IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 8049/12
8050/12
10263/12

In the matter between

THE TWELVE APOSTLES CHURCH IN CHRIST	**FIRST APPLICANT**
NAPHTALI VUSUMZI MLANGENI	**SECOND APPLICANT**

and

THE TWELVE APOSTLES' CHURCH IN CHRIST	**FIRST RESPONDENT**
CAESAR NONGQUNGA	**SECOND RESPONDENT**
INGONYAMA TRUST BOARD	**THIRD RESPONDENT**

JUDGMENT

Delivered on: 12 October 2017

Order:

The ejectment claims:

1. The applications for the ejectment of the respondents in cases 8049/2012, 8050/2012 and 10263/2012 are refused.
2. The first and second applicants are directed to pay the costs of the first respondent jointly and severally, the one paying the other to be absolved.

3. The first and second applicants are directed to pay the costs of the second respondent on an attorney and client scale jointly and severally, the one paying the other to be absolved.

The counter-application

1. The counter-application is granted.
2. The long term registered leases concluded by the first applicant with the third respondent, as described in cases 8049/2012, 8050/2012 and 10263/2012 are declared invalid and of no force and effect.
3. The first and second applicants are directed to pay the first respondent's costs of the counter-application jointly and severally, the one paying the other to be absolved.

MOODLEY J

[1] In each of these three applications, the applicants seek an order evicting the first and second respondents and any other person in occupation, directly or indirectly, through or by them, from the following immovable properties (collectively referred to as 'the properties'):

1.1 under case number 8049/12: 'All that Portion of the Farm Umnini, Location No. 1788 ET in extent 1.192 hectares (more or less)' (the Umgababa property);

1.2 under case number 8050/12: 'The Farm Umsunduzi Mission Reserve No. 8313 FT in extent 2145 square meters (more or less)', (the Ndedwe property); and

1.3 under case number 10263/12: 'Reserve No. 21 No. 15841GU situate at Mandeni in extent 7682 square metres' (the Mandeni property).

and for costs against the respondents, jointly and severally. The applicants aver that they are lawfully entitled to possession and occupation of the properties in terms of registered long term leases which were concluded with the third respondent (the ITB), who is the registered owner of the properties.

[2] The applications are opposed by the first and second respondents, who dispute the validity of the leases and assert their right to remain in occupation premised on their existing occupation and possession of the properties, alternatively in terms of written certificates termed 'Permission to Occupy', (PTOs) issued in favour of the first respondent. The respondents have also filed a counter-application seeking an order declaring the leases void ab initio alternatively null; further alternatively, an order declaring that the purported leases were voided at the first respondent's instance, alternatively be declared unlawful, further alternatively, unenforceable and /or invalid and of no force and effect.

[3] No relief is sought against the ITB, who has indicated that it will abide the decision of the court. The ITB has however furnished an affidavit in respect of the three leases concluded with the first applicant, by its authorised signatory to the leases, WER Raubenheimer (Raubenheimer).

[4] The three applications were consolidated for hearing in terms of a consent order on 27 February 2014, of which the following terms are relevant:

> '1 In all the matters, which are set down for hearing 1 August 2014, the following issue is referred to the hearing of oral evidence on that date: "Whether the first respondent was the holder of a valid permission to occupy in respect of the premises which are the subject matter of the lease in question and which would have the effect of invalidating the said lease."
>
> 2 The deponents to the affidavits, except Raubenheimer, will be the witnesses at the hearing.'

Onus and the duty to begin

[5] The parties agreed that the applicants bore the onus to prove the leases but that the respondents bore the onus in respect of the misjoinder, non-joinder and the

PTOs. But prior to the commencement of the hearing on 10 March 2015, I was called to rule on the issue of onus and the duty to begin.

[6] Mr *Penzhorn SC*, who represented the applicants, submitted that the first applicant asserted its right to occupy in terms of leases, the validity of which has been confirmed in the affidavit of Raubenheimer, which was not disputed. The duty to begin and the evidentiary burden therefore lay with the respondents.

[7] In response Ms *Lennard*, who represented the respondents, disputed that Raubenheimer's affidavit had been accepted as the respondents had reserved the right to call Raubenheimer. She submitted that the duty to begin lay on the applicants who bore the onus of proof in respect of the leases.

[8] The respondents allege that the first respondent as the mother church has prior rights of occupation over the properties, and the single issue which was referred to oral evidence requires the respondents to prove that the first respondent is the holder of valid PTOs in respect of the properties which are the subject matters of the leases. I therefore ruled that the respondents bore the onus on this issue and the duty to begin.

[9] Two preliminary issues have been raised by the respondents which may be disposed of briefly:

9.1 the material non-joinder of the Minister of Rural Development and Land Reform; and

9.2 the misjoinder of the second applicant and second respondent.

Non-joinder of the Minister of Rural Development and Land Reform

[10] *In limine* the respondents aver that there has been a material non-joinder of the erstwhile Minister of Agriculture and Land Affairs of the National Government now referred to as the Minister of Rural Development and Land Reform (the Minister) by the applicants, because the properties constitute land to which the Communal Land Rights Act 11 of 2004 (CLARA) and the provisions of the KwaZulu-Natal Ingonyama Trust Act 3KZ of 1994[1] (the Trust Act) apply. The Minister was authorised to oversee any decision or election made by or on behalf of the ITB.

[11] The relevance of CLARA was effectively put to rest by the clarification of Raubenheimer that CLARA never became part of the body of active law because it was declared unconstitutional by the Constitutional Court.[2] I am also in agreement with Mr *Penzhorn* that Raubenheimer had personal knowledge of the granting of the leases by the ITB and the implementation of the Trust Act, and there was therefore no need for the Minister to be joined to clarify the granting of the leases. I am consequently unable to find any merit in the non-joinder raised by the respondents.

The misjoinder of the second applicant and second respondent

[12] The second respondent (Nongqunga) avers that neither he nor the second applicant (Mlangeni) ought to have been joined as parties to the eviction applications. They were parties to the action under case number 902/2000 because the court had to determine who the rightful successor to the late Chief Apostle Phakathi was. Although the first applicant was obliged to restore the assets in its possession to the mother church in terms of the judgment delivered by K Pillay J in that action, neither Nongqunga nor Mlangeni have any personal claim to the assets of the mother church nor have they raised personal claims in these proceedings. Further Nongqunga has no substantial interest in these applications in his personal capacity. Therefore he ought not to have been joined in these applications and the relief sought against him is ill-conceived.

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[1] Date of commencement 24 April 1994.
[2] *Tongoane & others v National Minister for Agriculture and Land Affairs & others* 2010 (6) SA 214 (CC).

[13] The applicants' response is that relief is sought against Nongqunga because of his admitted occupation of the properties. However, Nongqunga's occupation is by virtue of his leadership of the first respondent and not because of a personal right. The first respondent (and the first applicant) as a *universitas personarum* which has the capacity to acquire rights and incur obligations is distinct from its members and the rights and obligations are acquired or incurred for the body as a whole and not for its members.[3] The occupation rights asserted by the respondents are rights in favour of the first respondent only. Similarly the relief sought is premised on the rights over the properties the first applicant acquired under the leases. Therefore the appropriate relief sought ought to be an order for ejectment in favour of the first applicant enforceable against the first respondent, and those occupying under or through it. In the premises I am satisfied that the misjoinder of Nongqunga as second respondent in the eviction applications has been established.

[14] The remaining issues for determination are:

14.1 whether the applicants have established that the first applicant holds valid long leases which entitle it to the occupation and possession of the properties; and

14.2 whether the respondents have established that they hold preceding PTOs over the properties which would invalidate the leases alternatively that they have a right to remain in occupation premised on their existing occupation and possession of the properties.

Factual matrix and litigation history

[15] As these applications are part of a series of litigious matters between these parties which were referred to in the course of the hearing, it appears appropriate to set out briefly the relevant facts and preceding litigation.

[3] Exhibit A, appeal judgment of Gorven J, para 7 pg 127; both the first applicant and first respondent are also described as 'a universitas personarum' in case number 8757/ 2013.

[16] The founder of 'The Twelve Apostles' Church in Christ' (the mother church), was one Siqu David Phakathi (Chief Apostle Phakathi) who was the president and spiritual leader of the church. In 1991 Chief Apostle Phakathi nominated five apostles but he died intestate in September 1994 and without nominating his successor from amongst the five apostles.

[17] A dispute arose between two of the nominated apostles, Mlangeni and Nongqunga, as to who was entitled to succeed Chief Apostle Phakathi as the spiritual leader and president of the mother church. This dispute divided the mother church into two factions.

[18] After several litigious skirmishes in the form of applications and interdicts, the two factions concluded an out of court 'Deed of Settlement' on 1 December 1995 (the settlement agreement), in terms of which the mother church was separated into two churches and congregations, referred to as the Mlangeni church and the Nongqunga church, in accordance with the names of their respective leaders. The churches were also permitted to adopt as their individual names, variations of the name of the mother church: the Nongqunga church adopted the name, "Twelve Apostles' Church in Christ". The Mlangeni church did not indicate its name in the settlement agreement but subsequently claimed the name "The Twelve Apostles Church in Christ".

[19] However the settlement agreement did not bring the disputes to an end. The church council decided that the settlement agreement should not be ratified and the mother church and Nongqunga instituted an action against the Mlangeni church and Mlangeni seeking an order, inter alia, declaring the settlement agreement null and void and of no force and effect, directing the Mlangeni church and Mlangeni to restore to the mother church the possession of the properties and assets listed in schedules C, D, E and F to the settlement agreement, and an order declaring Nongqunga the true successor to the late Chief Apostle Phakathi and president of the mother church. The trial proceeded before K Pillay J.

[20] In her judgment (the Pillay judgment), K Pillay J held that no dissolution of the mother church had taken place by virtue of or pursuant to the settlement agreement which was declared null and void, and that Nongqunga was the true successor of Chief Apostle Phakathi and president of the mother church.[4] The Mlangeni church and Mlangeni were directed to restore to the mother church, all the properties and assets listed in the aforesaid schedules, which included the properties leased by the applicants. After some delay and further applications, the first respondent as the mother church, retook occupation of the properties.[5]

[21] The first applicant was constituted as a separate and distinct voluntary association with its own constitution, and the trade mark "The Twelve Apostles Church in Christ" was registered with the Registrar of Trade Marks on 28 February 2013.[6] The first applicant also concluded the leases over the properties with the ITB. However the first respondent and its members, led by Nongqunga, have refused to give possession and vacant occupation of the properties to the applicants, asserting that the mother church/the first respondent has pre-existing rights of occupation, which have been confirmed in PTOs issued in its favour.

The applicants' case

[22] The applicants' case is premised on the leases concluded with the ITB which entitles the first applicant to occupy the properties, and the confirmation by Raubenheimer that the leases were validly concluded.

The leases in favour of the first applicant

[23] The first applicant concluded the following long term leases with Raubenheimer as the representative of the ITB:

23.1 The Umgababa property:

[4] Delivered on 26 February 2009 under case number 902/2000, and confirmed on appeal by the Full Bench of this Division under AR 488/2009.
[5] The first respondent is therefore also referred to as 'the mother church' in this judgment.
[6] The application for the registration of the trademark was filed on 26 July 2011.

23.1.1 The first applicant represented by Zamokwakhe Petros Ndimande (Ndimande), concluded long term lease 2283LT in respect of the Umgababa property on 22 March 2012.[7]

23.1.2 The lease is for a period of forty years commencing on 1 April 2012 and terminating on 31 March 2052.

23.1.3 The chairman of the Mnini Traditional Council, Inkosi PP Luthuli confirmed under oath that the consent required in terms of clause 5 of the lease was given by the Mnini Traditional Council on 23 August 2011 to Ndimande who applied on behalf of the first applicant. Inkosi Luthuli confirmed that when the consent was given, the traditional council was aware of the separate identities of the first applicant (the Mlangeni church) and the first respondent (the Nongqunga church).[8]

23.2 The Ndedwe property:

23.2.1 The first applicant represented by Beryl Marx (Marx), concluded long term lease 2292LT in respect of the Ndedwe property on 22 March 2012.[9]

23.2.2 The lease is for a period of forty years commencing on 1 April 2012 and terminating on 31 March 2052.

23.2.3 The chairman of the Nkumbanyuswa Traditional Council, Inkosi SW Ngcobo confirmed under oath that the consent required in terms of clause 5 of the lease was given by the Nkumbanyuswa Traditional Council on 27 February 2012 to Marx who applied on behalf of the first applicant. Inkosi Ngcobo also confirmed that when the consent was given the traditional council was aware of

[7] The approval to grant the long term institutional lease 2283 is annexed to unsigned minutes of the Special Tenure Exco meeting of the Trust on 9 March 2012; but on the approval is noted 'withdrawn 14' and 'not withdrawn' on pg 258 of the pleadings in case number 8049/2012.
[8] Pleadings in case number 8049/12 pgs 59-61.
[9] The approval to grant the long term institutional lease 2292 is annexed to unsigned minutes of the Special Tenure Exco meeting of the Trust on 11 May 2012.

the separate identities of the first applicant and the first respondent.[10]

23.3 The Mandeni property:

23.3.1 The first applicant represented by Timothy Nene (Nene), concluded a long term lease 2752LT in respect of the Mandeni property on 30 July 2012.[11]

23.3.2 The lease is for a period of forty years, commencing on 1 August 2012 and terminating on 31 July 2052.

23.3.3 The chairman of the Skhonyana Tribal Authority, Inkosi MW Mhlongo confirmed under oath that the consent required in terms of clause 5 of the lease was given by the Skhonyana Tribal Authority on 21 April 1998 to Nene who applied on behalf of the first applicant. Inkosi Mhlongo also confirmed that when the consent was given the traditional council was aware of the separate identities of the first applicant and the first respondent.[12]

[24] Under each lease, the first applicant has exclusive use of the respective property, and the risk in and to the property has passed to the first applicant for the duration of the lease. The three leases have been registered with the Registrar of Deeds for KwaZulu-Natal.

The affidavit of Raubenheimer

[25] In the consent order dated 27 February 2014 the parties agreed that Raubenheimer, who had deposed to an affidavit in respect of the leases, would not be called as a witness when oral evidence was heard.[13]

[10] Pleadings in case number 8050/12 pgs 53-55.
[11] The approval to grant the long term institutional lease 2752 is annexed to minutes of the Special Exco meeting (tenure applications) of the Trust on 20 July 2012.
[12] Pleadings in case number 10263/12 pgs 51-53.
[13] Ms *Lennard* subsequently disputed that his affidavit had been accepted and noted that the respondents had reserved the right to call Raubenheimer. He did not testify.

[26] Raubenheimer was a member of the ITB[14] duly appointed by the Minister in terms of s 2A(3) of the Trust Act. He had served in the public service as Head of the KwaZulu-Natal Department of Local Government and Traditional Affairs (later known as the Department of Co-operative Governance and Traditional Affairs). Prior to that he was Head of the now defunct Department of Environmental and Traditional Affairs and in that capacity, he was a principal member of the team which drafted the KwaZulu-Natal Ingonyama Trust Amendment Act 9 of 1997, which, inter alia, created the ITB.

[27] Raubenheimer was duly authorised under s 2A(6) of the Trust Act by the Ingonyama or King, in his capacity as sole trustee and chairperson of the ITB, to sign all tenure instruments which were approved by the ITB. He was therefore the authorised signatory of the leases, 2283LT, 2292LT and 2752LT, which are the subjects of the dispute between the parties.

[28] The material allegations in his affidavit are:

28.1 Raubenheimer describes the prescripts and procedures to which the issue of leases by the ITB is subject[15] and declares that he was satisfied that proper procedures were followed and the leases are valid.

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[14] As at 11 July 2013, the date on which he deposed to the affidavit, Raubenheimer was a member of the ITB.

[15] At para 9 of his affidavit he states:

'(a) The ITB is the *de jure* owner of Ingonyama Trust land and any encumbrance of that land other than an acceptable customary allocation made by a traditional leader/entity competent to do so, must be authorised by the ITB.

(b) The ITB may not, however, authorise any encumbrance of the land or any alienation thereof without the written consent of the relevant traditional council (Section 2(5) of the Ingonyama Trust Act). Thus the ITB and the traditional council must be in agreement before an encumbrance is authorised, usually in the form of a lease.

(c) The party seeking a site, completes an application form (Form ITB1) to which they attach the written consent of the traditional council (Form ITB2). In form ITB2 the traditional council –

- Identifies the party;
- Records the land use to which they are agreeing;
- Confirms that any community members affected also support the application.

(d) The Estates Department of the ITB examines the application and compares the information on the ITB1 (application form) with that on the ITB2 (TC consent form) and if it agrees, processes the application.

(e) The IT Board or a committee of the Board holding appropriate delegated powers given to it under Section 2(6) of the Ingonyama Trust Act, considers the application. It is approved, otherwise refused, or, referred back if more information is needed.

28.2 The leases were supported by the relevant consent forms (ITB2) from the relevant traditional councils.[16]

28.3 No evidence of a valid existing PTO was submitted in respect of the Umgababa property, to which lease 2283LT refers.[17] The letter dated 19 January 1998 submitted by the applicant only authorised temporary occupancy for two years and the temporary occupancy expired four years before the grant of the long lease 2283LT.

28.4 PTOs were included in the application papers relating to leases 2292 LT in respect of the Ndedwe property and 2752LT in respect of the Mandeni property. The applicant for the long leases, 'The Twelve Apostles Church' indicated that the leases were to replace the existing PTOs. In their letters dated 22 March 2012 nominating the signatories,[18] the applicants specifically cross-referenced the PTOs to be replaced by long leases. The replacement of PTOs with leases had become common practice.

28.5 The ITB therefore considered the lease application forms supported by the letters dated 22 March 2012 and the appropriate Traditional Council consent, which constituted what it was required by law to consider when making its decision. The grant of the leases was not opposed and there was no duty on the ITB to query the inner functioning of the applicant church.

28.6 Raubenheimer also clarifies that although indigenous or customary law may apply by virtue of s 2(4) of the Trust Act, the use of indigenous law is subject to the Trust Act and any other law, which is also in accordance with s 211(2) of the Constitution.[19] Section 2(5) of the Trust Act recognises the role of traditional leadership and customary practice. A traditional council is constituted and recognised as a legal entity in terms of provincial legislation.

(f) After approval, the Estates Department submits the lease to me for signature. I must satisfy myself that all is in order and if so satisfied, I sign the lease.'

[16] Annexures R7, R8 and R9 to Raubenheimer's affidavit.

[17] Case 8049 - the Umgababa property.

[18] Annexures R11 and R12 to Raubenheimer's affidavit.

[19] The Constitution of the Republic of South Africa, 1996.

28.7 Raubenheimer reiterates that the ITB is not involved in the dispute between the parties within the Twelve Apostles Church and the purpose of his affidavit is to set out the factual matrix under which the leases were concluded.

The respondents' case

[29] The respondents' defence to the applications for their ejectment is that the first respondent has prior rights of occupation over the properties in terms of written PTOs issued to the mother church by the relevant traditional leader while Chief Apostle Phakathi was alive. These written PTOs were stored at the administrative offices of the mother church on the Umgababa property. But all documentation stored on the premises was retained by the applicants when the Umgababa headquarters were allocated to the first applicant in terms of the settlement agreement. However occupation and possession were to be restored to the first respondent in accordance with the Pillay judgment. The respondents contended that the leases concluded with the ITB were null and void for lack of compliance with the Trust Act and their prior right of occupation.

[30] The current Chief Apostle of the mother church, Nongqunga, testified in respect of the PTOs relied on by the first respondent as follows:

30.1 The settlement agreement was proposed by the lawyers representing the two factions because they could not agree on the leadership of the mother church.

30.2 Clause 3 of the settlement agreement recorded the de facto situation in respect of the immovable properties. In terms of clause 3.2 the faction in occupation of the properties identified in schedules A and B would remain in occupation of those properties.

30.3 The settlement agreement was set aside as null and void in terms of the Pillay judgment. Consequently,

i) The use of the name of the mother church by the first applicant[20] was no longer legal;

ii) The use of the church accounts and the assets in its possession by the first applicant was illegal;

iii) The properties owned by the mother church listed in annexure C to the judgment which were in the possession of the first applicant were to be returned to the mother church; and

iv) The five properties listed in annexure D to the judgment which were occupied by the mother church under PTOs were also in the possession of the first applicant and were to be returned to the mother church.

30.4 PTOs were issued when permission was given by the traditional leaders to certain persons to occupy rural land. The authority to occupy was first given by the traditional leadership; thereafter the occupier would take occupation and develop it. The written PTO was often issued by the traditional leadership after a year or even five years.

30.5 The PTOs for the five properties listed in annexure D had been granted to the mother church while represented by Chief Apostle Phakathi, and the properties were thereafter developed by the Chief Apostle and the mother church. Therefore the mother church had been in occupation of the properties by virtue of PTOs from the traditional leaders before the factions in the church existed. Nongqunga was not personally involved in obtaining the PTOs, but he was certain that the properties had been occupied by the mother church under oral PTOs.

30.6 All the documents belonging to the mother church had been stored on the premises of the property listed in annexure D as Umgababa Headquarters and Mission (the Umgababa property), which was also the main administration office of the mother church. When the settlement agreement was concluded the first applicant was in occupation of the Umgababa property and had retained occupation

[20] In his testimony Nongqunga referred to the first applicant in cases 8049; 8050 and 10263 as the 'Mlangeni Church' and to the first respondent as the 'Mother Church'.

until after the judgment was delivered. Although the first applicant had agreed to return the documents stored on the premises in a letter from its attorney,[21] it subsequently refused and retained all the documentation. When the Umgagaba property was restored to the possession of the first respondent, there were no documents on the premises.

30.7 The first respondent retook possession and occupation of the properties about a year after the Pillay judgment was delivered, and the ITB had not objected.

The PTOs for the properties

30.8 Although the first respondent relied on a prior written PTO in respect of the Umgababa property, all the documents belonging to the mother church had been left at the headquarters and were not returned to the mother church. But the building on the Umgababa property had been constructed prior to 1984, which indicated that the first respondent had a pre-existing right to occupy the Umgababa property.

30.9 The PTO dated 3 September 1996[22] related to the Ndedwe property[23] and was issued when the mother church occupied the building on the property.

30.10 The Mandeni property was undeveloped when Chief Apostle Phakathi obtained the right to occupy the property. The mother church thereafter obtained funding from the community to build on the site. The PTO for the Mandeni property which was issued on 11 November 1998[24] was issued to the mother church, referred to as 'The Twelve Apostles Church in Christ' because the judgment established that the mother church was entitled to the properties in annexure D, and because, in terms of paragraph 10 of its constitution, "any properties in the name of The Twelve Apostles Church in Christ belongs to the Mother Church".

[21] Exhibit A pgs 143-144, letter dated 13 November 2012 from AP Shangase & Ass to Magigaba Inc.
[22] Exhibit B, annexure CN3 pgs 95 and 266.
[23] Item 2 on annexure D.
[24] Exhibit A pg 156.

The name is reserved to the mother church in terms of its constitution and the name of the church with or without the apostrophe after the word 'Apostles' had been used interchangeably without an issue previously.

30.11 Chief Apostle Phakathi, who had been the only person responsible for acquiring properties, had reported about the properties acquired by the mother church to the central council of which Nongqunga was a member.

30.12 Nongqunga had never been advised by the tribal councils or the ITB that the PTOs issued to the first respondent to operate in perpetuity had been cancelled, withdrawn or varied. Therefore no further PTOs could be issued in respect of the same properties. Even if the applicants were in possession of a PTO, Nongqunga insisted that the PTO had been issued in the belief that the applicants were the mother church.

30.13 The first applicant had also tendered the return of the properties but had claimed that the properties were subject to a lien.[25] Therefore the only reason that the applicants did not return the properties was that they wanted to be paid for alleged improvements. Prior to the applications for eviction, the applicants had not advised the respondents that the leases took precedent, nor did they challenge the leases as set out in the judgment. The applicants had not raised the issue of the PTOs between 2000 and 2009, nor had the PTOs referred to in case number 902/2000 been challenged.

Cross-examination

[31] Under cross-examination Nongqunga was reluctant to admit that in terms of paragraph 3 of the settlement agreement the church was dissolved and the assets divided as per schedules A and B. But he confirmed that from 1 December 1995 when the settlement agreement was concluded, the mother church had taken up different headquarters while the Mlangeni faction occupied the original headquarters.

[25] Exhibit A pgs 143-147, letter dated 24 May 2010 from Horrena Jilata & Ass to HS Toni Attorneys.

He persisted that although there was provision for new names to be adopted by the factions in paragraph 7 of the settlement agreement, the attorneys had known that the mother church had two names.

[32] Nongqunga was referred to the founding affidavit he had deposed to in case number 1556/2013, which is an application by the Twelve Apostles Church in Christ (the respondents in the eviction applications) for an order interdicting and restraining the first applicant in the eviction applications, from the continued use of the name 'The Twelve Apostles Church in Christ'. Despite the allegations in the founding affidavit about the names adopted by the two factions, Nongqunga disputed that the names of the church were as set out in the settlement agreement, reiterating that the central council had not intended that the mother church be dissolved and two separate churches would be formed, although the intention at the time when the settlement agreement was signed had been to give effect to it.

[33] Nongqunga alleged that he did not remember the founding affidavit in support of the application under case number 7275/97[26] in which an order authorising him to sign documents required to give effect to the settlement agreement was sought. He denied that he had given instructions in respect of the allegations expressed in the affidavit and was uncertain that the signature appended to it was his. He added that he had disputed the validity of the signatures on other documents, but not this signature previously. The affidavit had been commissioned by his attorney who had subsequently been struck off the roll of attorneys.

[34] Nongqunga admitted that most of the contents of the founding affidavit were correct and despite expressing uncertainty as to whether he had signed the affidavit, when asked whether he had initialled the affidavit before he signed it, he responded "Yes I did initial before I signed it". However he denied that he had made this application because there was no resolution which authorised the application, and reiterated that there was never any intention to transfer properties pursuant to paragraph 3 of the settlement agreement.

[26] Exhibit B pg 54-63.

[35] Nongqunga confirmed that in terms of the settlement agreement the mother church would have had no interest in the properties which were to be transferred to the Mlangeni church, but he disputed that there was a 'former' mother church.[27]

[36] Nongqunga denied any knowledge of the application in terms of reg 68(1) of the Deeds Registries Act 47 of 1937 (the Deeds Act),[28] alleging that the respondents' attorneys would have attended to this on their own, and the respondents had not instructed attorneys in Durban. Nongqunga also denied that the "Mother Church" was de facto dissolved.[29] He confirmed that the Mlangeni church adopted the name 'The Twelve Apostles Church in Christ' without the apostrophe, but also reiterated that the mother church used the name 'The Twelve Apostles Church in Christ' with or without the apostrophe after the word 'Apostles' interchangeably.[30]

[37] Even after reading the affidavit in case number 7275/97, Nongqunga persisted that this affidavit was not familiar and he could not confirm that he had made it. When referred to paragraph 44 of the Pillay judgment,[31] which referred to the affidavit in the application to enforce the settlement agreement, he responded that that had to be a different affidavit and disputed that the affidavit in case 7275/97 was the only related affidavit.

[38] Nongqunga also insisted that the constitution signed on 6 January 1996 was not that of the Mlangeni faction or the Nongqunga faction which did not exist, but it was the constitution of the mother church.

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[27] Exhibit B pg 58 para 12: 'The present situation is that the former Mother Church exists only to the extent that the various immovable properties listed in the Settlement Agreement are still registered in its name. Both Apostle Nephtan Mlangeni and myself lead totally independent Churches with their own separate Constitutions.'
[28] Exhibit B pg 58, founding affidavit para 13.
[29] Exhibit B pg 60, founding affidavit para 14.1-14.2.
[30] Exhibit B pg 60, founding affidavit para 14.3.
[31] Para 44 reads: 'He was confronted by his affidavit (Exhibit "E"), part of an application to enforce the Settlement Agreement. He confirmed that the contents were not honest but done purely on the advice of his attorneys. He stated that although he knew it was not the truth, he believed it was the right thing to do at the time.'

[39] Although he agreed that the Mlangeni church, and not the mother church, was in possession and occupation of the Umgababa headquarters from 1 December 1995 until the Pillay judgment was delivered in 2009, when referred to the 'application for a church site' dated 19 January 1998,[32] he retorted that PTOs could not be issued to a non-existent entity.

[40] When it was pointed out to Nongqunga that in the summons to case number 902/2000[33] the first applicant was described as 'The Twelve Apostles Church in Christ, a religious association which carries on its business and functions and holds as its principal office and place of business at South Coast Road, Umgababa, KwaZulu-Natal', and that therefore the Mlangeni church could not be 'non-existent', he responded that MJ Gabela (Gabela), the Secretary of the Traditional and Environmental Affairs Department who signed the approval on 19 January 1998 would not have known that 'the Mlangeni church was not registered'. He did however explain that it had been necessary to identify the Mlangeni church as a defendant and that the name it had adopted was utilised to cite the church.

[41] Nongqunga reiterated that the right to occupy was given to the late Chief Apostle Phakathi by the chief traditional leader who communicated this to the members of the mother church, although no title deeds were handed over. He disputed that the mother church would not have applied for a PTO as it had no interest in the property while the settlement agreement was in place, stating that the mother church had retained its interest in the property even when the Mlangeni church was in occupation.

[42] Nongqunga refused to comment on the proposition that the Nongqunga church had applied to regularise its possession of the properties allocated to it,[34] and ten days later the Mlangeni faction did the same by applying for the PTO.

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[32] Exhibit B pg 105.
[33] Case number 902/2000.
[34] Under application 7275/97.

[43] Nongqunga clarified that the mother church originally had the permission from the traditional leader to occupy the Umgababa property and thereafter received the permission to occupy in favour of Chief Apostle Phakathi from the KwaZulu-Natal Land Affairs Department prior to his death. He reiterated that there was 'a PTO on a piece of paper' referring to the response from the Department of Traditional and Environmental Affairs dated 19 January 1998.[35] He alleged that the application must have been made a long time ago although it may have only reached the Department office in September 1997. When it was pointed out to him that the same document was furnished when the first applicant requested for a copy of the PTO[36] and also by Raubenheimer, he pointed out that the first applicant had applied only for a copy. He added that he had waited to be given the documents that were in the possession of the Mlangeni church, and would have applied for any documents or copies when it became necessary.

[44] When asked why the mother church would have applied for a PTO for the Ndedwe property which was in the possession of the Mlangeni church as at 3 September 1996,[37] he reiterated that the mother church had not lost interest in the property and further, because of the dispute about the occupation of the property by the Mlangeni church, the traditional chief had asked the mother church for documentation to prove its right of occupation. He had then instructed someone to obtain the copy of the PTO, which satisfactorily proved that the property belonged to the mother church. He also persisted that although the Mlangeni church may have been in occupation in terms of the settlement agreement, the mother church was not precluded from applying for the PTO because it had retained its interest in the property and the PTO would have been issued only consequent to such application.

[45] Nongqunga alleged that the PTO issued on 11 November 1998[38] was issued to the mother church which had the right to occupy the Mandeni property, although the Mlangeni church had at that date been in occupation in terms of the settlement

[35] Exhibit B pg 105.
[36] Exhibit B pages 126-127.
[37] Exhibit B pg 128(a), case number 8050/12 – iro the Ndedwe property.
[38] Exhibit B pg 129(a), case number 10263/12 – iro the Mandeni property.

agreement. He disputed that the party identified on the PTO was the Mlangeni church.

[46] He also disputed that 'The Twelve Apostles Church in Christ' was the name of the Mlangeni church; the name had only been used, even in the pleadings, merely to identify the breakaway church and as a matter of convenience. He also explained that when the action under case number 902/2000 was instituted, the Mlangeni church was suggesting that it was the mother church, and it was therefore was cited as a distinct and separate entity from the mother church in the summons.

[47] When questioned how the first respondent could have asserted that it had duly issued PTOs for the properties listed in annexure D of the judgment,[39] when there was no PTO for the Umgababa property, Nongqunga responded that he knew that there were PTOs. He rejected the proposition that the assertion was made because by the time the summons was issued in 2000, the first applicant had obtained the PTOs, insisting that the properties had been developed by the mother church after it was granted occupation rights.

Argument

[48] Mr *Penzhorn* contended the respondents had failed to show that the first respondent held valid PTOs in respect of the properties over which the first applicant holds leases. The evidence of Nongqunga did not assist because he had no direct knowledge about the application for or issuing of the PTOs. He was also untruthful and evasive, particularly when confronted with his affidavit in case number 7275/97, but inadvertently admitted that he had initialled each page of the affidavit. He desperately sought to distance himself from the affidavit because only the Mlangeni church had an interest in and was in possession of the properties when the PTOs were issued between 1996 and 1998. Therefore the PTOs and the temporary PTO for the Umgababa property were issued to the Mlangeni church when it sought to

[39] Exhibit B pg 67, particulars of claim, para 6.2.

regularise its possession of the schedule A properties after the Nongqunga church sought to do the same in respect of the schedule B properties under Case 7275/97.[40]

[49] Mr *Penzhorn* submitted that Nongqunga's evidence also did not sustain the allegation in case number 902/2000 that the mother church had the right to occupy the properties listed in annexure D under duly issued PTOs because he testified that prior to the settlement agreement, the mother church only had oral permission from the local authority, not PTOs.

[50] He submitted further that K Pillay J had merely ordered the restoration of the properties as described in annexure D but annexure D did not specify in whose favour the PTOs were issued. Therefore the probabilities favoured the conclusion that the reference in the judgment to 'properties occupied under permission to occupy in the defendant's possession' were to the PTOs issued in favour of the first defendant (the first applicant herein).

[51] Mr *Penzhorn* stressed that the first applicant held valid lease agreements which complied with the provisions of the Trust Act, including consent from the traditional councils, who were aware that they were dealing with the first applicant, not the first respondent, and Raubenheimer had followed the proper procedures in concluding the leases.

[52] In respect of the Umgababa property, the respondents relied on a PTO signed on 3 September 1996 by Gabela, of which there is no evidence.[41] Only a temporary authority to occupy was issued to the first applicant, which expired prior to the conclusion of the lease agreement. It is also improbable that Gabela would have issued a PTO in perpetuity on 3 September 1996, and thereafter issued the temporary authority to occupy in favour of the first applicant on 19 January 1998.

[40] Exhibit B pg 62, founding affidavit para 16.
[41] Although referred to as CN3 in the answering affidavit, no PTO is annexed and CN3 is the Pillay judgment.

Consequently the probabilities overwhelmingly suggest that no PTO was ever granted to the first respondent.

[53] Although the respondents averred that since about 1986, the first respondent had been in physical occupation of the Ndedwe property, alternatively had a right to occupy by virtue of a written PTO, the PTO on which they relied indicates that permission was only granted on 3 September 1996, and was issued to the first applicant because the name of the party to whom the PTO was issued does not have an apostrophe.

[54] The respondents make a similar allegation in respect of the Mandeni property, but the PTO on which they relied was issued on 11 November 1998 in the name of the first applicant, because there is no apostrophe after the word ‘Apostles’ and it was issued only after the first applicant had formed itself as a separate church. Raubenheimer had also confirmed that the PTOs which existed in respect of the Ndwedwe and Mandeni properties were tendered by the first applicant in favour of the leases.

[55] Mr *Penzhorn* contended that the reliance of the respondents on the Pillay judgment is ill-conceived because the court did not consider whether either party had any rights to the properties vis-à-vis the owner of the property, the Ingonyama Trust, and assumed that the first respondent had a right to the properties by reason of a valid PTO. The appeal court also dealt with rights to the properties only in the context of the claims of the two parties and did not concern itself with the rights of the ITB to enter into lease agreements in respect of the properties. But Raubenheimer confirms that the leases were properly concluded on 22 March 2012 without contravention of any right to occupy.

[56] Mr *Penzhorn* argued that although the respondents rely on a lien for improvements to the properties and seek compensation therefor in their counter-application, they have not established any basis for the compensation which would entitle them to retain the properties until compensated.

[57] Consequently the evidence sustains the finding that valid leases were concluded between the ITB and the first applicant, entitling the first applicant to the occupation of the properties, while the respondents failed to establish their defence that preceding PTOs were granted in favour of the first respondent, which override or invalidate the leases. Therefore the applicants are entitled to an order for ejectment, and the counter-application by the respondents should be refused.

[58] In response, Ms *Lennard* submitted that the applicants asserted their rights to occupation in the eviction applications through the existence of long term leases over the properties concluded with the ITB, and there was no suggestion in the founding affidavits that the rights existed or evolved pursuant to the granting of PTOs in favour of the first applicant. However the applicants' case had evolved from the initial assertions.

[59] In case number 8049/12 it was only suggested in the replying affidavit that no PTO existed in respect of this property. The applicants also for the first time suggested then that the property was the first applicant's head offices and not that of the first respondent. In case number 8050/12 it was suggested in reply for the first time that the PTO over the Ndedwe property was granted in favour of the first applicant and replaced by the lease. In case number 10263/12, the deponent Nene suggested for the first time in reply that the PTO could have only been granted in favour of the first applicant and dismissed the factual inaccuracies on the PTO as irrelevant. He also did not take issue or dispute the correctness of the Pillay and appeal judgments.

[60] Clause 5 of the leases contemplates consent by the traditional council which was to be secured within sixty (60) days of the signing of the lease, without which the lease would lapse and be of no force and effect. But none of the 'Traditional Council Consents' post-date the conclusion of the leases. Further the traditional council as constituted in 2012 would have been different from the council as constituted during the periods referred to in the three applications, and there is no provision for ratification of a future act not yet contemplated. Ms *Lennard* therefore contended

that, absent the fulfilment of the suspensive condition to which the leases were subject, the leases are null and void ab initio, and the applicants had failed to discharge their onus to establish the fulfilment of the suspensive condition.

[61] She pointed out that the ITB had indicated that it would abide the decision of the court and if it were determined that the respondents enjoyed pre-existing rights over the properties, it would not be held to the long leases in favour of the first applicant.

[62] Ms *Lennard* submitted that the rules of interpretation applicable to the interpretation of contracts should be applied to the interpretation of court orders. She emphasised that the Pillay judgment had confirmed the first respondent's rights to the assets listed in annexures C to E of the judgment, which had not been disputed by the applicants, who had assured the respondents that the judgment would be given effect to and/or implemented. Not once prior to the institution of the three eviction applications had the applicants averred that the PTOs were issued in their favour. The applicants were bound to obey the judgment,[42] which had been confirmed on appeal.

[63] Ms *Lennard* contended that the evidence of Nongqunga which was on point and remained wholly uncontested, also served to contextualise the PTOs and the lease agreements, and establish the relevant factual matrixes to the eviction applications. He had verified that the first respondent had pre-determined rights to the three properties; he had personal knowledge of the existing PTOs and confirmed that various oral discussions and agreements preceded the issuing of the written PTOs, which generally took years; the first respondent had built structures on the properties long before the PTOs were formally issued; PTOs could not have been issued in favour of the first applicant because it was a non-existent entity and the mother church had utilised the name "Twelve Apostles Church of Christ" with or

[42] Ms Lennard submitted that the conduct of the applicants was similar to that of the applicant in *Bezuidenhout v Patensie Sirius Beherend Bpk* 2001 (2) SA 224 (E), who did not seek to have an adverse order made against him in the High Court set aside in the competent forum, but attempted to obtain an order in his favour from another court. But the court refused to make an order which would nullify the effect of the previous order, which remained binding and had to be obeyed even if it may be wrong until it was set aside by a court of competent jurisdiction. Only a court of appeal or review may set aside the order of another court in respect of a claim for the same relief between the same parties.

without the apostrophe interchangeably. Therefore the PTOs could have only been issued in favour of the first respondent.

[64] Ms *Lennard* argued that the cross-examination of Nongqunga by Mr *Penzhorn* on the settlement agreement was irrelevant. But his evidence when evaluated against the underlying probabilities,[43] sustained the conclusion that the PTOs were issued in favour of the mother church. The applicants had no basis for their averment that the PTOs were issued in favour of the first applicant or the proposition that the PTOs were issued contemporaneously with the oral consents. Ms *Lennard* submitted that the burden had subsequently shifted to the applicants, but none of the deponents to the affidavits relied on by the applicants testified, and there was no evidence to supplement the contents of the affidavits. Therefore the court should find on the unchallenged evidence of Nongqunga that the PTOs had been issued in favour of the first respondent and that the respondents had established a clear right to occupy the properties and to the relief claimed in the counter-applications, and the eviction applications should be dismissed.

Evaluation of the testimony of Nongqunga

[65] In evaluating Nongqunga's testimony, I am mindful that Nongqunga and Mlangeni had been chosen apostles during Chief Apostle Phakathi's lifetime and both would have been part of the church council to whom the Chief Apostle reported, and have had knowledge of the affairs of the mother church. Without such knowledge of the affairs of the church it is improbable that Mlangeni would have commanded a following in the church which mooted him as the successor to Chief Apostle Phakathi. Therefore Mlangeni could have challenged any portion of Nongqunga's evidence if it were untrue, by testifying himself, particularly as Nongqunga testified first in accordance with the respondents' duty to begin.

[66] However I am also mindful that Mlangeni's failure to testify does not shift the burden of proof in respect of the PTOs held by the mother church from the

[43] *Medscheme Holdings (Pty) Ltd & another v Bhamjee* [2005] 4 All SA 16 (SCA) para 14.

respondents or that Nongqunga's evidence should merely be accepted as reliable and truthful or that any negative inferences should be drawn against the applicants for this reason.

[67] Nongqunga testified coherently and effectively confirmed the respondents' pleaded version in respect of the prior occupation by the mother church of the three properties in his evidence in chief. Although he did not have personal involvement in obtaining permission from the traditional authorities, his evidence that Chief Apostle Phakathi reported back on the properties to which he acquired the rights of occupation for the mother church, to the church council of which Nongqunga was a member and that the properties were occupied and developed during the lifetime of the Chief Apostle was not disputed. His evidence that the mother church took occupation and developed the properties when it received permission from the traditional leadership, although there was generally a delay in the issue of written PTOs is credible. It is improbable that the mother church would have expended money on developing the properties to which it had no rights or that the traditional authority would not have protested if its land was simply appropriated by the church. His evidence that building had taken place prior to 1984 on the Umgababa property which was substantially developed as the headquarters and administration office of the mother church remained unchallenged and is reflected as the headquarters in schedule A to the settlement agreement and annexure D to the Pillay judgment. Nongqunga's evidence that the mother church's documents which were stored on the Umgababa property were tendered but not returned was also not controverted. As pointed out by Ms *Lennard*, the applicants raised for the first time in reply in case number 8049/12 that the property is the head office of the first applicant, an allegation which I find is not sustained by any facts.

[68] Nongqunga testified that the Mandeni site was vacant when occupied but was developed with church funds. The applicants' attorney in his letter dated 24 May 2010 stated that the applicants had completed the building of the church on the Mandeni site, which confirmed that the construction on the site had been commenced by the mother church. Nongqunga explained that although the Ndedwe property which had also been a vacant site, had been occupied in 1986, the PTO for the property was obtained in 1996 when the traditional chief requested proof of the

mother church's right of occupation after the dispute arose about the settlement agreement between the two factions.

[69] Mr *Penzhorn's* attempt to elicit an acknowledgment from Nongqunga that there was nothing untoward about the first applicant obtaining PTOs over the leased properties when the first applicant had attempted to regularise its possession of the mother church's properties in terms of the settlement agreement in case number 7275/97, was met by Nongqunga's refusal to comment. Mr *Penzhorn* consequently argued that serious doubt was cast on Nongqunga's credibility during cross-examination when he resisted confirming that he had deposed to the founding affidavit in the application under case number 7275/97[44] to obtain authorisation for him to sign the documents necessary to give effect to the provisions of the settlement agreement, in particular, to effect the transfer of the properties allocated to the Nongqunga faction from the mother church.

[70] It is correct that Nongqunga was intent upon reiterating that the mother church had never been dissolved because the settlement agreement was not properly authorised, and refused to admit that, in the intervening period between the conclusion of the settlement agreement on 1 December 1995 and the delivery of the Pillay judgment in February 2009, the two factions had conducted themselves as separate churches and each faction had possession, control and occupation of its own share of the mother church's assets, including its rights in immovable properties.

[71] It is not unexpected that the formalities and procedure for compliance with the Deeds Act, and the practice of attorneys to appoint attorneys to act as their agents in the relevant jurisdiction to comply with the rules of court may be difficult for a layperson to understand. But Nongqunga's vacillation about whether he had signed the founding affidavit or not did have a very limited adverse effect on his credibility because he admitted that he had initialled the pages of the affidavit. Nevertheless he stated that he had also challenged his signature on other documents, but he was not requested to elaborate on the nature of the challenges or the documents or to

[44] This application is referred to in para 141 of the Pillay judgment.

explain how the striking off of his attorney from the roll of attorneys was related to his challenges.

[72] However Nongqunga was correct when he stated that the founding affidavit in case number 7527/97 was not the affidavit that was referred to in paragraph 44 of the Pillay judgment. K Pillay J states that the first applicant was intent on proving that the respondents had attempted to enforce the settlement agreement in two applications. She permitted late discovery of the 1997 application to enforce the settlement agreement, but it was not dealt with in the trial before her.[45] Therefore Nongqunga was not being untruthful or evasive when he stated that there was another affidavit in a related matter.

[73] Consequently I am unable to agree with Mr *Penzhorn* that Nongqunga proved to be a completely untruthful witness and his evidence should be rejected as a whole. To the contrary, much of his evidence was uncontroverted and corroborated by facts that are common cause. Nongqunga's evidence gains further credibility when viewed against the time line when the central council of the mother church refused to ratify the settlement agreement and decided that legal action should be instituted to set the settlement agreement aside. It was noted in both the Pillay and appeal judgments that the minutes of the meeting of the central council held on 6 January 1996 confirmed that the central council rejected the settlement agreement and the dissolution of the mother church, and accepted Nongqunga's apology for signing the settlement agreement.[46]

[74] The settlement agreement was signed on 1 December 1995. Therefore there was only a very short period when the Nongqunga faction may have conducted itself as a separate church, although it seems improbable given Nongqunga's apology. Consequently Nongqunga's persistence that the mother church continued to exist and to conduct itself as such despite the settlement agreement was well founded,[47] and the mother church is the first respondent herein.

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[45] Exhibit A pg 111, para 141.
[46] Pillay judgment para 142; appeal judgment para 12.
[47] This is confirmed in para 15 of the appeal judgment.

[75] Although the respondents relied on a PTO dated 3 September 1996 in respect of the Umgababa property, they also averred that the PTO was in the possession of the first applicant. Nongqunga admitted that he had no personal knowledge of the PTO certificates but alleged that the written document to which he had referred in his affidavit was the temporary authority to occupy which was granted on 19 January 1998 in response to an application dated 25 September 1997.[48] The only PTO issued on 3 September 1996 is in respect of the Ndedwe property. It would therefore appear, in view of the contradictory allegations in the affidavit and Nongqunga's clarification, that the only document evincing a right to occupy the Umgababa property was the temporary authority provided to the applicants when they requested a copy of the PTO for the Mission House at Umgababa on 15 April 2004.

[76] Mr *Penzhorn* submitted that it was improbable that a PTO in perpetuity in respect of the Umgababa property would have been issued to the first respondent on 3 September 1996 and then a temporary authority on 19 January 1998. However the temporary authority to occupy refers to an area approximately .2141 hectares in extent, which is smaller than the leased area of 1.192 hectares which is the extent of the Umgababa property in contention, and therefore appears to refer to an ancillary extent of property and not the property already occupied by the first respondent. Therefore Mr P*enzhorn's* argument cannot hold.

[77] Mr *Penzhorn* also contended that it was improbable that the application could have been made in 25 September 1997 by the respondents and that the date of the application was recorded incorrectly, as alleged by Nongqunga, because the applicants occupied this property from about 1984. He also pointed out that in September 1997 Nongqunga had tried to regularise the first respondent's right to the immovable properties in schedule B, which did not include the Umgababa property.

[78] I do not find merit in these submissions. I have already found that Nongqunga's evidence that the mother church remained in existence and continued to conduct itself as such must be accepted. Therefore it was not precluded from making any applications in respect of properties it had already acquired rights in,

[48] Exhibit B pg 127.

even though the first applicant was in occupation. Mr *Penzhorn* put it to Nongqunga that both the applicants and Raubenheimer had the same PTO. Nongqunga correctly pointed out that the applicants had applied for a copy. The PTOs that were provided by Raubenheimer were the PTOs which the applicants tendered when applying for the leases.

[79] Further, the temporary authority to occupy specified that a school building and fencing was to be erected within 24 months on the property to which it related. In his letter dated 24 May 2010 the applicants' attorney[49] stated that the improvements effected by the applicants to the Umgababa property and for which it seeks compensation include a large church hall with a gallery, the completion of a basement under the church hall, improvements to the ablution block, a dining hall, and large cemented parking area. There is no correlation between the improvements described in the letter and the improvements stipulated in the temporary authority. But the fact that the authority lapsed favours the inference that the stipulated buildings and fences could not be constructed because the property was occupied by the first applicant, although the mother church applied for such authority.

[80] Consequently, although the temporary authority was issued to 'The Twelve Apostles Church', the respondents have persuasively laid a basis for their contention that it was issued to the first respondent, which occupied and developed the Umgababa property as its headquarters during the lifetime of Chief Apostle Phakathi and prior to its occupation by the applicants.

[81] The Umgababa and Ndedwe properties were listed in the annexures to the summons in case number 902/2000, as properties occupied under PTOs, and Nongqunga clarified that the Mandeni property was also occupied under a PTO although it was referred to as a leased property. A PTO was produced in respect of this property. Although the PTOs for these properties were also issued after the first respondent took occupation, the dates are not conclusive proof that the PTOs were issued to the first applicant, as the mother church conducted itself as the rightful occupier of the properties. I am also satisfied that despite the time lapse between the

[49] Exhibit B pgs 143-147.

occupation of the Ndwedwe property in 1986 and the issue of the PTO on 3 September 1996, Nongqunga provided a reasonable explanation as to why it became necessary to obtain the PTO as proof of its right of occupation, which was not controverted.

[82] In so far as reliance is placed by the applicants on the names of the beneficiaries on the PTOs and the temporary authority, the respondents have consistently persisted that the name of the mother church was sometimes reflected without the apostrophe on documents. The first applicant only registered the trademark of its name in February 2013, after applying in 2011. In my view, the conspectus of evidence favours the conclusion that permission to occupy the properties was granted to the mother church, although the names on the PTOs are not punctuated with an apostrophe.

[83] I am consequently satisfied that although Nongqunga did not have personal knowledge of the PTOs that were issued during the lifetime of Chief Apostle Phakathi, he knew about the acquisition of oral rights of occupation from the traditional authority which were subsequently confirmed by the issue of a PTO in writing. He also had knowledge of the PTOs that were tendered to the ITB by the first applicant and was able to place them in context. Therefore it cannot be properly suggested that the high water mark of his evidence is that oral permission was granted to the mother church by the traditional authorities. In my view, Nongqunga's evidence sustains a finding on the probabilities that the mother church acquired prior rights to occupy the properties subsequently leased by the first applicant, which were formalised by the issue of PTOs in due course.

[84] I have no quibble with Mr *Penzhorn's* contention that K Pillay J did not pronounce on the validity or otherwise of the rights under which the mother church laid claim to the assets in the annexures to the judgment and merely ordered restoration of the properties listed,[50] but I am not persuaded that the probabilities favour the conclusion that the PTOs were issued to the first applicant as contended

[50] In para 131 of her judgment K Pillay J states that the principal issues for determination were whether the settlement agreement was valid, whether the plaintiffs had the locus standi to institute the action and whether the second plaintiff was the true successor of Chief Apostle Phakathi.

further by Mr *Penzhorn*. Had the PTOs been issued to the first applicant in 1996 or 1998, it is improbable that the applicants would not have produced or referred to the PTOs in their favour prior to the eviction applications, at least at the stage when the occupation of the properties was in dispute under case number 9182/10, after the judgment was delivered in 2009. Further the applicants claimed a lien for improvements to the properties, and did not assert a right of occupation under a PTO when they tendered the properties to the respondents in 2010. In case number 11247/2010 the first and second respondents consented to a contempt order on 26 February 2013 which declared that they were in contempt of court for failing to comply with the Pillay judgment as amended by the appeal court, which included the restoration of the leased properties, without any complaint that they have a right to the properties in terms of PTOs. For these reasons, the tender of the PTOs by the applicants to the ITB in exchange for long term leases only in 2012 must be treated with circumspection.

[85] But even if the first applicant had applied for PTOs while it occupied the mother church's properties pursuant to the settlement agreement, no legal consequences could flow from its conduct in respect of the properties. Consequent upon the Pillay judgment that the mother church had never been dissolved and the settlement agreement was null and void and of no force and effect, the constitution of two separate two churches as successors to the mother church as contemplated in paragraph 3.1 of the settlement agreement was improper and unsustainable.

[86] The mother church occupied the properties prior to conclusion of the settlement agreement, having acquired the right to occupy the properties from the traditional authority and/or relevant government department which exercised control over the properties. But because the first applicant was not a successor to the mother church, it could not acquire the rights held by the mother church in respect of its assets. Those rights were always retained by the mother church, and as a *universitas personarum*,[51] the intention was that the mother church would continue for ever and it shall carry out the purposes of its founder, Chief Apostle Phakathi.[52]

[51] *Webb & Co Ltd v Northern Rifles; Hobson & Sons v Northern Rifles* 1908 TS 462 at 464-465: 'An *universitas personarum* in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a *persona* or entity, having the capacity of acquiring rights and incurring obligations to a great extent as

[87] Therefore even if the first applicant did constitute itself as a separate church from 1 December 1996,[53] any PTOs issued in respect of the properties in which pre-existing occupation rights were held by the mother church, could not confer any right on the first applicant as it did not have the legal capacity or authority to apply for PTOs over such properties.

[88] It must then follow that the applicants did not have the authority to tender the PTOs in their possession to the ITB and request that they be replaced with long leases on the basis that they had the right to occupy the properties. It does not assist the applicants to claim that the first applicant constituted itself as a separate entity, independent of the settlement agreement and irrespective of the consequences of the Pillay judgment. Only the mother church had the right to occupy the properties and only the mother church had the right to deal with the PTOs which were issued in respect of the properties.

[89] But, although there was no PTO for the Umgababa property, the ITB entered into the leases for the Ndedwe and Mandeni properties on the basis of the first applicant's representation that it was the legal holder of PTOs for those properties. According to Raubenheimer the ITB did not concern itself with the conflict within the church when it dealt with the application for the leases. He had the requisite authority to bind the ITB, and the relevant traditional councils had granted their consent to the leases being concluded with the applicant for those leases. It was in this context that Raubenheimer was "satisfied proper procedures were followed and that the leases are valid",[54] and the ITB considered that the leases binding upon it.

[90] Mr *Swain* emphasised that Raubenheimer had deposed to the affidavit not to lend support to the case of either party, but to place on record the fact that the ITB had entered into the three disputed leases bona fide, and on the apprehension that

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a human being. An *universitas* is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for individual members.'

[52] *Wilken v Brebner & others* 1935 AD 175 at 184.

[53] Exhibit A pgs 143 -7, letter dated 24 May 2010 from Horrena Jilata & Ass.

[54] Raubenheimers's affidavit para 10.

there was no legal impediment to those leases being concluded with the first applicant.[55]

[91] Mr *Swain* also made it clear that the suggestion by the applicants that the ITB has "confirmed" the applicants' right to rely upon the lease is incorrect.[56] He pointed out that Raubenheimer had not testified on whether the first applicant or the first respondent is the holder of PTOs in respect of the disputed properties, and the ITB had not taken, and would not be able to take, a position on whether the leases ought to be set aside on the basis contended for by the first respondent.

[92] It is common cause that the properties which are subject to the leases vested in the Ingonyama Trust in terms of s 3(1) of the Trust Act. Section 2(8) of the Trust Act provides:

> 'In the execution of his or her functions in terms of this section the Ingonyama shall not infringe upon any existing rights or interests.'

[93] Consequently the PTOs or pre-existing rights of occupation held by the first respondent cannot be infringed upon or over-ridden by the leases concluded with the first applicant, irrespective of whether the ITB followed the correct procedures in approving the leases.

[94] It is also relevant that clause 3 of the consents granted by the respective traditional council in terms of s 2(5) of the Trust Act [57] provides:

> '3. The Traditional Council confirms that all persons occupying or having an interest in the said Land have been consulted and have no objections to the proposals.'

[95] But nowhere is it apparent or averred in the pleadings or in Nongqunga's evidence or in Raubenheimer's affidavit, that the first respondent, which does have

[55] Incorrectly referred to as the 'first respondent'; also in para 4.2 of Mr *Swain's* HOA.
[56] HOA dated 5 February 2014.
[57] Form ITB2 annexed to the leases.

an interest in the properties, was consulted prior to the consents being granted to the first applicant's representatives as the first respondent would undoubtedly have objected to the proposed leases, and the confirmation by the council cannot therefore cannot be true or proper.

[96] In the premises the leases are invalid and the applicants are not entitled to vacant possession and occupation of the properties. The lien claimed by the respondents is no longer relevant.

Costs

[97] There is no reason why costs should not follow the results in respect of the application and counter-application. Consequent upon the misjoinder of Nongqunga in the ejectment claims, I am of the view that costs on a punitive scale are warranted in his favour. In respect of the counter-application, only the costs of the first respondent are warranted.

Order

The ejectment claims:

1. The applications for the ejectment of the respondents in cases 8049/2012, 8050/2012 and 10263/2012 are refused.

2. The first and second applicants are directed to pay the costs of the first respondent jointly and severally, the one paying the other to be absolved.

3. The first and second applicants are directed to pay the costs of the second respondent on an attorney and client scale jointly and severally, the one paying the other to be absolved.

The counter-application

1. The counter-application is granted.

2. The long term registered leases concluded by the first applicant with the third respondent, as described in cases 8049/2012, 8050/2012 and 10263/2012 are declared invalid and of no force and effect.

3. The first and second applicants are directed to pay the first respondent's costs of the counter-application jointly and severally, the one paying the other to be absolved.

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MOODLEY J

APPEARANCES

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