




**IN THE LAND CLAIMS COURT OF SOUTH AFRICA  
HELD AT RANDBURG**

**CASE NO: LCC74/2019**

**Before: The Honourable Ngcukaitobi AJ**

**Heard on: 25 June 2019**

**Delivered on: 28 June 2019**

<b>DELETE WHICHEVER IS NOT APPLICABLE</b>	
(1) REPORTABLE: YES <input checked="" type="checkbox"/> NO	(2) OF INTEREST TO OTHER JUDGES: YES <input checked="" type="checkbox"/> NO
(3) REVISED: YES / NO	
28/6/19 DATE	 SIGNATURE

In the matter between:

<b>EMBO EMFENI COMMUNITY TRUST</b>	1 <sup>st</sup> Applicant
<b>EMMANUEL BENJAMIN TAMSANQA MKIHZE</b>	2 <sup>nd</sup> Applicant
<b>VULINDLELA DUKE MKHIZE</b>	3 <sup>rd</sup> Applicant
<b>SANDILE BHEKA LINDELANI MKHIZE</b>	4 <sup>th</sup> Applicant
<b>EPHRAM PERCIVAL MANDLA MKHIZE</b>	5 <sup>th</sup> Applicant
<b>ZWELABANTU ERIC MKHIZE</b>	6 <sup>th</sup> Applicant
<b>MANDLAKHE GABRIEL MKHIZE</b>	7 <sup>th</sup> Applicant
<b>RUTH THEODORIS KHOZA</b>	8 <sup>th</sup> Applicant
<b>DENNIS THULANI VILAKAZI</b>	9 <sup>th</sup> Applicant

**NHLANHLA VICTOR MBONGWE**

10<sup>th</sup> Applicant

**and**

**MHLENYUKA MTHUNGWA**

1<sup>st</sup> Respondent

**ANDILE FORTUNE NGCOBO**

2<sup>nd</sup> Respondent

**NELISIWE PELISIWE NYINDE**

3<sup>rd</sup> Respondent

**CONSTANCE NONHLE NGCOBO**

4<sup>th</sup> Respondent

**PHILIOS MUSAWENKOSI MKHIZE**

5<sup>th</sup> Respondent

**DUMILE FLOMINA LANGA**

6<sup>th</sup> Respondent

**JACOB HLONGWA**

7<sup>th</sup> Respondent

**JAMES KWEYANA**

8<sup>th</sup> Respondent

**JOE MKHIZE**

9<sup>th</sup> Respondent

**ABSA BANK LIMITED**

10<sup>th</sup> Respondent

**MASTER OF THE HIGH COURT  
PIETERMARITZBURG**

11<sup>th</sup> Respondent

**THE REGIONAL LAND CLAIMS COMMISSIONER,  
KWA-ZULU NATAL**

12<sup>th</sup> Respondent

**CHIEF LAND CLAIMS COMMISSIONER**

13<sup>th</sup> Respondent

**MINISTER OF RURAL DEVELOPMENT AND  
LAND REFORM**

14<sup>th</sup> Respondent

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## **JUDGMENT**

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**NGCUKAITOBI AJ:**

### **INTRODUCTION**

1. For many African communities who were dispossessed of land as a result of colonial conquest and apartheid violence, the return of the land is a promise of the restoration of an imagined past, signalling at the same time the fulfilment of the promise contained in section 25 of the Constitution. Section 25(7), it

will be recalled, is emphatic in its undertaking that any person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is *entitled* either to restitution of that property or to equitable redress. The return of dispossessed land under the law *is* the implementation of section 25 of the Constitution.

2. There are intangible aspects too. Land restoration also represents the translation, into reality, of the founding values of the Constitution, provided for in section 1(a) namely, human dignity, the achievement of equality and the advancement of human rights and freedoms. Thus, the restoration of dispossessed land under the law proves, in the most concrete manner, that everybody counts; that the struggle for freedom was not in vain; and that the Constitution matters.
3. For the community of Embo Emfeni in KwaZulu Natal, however, the restoration of land has not resulted in prosperity for the claimants. Land that was restored has turned out to be the source of conflict. Now, the community is split in the middle over the control for the land and the financial benefits it generates. The dispute has escalated to threats of death and physical violence. The Master of the High Court, Pietermaritzburg says that this is not an isolated case. He states that his office is swamped with disputes about community structures that have collapsed, internal conflicts characterised by greed and personal ambition and governmental institutions seemingly unable to help communities manage restored land.
4. Government policy has always been to restore land to communities through the medium of trusts established in terms of the Trust Property Control Act 57 of 1988. The basic structure is that members of the community come together and constitute themselves into a community trust comprising of trustees and beneficiaries. A few trustees are elected at a general meeting and they assume control of the affairs of the community in the relation to the restituted land. Members of a successful land claiming community would then constitute themselves into a class of beneficiaries carefully chosen and identified on the basis of whether or not they were dispossessed on racial grounds.

5. A document either called a Trust Deed is then drawn up. It would contain the powers of the trustees and the rights and obligations of beneficiaries. Beneficiaries are also not a static class. As people die, others born and some more re-appear with the promise of the new claimed land, their details are updated in the beneficiary list. Thus constituted, the community may transact sometimes receiving the land, and where commercial activity is taking place on the land responsible for taking the financial proceeds which may be in the form of rental or any income generated from the land. Trustees are thus in a powerful position. They usually control the main asset of the community, namely the land.
6. In this case, a dispute has arisen about the conduct of the trustees that were appointed in 2006, for a three year period, but at the time of the hearing of this application were still in office. Other members of the community have decided to take matters into their own hands and elect new trustees. The Master of the High Court has recognized the new committee in effect terminating the appointment of the applicants as trustees. I must decide whether a case has been made out for interim relief.
7. Objection has been taken to the jurisdiction of this Court. It is argued that this matter falls outside the scope of section 22 of the Restitution Act because it concerns the conduct of trustees, which is unconnected to the land claim. I do not think that the objection is properly taken. The trust was established solely to receive land restored to the community in terms of the Restitution Act. Its establishment was part of the settlement agreement for the land claim. The underlying complaint in this case is that the land which was restored to the community is not being used for the benefit of all the parties. Section 22(1)(cE) of the Restitution Act states that this court has the power “to determine any matter involving the validity, enforceability, interpretation or implementation of an agreement contemplated in section 14(3), unless the agreement provides otherwise.” Moreover, the dispute herein is necessarily incidental to the land claim which squarely within the powers of this Court. It seems to me that not only does this Court have jurisdiction, it is the most

appropriate forum to ventilate disputes about alleged misuse of land acquired under the Restitution Act.

8. There are other points are taken *in limine*. But I think they must be understood in the context of the matrix of fact which underpins this dispute. I turn to that now.

#### **MATRIX OF FACT**

9. The Embo Tribe, acting through its chief, Inkosi HTL Mkhize lodged a claim for the restitution of land rights pursuant to section 2 of the Restitution of Land Rights Act 22 of 1994. At the time of the lodgment of the claim on 30 December 1998, they had reconstituted themselves as the Embo Tribe Community. They alleged that they were dispossessed of rights and land during the colonial era which dispossession continued after 19 June 1913 when the Natives Land Act 27 of 1913 came into effect.
10. The claim was accepted as valid and published in the Government Gazette in 2005. The Government Gazette listed some 148 properties which were subject to the land claim. Land owners opposed the claim, denying the existence of the claimants as a “community” as defined in the Restitution Act and alleging that when the white settlers – the Voortrekkers – arrived, the land was “vacant”. The matter, however, was settled on the basis that several of the claimed farms were restored to the community. The community own the farms as going concerns. Some of the farms are commercially run by the previous white owners, who pay rentals to the community via its Trust.
11. To administer the affairs of the community, a trust was set up in terms of the Trust Property Control Act, in 2006. Initial trustees were appointed, who were Emmanuel Benjamin Tamsanqa Mkhize, Vulindlela Duke Mkhize, Sandile Bheka Lindelani Mkhize, Ephraim Percival Mandla Mkhize, Zwelabantu Eric Mkhize, Mandlakhe Gabriel Mkhize, Patricia Qhubekile Mkhize, Theodorus Ruth Khoza, Dennis Thulani Vilakazi, Zasenbo Happiness Mkhize, Ntozonke Nkululeko Mkhize, Nhlanhla Victor Mbongwe and Tressa Hlongwane.

12. These were entrusted to look after the land that was transferred. A trust deed was drawn up. It was concluded between the trustees and the chief of the community HBT Mkhize.

13. Several clauses of the trust deed should be mentioned.

12.1 The trust would receive the transfer of the property and hold it for and on behalf of members.

12.2 The trust would regulate the process of the election of trustees, manage and administer the trust property on behalf of members, and raise, receive and manage funds for the benefit of the trust.

12.3 The main objects of the trust also included the acquisition of rights and land, the development and the improvement of such land.

12.4 Membership is dealt with in clauses 7 and 8 of the trust deed. In terms of clause 7.1 the first members of the trust are contained in annexure A of the trust deed. In terms of clause 7.2 the trustees may admit a person as a member provided that if a member who has died has appointed as his/her successor a person who is a member of his/her household and who has reached the age of 18, the trustees shall admit such person as a member.

12.5 Clause 8 deals with a membership register. The trustees are required to establish and maintain a membership register which must reflect the name, address, identity number and date of birth and any exclusive rights, interest or benefits of each member in relation to the property.

12.6 The trustees may also create such categories of membership and sub-registers as they deem appropriate subject to the principle of equity in the affairs of the trust.

12.7 Clause 9 is also relevant. It sets out the rights and obligations of members. Members may not cede, assign or pledge their rights to the trust without the consent of the trustees. Nor may they take credit in relation to the trust property. Members are also obliged to pay a levy if lawfully imposed by the trustees.

12.8 Members are also required to actively participate in the upgrade and developments taking place in the community failing which they will forfeit any benefits accruing from such developments. Members and those from their households who have reached the age of 18 are entitled to attend and speak at general meetings, inspect any minutes or any other records of decisions of any general meeting and trustees meetings, inspect copies of financial statements and records of the trust, inspect the membership register and be candidates for election as trustees.

12.9 Each member is required within a year of admission to name a successor and to disclose that successor to the trustees. If the named successor is not a member of the member's household, the trustees are entitled to object to the person who has been named and to request the member to name a different person.

12.10 Membership may be terminated in terms of clause 10. There are two instances of such termination, the first is death of a member and the second is voluntary resignation, which will result in the forfeiture of benefits accrued as a result of membership.

12.11 When a member dies and has named a successor, the successor is to be admitted if they are from the member's household. A successor who has yet reached the age of 18 will not be allowed, although the trustees have the responsibility to ensure that their interests in the trust property are protected. If no successor is named the trustees may at their discretion admit a person who is from the household of the deceased member.

12.12 Members may transfer their rights upon resignation. For instance, they may sell their access to grazing and arable land or their right to build a residential site. But this too is subject to strict regulation by the trustees. Any prospective buyer of such rights must be introduced to the trustees and the trustees must agree to admit the prospective buyer as a member. If the trustees refuse to accept the nominated buyer, they are obliged to pay the member just and equitable compensation.

- 12.13 Clause 13 deals with the election of trustees. Clause 13.1 states that the management of the affairs of the trust shall be undertaken by the trustees who shall be responsible for implementing the terms of the trust according to its intent and purpose and subject to any directions from members in the form of resolutions taken at general meetings. Clause 13.1.1 states that the election of trustees shall take place every 3 years at an annual general meeting of members. Clause 13.1.2 states that the trustees shall hold office for a 3 year term from date of election and shall be eligible to stand for election for a second term, where after they shall retire.
- 12.14 At any given time there shall not be more than 13 persons serving as trustees.
- 12.15 General meetings may be convened if called upon by the chairperson or deputy chairperson of the board of trustees, or any three trustees or by petition of at least 50 percent of registered members. A quorum of a general meeting is constituted, in terms of clause 17.6 by 70 percent of the members recorded in the membership register of the trust at the time.
- 12.16 Clause 17.7 states that in the event of a meeting having been duly convened but no quorum being present, the meeting shall stand adjourned to another date which shall be not less than 21 days thereafter as may be determined by the board of trustees. At a reconvened general meeting the persons present shall be deemed to constitute a quorum provided that there shall be personally present at least 60 percent of the members recorded in the membership register at the meeting. Provided the meeting is duly quorate, it shall be competent to carry out all the objects of the trust and to exercise all its powers.
- 12.17 Clause 21 states that any member or class of members or any person having a material interest is entitled to apply to court for a appropriate relief in the event of failure on the part of the board of trustees to give proper effect to the principle of equity which is mentioned in clause 5 of the trust deed or to implement the terms of the trust deed in accordance with its intent and purpose.



12.18 Clause 22 deals with disputes. Disputes are to be resolved internally through a specified procedure but if they cannot, they may be escalated to the Master. Yet, another procedure for resolving disputes is an arbitration process to be held on an informal basis to ensure that disputes are resolved expeditiously and subject to the observance of the rules of the principle of natural justice. However, to avoid unnecessary arbitration members are encouraged to resolve disputes through mutual negotiation and agreement.

14. The trust holds a bank account at Capitec Bank. At the time of these proceedings the amount held in the bank account exceeded R500 000.00. The letters of authority were issued to the applicants on 31 May 2006. There was some argument as to whether the trust deed was registered in 2018 or not. But counsel for the applicants accepted that the trust deed was indeed registered in 2006 at the time of the appointment of the applicants as trustees.
15. The implications are clear. The trustees had the obligations imposed upon them under the Trust Property Control Act and the deed of trust with effect from that date.
16. Over time, there were complaints about the administration of the trust. Matters came to a head in September 2018.

***Complaints about election of new trustees***

17. On 2 September 2018 three individuals, James Kweyama, Mbukelwa Mltungwa and Musawenkosi Mkhize brought a letter to the chairperson of the board of trustees, also the second applicant herein, which stated “*we an interim committee for concerned members of Embo Emfeni Community Trust (IT869/2006/PMB) hereby request a meeting to elect new board of trustees for Embo Emfeni Community Trust. Your co-operation with us will be highly appreciated.*”

18. The second applicant, who is the principal deponent to the application, says that he took the letter but did not attend the meeting requested because he was not aware of any "*interim committee*" of Embo Emfeni Community Trust.
19. The full story, however, appears in the answering affidavits. There were concerns as early as July 2018 about the administration of the trust. On 22 July 2018 at the Mkhambathini Municipality Council Chambers there was a meeting convened to discuss the administration of the trust. That meeting was chaired by the 8<sup>th</sup> respondent, James Kweyama who is one of beneficiaries to the trust. It discussed four items, namely the beneficiaries concerns regarding the management of the trust, the lack of communication between the members of the trust and the chairperson of the board of trustees, the concerns that there were no reports or updates by the trust given to the community and allegations that land was utilized without the approval of the trust or its knowledge. It was at this meeting that an interim committee was appointed.
20. In the replying affidavit, the applicants state that they have no knowledge of the meeting of 22 July 2018. Further, they allege that if any such meeting was held, it was not a meeting convened by members or beneficiaries of the trust. They deny that there was ever a discord about the administration of the trust. They allege that true members and beneficiaries of the trust have "*no problems*" with the applicants' administration of the trust.
21. Further, the applicant states that of the 56 people who are said to have attended the meeting of 2 July 2018, only 2 appear as claimants from the beneficiary verification list. These are Mziwenduna Mntungwa and Thabile Ngcongo. As such, the applicants come to the conclusion that the people who elected the interim committee are not claimants or beneficiaries. The applicants also deny that Mntungwa and Ngcongo are genuine beneficiaries since Mntungwa was apparently dispossessed from Mount Desire which was not fully restored and Ngcongo was removed from Eston which was also not restored to the trust. On those bases, it is then alleged that all the 56 people who attended the meeting that elected the interim committee were not beneficiaries.

22. The point made by the respondents, however, is that the meeting of 2 July 2018 was chaired by the 8<sup>th</sup> respondent. This is not answered. And it is common cause that he is a beneficiary. I must therefore accept that at least some of the people who attended the meeting were beneficiaries. But most importantly, the specific items relating to alleged mismanagement of the trust, lack of communication, failure to provide reports, and the utilization of land without the trust's approval contained in paragraph 27 of the founding affidavit have not been answered in the replying affidavit. These must be accepted on these papers as being reflective of the concerns genuinely held by members.
23. The interim committee elected on 22 July 2018 wrote a letter to the Land Claims Commissioner of KwaZulu Natal on 29 August 2018 asking for a list of claimants and beneficiaries of the trust, which was given. Although the respondents have alleged that all the members of the interim committee are beneficiaries, they could not substantiate this. Indeed, during argument counsel for the applicant could show by reference to the verified beneficiary list that the names appearing in paragraphs 32(b) to (g) of the answering affidavit do not appear from the beneficiary list. I must accept this to be the case.
24. It is so that this may well be evidence of the failure to implement the provisions of the deed of trust. It is notable that the names of the principal members listed in paragraph 32 of the founding affidavit as beneficiaries are all deceased. The argument of the respondents is that the list should have been updated and their names included so that the list is accurate and properly reflective of genuine beneficiaries. Whether this should have been the case or not is not easy to decide on these papers. Nor is it necessary to take a view on it at this stage of interim relief.
25. On 9 September 2018 there was another meeting at Dukes Community Hall. At this meeting it was reported that the interim committee had resolved to write a letter to the chairperson of the trust requesting him to convene a meeting for the election of a new board of trustees. But as we have seen, this

request came to nought as the applicants refused to recognise the interim committee.

26. So the interim committee carried on with its activities. On 14 October 2018 it held another meeting at Dukes Community Hall to elect a new board of trustees and to request the applicants to hand over the assets of the trust to the new trustees. The applicants were not present. In the replying affidavit the applicants allege that the “community” under the interim committee could not validly hold the meeting since several persons who attended are not members or beneficiaries of the trust. Only about 31 people listed in annexure E3, which is the attendance register of that meeting form part and parcel of the beneficiaries. The remainder are persons belonging to different community trusts such as Nkumbuleni Community Trust, Umsunduzi Community Trust and Masibuyelemakhaya Trust. The applicants deny that these people were part and parcel of the Embo Emfeni community trust.
27. Nevertheless, the 14 October 2018 meeting proceeded to elect a new board of trustees. Members of the interim committee were elected as the new trustees.
28. Meanwhile, it appears that another group of persons alleging to be beneficiaries – a third splinter group – wrote directly to the Master. Their letter, which is dated 23 October 2018, is headed “*Letter of Grievances*”. It is written in what purports to be a letterhead of the first applicant, the Embo Emfeni Community Trust, (although in argument counsel for the first applicant was emphatic in his clients’ denial of any association with this group). The letter is signed by 5 persons: S Msomi, M Meyiwa, F Ngcobo, S Mkhize and M B Mkhize. They complained about the election held on 14 October 2018, at Dukes Community Hall. They stated that the procedure followed was flawed and unfair. They complained that freedom of expression, equal opportunity and fairness was suppressed.
29. It is necessary to quote the letter *in extenso* as it shines a spotlight into the extent of the irregularities at the meeting:

*“We believe that the program of the day was sabotaged and framed to suit and present a particular system at some point. The chairperson of*

*the day was Mr Andile Ngcobo coming from the interim committee who shared the podium with Mr Mdu Gumede and Mr Joe Nyide. Both Mr Gumede and Mr Nyide were announced as neutral members who would assist on the meeting as chairpersons of the electing process. They also explained that this was due to their experience.*

*On the process of voting Mr Mdu Gumede took the stand with Mr Joe Nyide on his left side as partners. Mr Mdu Gumede is a permanent member of African National Congress (ANC) in Hammersdale (Mpumalanga Townships) in his speech, he told the quorum that only 9 (nine) members of the board of trustees will be elected instead of 13 (thirteen), the remaining 4 (four) will be co-opted by the elected committee. We believe that this was unfair because members of the trust should decide and elect, not Mr Mdu Gumede to instruct.*

*Mr Mdu Gumede failed to drive the process fairly as he was taking hands of voters on the people who were in front of him, other sides like right hand side, backside and far left were ignore till members complained, but only it was he took on the right side.*

*In conclusion, there is a tribal conflict between Mr Thamsanqa Mkhize (chief) and Mr Gwala (chief of Njobokazi Tribe) who is related to Mr Bongani Kwana (councilor). Also, he is involved in taking sides of his relatives. We fear, this could perpetrate the situation between the people and cause more problems in the trust. Only 2 (two) elected members have criminal records of which they never declared to the members except the rumours we heard from Mr Andile Ngcobo. Also Nelie Nyide, she is a prominent member of the African National Congress (ANC) at Mlaba Village (Hammersdale) and she is related to Mr Joe Nyide.*

*The statistics for voters were extremely above the number of beneficiaries within the database.*

*We therefore call for the rerun of the elections.”*

30. The Master did not resolve the grievance as such. He referred the matter back to the interim committee. The interim committee announced its intention to hold another meeting via a circular signed by Andile Ngcobo, Nelisiwe Nyide and Joe Mkhize. The circular emphasised that the persons who were present at the meeting of 14 October 2018 were specially invited to attend.
31. The meeting of 11 November 2018 was attended by 708 people, as noted from the attendance register. The unanimous view at that meeting was the reinstatement of those who were elected on 14 October 2018. According to the applicants only 40 of the 708 people present at this meeting were legitimate beneficiaries.
32. Counsel for the respondents accepted that there were persons who were present at both meetings who did not appear on the beneficiary list. His explanation was that this could be because the beneficiary list should have been updated but was not. I do not believe this to be the case. It seems that the numbers are so substantially high that it is not possible that a discrepancy occurred as a result of the failure by the applicants to keep the beneficiary list up to date. It seems that the correct position is as alleged by the applicants that the meeting was taken over by persons that came from different communities.
33. On 23 November 2018, another grievance was raised by the same group, also using the letterhead of the first applicant. It complained about procedural irregularities in the meeting of 11 November 2018. Replies were given to this letter by the newly elected trustees.
34. Finally, the Master addressed another letter on 19 February 2019 raising further queries, which were responded to by the respondents as the new trustees on 25 February 2019. It was on this bases that the Master then issued fresh letters of authority to the respondents, on 3 May 2019 thus, marking the end of the trusteeship of the applicants.

### *Complaints about abuse of office*

35. Quite apart from the dispute for the control of the trust there were further events taking place, underscoring the depth of the mistrust over the control of the trust.
36. The chairperson of the trust was accused of selling land belonging to the trust. He disputes the allegation as false. According to him the land that was allegedly sold was his homestead before the dispossession. It was occupied by his late father and is now situated in the area known as Remainder of Grovehurst Farm. After the farm was transferred to the community, a resolution was taken that the farm should be used as a residential area because nothing had been planted in that farm since 1953. Despite this, in 2018 and in May 2019 the second respondent accused the second applicant on Ukhozi FM of selling trust land, which accusation was denied.
37. After the election, the respondents are alleged to have threatened persons who live on the property which the second applicant claimed belonged to his family. It is alleged that threats to demolish houses were made by the recently elected trustees.
38. Not only did they threaten those people in his particular homestead, it is alleged that they went on a campaign of intimidation and threats telling everyone in the restored property that they were now in control of the trust and that the initial trustees were out of office. It is alleged that they threatened to stop paying salaries to those employed by the trust if they did not show allegiance to the new trustees.
39. The founding affidavit alleges that the respondents demanded keys to the houses that are used by the second applicant, which he refused to do after which they reported the matter to the local police.
40. Finally, the second applicant claims that the 7<sup>th</sup> respondent called him on his cell phone and threatened to kill him. That incident was reported to the police, and it is not clear whether any case opened or not.
41. The respondents persist with the allegation that the second applicant has been selling land in exchange for payment of R15 000.00 per stand. They have

annexed a bank statement of one Buzani Charles Mnikathi which shows a payment of R15 000.00 to the personal bank account of the second applicant. Mnikathi filed an affidavit in terms of which he stated the following:

40.1 In about 2016 he met the second applicant to discuss buying of land which was under the control of the trust. It was explained to him that the process was that the price for a stand is R15 000.00. Once payment is made he would be contacted to measure the site. A further fee of R1 000.00 would be paid for the measurement of the portion of land. Once the land was measured he would have the full rights over the measured portion of the property. A permission to occupy would be issued in his favour.

40.2 Indeed, banking details of the second applicant were provided and the amount of R15 000.00 was paid on 4 July 2016. A further payment was made for the measurement of the site in the amount of R1 000.00.

40.3 The replying affidavit did not adequately deal with this allegation, particularly since it is also supported by records indicating the payment.

42. The respondents have now also taken over the bank details. They are in charge of the bank account and as clearly appears.
43. It is now convenient to turn to the requirements for interim relief.

## ANALYSIS

44. The requirements for interim relief are trite. First, a *prima facie* right even though open to some doubt, must be established. Second, irreparable harm must exist. Third, the scales of the balance of convenience must tip in favour of the applicant. Finally, there should be no alternative relief available. (See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para 41)



45. Since this matter turns on the conduct of trustees, it is proper to restate some basic principles.

*Trustee duties*

46. A trust is an accumulation of assets and liabilities. When the trustees act, they must do so jointly.<sup>1</sup> When they are sued they must be sued jointly although where a deed of trust assigns one of the trustees the power to institute proceedings on behalf of a trust, the trust is bound by the proceedings so instituted. But it must be clear that it is the trustees that have acted and not an individual doing so on a frolic of their own.
47. Trustees stand in a fiduciary relationship to the beneficiaries. They must act honestly and in good faith. They must act in pursuit of the interests of the beneficiaries as a whole. The fiduciary duty means trustees must administer the property of the trust properly<sup>2</sup> and they must promote the interests of the beneficiaries.<sup>3</sup>
48. In *Sackville West v Nourse & Another* 1925 AD 516, it was held:

“The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the *bonus et diligens paterfamilias*”

49. It was argued that the applicants have no standing to act insofar as they failed to produce a power of attorney, pursuant to rule 7 of the rules of this Court and owing to the fact that they have been replaced by the Master. I do not think either objection has merit.
50. Firstly, a power of attorney, imperfect as it is, has been produced and is signed by the applicants. Although not all of them have signed it, they have

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<sup>1</sup> *Land and Agriculture Bank of South Africa v Parker and others* 2005 (2) SA 77 (SCA).

<sup>2</sup> *Hofer v Kevitt* 1996 2 SA 402 (C) 407F; *Lorentz v TEK Corporation Provident Fund* 1998 1 SA 192 (W) 221A-B; *Welch's Estate v Commissioner, South African Revenue Service* 2005 4 SA 173 (SCA) 195J-196A

<sup>3</sup> *Jowell v Bamwell-Jones* 1998 1 SA 836 (W) 891B 894E; *Bafokeng Tribe v Impala Platinum Ltd* 1999 3 SA 517 (BHC) 545J-546A; *Nel v Metequity Ltd* 2007 3 SA 34 (SCA) 38G

confirmed the institution of the proceedings. This suffices to show that the proceedings are indeed instituted for and on behalf of the first applicant. The second objection, namely the replacement of the trustees by the Master is equally unconvincing. Part B of the intended review proceedings will challenge the very decision of the Master to replace the applicants. It will be absurd to non-suit them because of the very decision that is subject to challenge. In my view the applicants remain entitled to challenge the decision of the Master on any basis permissible in law.

51. But there is a fundamental problem with the application. I pointed out earlier that the underlying issue raised by the applicants is that they believe that they are entitled to continue acting as trustees. They seek an order, whose effect is to prevent the respondents from acting as trustees and to transfer the power to control the affairs of the trust back to themselves.
52. I should start with examining whether or not the applicants are entitled to institute proceedings at all. In my view, the applicants hold two capacities. The first is the capacity of trustees and the second is that of member or beneficiary. The mere election of a person as a trustee does not take away their status of member or beneficiary.
53. The trust deed contains important provisions relating to the rights of members to sue. Clause 21 of the deed of trust provides the following

*“Notwithstanding anything to the contrary herein contained or implied it is the right of a member, or class of members, or any other person having a material interest therein, to apply to court for appropriate relief in the event of any refusal or failure on the part of the board of trustees to give proper effect to the principle of equity referred to in clause 5 above, or to implement the terms of this trust deed in accordance with its intent and purpose.”*

54. It is apparent then, that in terms of this clause a member or any other person having a material interest is entitled to approach a court where there is a complaint pertaining to the proper administration of the affairs of the trust. Here, the applicants are concerned that the respondents are improperly and

unlawfully holding themselves out to be the trustees and acting in ways that are not in accordance with the provisions of the trust deed. For purposes of deciding whether or not the applicants have standing to institute the proceedings, I need not decide the merits of the case as such. It is enough to note that the applicants make grave allegations of illegality.

55. Moreover section 23 of the Trust Property Control Act 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.”.*

56. It seems therefore, that the standing of the applicants need not be that of trustees. They qualify first as members or beneficiaries and second as *“any person”*. Their grievance is that the appointment of the respondents as trustees is unlawful. They are accordingly entitled to bring that application before court.

### ***Prima facie right***

57. I must therefore consider whether or not the respondents election and appointment is lawful.

58. There are two clauses of relevance from the deed of trust. The first is clause 16 which regulates Annual General Meetings. Clause 16.1 refers to the first annexure general meeting of *“members”*, which must be held within 12 months of the date of the registration of the trust and subsequent annual general meetings which must be held within 3 months of the end of each financial year which shall be the last day of February each year.

59. The opening line to clause 16.1 limits the attendance of persons at the annual general meeting to *“members”*. The second category of meetings is mentioned at clause 17. Clause 17.1 speaks of general meetings of members

which may be convened at any time upon the requisition of the Chairperson or Deputy Chairperson of the board of trustees, any 3 trustees or any petition by 50 percent of registered members. The term "*members*" is, in turn, defined to mean "*the beneficiaries of the trust, being such persons, and categories of persons, designated as such in terms of clause 7.*".

60. For its part, clause 7 provides that the first members of the trust "*are those persons mentioned in the membership register annexed herein above and marked annexure A and for whose benefit the State has undertaken to purchase the land.*". As noted above, this number may go up or down depending on factors such as the death of persons and the admission of further members.
61. From these provisions, it is quite clear that a meeting of the trust can only be attended by members.
62. I accept, of course, the general proposition that the mere attendance of non-members may not always invalidate a meeting. It is a question of degree. Where the overwhelming majority of persons present are not members, it seems to me that the meeting can hardly qualify to be called a meeting of the members of the Embo Emfeni Community Trust. So, if the proportion of the non-members is so high compared to the members as to impact on the essential character of the meeting, that meeting is irregular in terms of the trust deed.
63. In this particular case, there are two meetings at issue. The first is the meeting of 14 October 2018. What we know about that meeting is that it was attended by more than 1 000 people. Only 31 persons appear from the members register. Counsel for the respondents suggested to me in oral argument that the fault lies with the applicants for failing to include names of persons who should have been members according to the deed of trust.
64. I do not accept this. Given the huge disparity between the legitimate members and the rest, it is extremely difficult to put the blame squarely on the applicants.

65. The second meeting suffers from the same defect. It was held on 11 November 2018. 708 people turned up. On the count given before this court, only 30 are genuine members. The same explanation as in regard to the meeting of 14 October 2018 was given. But I believe for the same reasons I should not accept this explanation. There was also no explanation given for the discrepancy in the numbers.
66. In the circumstances I should find that the meetings were heavily infiltrated by non-members so as to distort the essential character of these meetings. There is accordingly a strong basis for the finding that the meetings were improperly held and in breach of the provisions of the deed of trust.
67. There are further complaints in relation to the conduct of the persons who chaired these meetings. I do not think it is necessary, at this stage, to delve into that issue.
68. In my view there is a strong *prima facie* right established by the applicants. They have shown that the election of the respondents was not in accordance with the trust deed. They are accordingly not entitled to become trustees. As such, their letters of authority should not have been issued. Based on this, it is my view that they should not be allowed to continue acting as trustees.
69. The right has been infringed by the election and recognition of the respondents as trustees. I do not think there can be a genuine argument concerning irreparable harm. It seems manifest that there will be irreparable harm if I do not intervene. The harm, however, will not be suffered by the applicants, but the beneficiaries who will have to live with illegally elected trustees. This must not be countenanced.

***Restoration of status quo ante?***

70. The remaining question however, is whether the consequence of this finding is that I should restore the *status quo ante*. I do not think that I should do so. I have already pointed out that the deed of trust allows the applicants to remain in office for a period no more than 3 years. The applicants have been in office since 2006.

71. In those periods, they have ever held an annual general meeting where they presented annual financial statements an annual report and availed themselves for an election. In September 2018 they were challenged to convene an AGM, which they ignored. Some members took the matter into their own hands and attempted to force a meeting, which subsequently occurred. It seems to me that had it not been for the groundswell of opposition to the applicants, they would have been content to remain in office, despite their remaining in office being in conflict with the stipulations in the deed of trust. This situation simply cannot be tolerated any longer.
72. When I pointed out to counsel for the applicants the difficulty of restoring his clients to the status of trustees, his reply was that they still hold letters of authority which were never withdrawn and in any event they were never replaced in a lawfully convened meeting. Well, the letters of authority were issued on the strength of their election as trustees by the members. That election was not in perpetuity. It was constrained by the terms of the deed of trust. The deed of trust itself regulated the period. The deed of trust stands in the same position as a contract amongst the members. It conferred powers to the trustees. The trustees could not exercise powers beyond those conferred upon them in the deed of trust. Nor could they remain in office beyond that which was given to them by the members through the deed of trust.
73. The members carefully regulated the term of office and placed the maximum at 3 years. Once the 3 year period lapses, there was no need for any action to be taken. The fact is that the term of office lapsed by operation of law. (Compare for instance: *Enforce Security Group v Fikile and Others* (2017) 38 ILJ 1041 (LAC) at para 18.) This was the natural consequence of the terms of the deed of trust.
74. It would be quite wrong to elevate the decision of the Master to something other than a recognition of the decision by members reduced into a contract. If the members decided that other people should be elected, it would not be up to the Master to dictate to the members who should be elected, provided the meeting was held in accordance with the deed of trust and the persons so appointed are not disqualified under the Trust Property Control Act.

75. It is therefore quite clear that the applicants are not entitled to remain in office. If I reinstated them to their position, I would be perpetuating a state of illegality and which in any event is in conflict with the terms of the deed of trust.

#### APPROPRIATE RELIEF

76. The consequence of my finding is that neither the applicants nor the respondents are entitled to act as trustees. But the interest of the beneficiaries needs to be protected. But how is this to be done? The ethos of the deed of trust are that the leadership of the community must be decided democratically. But neither the applicants nor the respondents have been decided by members through the exercise of democratic practices. Their internal conflict has so paralyzed the trust that external intervention is warranted.
77. There is a report filed by the Master. It explains the crisis faced by community trusts established in order to assist communities managed properties restored under the Restitution of Land Rights. As its point of departure, the report says that the Master has been inundated with a series of challenges pertaining to this trust.
78. Specifically, the Master explains the nature of the problems associated with community trusts.
1. The trusts are often mismanaged by the trustees which then results in disputes amongst the trustees or sometimes between the trustees and beneficiaries. These disputes are escalated to the Master to resolve.
  2. Most of the time, the Master states, when the trustees fight each other, the fights are often *“motivated by greed, lack of knowledge or deep understanding of their fiduciary duties, jostling for personal advantages that come with being a trustee.”*
  3. When its disputes between trustees and beneficiaries it is usually because of mismanagement of the trust, its access or its money or failure to account properly in respect of the management.

4. The issues may sometimes be complex, petty, vexatious, vague and/or serious. But, as the Master points out "*they certainly clog the effective administration of trusts, at the Master's office.*". The Master then describes this administration of community trusts that have been established to hold land as a "*nightmare*" that has "*spilled over into the effective administration of cases*" in the Land Claims Court.
5. Although it is the case that the Master has the powers to deal with trusts in general, the unique challenges associated with community trusts holding restituted land would call for extra and more effective resources. In this instance, the office of the Master has established a separate section dealing specifically with community trusts so that these can receive special attention so they do not clog the entire system. In this regard it is pointed out that there is a panel of individuals with specific knowledge and experience in the administration of trusts which includes attorneys, auditors and other independent entities.
79. Bearing in mind my finding, I am inclined to partially follow the proposals of the Master.
80. The facts of this case provide an illustration into one of the areas which show the crisis of land reform. The dream of the return of land has turned into what the Master has called a "*nightmare*". This is largely due to greed, personal ambition, lack of adequate knowledge and experience and no proper support systems.
81. In my view, it seems that the correct approach right now is to find a just and equitable remedy without damaging the long term democratic nature of the governance of the trust.
82. I propose therefore to partially adopt the suggestions made by the Master that there should be a team of independent professionals to manage the affairs of the trust for the time being.

## **ORDER**



83. The following order is therefore issued:

1. The applicants are not entitled to remain in office as trustees.
2. The respondents are interdicted from acting as trustees of the first applicant.
3. The Master of the High Court, Pietermaritzburg is directed to appoint 2 persons, one of whom must be legally qualified and another with appropriate financial and accounting expertise to assume the control and management of the affairs of the Embo Emfeni Community Trust, with immediate effect.
4. The applicants and the respondents are directed to surrender any assets of the trust to the persons so appointed by the Master of the High Court, Pietermaritzburg within the time period decided by the Master.
5. The persons so appointed by the Master shall remain in control of the affairs and administration of the Embo Emfeni Community Trust for a maximum period of 60 days.
6. During the period mentioned in paragraph 5 above, the Master is directed to ensure that a lawfully convened annual general meeting attended by members as defined in the deed of trust takes place and trustees are elected in accordance with the deed of trust.
7. The applicant is directed to indicate to this court whether it will proceed with Part B of this application, within 7 days of this order.
8. The determination of costs of part A is postponed pending the indication of the applicant whether or not they will pursue part B.



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**TEMBEKA NGCUKAITOBI**  
**JUDGE OF LAND CLAIMS COURT**

**Appearances:**

For the Applicants: Adv. C M Nqala: *Instructed by M Magigaba Inc.*

For 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents: Adv. K. Gounden: *Instructed by Venns Attorneys*

For the 10<sup>th</sup> Respondent: Adv. L Peter: *Instructed by Lowndes Dlamini Attorneys*