REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 925/2019

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
……
……

DATE..... SIGNATURE.....

In the matter between:

THETELE JOSEPH MALATJI : APPLICANT

[ID No. [….]]

And

MAPANYA LAZARUS LEDWABA N.O : 1ST RESPONDENT

[ID No. [….]]

[In his capacity as independent trustee of the MAMPHOKU MAKGOBA COMMUNITY TRUST, Trust registration No. IT8699/2004 ("the Trust"), acting on behalf of MAPONYA LEDWABA INC, Registration No. 2002/022888/21]

GISELA STOLA N.O : 2ND RESPONDENT

[ID No. [….]]

[In her capacity as independent trustee of the Trust, acting on behalf of GISELA GRUNWALD ATTORNEYS INC, Registration No. 2016/109692/21]

THE MASTER OF THE HIGH COURT, GAUTENG

DIVISION PRETORIA : 3RD RESPONDENT

THE MINISTER FOR RURAL DEVELOPMENT : 4TH RESPONDENT

AND LAND REFORM

PROVINCIAL SHARED SERVICES CENTRE : 5TH RESPONDENT

OF THE DEPARTMENT OF RURAL DEVEOLOPMENT

AND LAND REFORM, LIMPOPO PROVINCE

THE REGIONAL LAND CLAIMS COMMISSIONER : 6TH RESPONDENT

LIMPOPO PROVINCE

REFILWE IRENE LETSOALO : 7TH RESPONDENT

[ID No. [….]]

MOTLOKWA SUZAN MOJAPELO : 8TH RESPONDENT

[ID No. [….]]

ZILI MASETLA : 9TH RESPONDENT

PHUTIANE CURRY LETSOALO : 10TH RESPONDENT

MANKUROANE MODIBA : 11TH RESPONDENT

ALI MAAKE : 12TH RESPONDENT

VERONICA SEBOLWANA MOTSWI : 13TH RESPONDENT

FRANS MOKOENA KUBJANA : 14TH RESPONDENT

JIMMY KUBJANA : 15TH RESPONDENT

DAVID MEHLAPE-MALATJI : 16TH RESPONDENT

MAITE MOSERI : 17TH RESPONDENT

MARY NTOAMPE : 18TH RESPONDENT

JANE MAHASHA : 19TH RESPONDENT

MOKOPA WILLIAM MONYAMA : 20TH RESPONDENT

JUDGMENT

SEMENYA J:

[1] The issues between the parties in this application revolve around the order granted by the Supreme Court of Appeal in **Makgoba and Others v Ledwaba NO. and others (054/2018) [2018] ZASCA 181** (4 December 2018) (the SCA order). The applicant, being of the view that the respondent failed to comply with the order as it stands, approached the Gauteng Division of the High Court, Pretoria, with an urgent application in which he sought certain interdictory orders and mandamus and structural interdict against the respondent. The application was struck off the roll for want of jurisdiction.

[2] It is apposite to quote the order of the SCA in its entirety in view of the nature of the issues between the parties. The SCA ordered as follows:

> *"1. The appeal is upheld to the extent that the order of the court a quo is replaced with what follows in paragraphs 2 to 7 below.*
>
> *2. It is declared that the first to twelfth appellants' term of office as trustees terminated with effect from 26 June 2013, and any subsequent letters of authority issued to the first to twelfth appellants, to date of this order are set aside.*

3. The first and second respondents are to convene and hold a general meeting of the Trust within 60 calendar days of date of this order for the purpose of nominating and appointing a new Board of Trustees, which will not include the first, second and third applicants, who are ineligible to stand for election.

4. Only those beneficiaries who appear on the list of 603 beneficiaries (Annexure A14, record, pp196-225) are entitled to attend and vote at the general meeting ordered 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 to in paragraph 3 above will take place in accordance with the relevant provisions of the Trust Deed.

7. The newly appointed Board of Trustees shall within 60 calendar days of date of their appointment, after the elections 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, which general meeting shall be conducted with the oversight of the Master and the Department of Rural Development and Land Reform.

8. The appellants to pay the costs of this appeal".

[3] On the 12 January 2019, the 1st and 2nd respondents in this matter, who were similarly cited as such in the SCA, indeed convened a general meeting for the purposes of electing new trustees as directed in Clause 3 of the SCA order. It is common cause that the applicant was appointed as one of the 15 trustees. The applicant is challenging the procedure followed by the first and second respondents during the election and is seeking the following orders:

> *"2 Pending the holding of a general meeting and the appointment of new trustees as referred to in paragraph 4 and 5 below:*
>
> *2.1 The 3rd respondent is interdicted and restrained from issuing letters of authority to the Applicant and the 7th -20th Respondents (" the elected trustees") in terms of section 6(1) of the Trust Property Control Act 57 of 1988 ("the TPCA") authorising them to act as trustees of the Mamphoku Makgoba Community Trust [Trust Registration No. IT8699/2004 ("the Trust");*
>
> *2.2 1st and 2nd Respondents are directed to continue to act as the only trustees of the Trust;*
>
> *2.3 In the alternative to paragraph 2.1 and 2.2 above, and only in the event of the 3rd Respondent having already issued letters of authority to elect trustees in terms of section 6(1) of the TPCA:*
>
> *2.3.1 The elected trustees are interdicted and restrained from acting as trustees of the Trust;*

2.3.2 The 3rd Respondent is directed to withdraw the letters of authority issued to the elected trustees and to issue letters of authority to the 1st and 2nd Respondents;

2.3.3 In the alternative to paragraph 2.3.2 above, the decision of the 3rd Respondent to issue letters of authority to the elected trustees is reviewed and set aside in terms of section 23 of the TPCA and the 3rd Respondent is directed of issue new letters of authority to the 1st and 2nd Respondents;

2.3.4 The 1st and/or 2nd Respondents are directed to continue to act as the only trustees of the Trust;

3. The voting process and/or the election are declared to be unlawful and/or irregular and are set aside;

4. The 1st and 2nd Respondents are directed to convene and hold a general meeting of the Trust within 60 (sixty) calendar days of the date of this order for the purpose of nominating and appointing a new board of trustees which are eligible to stand for election;

5. The 1st and 2nd Respondents are directed to follow the following procedure at the general meeting as referred to in paragraph 4 above;

5.1 Only the 603 beneficiaries/claimants whose names appear on the 603 list are entitled to attend and vote at the general meeting ordered in paragraph 4 above;

5.2 No person is allowed to vote by way of proxy;

5.3 nominations for new trustees must be received in writing 5(five) days prior to the holding of the meeting referred to in paragraph 4 above by the 1st and 2nd Respondents, which nominations must be in writing and signed by the proposer, the seconder and the nominated trustee;

5.4 The names of both the proposer and the seconder must appear on the 603 list as a beneficiary /claimant;

5.5 603 ballot papers must be prepared, numbered consecutively, which will be handed to those present at the meeting and who are entitled to cast a vote;

5.6 Each of the 603 persons entitled to vote will be entitled for 15 or less of the nominated candidates;

5.7 Any person voting for more than 15 of the nominated candidates will be deemed to have cast a spoilt vote;

5.8 The 1st and 2nd Respondents are to publish the results of the election within 48 hours of it being held;

6. Attorney Jaco Oberholzer is appointed as independent attorney ("the independent attorney") for the purposes of observing and reporting to this Court within 5 (five) days of the date of the general meeting provided for in paragraph 4 above in which report the independent attorney is to set out precisely how this order was carried out by the 1st and 2nd Respondent;"

[4] The applicant alleges that the 1st and 2nd respondents did not conduct the election in accordance with the relevant provisions of the Trust Deed and the SCA order. The respondents argued that neither the SCA order nor the Trust Deed prescribe the procedure to be followed in an election of new Trustees. It was further submitted that the relief sought by the applicant, if granted, will have the effect of varying/amending the SCA order and that this Court, as the lower Court, do not possess the power to amend or to interpret the SCA order. In the main, the applicant challenges the 1st and 2nd respondents' decision to allow voting by way of proxies on behalf of the beneficiaries who were absent from the general meeting and to allow the proxies to vote without written authority in the form of documents signed by those who were absent. The applicant further takes issue with the 1st and 2nd respondents' decision to allow only one vote per voter despite the fact that 15 trustees were required. According to the applicant the 1st and 2nd respondents, in so doing, violated the SCA order and the Trust Deed.

[5] In the applicant's heads of argument, it was submitted that this Court should follow the approach laid down by Wallis JA in Natal Joint **Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 (SCA)** at para [18] in its interpretation of the SCA order and the Trust Deed. The Court stated that:

"[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in ***Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School.*** *The present state of the law can be expressed 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 business like 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." and at

[25] Which of the interpretational factors I have mentioned will predominate in any given situation varies. Sometimes the language of the provision, when read in its particular context, seems clear and admits of little if any ambiguity. Courts say in such cases that they adhere to the ordinary grammatical meaning of the words used. However that too is a misnomer. It is a product of a time when language was viewed differently and regarded as likely to have a fixed and definite meaning, a view that the experience of lawyers down the years, as well as the study of linguistics, has shown to be mistaken. Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to glaring absurdity, the court will ascribe a meaning to the language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an apparent error in the language in order to avoid the identified absurdity."

[6] With specific reference to the interpretation of a Court order, counsel for the applicant referred this Court to the decision in **Firestone South Africa (Pty) Ltd v Genticuro *AG* 1997 (4) SA 298 (A) at 304D-F** (Genticuro) as cited with approval by the Constitutional Court in **Electoral Commission v Mhlope 2016 (5) SA 1 (CC) at [33] where it was stated that:**

> *"On interpreting court orders, authority tells us:*
>
> *"The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. . . . [A]s 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. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it."*
>
> This approach has been endorsed by this Court in **Kriegler J in *Ex Parte Women's Legal Centre*** added that the interpretation of a court order *"entails determining the legal context in which the words in the order were used".*

On the basis of Genticuro above, I will without further ado, reject counsel for the 1st and 2nd respondents' submission that this court has no power to interpret the judgment of the SCA. I however agree with the argument

that as the lower court I cannot substitute or amend its order with my own.

[7] Clause 15 of the Trust Deed provides that "*the Trustees shall hold an Annual General Meeting of the Trust within 6(six) months of the end of the Financial Year which Beneficiaries shall be entitled to attend , having been given due as thereof contemplated paragraph 15.5.5 below, for the purposes of:*

> *15.1.3 the election of Trustees by Beneficiaries present and entitled to vote in terms of the Trust Deed"*

Counsel for the applicant argued that the Trust Deed requires only the beneficiaries who are present at the General Meeting to vote and that there is therefore no room for voting by proxy. It was further submitted the SCA order is silent about voting by proxy. It was on this basis that the applicant is contended that the court should find that the 1st and 2nd respondents failed comply with the SCA order.

[8] As stated in Genticuro, the court is enjoined to read the entire SCA judgment, the order and the reasons for arriving at it so as to establish what the intention of the SCA was. The applicant in this matter was one of the initial Trustees elected after the coming into being of the Mamphoku Makgoba Community Trust. These initial trustees held onto

office despite the expiration of their term, the action by the Master of the High Court to remove them from office as well as the court order granted by Mabuse J in the Pretoria High Court. The SCA stated as follows with regard to the challenges occasioned by the refusal of the initial Board of Trustees to vacate the office:

> *"[3] The major challenges in advancing the objects of the Trust in favour of the community were as follows: allegations of maladministration of the Trust properties by the initial trustees, dissatisfaction amongst the intended beneficiaries with the failure of the initial trustees to hold Annual General Meetings to elect new trustees who would identify and verify members of the Trust who had an interest in and would entitled to vote on issues related to the Trust. All these allegations have been compounded by the appellants holding onto power despite the existence of a final court order made on 24 November 2015 declaring that their term of office had expired due to effluxion of time at the end of what was the three years maximum period for holding trusteeship as provided for in clause 6.4 of the Trust Deed.*
>
> At paragraph [16] it is stated that:
>
> *[16] It is clear from what is set out above that the Trust under the administration of the appellants has been dysfunctional and has for more than six years not served the needs of the beneficiaries it was created for and the community at large. The appellants abdicated their fiduciary responsibility and had to be removed from their office of trusteeship to allow new trustees to be elected and run the Trust as it befits their office. To allow their continued*

presence in the office of the Trust would perpetuate the Trust being improperly administered and will be detrimental of the welfare of the beneficiaries, contrary to the provisions of clause 6.4 of the Trust Deed and the existing order of Mabuse J".

[9] It is evident from the two paragraphs of the SCA judgment quoted above that the intention of the Court was nothing other than to put to an end the sufferings of the beneficiaries of the Trust and the community at large at the hands of the applicant and the other erstwhile trustees. Its intention was for the beneficiaries to reach a solution in the best way possible. The respondents argued that the list of beneficiaries was compiled in 2005 and that most of the people whose names appear on that list have perished. It was argued that a proper understanding of the list of beneficiaries is that 603 referred thereto and on the SCA judgment represent households. This argument is based on the fact that there is another number which is in excess of a thousand (1087) which specifically refers to the number of beneficiaries. According to the respondents the SCA intended that it should be the1087, who are the actual beneficiaries, who should have the right to vote for the new trustees.

[10] The first page of the document that contains the list of beneficiaries reads as follows:

> *"Summary of findings:*
>
> ***4.1 TOTAL NUMBER OF CLAIMANTS = 603***
>
> ***4.2 TOTAL NUMBER OF BENEFICIARIES = 1987***
>
> ***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***

It is my view that the above summary depicts the number of the beneficiaries whom the SCA intended to bring their sufferings to an end.

[11] On the issue of voting by proxy, it is common cause that when the general meeting commenced, it was apparent that there were three rival groups in attendance *i.e* a group that represented the members of the so-called Steering Committee, the initial trustees and members to the traditional council. The 1st and 2nd respondents, entrusted with the duty to hold elections in terms of the SCA order, held a discussion with

representatives of the different groups. It was then agreed, as per the notice of the General Meeting, that those persons whose names appear on the list and who have since perished, will be represented by a person nominated by the family of the deceased. It was again agreed that other beneficiaries, who were for one reason or another, unable to attend may vote by proxy as well. In short the procedure adopted at the General Meeting was agreed upon by those who were in attendance present at the meeting. It is an undisputed fact that the applicant was nominated and subsequently elected as a trustee at the very same meeting through the procedure agreed to by most, if not all, of those who were in attendance. It is not the applicant's case that he raised an objection as early as the date on which the notices were issued, inviting beneficiaries who are referred to as 603 households and not 603 individuals, to a General Meeting, until the end of the voting process.

[12] In his answering affidavit, the applicant does not deny the respondents' averments that those who attended the meeting, which would invariably include him, agreed to the procedure adopted by the 1st and 2nd respondents. The applicant's submission that the agreement itself cannot be used to amend the SCA order is found to be without merits. In **Bothma-Both Transport (Edms) v Bothma & Seuns Transport (Edms) Bpk 2014 (2) SA 494 (SCA) ([2014] 1 All SA 517;**

[2013] ZASCA 176) para12 it was stated that:.. *"the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise."* The 1st and 2nd respondents contended that their decision was guided by the preamble to the Trust Deed. It is indeed so that the said preamble clearly states that the Trust is founded on the agreement of the beneficiaries of the Trust. On this basis I find that the SCA order envisaged a situation where the majority, if not all of the beneficiaries, will agree on who is to be elected as members of the Board of Trustees.

[13] The applicant alleges that he is not the only beneficiary who is not satisfied with the procedure adopted by the 1st and 2nd respondents during election. He has attached the affidavits of these other people to the founding affidavit. The respondents questioned the validity of the affidavits in that, among others, some of them are the respondents in this application. The respondent argued that if that was the case, the applicants would have joined them as applicants and not as respondents. Be that as it may, I am of the view that this fact does not take the matter any further in that, just as the applicant, none of them

objected to the procedure from the beginning when the notices which authorised voting by proxy were issued up until the time of election.

[14] With regard to the proposed procedure as contained in the prayers in the notice of motion, I am in agreement with the respondents' argument that the correct procedure is for the applicant to approach the SCA and not this Court. Although the applicant refers to this specific prayer as a structural interdict, I am of the view that granting the order will have the results of amending the SCA order, the powers that I certainly lack. I however agree that the 3rd respondent had no powers to authorise the 1st and 2nd respondents to act as trustees as this is contrary to clause 3 of the SCA order. The remedy in this case will be to withdraw the authority which will not in any way render the election invalid. In any event the Trust will remain with 15 trustees, the number of trustees required in terms of the Trust Deed.

[15] In the results I find that the application has no merits and stands to fail. I therefore make the following order:

i. The application is dismissed;

ii. The 3rd respondent is ordered to withdraw the letters of authority issued to the 1st and 2nd respondents;

iii. The applicant is ordered to pay the costs of this application.

M.V SEMENYA

JUDGE OF THE HIGH COURT;

LIMPOPO DIVISION.

APPEARANCES:

ATTORNEYS FOR THE APPLICANT	**: THOMAS & SWANEPOEL INC.**
COUNSEL FOR THE APPLICANT	**: ADV. A.G SOUTH SC**
ATTORNEY FOR THE RESPONDENT	**: MPOYANA LEDWABA ATT.**
COUNSEL FOR THE RESPONDENT	**: ADV. K.A WILSON**
	: ADV. V.M MAGWANE
RESERVED ON	**: 25 MAY 2019**
JUDGMENT DELIVERED ON	**: 08 AUGUST 2019**