



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

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

SIGNATURE  DATE: 10th August 2023

CASE NO: LCC 89/2019

In the matter between:

**THE N'WANDLAMHARI COMMUNAL PROPERTY
ASSOCIATION CONCERNED BENEFICIARIES**

Intervening Party

and

**THE N'WANDLAMHARI COMMUNAL PROPERTY
ASSOCIATION**

First Plaintiff

MHLANGANISWENI COMMUNITY

Second Plaintiff

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

JUDGMENT

COWEN J (Assessor B Padayachi in agreement)

1. This judgment deals with three preliminary issues which have arisen between the plaintiffs and the fourteenth defendant in the above action (the main action). While preliminary in nature, they have arisen belatedly in circumstances where this Court granted the fourteenth defendant leave to intervene in the main action after the trial commenced. The reasons for doing so, and the related circumstances, appear from the judgment granting intervention (21 February 2023).
2. The main action was instituted under case no LCC 89/2019. It concerns the entitlement to benefit from land colloquially known as the Mala Mala land, which comprises some 9 (nine) land parcels, which were the subject of land claims lodged

in terms of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). The first and second plaintiffs, the N'Wandlamhari Communal Property Association (NCPA) and the Mhlanganisweni Community, seek declaratory relief to the effect that only members of the Mhlanganisweni Community are entitled to share in the benefits of the Mala Mala land. The plaintiffs seek to exclude from its benefits, members of another community known as the Mavhuraka Community, whose members, it is said, laid claim to different land.

3. The main action was instituted in 2019. The first sitting of the trial was in February 2022 when the parties argued certain special pleas, with judgment delivered on 18 May 2022. Evidence in the main action commenced during the second sitting, being 3 to 6 October 2022, during which the evidence of only the plaintiffs' first witness was completed. The action was then postponed until March 2023 for its third session. However, although recalled in March 2023, and various efforts made to enable its further prosecution, it did not proceed, save to conduct various case management meetings in terms of Rule 30 to promote its expeditious, economic and effective disposal. The reasons for this are the subject of reserved costs of some magnitude, yet to be argued and decided, and may become the subject of further dispute, and I accordingly decline to deal with them in any detail.
4. One feature of the events, however, was an effort to use some of the time allocated to ventilate the dispute in respect of the preliminary points. This was in circumstances where the plaintiffs and fourteenth defendant anticipated that the matter could be adjudicated on only points of law, limited oral evidence or a stated case. But that did not eventuate. The Court was then requested to enrol the preliminary points for hearing between 12 to 15 June 2023 for limited oral evidence

and argument. During a case management conference convened on 26 May 2023, the Court was assured that the parties were ready to proceed. The Court was informed that only two witnesses would be led: Mr Dion Mnisi on behalf of the fourteenth defendant and Mr Freddy Mthombeni on behalf of the plaintiffs. The parties had exchanged witness statements and confirmed that the main trial bundles would be used in the proceedings. The Court was informed that the matter could proceed on both evidence and argument and would, during the same session, be able to hear brief argument in an interlocutory application, anticipated to take approximately one hour. The interlocutory proceedings were then scheduled for 10 am on Tuesday 13 June 2023. The Court was further informed that these proceedings would not take the full four days. In circumstances where the parties requested that the main action recommence on 17 July 2023, and a two-week period was provisionally allocated for that purpose, the Court was requested to deliver its judgment, if possible, by the end of June 2023. The matter was thereafter enrolled. Shortly thereafter, and in light of the parties' advising that the matter would not take the full four days, the Court informed the parties that it would not sit on Thursday 15 June 2023: that date was required for another matter.

5. In the ultimate result, matters did not ensue as planned. The time allocated on 12 June 2023 was lost in circumstances where the fourteenth defendant requested a postponement following late discovery by the plaintiffs the previous week. The postponement was granted but only until 13 June 2023.¹ Evidence on the preliminary points ensued at 10 am on Tuesday 13 June 2023, with the evidence of Mr Mnisi, and evidence was completed on Wednesday 14 June 2023, with the

¹ The issue of costs is dealt with in a brief judgment delivered on 13 June 2023.

evidence of Mr Mthombeni.² Oral argument was then postponed until Monday 19 June 2023. It was heard during a special hearing convened between 4pm and 7pm on a virtual platform. In order to allow further time to ventilate the preliminary points in view of the postponement, the Court postponed argument in the interlocutory application until the afternoon of 15 June 2023. The Court, further, made arrangements to sit late and start early where possible during the week.

6. The preliminary issues to be decided are three-fold. During case management, the parties agreed that they may be stated as set out below.

6.1. The first issue is whether the current executive committee of the NCPA is a *bona fide* executive committee that has the necessary *locus standi* to sue on behalf of the NCPA. [During argument it was clarified that the reference to *bona fide* should be understood to mean having legal competence.]

6.2. The second issue is whether there is a resolution by the members of the NCPA authorising the institution of the action on behalf of the NCPA.

6.3. The third issue is whether the NCPA is non-suited to bring the current action by reason of a conflict of interest.

7. It must be stated upfront that while the issues were framed in this way, their import and scope must ultimately be gleaned from the pleadings. Some of the submissions advanced went beyond the pleadings, reasonably interpreted, and I do not deal with these. Each of the preliminary disputes raise questions that are ultimately informed by the provisions of the NCPA Constitution. It is helpful to detail

² The Court made arrangements during these two days to sit late and commence early on 14 June 2023. The parties declined to use the additional time offered on 13 June 2023.

some of its core features, before turning to summarise key features of the evidence.

Features of the NCPA Constitution

8. The NCPA Constitution was signed on 19 October 2013, nearly a decade ago. Its preamble records that various communities and individuals lodged land claims in terms of the Restitution Act in and around the Sabie-Sand Region, historically known to indigenous owners by the name N'wandlamhari. It records further that the claimants³ 'have decided to create a joint legal entity to receive all the land claimed in the area historically known as N'wandlamhari and to own and manage the land of their ancestors for the benefit of this generation and all future generations.' It continues, '[t]herefore the claimant communities of Mhlanganisweni and Mavhuraka have joined to adopt this Constitution of the [NCPA].'
9. The property of the association is referred to in Clause 3.2. It initially includes only the Mala Mala land but the Constitution contemplates it would thereafter include 'any other land restored to or granted to or acquired by the Association in future.'
10. The provisions dealing with membership are complex. Importantly, Clause 8.1 provides: 'Qualification for membership of the association shall be limited to members of the households and their descendants who form part of the groups of people that were dispossessed of rights in land within the lands traditionally known as N'wandlamhari, being the land in and around the area known today as the Sabie

³ Who are stated to be listed in an Annexure B but the Court has not been supplied with Annexure B.

Sand Game Reserve.’ The Constitution delineates two categories of persons entitled to membership in Clause 8.5 and Clause 8.6 respectively. The first category (Clause 8.5) concerns persons who must associate with the community and continue to maintain adequate links with the community and the second category (clause 9) concerns persons who have left the area where the community now live and who wish to retain cultural or symbolic links with the community. The rights and privileges of the latter may be limited appropriately.

11. Clause 3.9 defines the term ‘members’ as follows:

‘3.9 Members

Depending on the context, may mean

- A child member; or
- An adult member or
- The individual members of households who are entitled to vote at general meetings, or
- A person who is registered on the membership register as such, or
- All those persons who have been verified as originally dispossessed persons who held rights in land in the area known as N’wandlamhari and descendants of such originally dispossessed persons;
- Any person who is not registered as a member of the association, but who is entitled to be a member.’

12. The Committee responsible for the day to day governance of the NCPA is its Executive Committee. One of the functions of the Executive Committee of the NCPA is to establish and maintain a membership register,⁴ which must be updated annually.⁵ The membership register must indicate which members belong to which

⁴ Defined in Clause 3.10 to mean ‘the register of individuals and households who are members of the association which shall be established and maintained by the Executive committee through a subcommittee specifically tasked with ensuring the integrity of the membership register.’

⁵ Clause 8.2 which provides: ‘The Executive Committee shall establish and maintain a membership register which shall be updated annually. This function may be delegated to a specific subcommittee which shall advise the

household,⁶ and households are considered established in terms of the rules of customary law.⁷ Applications for membership must be submitted to the Executive Committee or membership subcommittee.⁸ However, decisions of the Executive Committee on any matter relating to membership shall be subject to ratification by a general meeting.⁹ Clause 9.10 is material. It provides: 'The presence of the name of any member in the register shall be *prima facie* proof of membership of the Association, and conversely, the absence of any member's name in the register shall be *prima facie* proof that such person does not have any right to membership in the Association. The onus of proving otherwise shall vest with the person seeking rectification of the register.'

13. In terms of Clause 8.9, the 'membership register shall ... serve as the voters roll of the Association, and may indicate categories of voters and subgroupings for purposes of elections.' The NCPA Constitution deals with eligibility to vote at elections in two stages: the initial voting process and the process that should ensue thereafter. The initial voting process is regulated by Clause 8.10 which provides: 'At the first elections to be held after adoption of this Constitution, which adoption is scheduled for 19 October 2013, the eligible voters shall be determined by informal processes agreed to by the *de facto* committees of the constituent

executive on all membership issues.' The duty to review the membership regularly is further regulated in Clause 9.8 and 9.9, which provide:

Clause 9.8 provides: 'The membership register shall be reviewed annually within one (1) month after the Annual General Meeting, and such amendments shall be made thereto as may, at the time of such review, be necessary to maintain the register as correctly as possible, reflecting the members and the particulars of such members as required in terms of this Constitution and the decisions of the Annual General Meeting.'

Clause 9.9 provides: 'Any member admitted to the Association at any time after the date of the first establishment of the register shall be entered into the register immediately after the approval by the next Annual General meeting.'

⁶ Clause 8.7 which provides: 'The membership register shall indicate which members belong to which household.'

⁷ Clause 8.8 which provides: A household shall be considered established in terms of the rules of customary law.

⁸ Clause 8.3

⁹ Clause 8.4 which provides: 'A decision of the Executive Committee on any matter relating to membership shall be subject to ratification by a general meeting.'

claimant groupings and rulings made at the first general meeting.’ The Constitution then contemplates, in clause 8.12, that the Executive Committee consult with the community and present an electoral system to a general meeting for adoption, which would then become part of the Constitution.¹⁰ Save for the initial elections, the Executive Committee is elected by voting members of the NCPA at a general meeting.¹¹

14. The right to vote is a right that attaches to membership, as provided in Clause 9.4 in the following terms (underlining in Constitution): ‘Every member of the association who is the head of the household and over the age of 18 years shall have the right to vote at meetings of members in person. In addition to the head of the household, each household must nominate an adult member of the opposite gender to attend general meetings and who may vote thereat.’ Clause 9.5 deals with the position of child headed households.¹²

15. Clause 3.3 of the NCPA Constitution defines the executive committee to mean ‘the committee of members who constitute the committee elected from time to time by the members of the Association in terms of paragraph 11 hereof to manage the affairs of the Association, subject to the provisions set out in this Constitution.’ In terms of Clause 11.4 of the Constitution, the Executive Committee ‘shall be comprised of a Chairperson, Deputy Chairperson, Secretary, Deputy Secretary, Treasurer and Public Relations officer and nine other additional members, or so

¹⁰ Clause 8.12 provides: ‘As soon as is practical after the first election, and after proper consultation within the community, the Executive Committee must present an electoral system to a general meeting for adoption, which electoral system shall become an addendum to this Constitution.’

¹¹ See Clause 11.5 which provides: ‘The Executive Committee is elected by voting members of the Association at a general meeting.’

¹² It provides: ‘Child headed households shall be allowed representation in the Association through an adult or guardian nominated by the household. The Executive committee has a duty to ensure that child headed households can access and enjoy all the rights of membership.’

many as may be determined in general meeting.’ Under the NCPA Constitution, the term of office of a member of the Executive Committee is three years.¹³

The evidence

16. The evidence traversed events between October 2013, when the NCPA was initially constituted and March 2019, when the plaintiffs say the NCPA authorised the action. During the course of the proceedings, Mr Ogunronbi (counsel for the Minister and Department) requested the Court to make a ruling regarding the status of the evidence given in these proceedings in the main action. He made the request in circumstances where his clients are not participating actively in this part of the proceedings, save to make submissions.¹⁴ After hearing the parties, the following ruling was made:

- 16.1. The evidence in these proceedings (ie the trial relating to the preliminary points) is not to be regarded as evidence in the main action.
- 16.2. The State defendants are entitled, should they be so advised, to adduce the evidence in the main action of a Ms Zanele Sihlangu (an official of the Department) and the Chief Land Claims Commissioner, Ms Gobodo on issues traversed in these proceedings.

¹³ Clause 11.8 provides: ‘A member of the Executive Committee shall hold office for a period of three (3) years from the date of election or until he / she is obliged to vacate the office of the Committee. Individual members of the committee are eligible to be elected for a second consecutive term. Thereafter such member is not eligible for a period of three years.’

¹⁴ One material issue raised in this regard is that it was only during evidence that the alleged involvement in the disputed events of persons from the Commission and Department became apparent as it was not foreshadowed in the plaintiffs’ witness summaries.

16.3. This ruling does not preclude any party from referring to evidence produced in these proceedings, whether documentary or *viva voce*, in the course of adducing evidence in the main action.

17. It is common cause that the first executive committee of the NCPA was elected on 19 October 2013, when the NCPA Constitution was signed and that the Executive Committee that was then elected was made up of members of both the Mavhuraka Community and the Mhlanganisweni Community. That it was so constituted notably accords with Clause 8.10 of the NCPA Constitution. Moreover, in circumstances where the term of office of the Executive Committee is three years, there is no dispute that the Constitution contemplated that a new Executive Committee be elected in 2016. It is common cause that the Department then sought to facilitate an elective AGM in October 2016. The difficulty that arose, however, is that only members of the Mhlanganisweni Community were present at the AGM that was called. The events that ensued thereafter are disputed, either factually or in their legal consequences.

18. According to Mr Mnisi, the AGM that was called in October 2016 ought to have been constituted not only of members of the Mhlanganisweni Community but also of members of the Mavhuraka Community. Their absence arose because their constituent members had not been verified as members of the NCPA. The meeting proceeded, he explained, but only for purposes of selecting an interim Committee of seven persons from the Mhlanganisweni Community, which would operate for a six-month period with the sole task of ensuring that the verification procedure was finalised and a new AGM held. This limited purpose, he testified, was communicated to the meeting by officials present. Mr Mnisi testified further that

the problem that arose is that the committee of seven ‘turned itself into’ an Executive Committee and is still acting as such until the present time.¹⁵ Mr Mnisi testified that in fact the necessary verification processes ensued and on 12 December 2020, and at a special general meeting, the NCPA duly adopted the verification report of a Singwane and Partners dated March 2019. The resolution is signed by Mr Mnisi representing the ‘Former Mhlanganisweni Group’ and by Mr Richard Ngomane representing the ‘Former Mavhuraka Group’. Under cross examination, and in argument, plaintiffs’ counsel Ms Barnes made it clear that the plaintiffs dispute that this was a proper meeting.

19. Mr Mnisi testified that to his knowledge, the NCPA had not given anyone the authority to institute the action. He contended that such a decision, if made, would have to be made by the NCPA after consultation with its members. He testified that he only learnt of the action when informed about it by the first to ninth defendants at a meeting in 2019 after they had been served. Under cross-examination, Ms Barnes alerted Mr Mnisi to a document purporting to be the minutes of a meeting of the NCPA held on 9 March 2019 which is the document the plaintiffs rely on to assert that the NCPA authorised the action. She also drew Mr Mnisi’s attention to the fact that the attached attendance register records his presence at the meeting. In response, Mr Mnisi contended, amongst other things, that these documents are fraudulent. In re-examination, he testified – with

¹⁵ Mr Mnisi’s version is at least partly corroborated by the content of a report from the Chief Land Claims Commissioner to Parliament’s Portfolio Committee on Rural Development and Land Reform dated 20 February 2019. In this regard, Mr Mnisi referred to the report during his testimony (Annexure DMS18 to the founding affidavit of the fourteenth defendant’s intervention application) and confirmed that Parliament was informed that the committee that was elected was interim in nature and elected with the objectives he had stated.

reference to the terms of the resolution purportedly taken – that he does not understand it to authorise the action.

20. Finally, Mr Mnisi testified about his understanding of why the NCPA cannot lawfully take a decision, through its Mhlanganisweni membership, to exclude the Mavhuraka Community from its ranks due to a conflict of interests. He explained the conflict by referring to the Mhlanganisweni and Mavhuraka Communities as being the two children of the NCPA and the decision of the entity constituted as it was, to exclude one child, in his understanding, presents a conflict of interests. Ms Barnes did not cross examine Mr Mnisi on the alleged conflict of interests.

21. Mr Mnisi's cross examination was focused on matters germane to credibility, seeking to demonstrate that Mr Mnisi does not appear on the 2019 verification list and putting the plaintiffs' version to him. On the latter, this concerned both the events of the October 2016 and 9 March 2019 meetings, and a series of unsuccessful attempts to hold meetings of the NCPA and Mr Mnisi's attempts (with others, including the Mavhuraka) to disrupt them with the effect that the NCPA, it is said, has not been able to convene an AGM or finalise the verification process to bring the Mavhuraka into their ranks.

22. Mr Mthombeni is a member of the Mhlanganisweni Community and since 2016 has acted as the Secretary of the NCPA. He testified that he was elected as Secretary of the NCPA at the October 2016 meeting. Prior to that, and from 2013, he served as an additional member of the Executive Committee of the NCPA. Mr Mthombeni testified about the events that ensued during the October 2016 meeting. He explained that only members of the Mhlanganisweni Community were present at

that meeting, which was also attended by officials from the Department. The Department's Ms Zanele Sihlangu addressed the meeting and informed attendees that she had received a call from the Chief Land Commissioner who had asked if members of the Mavhuraka Community were present and upon learning that they were not, had said that the meeting should be halted. Those present were not happy with the message and it was thereafter suggested that the elections proceed with seven members elected to the Executive Committee: Once the Mavhuraka membership had been verified, a further eight members would be elected to the Executive Committee from their ranks. The elections then proceeded on that basis. Mr Mthombeni disputed that the Department had placed any limitations on how the Executive Committee would work or that it would be in existence for only six months. Under cross-examination, Mr Mthombeni conceded that there were, at this stage, no minutes of this meeting nor any attendance register. He explained that minutes 'can be produced after a while.' He emphasised that the Executive Committee that emerged from the meeting was elected and was not serving on any interim basis. Moreover, he emphasised that the exclusion of the Mavhuraka Community was justified on the basis that the Mavhuraka had not been verified, and accordingly, its constituent members could not be members of the NCPA or part of an AGM.

23. Mr Mthombeni then testified about several attempts to convene an AGM of the NCPA which were disrupted, including meetings of 17 February 2018, 12 October 2019 and 18 January 2020. The disruptions are attributed to Mr Mnisi, a Mr Zamani Mathebula, a Mr Reinas Mkansi and members of the Mavhuraka Community. During cross examination, Mr Siyo highlighted formal difficulties with some of the

relate notices or minutes (for example, if not signed or dated) and posed questions to the effect that the plaintiffs were seeking both unduly to single out Mr Mnisi as a wrong-doer and to exclude the Mavhuraka Community from the affairs of the NCPA. Mr Mthombeni confirmed that only verified members of the NCPA are permitted to attend general meetings and that in the result, members of the Mavhuraka Community were excluded from such meetings. Mr Mthombeni was ultimately unable to explain why the Court had not been approached over these years to interdict the alleged unlawful disruptions, so that the NCPA could become constituted as envisaged by its Constitution.¹⁶

24. Mr Mthombeni testified about the meeting of 9 March 2019 – which notably did proceed without apparent interruption – and confirmed the resolution recorded in the minute was in fact taken. The resolution records the following:

‘4.2 Application to land claims court. After deliberation on each issue N’wandlamhari (Mhlanganisweni) community took the following resolutions that.

1. N’wandlamhari CPA committee must make application to the land claims court
2. Application must be made through lawyers (Legal Team)
3. Court must separate Mhlanganisweni and Mavhuraka Community
4. N’Wandlamhari community (Mhlanganisweni Community) took resolution to submit application to land claims court to request the court to separate Mhlanganisweni and Mavhuraka Community.’

25. Notably, when testifying about the resolution taken and under cross-examination, Mr Mthombeni unequivocally referred to the Mhlanganisweni Community as those who took the resolution. The Mavhuraka constituents were not present at the meeting.

¹⁶ It is only very recently – in response to a recent alleged disruption in October 2022 – that the prospect of such action has been intimated.

26. Mr Mthombeni was cross-examined about the alleged conflict of interest through a set of questions concerning the position of the NCPA as the first plaintiff and co-plaintiff with the Mhlanganisweni Community, in the main action, with the Mavhuraka Community as a respondent. He deferred each of these questions for answer by the plaintiffs' attorneys.

27. It is neither necessary nor desirable to deal with each of the issues that arise in connection with what was a credibility focused attack on Mr Mnisi. However, it is necessary to indicate my general findings on his credibility and to make limited factual findings on disputed issues. There were indeed features of Mr Mnisi's evidence that were unsatisfactory, and which were laid bare during his cross-examination. At times, the witness was inconsistent and advanced explanations (specifically concerning fraud and conspiracy) about the plaintiffs' holding of meetings that did not persuade. However, while the cross-examination was impactful and rendered features of Mr Mnisi's evidence unacceptable, important truths emerge from his evidence, which are furthermore corroborated, and his evidence cannot be wholly rejected. A far more nuanced approach is necessitated. Importantly, I am left with the overall impression that Mr Mnisi has, as suggested, being unduly singled out as a cause of the difficulties of the NCPA with the result that the real cause of the difficulties is thereby masked.¹⁷ In consequence, his resultant marginalisation, rather than dishonesty, may well explain at least important unsatisfactory features of his evidence. That said, I ultimately accept that Mr Mnisi has been one of a group of persons who have disrupted meetings sought to be called by the plaintiffs and that the meetings were disrupted.

¹⁷ Notably, Mr Mnisi is not a member of the Mavhuraka Community. He is a member of the Mhlanganisweni Community, but amongst those who seek to defend the unitary objectives of the NCPA.

28. Mr Mnisi's disputed membership of the NCPA illustrates the complexity. Although his name does not appear on the 2019 verification list, Mr Mnisi's persistence regarding his own membership of the NCPA was wholly credible and his exclusion is difficult to understand. Indeed, in moments of testimony noted by obvious and palpable candour, and notwithstanding the case the plaintiffs have asserted on paper, Mr Mthombeni effectively accepted that Mr Mnisi's membership of the Mhlanganisweni Community and NCPA is legitimate. While this is not the occasion finally to resolve that dispute, it is of course vital that it be duly resolved in accordance with due process. What happened in the October 2016 meeting are similarly complex.¹⁸

29. Mr Mthombeni was, overall, a credible witness, not least due to his candid position regarding Mr Mnisi's membership. That does not mean that all features of his testimony were satisfactory. Specifically, the record of calling of meetings and minutes – for which the witness is responsible – is inconsistent – calling into question how much store can be placed on them. Moreover, his overall credibility does not mean that the plaintiffs' stance on material issues or the manner in which the NCPA has been run is regular or correct. I find below that it has not been, and while I should not be viewed as condoning unlawfully disruptive conduct, I am left with the distinct impression that legitimate grievances regarding the running of the NCPA may at least partly explain its disruptive history. Mr Mthombeni's overall credibility as a witness also does not mean that Mr Mnisi has not been unduly singled out as a troublemaker.

¹⁸ See below at para 32.

30. Before turning to the issues for determination, I pause to emphasise that the above 'credibility' complexities ultimately unmask the real challenges facing the NCPA. Amongst these are the issues that arise in the main action. Furthermore, while there are unsatisfactory features of the evidence of both witnesses, at least part of the explanation probably lies in the fact that the deep divisions in the community will invariably have given rise to profoundly different points of view about what constitutes legitimate and lawful NCPA action and procedures. It is clearly of vital importance that the underlying problems within the NCPA be peacefully and lawfully resolved.

The first issue: whether the current executive committee can sue on behalf of the NCPA

31. The first issue is whether the current executive committee of the NCPA is legally competent to sue on behalf of the NCPA. In my view, and as Ms Barnes submitted, this issue can be disposed of on the basis that the party before the Court is the NCPA itself and the decision the plaintiffs rely upon to institute the proceedings was not made by the committee asserting power as the Executive Committee, and whose competence to so act is impugned by the fourteenth defendant. It was taken at a meeting convened on 9 March 2019 as a special general meeting of the NCPA.

32. In deciding the issue on this basis, I should not be understood to minimise the significance of the underlying dispute about the competence of the committee and what transpired on 16 October 2016. On the contrary, it is clear that the dispute about the status of the committee that came into office in 2016 is a matter of real

importance and needs to be resolved. However, in my view, this is not the appropriate occasion to resolve it as it does not squarely arise. At best the committee would have probably been instrumental in calling the meeting and giving effect to the resolution taken. But the issue was not pleaded or dealt with on that basis. To the extent that the broader role of the committee was canvassed in evidence, the interests of justice would not – in my view – be served by venturing to deal with that issue now. This Court does not currently exercise primary jurisdiction over the Communal Property Associations Act 28 of 1996,¹⁹ or disputes about the exercise of powers within a communal property association. This Court's jurisdiction to decide the issue currently arise from this Court's incidental jurisdiction. Specifically, under section 22(2)(c) of the Restitution Act, the Court's power to decide issues not ordinarily within its jurisdiction, which arise incidentally, can only be exercised when it is in the interests of justice to do so. There are several reasons why the interests of justice militate against this Court venturing beyond what is necessary to decide the preliminary disputes where the issues raised fall outside of its primary jurisdiction. First, the dispute affects thousands of people and may affect the validity of numerous decisions that may have been taken by the Executive Committee, some with far-reaching implications including regarding financial benefits of the NCPA. The dispute currently being ventilated is being ventilated centrally between the plaintiffs and the fourteenth defendant. The ninth defendant and the State defendants are not actively participating in the dispute and the presence of the fourteenth defendant indicates that there is a level of division – the extent of which is unclear – even within the Mhlanganisweni Community. Secondly, the evidence that has been led raises questions about the

¹⁹ The position will be altered when the Land Court Bill, recently passed by Parliament, is in force.

events that transpired during the 16 October 2016 meeting and how they were understood. This Court has only heard the evidence of two witnesses from within a clearly divided NCPA, and it has not heard from any departmental officials or Ms Gobodo, whose representations appear to have been instrumental to what ensued. Thirdly, there is an existing Court order in place made by the Gauteng High Court, by my sister Judge Khumalo, which concerns the functioning of the NCPA, which is yet to be complied with. In these circumstances, this Court must, in my view, be deferent to the existing jurisdiction of the High Court, preserve the integrity of existing court orders – notably that of Judge Khumalo – and be cautious not to make unnecessary findings that can have dramatic implications for thousands of people in a deeply divided communal property association who have not been duly heard. Fourthly, the credibility issues that arise in respect of this particular dispute do not permit of ready resolution. Rather, on the limited evidence to hand, there appears to be truth and plausibility in features of both versions advanced, with the explanation for the divergence probably lying not in dishonesty but in what was understood on the occasion.

33. In the result, I decide the first issue in the plaintiffs' favour on the basis that the decision the plaintiffs rely upon to authorise the first plaintiff to institute the proceedings is a decision of a special general meeting and not the impugned committee which is asserting the powers of the Executive Committee.

The second issue: whether there is a resolution by the members of the NCPA authorising the institution of the action on behalf of the NCPA

34. The second issue is whether there is a resolution by the members of the NCPA authorising the institution of the action on behalf of the NCPA. As indicated above, the plaintiffs rely for this purpose on the decision taken at the special general meeting called and held on 9 March 2019 at which the resolution quoted in paragraph 24 above was taken. This issue ultimately raises whether it was competent for the NCPA to convene a special meeting comprised only of the Mhlanganisweni Community households, being the only verified members at that time in order to take the impugned decision.

35. This Court's jurisdiction to deal with this issue also arises from its incidental jurisdiction conferred by section 22 of the Restitution Act. I am satisfied that in this instance, it is necessary and in the interests of justice to decide it.

36. In essence, the Court is required to determine how a special meeting of the NCPA must be constituted for a valid decision of this sort to be taken. The plaintiffs submit that as only the members of the Mhlanganisweni Community had been verified at that time, only they could be present and vote. Further, they say, it had proven impossible to convene an AGM necessary to further the verification processes – due to ongoing disruptions. The fourteenth defendant submits that on a proper interpretation of the Constitution, the meeting could not be composed of only the Mhlanganisweni Community.

37. In my view, the fourteenth defendant is correct. On an interpretation of the NCPA Constitution, a decision of this sort would have to be taken by the NCPA constituted of both its constituent parts. Although the Constitution does not deal expressly with

the scenario, I arrive at this conclusion having regard to the language, context and purpose of the NCPA Constitution.

38. The law relating to the interpretation of documents was expressed in *Endumeni Municipality*²⁰ as follows:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”²¹ (Footnotes omitted.)

39. In *University of Johannesburg*,²² the Constitutional Court elaborated on the principles articulated in *Endumeni Municipality*, emphasising the unitary nature of the interpretative process which means that ‘interpretation is to be approached

²⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) (*Endumeni Municipality*).

²¹ *Endumeni Municipality* at para 18 cited with approval by the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33 at para 29. See too *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA).

²² *University of Johannesburg v Auckland Park Theological Seminary and another* [2021] ZACC 13; 2021(8) BCLR 807 (CC); 2021(6) SA 1 (CC) (*University of Johannesburg*).

holistically: simultaneously considering the text, context and purpose.²³ The need to have regard to context and purpose arise irrespective of any ambiguity in the words used in a contract.²⁴ While extrinsic evidence is not always admissible, and it is to be used conservatively, ‘the unitary approach to contractual interpretation enjoins a court to err on the side of admitting [extrinsic evidence of context]’, even if limited weight is ultimately to be given to it.²⁵ Under the current approach, parties ‘invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions.’²⁶

40. In *Capitec Bank Holdings*,²⁷ the Constitutional Court further elaborated on the principles articulated in *Endumeni Holdings* by stating:

‘the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined.’²⁸

41. The Court further emphasised that *Endumeni Municipality* :

‘is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does [Endumeni Municipality] license judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.’²⁹

²³ At para 65.

²⁴ At para 66.

²⁵ At para 68.

²⁶ At para 67.

²⁷ *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022(1) SA 100 (SCA).

²⁸ At para 25.

²⁹ At para 26. See too para 50.

42. The preamble of the NCPA Constitution makes it clear that the Mhlanganisweni and Mavhuraka Communities have joined, and created the NCPA as an entity to receive all land claimed in the area known as N'wandlamhari and to own and manage it for the benefit of this and future generations.³⁰ Clause 7, materially, firmly embraces the principle of equity and in doing so contains interpretive principles. It provides:

- '7.1 The powers of the Association and the Executive Committee shall be interpreted and implemented at all times in accordance with the overriding principle of fairness and equity.
- 7.2 The administration of all assets, rights and interests of the Association shall be conducted only for the benefit of the members of the Association.
- 7.3 Members of the Association shall be dealt with in such a manner as to ensure that all members receive the same or similar benefits and that any arbitrary distinction or unfair discrimination shall be avoided.
- 7.4 The terms and conditions of this Constitution shall be interpreted and implemented in a manner consistent with the spirit and objects of the principles contained in section 9 of the Constitution.
- 7.5 Distribution of funds for community projects, bursaries or any other valid cause shall be made strictly in terms of written policies approved by the general meeting, and shall contain provisions that promote substantive equality.'

43. In terms of Clause 25, the Constitution can only be amended with the support of two-thirds of members present, preceded by a process of broad consultation and on one months' notice.

³⁰ See para 8 above.

44. It is common cause that its first general meeting was constituted of members of both communities. It may sensibly be assumed (but I do not thereby determine) that eligible voters would have been determined by informal processes agreed to by the *de facto* committees of the constituent claimant groupings and rulings made, as contemplated by Clause 8.2 of the NCPA Constitution.³¹ There is no suggestion that any electoral system has since been devised and adopted, as contemplated by Clause 8.12. However, the system would need to be compliant with the NCPA Constitution which, amongst other requirements, treats the membership register as the voters roll (Clause 8.9) and, in Clause 9.4, confers the right to vote on every member of the association who is the head of a household and over the age of 18 years, together with a person nominated by that household of the opposite gender.³²

45. While it stands to reason that the membership register should ultimately substantially accord with a list of verified members, the register and verification list cannot be conceptually conflated. Indeed, the definition of member in Clause 3.9 makes it clear that verification is not a prerequisite for the exercise of all rights: whether that is so depends on the context the term 'member' is used in the Constitution and may include a child member, an adult member, individual members of households entitled to vote at general meeting, persons registered on the membership register as such or those verified as originally dispossessed persons who held right in land in the N'wandlamhari area. And notably, Clause 9.4 itself does not restrict the right to vote to verified members.

³¹ See para 13 above.

³² See para 14 above noting that special provision is made for child headed households.

46. The NCPA was not established in circumstances where the verification process had been finalised, in respect of either community. In my view, in those circumstances, if it was intended that only verified members of the respective communities could vote at any general meeting, the NCPA Constitution would have said so expressly and provision would not have been made for an initial electoral process in the terms it did and which included representatives from both communities. Indeed, if a construction is given that restricts the voter's roll to verified members in circumstances where verification is substantially incomplete, it would defeat the purposes of the NCPA, compromise the electoral system that is put in place, and undermine the principle of equity. It would also undermine the notion that the member's register is only *prima facie* proof of membership.³³

47. I accept that it may be practically challenging to work out how the members' register should be comprised without resorting to the list of verified members. And it is possible that these practical considerations have partly informed what has happened in recent years. But that approach gives undue priority to the status of being verified, and in doing so, subverts the Constitution's requirements that all those who are entitled to membership, from both communities, must be on the members' register, and thus able to exercise their right to vote. It also subverts the principle of equity, because it was bound to mean, practically, that only persons from one community, the Mhlanganisweni Community, can vote, to the exclusion of the Mavhuraka Community members.

48. In my view, in circumstances where the verification process has been delayed, the members' register – and thus the voter's roll – would have to be compiled in a

³³ Clause 9.10. See para 12 above.

different way, at least pending finalisation of the verification process and its adoption. It would have to be compiled in a way that includes members from both constitutive communities. The Constitution itself provided a solution, being that used for the initial electoral process.

49. While the decision to institute these proceedings was allegedly taken in March 2019, it was very shortly thereafter, on 9 May 2019 that the Pretoria High Court (per Judge Khumalo) granted an order which contemplated that the verification process be finalised and an AGM be convened shortly thereafter. The verification process has now long been finalised. Even on the plaintiffs' approach – which disputes the validity of the 12 December 2020 AGM – there is no good reason why an AGM could not have been convened to regularise the position. Even accepting, as I do, that attempts to convene an AGM have been disrupted, the plaintiffs had and still have recourse to remedies, through the Department, the IEC, SAPS and ultimately the Courts. And there has been no effort to convene an AGM that includes the Mavhuraka membership. On the respondents' approach, that AGM has already taken place (on 12 December 2020). Precisely how the resultant impasse arising from these divergent positions may now sensibly be resolved is a matter for another day and a mediated solution may be warranted.

50. For present purposes, the result of my interpretation of the NCPA's requirements is that the special general meeting of 9 March 2019 was not properly constituted, at least for purposes of taking a decision of the sort impugned. This means that there was no decision to authorise the action on the part of the NCPA itself. It is not necessary for me to decide whether there may be decisions of a nature that can be taken by a general meeting constituted by only members of one group.

That may well be so, but even if there are, this is not such a decision, concerning as it does the constitutive basis of the NCPA.

The third issue: conflict of interests

51. The third issue is whether the NCPA is non-suited to bring the current action by reason of a conflict of interest. This issue is pleaded more fully in the fourteenth defendant's plea as follows: '27.7.1 The [NCPA] is constituted by the Mhlanganisweni Community and the Mavhuraka Community; 27.7.2 The [NCPA] has issued these action proceedings against Mavhuraka as the Ninth Defendant; 27.7.3 On the other hand, in the current action proceedings, Mhlanganisweni Community has been cited as a co-plaintiff with the [NCPA]; 27.7.4 The [NCPA] is faced with a conflict of interest and is placed in an invidious position where it must choose a side between two of its constituent members. As such, this constitutes a clear and obvious conflict of interest which was foreseeable before the current action proceedings were launched. 27.7.5 Effectively, the [NCPA] has issued action proceedings against itself. I am advised, which advice I accept as both true and correct, that this is legally impermissible, unsustainable and untenable. Effectively, the [NCPA] is both the Plaintiff and the Defendant.' Reasonably construed, the pleading amounts to a contention that the institution of the proceedings was unlawful due to the conflict of interests. During the case management process, I engaged the parties on whether this is not an issue that can be decided as a question of law or with reference merely to the terms of the NCPA Constitution. The parties indicated that it could not be as their contentions rest in part on the circumstances present within the NCPA.

52. In my view, the fourteenth defendant's contention would have had traction if the decision to litigate was a decision taken by the Executive Committee. The Executive Committee was then constituted only of members of the Mhlanganisweni Community. The Executive Committee is obliged to act in a fiduciary manner, yet its decision served to promote the interests of only the Mhlanganisweni Community members to the exclusion of the Mavhuraka Community members contrary to the principle of equity.³⁴

53. However, in this case, the decision was taken by the NCPA membership, who are not precluded from advancing their own interests when voting on matters properly placed before them in accordance with the Constitution and in a properly constituted meeting. The difficulty here is that, as I have already found, the relevant meeting was not properly constituted. In practice, this meant that only the interests of the Mhlanganisweni Community members could be and were advanced. But while this serves to frustrate and compromise the interests of the Mavhuraka Community members, the vitiating reason is their exclusion from the meeting in the first place.³⁵

Conclusion, order and costs

³⁴ Clause 11.2 of the NCPA Constitution: 'The Committee members shall act jointly in a fiduciary manner in relation to the Association.' *Robinson v Randfontein Estate Gold Mining Co Ltd* 1925 AD 168 at 178-9. On the analogous position when a person in a fiduciary relationship purchases immovable property in respect of which that relationship applies, such as under the law of trusts, was recently restated *Kuttel v Master of the High Court and others* 2023 (3) SA 498 (SCA) at paras 30 to 36 where the relevant authorities are set out and which affirms *Hoppen v Shub* 1987(3) SA 201 (C) at 210. See too *Grobbelaar v Grobbelaar* 1959(4) SA 719 (A) and *Trustees for the time being of the DA Fordyce Testamentary Trust v Weber and Le Clezio* (unreported) Case No 42094/2014) delivered 13 December 2019 at para 66.

³⁵ I do not deal with all requirements necessary to place an item of this sort on an agenda or the requirements of a valid electoral system, as these were not in issue. Cf *Bafokeng Land Buyers Association and others v Royal Bafokeng Nation and others* [2016] ZANWHC 45.

54. In the result, I have concluded that the first plaintiff was not authorised to institute these proceedings because the meeting of members at which the decision to litigate was taken was not properly constituted in that it excluded members of the Mavhuraka Community. In short, the NCPA has not authorised the action.

55. Subject to *Biowatch Trust*,³⁶ this Court only orders costs in special circumstances dealing as it does with social legislation. The fourteenth defendant, who has succeeded, did not seek any costs against the plaintiffs. The State defendants do not seek costs. The first to ninth defendants sought their costs against the plaintiffs. This request might have been justified had the issue been raised and ventilated by these parties, but it was not and the fourteenth defendant does not seek any costs.

56. Finally, the plaintiffs contended that this Court must make a costs order in their favour adverse to the Minister and the Department in circumstances where their counsel, Mr Ogunronbi, has – they submitted – repeatedly failed to comply with directives of this Court. The submission is advanced in supplementary heads constituting some 22 pages delivered after the hearing. The submissions were delivered ostensibly in response to the Court's directive that the plaintiffs may respond in written heads of argument to various questions raised by Mr Ogunronbi during his oral submissions in the hearing³⁷ and to an issue raised by Mr

³⁶ *Trustees for the Time being of the Biowatch Trust v the Registrar Genetic Resources and others* 2009(6) SA 232 (CC). Importantly, in para 24, the Constitutional Court held in context of constitutional litigation that '... particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.'

³⁷ These were then reduced to writing. They centrally concerned how properly to interpret the NCPA Constitution and whether the Mavhuraka Community members were properly excluded from decision-making since 2016.

Springveldt.³⁸ The Court made the directive after Mr Musandiwa, for the plaintiffs, objected to Mr Ogunronbi's submissions, and after hearing the parties in respect of the objection. Notably, the plaintiffs dealt in their submissions only scantily with the questions raised by Mr Ogunronbi (about five pages). The bulk of the submissions are addressed to the complaint about Mr Ogunronbi's conduct.

57. In a letter addressed to this Court, Mr Ogunronbi objected to the submission, and indicated that if the Court was to entertain them, he and his clients would require an opportunity to deal with them fully including by way of affidavit. The objection was again raised during a case management conference held on 4 July 2023. During that conference it was confirmed that the main action would not be recommencing on 17 July 2023 as pleadings (which reopened) have not yet closed and the parties are not ready. I then indicated to Mr Ogunronbi that I would afford a further hearing if the submissions were to be entertained.³⁹

58. In my view, the submissions cannot be entertained. During the course of the hearing itself, Mr Musandiwa fervently objected to Mr Ogunronbi's submissions. I dealt with the objection by affording the plaintiffs an opportunity to respond to what Mr Ogunronbi had said in written submissions. It must be noted that the Court is appreciative of the questions raised by Mr Ogunronbi during his oral submissions and the note then produced. The plaintiffs had a fair opportunity to deal with them. The plaintiffs also rely on conduct of Mr Ogunronbi unrelated to this hearing. I am of the view that this it is not appropriate to raise these complaints now. First, the plaintiffs take issue with conduct relating to a recent application to compel further

³⁸ Concerning whether the decision taken in the form set out in paragraph 24 in fact authorises the litigation in the form that it has ensued.

³⁹ At that stage, it was intended that this judgment would be delivered shortly thereafter. However, due to a burglary, this was not possible.

particulars. But this Court has already adjudicated the issue in dealing with costs in that judgment. Second, the plaintiffs take issue with conduct in a hearing of an urgent application of 10 February 2022. These costs are to be dealt with as costs in the main action. In conclusion, I emphasise that this approach does not mean that this Court will not censure the conduct of parties through costs awards in an appropriate case or at an appropriate time.

59. The following order is made:

59.1. The first objection relating to the legal competence of the Executive Committee to sue on behalf of the NCPA is dismissed.

59.2. The second objection is upheld and it is declared that the first plaintiff has not duly resolved to authorise the action on behalf of the NCPA pursuant to the decision of 9 March 2020.

59.3. The third objection relating to whether the NCPA is non-suited to bring the action by reason of a conflict of interests is dismissed.

59.4. Each party shall carry its own costs.



S Cowen

JUDGE

Land Claims Court

I agree

p.p.



B Padayachi

ASSESSOR

Appearances:

14th Defendant: L Siyo and T Pooe instructed by Legal Aid, South Africa.

Plaintiffs: Ms H Barnes SC and Mr M Musandiwa
instructed by Malatji & Co Attorneys

1st to 9th Defendants: Adv P Springveldt
instructed by G W Mashele Attorneys

10th and 11th Defendants: Adv S Ogunronbi and Adv L Phasha
instructed by the State Attorney

12th and 13th Defendants: Adv C Marule
instructed by the State Attorney