below recognised that the payments by Abacus to the respondents were 'to say the least, questionable'. That notwithstanding, the court held that this did not disqualify the respondents from being entitled to hold the office of trustee.

[68] The contention, before us, on behalf of the respondents that the Master had firmly intended to authorise them to act before a change of attitude leading to the

refusal to issue letters of authority, and that the refusal was an act beyond the Master's authority in terms of s 6(1) of the Act, is not borne out by the exchange of correspondence between the Master and the respondents' attorney, as set out in paras 29-33 above. The Master was considering whether to issue the letters of authority, but finally made the decision not to do so after the sequence of events referred to above and after concerns were raised about the legality of the election process which the Master thought best determined by a court.

[69] To sum up, the election of the respondents was for the reasons set out above, not in accordance with the trust deed. That alone disentitled the respondents to the relief sought and granted. It was dispositive of the dispute in the court below and is of this appeal. This was a case in which there were bright flashing lights and sirens wailing against the grant of letters of authority, which the Master rightly heeded. For all of the reasons set out above, the Master's refusal to issue letters of authority was clearly justified.

[70] Public office bearers featuring in litigation in which their conduct is called into question often face public scrutiny and denunciation. They very rarely receive accolades for performing their duties commendably. In the present case the Master, the Minister and the Commissioner all acted in a manner that was laudable. They were all intent on ensuring that the objectives of the trust were met and that the importance of land restitution and its benefits for formerly displaced communities were taken into account. Importantly, they were ensuring that constitutional objectives were promoted and protected.

[71] I return to an aspect alluded to above, namely, the conduct of both the respondents and their attorney leading up to the litigation in the court below and thereafter. As stated earlier, the attorney agreed on behalf of the respondents to follow a process to verify membership of the community, but nonetheless rushed to court before it was finalised. The compelling conclusion is that the urgent approach to court was meant to expedite and finalise the sale of the property in question. The application for sequestration of the trust because of fees owed to the respondents' attorneys, ostensibly by the trust, has to be viewed with a great degree of disquiet. It was resorted to despite the pending litigation by Ms Fesi and the present appeal.

One might rightly ask, how in the absence of letters of authority, which are a pre-condition for trustees to act in that capacity, the respondents' attorney could have taken instructions on behalf of the trust to eject unlawful occupants from the property, entitling him to charge fees, which was the debt on which the application for sequestration was brought. In similar vein, how could one of the six respondents, in the absence of letters of authority, accept service on behalf of the trust? This could not have been lost on the respondents' attorney.

[72] The respondents' contention that the assistance they had thus far received from their attorney, whilst without funds, in the best interests of the community, was something that redounded to the credit of their attorney, has a distinctly hollow ring to it. The calamitous consequence of the trust being sequestrated, to the detriment of the long suffering community, was callously disregarded. In light thereof, the statements on behalf of the respondents, referred to in para 40 above, heralding the nobility of their attorneys for thus far providing services to the trust without charge, perhaps later to be recovered, smacks of hypocrisy. For completeness, I record that counsel representing the respondents was invited to make submissions concerning the conduct of the attorney and possible censure. The attorney was in court and instructions were taken. The submissions on his behalf were that he had acted properly and within the bounds of the law. In my view the respondents and their attorney conducted themselves in a manner that, at the very least, was questionable.

[73] For the reasons set out above, the following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court below is set aside and substituted as follows:

'1.The application is dismissed with costs including the costs of two counsel where so employed.'

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M S Navsa

Judge of Appeal

Appearances:

For the first appellant:	M Schreuder Instructed by: The State Attorney, Cape Town The State Attorney, Bloemfontein
For the second appellant:	B Joseph (with him L O'Conner) Instructed by: Du Plessis Hofmeyr Inc., Somerset West Symington & De Kok, Bloemfontein
For the respondent:	B J Manca SC Instructed by: Edward Nathan Sonnenbergs Inc., Cape Town Claude Reid Inc., Bloemfontein