IN THE LAND COURT OF SOUTH AFRICA

HELD AT RANDBURG

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

16 January 2025

SIGNATURE DATE:

CASE NO: LCC 89/2019

In the matter between:

THE N'WANDLAMHARI COMMUNAL PROPERTY ASSOCIATION	First Plaintiff / Applicant
MHLANGANISWENI COMMUNITY	Second Plaintiff / Applicant
and	
MILLINGTON ZAMANI MATHEBULA	First Defendant
RICHARD MANGALISO NGOMANE	Second Defendant
SURPRISE WELCOME NTIMANE	Third Defendant
KAIZER MESHACK KHUMALO	Fourth Defendant
SIPHO ORANCE MKHWANAZI	Fifth Defendant
FRANK SOLLY BHUNGELA	Sixth Defendant
RULANI HARRIET MAWELA	Seventh Defendant
THUYANI SOUL DLAMINI	Eighth Defendant
MAVHURAKA COMMUNITY	Ninth Defendant

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Tenth Defendant
DIRECTOR GENERAL: DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Eleventh Defendant
THE CHIEF LAND CLAIMS COMMISSIONER: COMMISSION ON RESTITUTION OF LAND RIGHTS	Twelfth Defendant
REGIONAL LAND CLAIMS COMMISSIONER: MPUMULANGA PROVINCE	Thirteenth Defendant
THE N'WANDLAMHARI COMMUNAL PROPERTY ASSOCIATION CONCERNED BENEFICIARIES	Fourteenth Defendant

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JUDGMENT

APPLICATION FOR LEAVE TO APPEAL

COWEN DJP,

Introduction

1. In the main action in the above matter, the N'Wandlamhari Community Property Association (the first plaintiff or the NCPA) and the Mhlanganisweni Community (the second plaintiff) seek declaratory relief concerning who is entitled to be a member of the NCPA and to share in the benefits of land it owns referred to as the MalaMala land. The MalaMala land is the property on which the world renowned eco-tourism MalaMala Game Reserve is situated, and which was purchased by the State for some R1.1 billion to be restored to land claimants. A dispute has arisen, and which has given rise to the main application, because it is not only the members of the Mhlanganisweni Community who are entitled to receive benefits under the NCPA Constitution but also members of the Mavhuraka Community (the

ninth defendant, of which first to eighth defendants are members), who the plaintiffs say did not lodge claims in respect of the MalaMala land and are not entitled to benefit from the settlement. The main action is defended on multiple grounds but a key thread of the defence is that the NCPA Constitution was drafted in this way with the agreement of the second plaintiff.

2. The main action had barely got out of the starting blocks when the fourteenth defendant applied, successfully, to be admitted to the proceedings, and raised various preliminary points, which were then decided separately. The preliminary points were ventilated in separated trial proceedings held from 12 to 15 June 2023. The preliminary points are dealt with in a judgment of this Court delivered on 10 August 2023 (the August 2023 judgment). The plaintiffs now seek leave to appeal against the order granted in paragraph 59.2 of the August 2023 judgment. In that order, this Court declared that the first plaintiff has not duly resolved to authorise the main action on behalf of the NCPA.

3. The application for leave to appeal was delivered on 4 September 2023. The Court set down the application twice, together with another related application, but on both occasions, on one days' notice from the parties, the parties sought to postpone the applications as they sought to settle the entire dispute between the parties. The Court postponed the applications, but on the second occasion, expressed concern at the belated notice given to the Court. As matters transpired, settlement negotiations failed. The leave to appeal was set down on 5 September 2024. The related parallel proceedings, yet to be dealt with, concern ongoing efforts on the part of the plaintiffs to interdict an AGM of the NCPA. On 5 September 2024, Ms Barnes SC (with her Mr Musandiwa) appeared for the

plaintiffs, as applicants for leave to appeal. Mr Mbhalati appeared for the first to ninth respondents. The matter was, however, ultimately postponed until 12 November 2024, when argument was finalised.[1] There was no appearance for any other party. Notably, the application was not opposed by the fourteenth defendant. However, this is in circumstances where the fourteenth defendant is no longer represented by its erstwhile legal representatives,[2] has no attorneys currently on record, and it subsequently transpired that the fourteenth defendant's witness and apparent leader, Mr Dion Mnisi, appears to be under the impression that this aspect has been settled and that his current attorneys are on record.[3] On enquiry, the plaintiffs however advised that settlement discussions had failed as did the attorneys for the first to ninth defendants, GW Mashele Attorneys. Before

[1] The primary reason for doing so was to accommodate the plaintiffs' objection that the first to ninth defendants had not given them notice that they would be opposing the application, nor delivered heads of argument. In their application for leave to appeal, the plaintiffs did not indicate that any notice should be given and no formal directive for the delivery of heads of argument was issued by the Court. However, the plaintiffs, understandably, understood that heads of argument ought to have been delivered in view of the content of a letter sent from my secretary to the parties following a query (regrettably not settled by myself). An apparent objection from the plaintiffs that the first to ninth defendants should not be permitted to oppose in circumstances as they did not actively participate in the hearing could not be entertained as the first to ninth defendants did participate by making submissions at the hearing, while aligning themselves with the position of the fourteenth defendants. Their stance was in some measure pursued due to costs limitations as – unlike the second plaintiff whose litigation is funded through the NCPA – the ninth defendant is unable to access any funds from the NCPA due to its exclusion, this being at the heart of the dispute between the parties.

[2] The notice of withdrawal was delivered on 22 May 2024 stating that the fourteenth defendant may be served personally at Stand No 949, Mkhuhlu Trust, Cell number 071 387 5162 and mnisidion5@gmail.com.

[3] In this regard, two e-mails bear reference. First an e-mail from Mr Mnisi dated 24 October 2024 which reads: 'I further confirm that Mculu Inc are the lawyers on record for the [fourteenth defendant]. I further state the community has taken a resolution to instruct our lawyers not to continue with the intervention matter since we believe we have dealt with the three points *in limine* and have stated our case in court that took place on the 12th to 15th June 2023. Since the proposal by the plaintiffs and respondents 1 to 8 that we as the 14th respondents must excuse ourselves in court in order for the court to expedite the main action, we have granted the wish and the court must continue with the main action because the community of Nwandlamharhi has suffered a huge loss because of the two parties that have been fighting in different courts without any mandate or resolution from the community they purport to be representing. …' Secondly an email dated 27 October 2024 states further (without correction): 'The has it on record that since the application for urgent application to interdict the December 12 2023 elective AGM of the NCPA by the applicant, the two parties have been negotiating with us to leave the mater to deal with Part B of the application and the applicant to stop the Leave to Appeal. Hence we have taken the resolution to allow the Court to expedite the main action case.'

proceeding with final argument in the application for leave to appeal, this Court accordingly satisfied itself that fourteenth defendant and their current lawyers – Mculu Inc (who, contrary to the apparent belief of Mr Mnisi, are not on record) were aware that the application is proceeding. A representative from Mculu Inc attended the virtual argument on 12 November 2024 confirming that they are not on record and were merely observing the proceedings.

4. Returning to the issue that is the subject of the application for leave to appeal, the NCPA contended that they authorised the litigation at a meeting of members convened on 9 March 2019 (the 9 March 2019 resolution). They tendered in evidence a document recording that decision. However, the Court found that that meeting of members was not properly constituted in that it excluded members of the Mavhuraka Community.

5. The plaintiffs apply for leave to appeal on two grounds. The first is that the Court is said to have failed to afford the plaintiffs *audi alteram partem* before arriving at its decision (the *audi* point). The second is that the Court's interpretation of the NCPA Constitution, which underpinned the decision, was erroneous (the merits point).

6. The plaintiffs seek leave to appeal in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, which provides, in relevant part, that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success. In *Ramakatsa,* the SCA interpreted this as follows: [4]

[4] *Ramakatsa and others v African National Congress and another* [2021] ZASCA 31 at para 10;

> 'The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.'

7. In arriving at that conclusion, the SCA relied on its earlier decisions in *Smith*[5] and *Mkitha*.[6] In the latter case, the SCA held that:

> 'An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

The *audi* point

8. The importance of a fair hearing is elementary to the rule of law and the constitutionally protected right of access to Court.[7] A party must be afforded an opportunity fairly and reasonably to state their case. In view of the importance of the issue, I deal with it in some detail below.

9. The *audi* point is advanced in the application for leave to appeal on the basis that the Court ascribed an interpretation to the NCPA Constitution on issues in respect of which no evidence was led by the parties and no submissions were made by the

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[5] *Smith v S* [2011] ZASCA 15; 2012(1) SACR 567 (SCA) para 7.
[6] *MEC Health, Eastern Cape v Mkhita and another* [2016] ZASCA 176 at para 17
[7] Section 34 of the Constitution, *De Beer NO v North-Central Council and South-Central Local Council and others (Umhlatuzana Civic Association Intervening*) [2001] ZACC 9; 2002(1) SA 429 (CC); 2001(11 BCLR 1109 (CC) at para 11.

parties in relation thereto; and the court did not provide the plaintiffs (or another party) with an opportunity to make submissions on the interpretive issues which the Court apparently considered relevant, indeed decisive, and which ultimately underpinned the impugned order.

10. While not canvassed in the application for leave to appeal itself, the plaintiffs' heads of argument seek partly to frame the grounds to include a concern about whether the issue decided was duly pleaded. It is of course elementary to fairness, that issues be decided on the pleadings. I am mindful that, at least on a fair reading of the application for leave to appeal, this point is not duly foreshadowed, and as such, it is impermissibly and unfairly raised by the plaintiffs. Nonetheless, to avoid doubt and out of caution, I satisfied myself again, as I did at the time, that the issue framed by the Court and decided, was properly foreshadowed on the pleadings.

11. In this case, and by agreement between the parties, the pleadings were constituted by the affidavits in the fourteenth defendant's intervention application. It appears from the judgment that the Court understood the issue as being whether it was competent for the NCPA to convene a special meeting for purposes of authorising the litigation comprised only of the Mhlanganisweni Community households, being the only verified members at that time. Put differently, the issue raised was how a special meeting of the NCPA must be constituted for a valid decision of this sort to be taken.[8] In my view, that is the issue raised on the pleadings. Indeed, that issue lies at the very heart of the dispute with the fourteenth defendant – namely that the litigation is being pursued by a grouping within the second plaintiff to the exclusion not only of the broader membership of the second plaintiff but the Mavhuraka

[8] See para 34 and 36 of the judgment.

Community members. It is squarely within context of that dispute that the fourteenth defendant raised the issue that there is no community resolution by members of the NCPA authorising the institution of the action on behalf of the CPA. In their answering affidavit, the plaintiffs pertinently plead that due to the fact that the Mavhuraka Community are not verified (in their contention) 'as is required by the NCPA Constitution, they are therefore, at this stage and for this reason alone, not entitled to participate in the NCPA.' In pleading specifically to the fourteenth defendant's complaint on the absence of an authorising resolution, the plaintiffs merely refer back to the general content of their affidavit, a key element of which is that only the Mhlanganisweni Community may participate in the NCPA.[9] The replying affidavit similarly deals with the issue, if briefly, on the aforementioned basis.[10]

12. The issue dealt with by the Court was, moreover canvassed in evidence,[11] and it was ultimately uncontentious that only the verified members of the Mhlanganisweni Community attended the 9 March 2020 meeting and, on the plaintiffs' case, authorised litigation to separate the two communities on behalf of the NCPA. The plaintiffs now say that they would have wished to adduce the member register which shows that only verified members of the Mhlanganisweni Community were on the membership register of the NCPA at the relevant time. In my view, there was not only ample opportunity for the plaintiffs to adduce that evidence should they have wished to, but that fact is in any event uncontroversial. It is implicitly accepted in the judgment, and has been so understood throughout the proceedings

[9] See paragraph 92 of the answering affidavit. The plea is not in the terms submitted by the plaintiffs in their submissions at para 11.
[10] See paragraph 7.
[11] The summation of the evidence in the plaintiffs' heads is not complete.

to date. Indeed, therein lies a core difficulty underpinning the fierce and protracted litigation between the parties in both this Court and the High Court. Unsurprisingly, while not abandoned, the plaintiffs' counsel did not press the evidential point at the final hearing of the matter.

13. A further leg of the *audi* complaint is whether the plaintiffs were afforded an adequate opportunity to make submissions on the point. In this regard, it can be accepted that the plaintiffs' legal team, and the plaintiffs (including the first plaintiff as currently constituted) have always treated it as perfunctorily self-evident that only the verified members of the Mhlanganisweni Community can be regarded as members of the NCPA under the Constitution at this stage and entitled to so participate. That has been their stance throughout, and as mentioned, is a central and key element of the deep conflict.

14. The plaintiffs sought to submit that none of the parties addressed submissions on the issue dealt with by the Court. But that is not correct. In arguing the matter, the fourteenth defendant dealt squarely in its heads of argument with the requirements of the NCPA Constitution, including its membership requirements.[12] The fourteenth defendant proceeded squarely to argue that the meeting at which the litigation was ostensibly authorised was not properly constituted as it was only attended by the Mhlanganisweni Community.[13] Reference is further made to the Mr Mthombeni's cross examination on the issue.[14] The argument is then developed further, again squarely, on the basis that the exclusion of the Mavhuraka

[12] See paragraph 11.
[13] See paragraph 37.2.
[14] See paragraph 37.3.

Community members from the authorising meeting vitiated the decision.[15] The points were persisted with in oral argument, on what was the plaintiffs' own evidence that the litigation was authorised only by the Mhlanganisweni Community members, they being the only recognised members. There can thus be no shadow of a doubt that the fourteenth defendant and its representatives understood the issue as the Court did and argued it on that basis.

15. In their written heads of argument, the plaintiffs dealt simply with the issue by relying on the 9 March 2019 resolution.[16] In a single sentence, they submit further: 'Members of the NCPA are of course, for the reasons set out above, members of the Mhlanganisweni Community only.'[17] The reasons set out above are constituted by a section in the heads dealing with the material facts, which seeks to conclude that while the NCPA Constitution 'contemplates that members of the Mhlanganisweni Community and the Mavhuraka Community will be members of the NCPA, in fact the only members of the NCPA (from 2013 to present) are members of the Mhlanganisweni Community.'[18] In oral argument, the plaintiffs focused their argument on seeking to persuade the Court to reject Mr Mnisi's evidence as false. In dealing with the 9 March 2019 resolution, the plaintiffs again emphasised that the NCPA took the decision as constituted, in other words, by the Mhlanganisweni Community members, being the only members. In short, the argument was that only the Mhlanganisweni Community members are members of the NCPA and accordingly the resolution was a resolution of the NCPA. The

[15] See paragraph 37 to 51.
[16] See paragraph 39 to 41.
[17] See paragraph 42.
[18] See paragraphs 21.5 to 21.10 of the heads of argument.

Mavhuraka Community members, they contended, only have a contingent right to become members.

16. The first to ninth defendants did not deliver written submissions, but in brief oral argument, their counsel (then Mr Springveldt) fully aligned his client with what was said on behalf of the fourteenth defendant and sought to add a further complaint, not dealt with in the judgment, that the resolution itself did not on its own terms authorise the litigation pursued.

17. The Minister's counsel, Mr Ogunrumbi, made oral submissions but did not deliver written heads of argument. The submissions were framed as questions for the Court to consider in arriving at a decision. The questions focused on aspects of the NCPA Constitution concerning, for example, membership, the distinction between a verified or non-verified member, and entitlement to participate in decision-making. These questions clearly foreshadowed the type of interpretive exercise that the Court embarked upon and on their own demonstrated what was front of mind for at least the Minister and the Department during the hearing. The plaintiffs' junior counsel, who at that point was in attendance without his senior, objected to the submissions on the basis that no heads of argument had been delivered. While the Court shared a concern with the approach, in the interests of ensuring issues were fully ventilated, the Court requested Mr Ogunrumbi and Ms Phasha to reduce their submissions to writing after the hearing and then afforded the plaintiffs (including their senior counsel) and other parties, an opportunity to respond. Surprisingly, when the plaintiff delivered its submissions in response, which totalled 22 pages, the bulk of the submissions were not focused on the

interpretive questions raised.[19] Inasmuch as they were, they did not take the plaintiffs' submissions further.

18. Against this background, the plaintiffs had a fair and reasonable opportunity to advance their case and make the submissions that they wished to on the issues raised on the pleadings and decided by the Court. Furthermore, having regard to the argument on the point on the merits, the same stance is adopted as was adopted at the hearing, namely that it is self-evident that the Mavhuraka cannot participate as members at this stage. While now partially developed, the plaintiffs' arguments remain limited.

19. In this case, the *audi* complaint is made against the backdrop that the plaintiffs were represented at the hearing by senior and junior counsel, their litigation costs are funded, the parties to the dispute were all afforded an opportunity to lead whatever evidence they deemed relevant, to make written and oral submissions, and, an opportunity to make further submissions was afforded after the hearing as indicated above. Contrary to what Ms Barnes submitted during the hearing, it is clear that the other parties were aware that this issue was under consideration and advanced their cases on that basis.

20. I am accordingly unpersuaded that the *audi* point has any prospects of success. In any event, because I grant leave to appeal on the merits of the decision, the plaintiffs will have another opportunity to seek to develop their arguments before the SCA.

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[19] I deal with this aspect in the judgment at paragraphs 56 to 58.

The merits point

21. The second point, the merits point, stands on a different footing and I am satisfied that leave to appeal should be granted on the issues raised in paragraphs 11 to 17 of the application for leave to appeal.

Conclusion, costs and order

22. As intimated above, this case has a protracted history and troubling features. One difficulty at this stage is the fact that the fourteenth defendant is no longer represented by any attorneys on record. The reasons and circumstances for this are not known. In order to facilitate the administration of justice, I make provision for the Registrar to deliver a copy of this judgment to all parties who participated in the initial proceedings and to Legal Aid South Africa.

23. This Court only grants costs in special circumstances, and there are none.

24. The following orders (varied) are made:

24.1. Leave to appeal is granted to the Supreme Court of Appeal on the grounds pleaded in paragraphs 11 to 17 of the application for leave to appeal.

24.2. Save as aforesaid, the application for leave to appeal on other grounds is dismissed.

24.3. There is no order as to costs.

24.4. The Registrar is directed to deliver a copy of this judgment to all parties who participated in the initial proceedings and to Legal Aid South Africa.

SJ Cowen

Judge, Land Court

I agree

p.p.

B Padayachi

ASSESSOR

Appearances:

Plaintiffs / Applicants for leave to appeal: H Barnes SC and M Musandiwa instructed by Malatji & Co Attorneys

First to ninth defendants / respondents in application for leave to appeal: S Mbhalati instructed by GW Mashele Attorneys