THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1136/19

In the matter between:

THETELE JOSEPH MALATJI	**APPELLANT**
and	
MAPONYA LAZARUS LEDWABA NO	**FIRST RESPONDENT**
GISELA STOLS NO	**SECOND RESPONDENT**
THE MASTER OF THE HIGH COURT GAUTENG DIVISION PRETORIA	**THIRD RESPONDENT**
THE MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM	**FOURTH RESPONDENT**
PROVINCIAL SHARED SERVICES CENTRE OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM LIMPOPO PROVINCE	**FIFTH RESPONDENT**
THE REGIONAL LAND CLAIMS COMMISSIONER LIMPOPO PROVINCE	**SIXTH RESPONDENT**
REFILWE IRENE LETSOALO	**SEVENTH RESPONDENT**
MOTLOKWA SUZAN MOJAPELO	**EIGHTH RESPONDENT**
ZILI MASETLA	**NINTH RESPONDENT**
PHUTIANE CURRY LETSOALO	**TENTH RESPONDENT**
MANKUROANE MODIBA	**ELEVENTH RESPONDENT**

ALI MAAKE	**TWELFTH RESPONDENT**
VERONICA SEBOLAWA MOTSWI	**THIRTEENTH RESPONDENT**
FRANS MOKOENA KUBJANA	**FOURTEENTH RESPONDENT**
JIMMY KUBJANA	**FIFTEENTH RESPONDENT**
DAVID MEHLAPE-MALATJI	**SIXTEENTH RESPONDENT**
MAITE MOSERI	**SEVENTEENTH RESPONDENT**
MARY NTOAMPE	**EIGHTEENTH RESPONDENT**
JANE MAHASHA	**NINETEENTH RESPONDENT**
MOKOPA WILLIAM MONYAMA	**TWENTIETH RESPONDENT**

Neutral citation: *Malatji v Ledwaba NO and Others* (Case no 1136/2019) [2021] ZASCA 29 (30 March 2021)

Coram: SALDULKER, MBHA and MBATHA JJA and GORVEN and EKSTEEN AJJA

Heard: 18 February 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 30 March 2021.

Summary: Election of trustees by beneficiaries of community trust – interpretation of court order and trust deed – beneficiaries ‘present at such meeting’ mean physically present – beneficiaries having no common law right to vote by proxy in election – proper interpretation of the trust deed does not include proxies – waiver and estoppel must be pleaded – evidence held to be insufficient to establish either waiver or estoppel.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Semenya J, sitting as court of first instance):

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

2 The order of the court a quo dated 8 August 2019 is set aside and replaced with the following:

‘2.1 The voting process and the general meeting of the Mamphoku Makgoba Community Trust (trust registration no IT8699/2004) (the trust) held on 12 January 2019 are declared unlawful and irregular and are set aside.

2.2 The trustees elected at the general meeting on 12 January 2019 are interdicted and restrained from acting as trustees of the trust.

2.3 The letters of authority issued by the third respondent to the elected trustees are reviewed and set aside in terms of s 23 of the Trust Property Control Act 57 of 1988 and the third respondent is directed to issue letters of authority to the first and second respondents.

2.4 The first and second respondents (the independent trustees) are directed to continue to act as the only trustees of the trust and to:

(i) Convene and hold a general meeting of the trust within 60 calendar days of the date of this order for purposes of nominating and appointing a new board of trustees who are eligible to stand for election in terms of the trust deed; and

(ii) Give notice of the meeting at least 14 days before the meeting in accordance with clause 15.5 of the trust deed.

2.5 The independent trustees are directed to apply the following voting procedure at the general meeting referred to in para 2.4 above:

(i) Only the 603 beneficiaries/claimants whose names appear on the list of 603 beneficiaries, or who have succeeded such beneficiaries in accordance with the provisions of clause 16.1 of the trust deed (the qualifying beneficiaries) are entitled to attend and vote at the general meeting.

(ii) No person shall be allowed to vote by proxy.

(iii) Nominations for the new trustees must be received in writing at least 5 (five) days prior to the meeting referred to in para 2.4 above by the independent trustees, which nominations must be in writing and signed by the proposer, the seconder and the nominated trustee.

(iv) Both the proposer and the seconder must be qualifying beneficiaries.

(v) Six hundred and three ballot papers must be prepared, numbered consecutively, one copy of which shall be handed to each qualifying beneficiary present at the meeting who is entitled to cast a vote as provided in clauses 2.9 and 15.1.3 of the trust deed.

(vi) Each qualifying beneficiary present at the meeting shall be entitled to cast one vote in respect of each vacancy which is to be filled.

(vii) Any person casting more votes than the number of vacancies to be filled will be deemed to have cast a spoilt vote.

2.6 The first and second respondents are to publish the results of the election within 48 hours of it being held.'

JUDGMENT

Eksteen AJA (Saldulker, Mbha and Mbatha JJA and Gorven AJA concurring)

[1] On 4 December 2018 this Court ordered the first and second respondents (the independent trustees) to convene and hold a general meeting of the Mamphoku Makgoba Community Trust (the trust) for the purpose of nominating and appointing a new board of trustees for the trust (the 2018 order). A meeting was convened and held pursuant to the order and a new board of trustees was appointed. However, Mr Thetele Joseph Malatji, who was both a beneficiary and a trustee, contended that the constitution of the meeting and the elective process followed were irregular and in breach of the trust deed and the 2018 order. He applied to the High Court, Polokwane (the high court), to set aside the election. The application was opposed[1] and the opposing respondents raised a number of points *in limine*. When the application was heard the judge *a quo* ordered that four points raised *in limine* be argued and adjudicated separately from, and before, the merits of the application. She dismissed the points *in limine* and there is no appeal against that finding. However, she proceeded further to dismiss the application on its merits, without affording the parties an opportunity to address her on the issue. The appeal to this court against the dismissal of the application is with leave of the high court.

[2] In this Court counsel were agreed that no purpose could be served by referring the matter back to the high court to adjudicate the merits as the high

[1] The third, fourth, fifth and sixth respondents did not enter an appearance. The eighth, ninth, tenth and eleventh respondents supported the application of Mr Malatji. The first, second and twelfth to twentieth respondents opposed the application.

court had already dismissed the application. I agree. The entire record is before us and this Court is in as good a position to deal with the matter as the high court.

[3] The material facts leading to the 2018 order and to the present dispute are as follows. Shortly after the advent of the millennium members of the Makgoba community had lodged a number of land claims with the Land Claims Commissioner in terms of the Restitution of Land Rights Act 22 of 1994, in which they laid claim to 39 farms in the Magoebaskloof area in the Limpopo Province. The trust was established in order to take transfer of the farms in due course, to hold them and to develop them for and on behalf of the beneficiaries of the trust.[2]

[4] The trust deed set out the identities of the initial trustees and beneficiaries. It provided for trustees to hold office for three years, after which they were required to resign.[3] On 27 June 2010 an election was held and a board of trustees (the previous trustees), which included Mr Malatji, was appointed. Thereafter, disputes arose between the previous trustees and certain members of the Makgoba community who made allegations of maladministration of the trust property and dereliction of duty against the previous trustees. Amidst this disunity the previous trustees declined to vacate their office at the expiry of the three-year period and an application to the high court followed. On 24 November 2015, Mabuse J granted a declaratory order (the declarator) that their term of office had expired by effluxion of time after the lapse of three years from 27 June 2010.

[5] Notwithstanding the declarator, the previous trustees failed to step down. They contended that the termination of their office could not take effect until a

[2] The trust was formed in 2004. A number of land claims were subsequently successful and the first properties were transferred to the trust in approximately 2008.

[3] Clause 6.4 of the Trust Deed provides: 'Subject to paragraph 6.9 below, a trustee shall hold office for a period of no longer than 3 (THREE) years upon which he shall resign.' In terms of clause 6.5 'a trustee shall be eligible for re-election for 2 (TWO) consecutive periods of 3 (THREE) years, whereafter he must stand down for a period of at least 3 (THREE) years, after which he shall be eligible for re-election'.

new board of trustees was elected at a general meeting, which, they argued, had been hampered by disruption on the part of a group of individuals referred to as 'the steering committee'. The Master of the High Court, Pretoria (the Master), intervened, and, in terms of s 20(2)*(e)* of the Trust Property Control Act 57 of 1988, removed all of the previous trustees from office and appointed the independent trustees as trustees. This decision by the Master prompted an application by the previous trustees to the high court, which was ultimately resolved by the 2018 order. The previous trustees raised two issues. First, they challenged their removal from office. Secondly, they tendered to hold a general meeting with the purpose of the appointment of a new board of trustees, but they sought a directive in respect of who would be entitled to attend and vote at the meeting. In respect of the first issue this court confirmed the declarator and set aside any subsequent letters of authority issued by the Master. The independent trustees were accordingly the only remaining trustees in the trust.

[6] In respect of the second issue, the 2018 order stipulated:

'3. The first and second respondents are to convene and hold a general meeting of the Trust within sixty calendar days of the date of this order for purposes of nominating and appointing a new board of trustees, which will not include the first, second and third applicants (the appellants), who are ineligible to stand for election.

4. Only those beneficiaries who appear on the list of 603 beneficiaries are entitled to attend and vote at the general meeting referred to in paragraph 3 above.

5. All the parties will use their best endeavours to advertise the general meeting referred to in paragraph 3 above to ensure that all 603 beneficiaries receive notice of the general meeting.

6. The nomination and appointment of a new Board of Trustees at the general meeting referred in paragraph 3 above will take place in accordance with the relevant provisions of the Trust Deeds.

7. The newly appointed Board of Trustees shall within 60 calendar days of the date of their appointment, after the election and receipt of letters of authority, convene a general meeting to appoint further beneficiaries, who are not part of the list of 603 beneficiaries, as

contemplated in clause 5.2 of the Trust Deed,[4] which general meeting shall be conducted with the oversight of the Master and the Department of Rural Development and Land Reform.'

[7] Ordinarily one might have believed that an order of such clarity would have resolved the dispute, but, alas, it was not to be. As adumbrated earlier the independent trustees did convene a general meeting and a new board of trustees was appointed. Mr Malatji, as well as the seventh to twentieth respondents, were appointed as the new board of trustees (the trustees). However, as I have said, Mr Malatji contended that the election was irregular, hence the application to the high court. He argued that the process was flawed in the following respects: (i) the independent trustees made provision in the notice convening the meeting for voting by way of 'proxy' where the particular beneficiary was deceased in circumstances where no provision therefor was made in the trust deed or in the 2018 order (the first issue); (ii) the independent trustees allowed absent beneficiaries to vote by way of proxy in circumstances where no provision therefor was made in the trust deed or in the 2018 order (the second issue); (iii) the proxies that were allowed by the independent trustees were not supported by a document or by an affidavit signed by the beneficiary/claimant who was entitled to vote (the third issue); and (iv) the election was not free, fair or democratic. This he contended was so because each beneficiary was allowed to cast only one vote in toto, instead of being permitted one vote in respect of each vacant post (the fourth issue).

[8] The events leading up to the general meeting and the election are not seriously in dispute. On 21 December 2018 the independent trustees issued an invitation, which was widely publicised, to beneficiaries to attend the meeting. The invitation recorded:

---

[4] Clause 5.1 of the trust deed provides that the initial beneficiaries shall be those persons listed in Annexure C to the trust deed. Clause 5.2 provides: 'Further beneficiaries shall be appointed by the incumbent beneficiaries in a general meeting called for that purpose ….' At the time of the 2018 order there were 603 beneficiaries.

'**INVITATION TO THE GENERAL MEETING OF THE MAMPHOKU MAKGOBA COMMUNITY TRUST (IT8699/2004)**

You are hereby invited as one of the beneficiaries who were enlisted on the verification list containing 603 households to attend the General Meeting for the election (nomination and appointment) of a new board of trustees, in accordance with the court order, read with the Trust Deed, which will take place on

DATE: 12 JANUARY 2019

VENUE: MAGOEBASKLOOF HOTEL

TIME: 10H00

Where a beneficiary is deceased, the family should pass a resolution nominating a successor to represent them as a beneficiary of the Trust and they should have this signed resolution together with a copy of the death certificate to be allowed into the elections. The resolution form is available at the independent trustees Mrs Gisela Stols and Mr Ledwaba Mpoyana Lazarus.

Yours Sincerely

. . .'

[9] In response to the invitation 344 persons attended the meeting. The names of approximately 100 of the attendees did not appear on the list of 603 beneficiaries, but they claimed to be entitled to represent listed beneficiaries who had passed away prior to the meeting, as recorded in the invitation, or listed beneficiaries who were unable to attend the meeting.

[10] At the meeting it was evident that the attendees represented three competing factions being the previous trustees, the steering committee and the royal council.[5] The steering committee and the previous trustees had had a history of animosity set out earlier and the independent trustees accordingly interacted with the various factions in an endeavour to agree to a procedure to be followed at the meeting. The engagement was protracted with the result that the eventual voting process continued into the early hours of the following day. However, prior to the commencement of the voting process the parties had agreed: (i) that

[5] The royal council appeared to have played a minor role and their participation is not material to the appeal.

15 trustees would be appointed; (ii) that each faction would be entitled to nominate 15 candidates;[6] (iii) that voting would be by secret ballot; (iv) that where a beneficiary whose name appeared on the list had died prior to the meeting a 'proxy' nominated by the family of the deceased would be entitled to exercise their voting rights; and (v) that each attendee would cast only one vote in respect of one candidate nominated.

[11] The independent trustees then resolved to permit proxy votes to be cast on behalf of absent beneficiaries provided that the alleged proxy was in possession of their identity document and the identity document of the absent beneficiary. The alleged proxy voter was further required to attest to an affidavit before a commissioner of oaths who was present at the meeting, to confirm that he was authorised to vote on behalf of the absent beneficiary.

[12] In this Court, Mr McNally, on behalf of the respondents, argued that on a proper interpretation of the trust deed the beneficiaries who appear on the list of 603 beneficiaries referred to in the 2018 order are not the sole repositories of benefits under the trust – rather they are representatives of a family or household. Thus, where a beneficiary had passed away, an individual, properly authorised, was entitled to continue to represent the household. Similarly, properly interpreted, so the argument proceeded, it provides for voting by proxy and accordingly the voting process had been in terms of the trust deed. The trust deed, he contended, was silent on the nomination of candidates and the number of votes which each beneficiary was entitled to cast, thus leaving the decision in the discretion of the trustees. Finally, he argued that, in any event, Mr Malatji, and those respondents supporting the application, were precluded from relying on the trust deed as they had, through their agreement, waived their right to challenge

[6] The royal council declined to nominate any candidates with the result that 30 candidates were available for election.

the procedure followed, alternatively, they were estopped from doing so. I shall revert to these issues.

[13] The primary issue for determination is whether the general meeting was convened in compliance with the 2018 order and the trust deed. This requires the interpretation of the 2018 order and the trust deed. The approach to the interpretation of documents is now well established. It does not stop at the perceived literal meaning of the words used by the contracting parties, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being.[7] The court in *Eke*[8] stated that court orders are interpreted in the same manner. At para 29 the Constitutional Court held:

'Once a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders. Here is the well-established test on the interpretation of court orders:

"The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."'

[14] The first issue relates to the invitation to and attendance by family nominated representatives. In their opposing papers the independent trustees provided no explanation at all for the inclusion of these persons in the invitation.

[15] The context in which the 2018 order came to be made is set out earlier. There was a dispute between the parties in respect of the persons who would be

[7] See *Natal Joint Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) para 28.

[8] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC).

entitled to attend the meeting and to vote. Paragraph 4 of the order was designed to define who would be entitled to do so. The question which remains is whether, in terms of the trust deed, relatives of a listed beneficiary were entitled to send a family representative to the meeting.

[16] As I have explained, the trust deed set out the names of the initial beneficiaries. Additional beneficiaries were added in terms of clause 5.2 thereafter. Ultimately, with the assistance of the Department of Rural Development and Land Reform a list of beneficiaries was compiled. A summary of the list, which served before this Court in 2018, reflected:

'4.1	Total number of claimants	=	603
4.2	Total number of beneficiaries	=	1087
4.3	Total number of female headed households	=	360
4.4	Total number of male headed households	=	243
4.5	Total number of households	=	603'

[17] Clause 16 of the trust deed, upon which the respondents relied for the contention that the trust deed envisaged a succession of benefits, required a register to be kept of the interest of each beneficiary. Clause 16.1.2 provided:

'Each Beneficiary shall nominate one further beneficiary, who shall be a family member, to succeed in his stead should the nominating Beneficiary cease to be a Beneficiary. A list of such nominated Beneficiaries shall be recorded in a registry kept at the office of the Trust. A non-family member may only be nominated if the Beneficiary has no member.'

A person ceases to be a beneficiary, inter alia, upon his death.[9]

[18] The trust deed was before this Court when the 2018 order was made. The context of the dispute which served before this Court and the provisions of clause 16 of the trust deed lead ineluctably to the conclusion that the reference to the 'beneficiaries who appear on the list of 603 beneficiaries' in the 2018 order is

[9] Clause 16.1.3.

to the 603 claimants recorded in the list of beneficiaries, ie, the 360 women and 243 men whose names appeared on the list. In the event of their death their name on the list might have been substituted in accordance with the provisions of clause 16. However, the trust deed makes no provision, directly or by inference, for the nomination of a successor to a beneficiary other than by way of clause 16.1.

[19] I turn to the issue of proxies. The 2018 order directed that the nomination and appointment of the new board of trustees was to take place 'in accordance with the relevant provisions of the Trust Deed'. It is accordingly primarily the interpretation of the trust deed which had to be considered. I shall refer to the material provisions of the trust deed where necessary below. The trust deed enjoined the trustees to hold a general meeting for the purpose of the election of trustees 'by beneficiaries present and entitled to vote in terms of this Trust Deed'. The entitlement to vote is circumscribed in clause 2.9 of the trust deed which provides:

'"Beneficiaries" for purpose of . . . a General Meeting at which it is required that a vote be taken for any reason whatsoever, shall mean Beneficiaries present at such meeting and not younger that 21 (TWENTY ONE) years of age as being a Beneficiary qualified to vote.'

[20] Mr McNally argued that 'present at such meeting' should be interpreted to include 'present by proxy'. As adumbrated earlier the argument was that the beneficiary named in the register is not the sole repository of benefits under the trust. Where the beneficiary had passed on, so the argument went, there was no warrant to disqualify that household or family from having its voice heard.

[21] Thus, the respondents submitted, the approach taken by the independent trustees to allow voting by proxy through mandated representatives is entirely consistent with the scheme of the trust deed. The argument cannot be sustained. The scheme of the trust deed in respect of succession of rights is set out earlier.

It provides no support for the respondents' argument. Moreover, a proxy is simply a form of mandate.[10] It requires a mandate to be extended by the principal to their agent to exercise the vote to which the principal was entitled at the meeting. Self-evidently a deceased beneficiary is unable to extend a mandate and the procedure adopted by the independent trustees in respect of the deceased beneficiaries is unrelated to proxies. It is also contrary to the provisions of clause 16 of the trust deed. For these reasons the first issue must be resolved in favour of Mr Malatji.

[22] I turn to the interpretation contended for, which was not raised on the papers, to the extent that it was applied to absent beneficiaries. In England it has been held that members of a corporation have no right by common law to vote by proxy.[11] In this country, too, where a person is required by statute to perform an act involving the exercise of his discretion in a matter in which another has an interest he may not, by common law, delegate his power.[12] Thus, a citizen is not entitled to vote by proxy in a public election. No reason in logic commends itself to hold otherwise where a trust deed entitles beneficiaries under the trust to vote for the appointment of trustees. Voting by proxy could therefore only have been permitted if the trust deed provided for it. It did not do so expressly and Mr McNally was unable to refer to any other provisions in the trust deed which might be indicative of an intention to permit voting by proxy. The ordinary language and syntax of the provisions of the trust deed indicate a contrary intention. Clauses 15.1.3 and 2.9 require of a beneficiary to be both present at the meeting and of sufficient age in order to qualify to vote. 'Present at the meeting', means physically present.

[10] The term derives from the Latin '*procurator*' which means 'mandate'.
[11] See *Harben v Phillips* (1883) 23 Ch 14 (CA) at 35; Halsbury's *Laws of England* para 701.
[12] See *Shidiack v Union Government* 1912 AD 642; *Strydom v Roodewal Management Committee and Another* 1958 (1) SA 272 (O).

[23] It was not alleged that voting by proxy has ever previously been permitted and no notice was given in the invitation to attend that absent beneficiaries would be entitled to delegate their voting rights to a proxy. The 259 beneficiaries who did not attend and had not been notified of the intention to permit voting by proxy were unrepresented at the meeting where agreement was reached. Accordingly, the acceptance of proxy votes by persons who were not entitled to attend in terms of the 2018 order would operate to the prejudice of absent beneficiaries who had not been advised of the intention.

[24] For these reasons, I find that on a proper construction of the 2018 order, read in the context of the trust deed, the presence of persons not listed as beneficiaries in the register was irregular and the acceptance of votes by 'proxy' on behalf of absent beneficiaries was in breach of the trust deed. The second issue must accordingly also be resolved in favour of Mr Malatji. By virtue of the conclusion to which I have come on this issue it is not necessary to consider the third issue.

[25] I turn to consider the method of voting adopted by the meeting. As I have said 333 votes, of which approximately 100 were by proxies, were cast. By virtue of the ruling that each attendee was entitled to cast only one vote, there were no trustees appointed with the support of the majority of the attendees. In some instances trustees were appointed who had secured less than ten votes. The independent trustees contended that the trust deed was silent in respect of the manner of election and that they were therefore entitled in their discretion to adopt the methodology which they applied.

[26] Such an assertion is incorrect. Clause 15.5 of the trust deed provides for notice to be given of a general meeting. It requires the notice to state that a decision of a simple majority of beneficiaries at the meeting shall be considered

the decision of the beneficiaries. The invitation distributed by the independent trustees omitted this requirement of the trust deed, but Mr McNally was constrained to acknowledge that the provision finds application to the appointment of trustees. What the trust deed envisaged is that all beneficiaries present at the meeting[13] would be entitled to cast one vote in respect of each appointment which was to be made. Only if a candidate secured a majority of the votes could they be appointed. It follows that none of the trustees was validly appointed and the fourth issue must also be decided in Mr Malatji's favour.

[27] To summarise, the inevitable conclusion is that, as a result of the invitation, the meeting was not properly constituted or conducted as envisaged in the 2018 order and in the trust deed and that the votes by 'proxy' on behalf of deceased and absent beneficiaries was in conflict with the provisions of the trust deed. The methodology adopted for the election was also in breach of the trust deed and the election must therefore be set aside.

[28] As I have recorded, Mr McNally argued that, in any event, Mr Malatji, by his agreement to the process followed, waived any rights which may have accrued to him in terms of the trust deed or the 2018 order to object to the methodology adopted, alternatively, that he was estopped from doing so.

[29] Waiver constitutes a special defence and must be pleaded. It is only under exceptional circumstances that a court would consider the defence in the absence of proper pleadings.[14] Neither the independent trustees nor the twelfth to twentieth respondents raised the question of waiver on the papers. However, Mr McNally submitted that the underlying facts to establish a waiver were fully

[13] Clause 2.9 and 15.1.3.
[14] See *Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another* 1965 (4) SA 373 (A); *Dale v Fun Furs (Pty) Ltd* 1968 (3) SA 246 (O).

canvased on the papers and that we should accordingly hold that Mr Malatji was precluded from relying on the 2018 order and the trust deed by virtue of his agreement to the procedure. The first difficulty with the argument, as I have found earlier, is that negotiations proceeded with persons who were not entitled to be at the meeting. It was simply not the meeting envisaged in the 2018 order. The second difficulty arises from the admission by the independent trustees that there was no agreement in respect of the acceptance of proxy votes on behalf of absentee beneficiaries (as opposed to deceased beneficiaries) and that they decided on the admission thereof. The high water mark of the respondents' case in this regard was that when the voting eventually started, Mr Malatji did not object to the acceptance of proxy votes. His silence, so it was argued, was plainly inconsistent with the intention to enforce the right to rely on the provisions of the trust deed in respect of the entitlements to vote. Thus, we were urged to hold that the waiver has been established. This argument, too, cannot be sustained for the reasons which follow.

[30] The waiver of a right has the effect of extinguishing that right and the corresponding obligation. It is a question of fact and it is difficult to establish[15] as there is a factual presumption that a party is not lightly deemed to have waived his rights. For this reason clear evidence of the waiver is required.[16] For a successful reliance on waiver the evidence must establish that when the alleged waiver occurred the party waiving their right had full knowledge of the existence of the right which they decided to abandon.[17] In this case the evidence shows that Mr Malatji approached an attorney, one Louis Erasmus, in the week following the appointment of the new board of trustees. It was Erasmus who set out the grounds of objection in a letter to the new board of trustees. There is no averment

[15] *Laws v Rutherfurd* 1924 AD 261.
[16] *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A); *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A).
[17] *Netlon Ltd and Another v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) at 873-4.

in the papers that Mr Malatji knew at the time that the voting occurred that the trust deed did not permit the acceptance of proxy votes. On the contrary, Mr McNally argued that all the beneficiaries understood that it clearly did.

[31] I conclude therefore that the issue of waiver was not properly raised on the papers and the evidence did not establish the defence.

[32] Estoppel, like waiver, is a special defence which must be raised in the pleadings.[18] The respondents relied, for the estoppel, on the silence of Mr Malatji when the voting took place, which, it was contended, conveyed to the independent trustees that he had consented to the voting procedure. The essence of an estoppel is that a person is precluded (or estopped) from denying the truth of a representation made by him to another if the latter, believing in the truth of the representation, acted thereon to his detriment. A causal connection must therefore be established between the representation and the act.[19] These matters were not canvased in the papers and there was no allegation that the independent trustees took the decision to permit proxy votes in consequence of a representation made by Malatji, nor that they would have acted differently had he protested. In the result estoppel, too, has not been established.

[33] That brings me to the form of the order sought. The appellant sought to enforce the 2018 order, which the independent trustees have failed to comply with. In view of their previous failure he sought a more elaborate order to ensure compliance with the 2018 order and the trust deed. Such an order is justified.

[18] *Blackie Swart Argitekte v Van Heerden* 1986 (1) SA 249 (A) at 260.
[19] See *Mahabeer v Sharma NO and Another* 1983 (4) SA 421 (D).

[34] In the result:

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

2 The order of the court a quo dated 8 August 2019 is set aside and replaced with the following:

‘2.1 The voting process and the general meeting of the Mamphoku Makgoba Community Trust (trust registration no IT8699/2004) (the trust) held on 12 January 2019 are declared unlawful and irregular and are set aside.

2.2 The trustees elected at the general meeting on 12 January 2019 are interdicted and restrained from acting as trustees of the trust.

2.3 The letters of authority issued by the third respondent to the elected trustees are reviewed and set aside in terms of s 23 of the Trust Property Control Act 57 of 1988 and the third respondent is directed to issue letters of authority to the first and second respondents.

2.4 The first and second respondents (the independent trustees) are directed to continue to act as the only trustees of the trust and to:

(i) Convene and hold a general meeting of the trust within 60 calendar days of the date of this order for purposes of nominating and appointing a new board of trustees who are eligible to stand for election in terms of the trust deed; and

(ii) Give notice of the meeting at least 14 days before the meeting in accordance with clause 15.5 of the trust deed.

2.5 The independent trustees are directed to apply the following voting procedure at the general meeting referred to in para 2.4 above:

(i) Only the 603 beneficiaries/claimants whose names appear on the list of 603 beneficiaries, or who have succeeded such beneficiaries in accordance with the provisions of clause 16.1 of the

trust deed (the qualifying beneficiaries) are entitled to attend and vote at the general meeting.

(ii) No person shall be allowed to vote by proxy.

(iii) Nominations for the new trustees must be received in writing at least 5 (five) days prior to the meeting referred to in para 2.4 above by the independent trustees, which nominations must be in writing and signed by the proposer, the seconder and the nominated trustee.

(iv) Both the proposer and the seconder must be qualifying beneficiaries.

(v) Six hundred and three ballot papers must be prepared, numbered consecutively, one copy of which shall be handed to each qualifying beneficiary present at the meeting who is entitled to cast a vote as provided in clauses 2.9 and 15.1.3 of the trust deed.

(vi) Each qualifying beneficiary present at the meeting shall be entitled to cast one vote in respect of each vacancy which is to be filled.

(vii) Any person casting more votes than the number of vacancies to be filled will be deemed to have cast a spoilt vote.

2.6 The first and second respondents are to publish the results of the election within 48 hours of it being held.'

_____

J W EKSTEEN

ACTING JUDGE OF APPEAL

Appearances

For appellant:	A G South SC
Instructed by:	Thomas & Swanepoel Inc, Polokwane
	Symington & De Kok, Bloemfontein
For twelfth to twentieth respondents:	J P V McNally SC
Instructed by:	Mapulana Maponya Inc, Polokwane
	Rampai Attorneys, Bloemfontein