THE FINANCIAL SERVICES TRIBUNAL

Case No: **PFA81/2020**

In the matter between:

ROYAL BAFOKENG PLATINUM LIMTIED	First Applicant
BAFOKENG RAMISONE MANAGEMENT SERVICES (PTY) LTD	Second Applicant
ROYAL BAFOKENG RESOURCES PROPERTIES (RF) (PTY) LTD	Third Applicant

and

THE PENSION FUNDS ADJUDICATOR	First Respondent
FUNDSATWORK UMBRELLA PENSION FUND	Second Respondent
FUNDSATWORK UMBRELLA PROVIDENT FUND	Third Respondent
MOMENTUM METROPOLITAN LIFE LIMITED	Fourth Respondent
SEFAKO ABIOT LUCAS DIKGOLE	Fifth Respondent
KHOMEDI SIMON MOHAPI	Sixth Respondent
LAWRENCE LUCKY KHUNOU	Seventh Respondent
MOLEFE ERNEST DIKOBO	Eight Respondent
OPPUTUNIA TSHEBOENG RANTSHO	Ninth Respondent
THERESA BAILE LEHOBYE	Tenth Respondent
OTHUSITSE EDWARD MABUDI	Eleventh Respondent
KGOTLAETSILE JERRY SEBOGODI	Twelfth Respondent
ITUMELENG JONATHAN SENNE	Thirteenth Respondent
MPOLOKENG SUZAN MATSOSO	Fourteenth Respondent

Tribunal Members: H Kooverjie SC (chair); W Ndinisa; Z Nkubungu-Shangisa

Summary: The term "*misconduct"* should contain an element of dishonesty as envisaged in section 37D(1)(b)(ii) of the Pension Funds Act.

DECISION

A INTRODUCTION:

1. This is an application in terms of section 230 of the Financial Sector Regulation ("*FSR Act*") whereby the applicants seek the reconsideration of the determinations made by the Pension Fund Adjudicator ("*the PFA*").

2. In this regard the PFA's determination dated 17 September 2020 together with its further reasons dated 10 December 2020 are taken into consideration. The fifth to fourteenth respondents will also be referred to as employees or members. The applicants would also be referred to as the employer.

3. This matter turns on whether the employer could withhold the respondent's withdrawal benefits in terms of section 37D(1)(b)(ii) of the Pension Funds Act. More specifically, the core issue for determination is whether the withholding of members' benefits in circumstances where the misconduct arose from a verbal agreement between the parties, was justified.

B PENSION FUNDS ADJUDICATOR'S DECISION:

4. The PFA held the view that the withholding of the employees' benefits was not justified as the misconduct alleged was not a "*workplace transgression*." The further issue raised by the PFA was whether the employer complied with the Fund Rules as set out by Momentum in its response.

5. In the PFA's initial set of determinations, it also ruled that it did not have jurisdiction to hear the matter for the following reasons:

   5.1 Firstly, that it did not have the requisite jurisdiction to investigate and make determinations relating to the alleged unreasonable withholding of the complainants' benefits as the matter was subject to court proceedings and which proceedings had already been instituted.

   5.2 Secondly, the nature of the matter concerns issues on non-payment of amounts owing to the employer and the fairness of the dismissals.

6. The PFA further took issue with the fact that when the matter was before the PFA the ambit of the applicants' claim included the R11 million loss suffered as a result of the unprotected strike as well as the unlawful continued occupation of the properties. In these proceedings, the applicants abandoned the R11 million claim and now persists with the claim pertaining to the unlawful occupation.

7. It is trite, and as the PFA pointed out, that pension benefits are not reducible, transferable or executable save for certain exceptions as outline in section 37A

and section 37D of the Act. Section 37D(1)(b)(ii) reads as follows:

> "*The registered fund may*
>
> *(a) …*
>
> *(b) Deduct any amount due by a member to his employer on the date of his retirement on or which he seizes to be a member of the fund in respect of:*
>
> *(i)…*
>
> *(ii) compensation including any legal costs recoverable from the member in a matter contemplated in subparagraph bb (in respect of any damage caused to the fourth respondent by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which:*
>
> *(aa) the member has in writing admitted liability to the fourth respondent; or*
>
> *(bb) judgment has been obtained against the member in any court, including a Magistrate's Court."*

8. In analysing the basis of the employer's claim, the PFA considered the representations of the applicants/employer which were *inter alia*:

8.1 The employer and respective employees concluded written sale of agreements of immovable property with their employer;

8.2 The employees had participated in an illegal and/or unprotected strike during their term of employment;

8.3 The dismissal occurred as a direct result of them participating in the unprotected strike;

8.4 The employer claimed that such acts of misconduct had the element of dishonesty. The complainants were fully aware that their participation in the strike was unlawful.

8.5 The employer claimed that it experienced financial loss of R11 million as

a result of the mis-shifts and production targets.

8.6 The employees despite their dismissal, continued occupation without complying with the terms of sale agreements. Such conduct constituted misconduct, unjustified enrichment and/or dishonesty.

8.7 Consequently the damage suffered was due to the complainants' dishonesty and/or misconduct.

9. The PFA emphasised that the employer's right to funds is only available in limited rare cases where the *cause* for the claim is an element of discreditable, untrustworthy conduct by the employee to his employer. Consequently section 37D(1)(b)(ii) is exclusively reserved for the employer who is able to demonstrate that dishonourable workplace transgression took place. In this regard, the PFA made reference to the **Boshoff** matter[1] and we deem it appropriate to reiterate the relevant extract of the said decision:

> "*[24] I pause to point out that it is not every civil judgment that can be enforced by an employer against an employee through the provident fund. The section specifies the genus of claims that may be enforced by the employer against the employee and directly recovered by the employer from the provident fund. An employer's recourse against the provident fund is an avenue available only in very rare cases. The golden thread which runs through all such exhaustively classified genus of debts or claims is a causa tainted by an element of discreditable or untrustworthy conduct on the part of an employee towards his employer (vide subsection (1)(b)(ii) of section 37D).*
>
> *[25] The section authorises the provident fund to deduct such compensation*

[1] Boshoff v Lliad Africa Trading (Pty) Ltd t/a Builders Market Welkom [2012] JOL 29400 (FB) at paras 24 and 25

from any pension benefit payable to such employee and to pay it to the employer concerned. It has to be stressed that not any employer armed with any civil judgment can lawfully have recourse against the provident fund for the pension benefit of a retiring employee. The section is exclusively reserved only for those employers who can show that they are legitimate victims of specific dishonourable workplace transgressions..." (emphasis added)

10. In its consideration the PFA also referred to a prior decision of of the High Court in **Moodley v Local Transitional Council of Scottburgh Umzinto** 2000(4) SA 524 D where the court held that misconduct must constitute an element of dishonesty:

> "*I am of the view that the common denominator of the specific words is dishonesty-they are species of the same genus, that is dishonesty, and that it consequently follows that the meaning of the general word misconduct must be inferred from that of specific words, which means that misconduct used in the section must be interpreted to include dishonest conduct, or at least an element of dishonesty."*

11. The PFA correctly alluded to the Fund's responsibilities regarding its decision to withhold the said funds. More specifically, it referred to the duties placed on the board of a Fund in terms of section 7C of the Pension Funds Act, which required a careful scrutiny of the claims made against the benefits by the employers.

12. The Board is required to uphold its fiduciary duties, which includes balancing the competing interest of the parties by considering the harm that will be suffered by

the employee if the funds are withheld against the harm to the employer if the remedy is not granted.[2]

13. Moreover it is a well established principle that the employer cannot be allowed to withhold the benefit indefinitely. Should the employer's liability not be determined within a reasonable period, the Fund is not entitled to withhold the benefits.

C THE RESPONDENTS' SUBMISSIONS:

14. The fifth to the fourteenth respondents were represented by counsel as well as an instructing attorney of record. The said respondents failed to comply with the Tribunal Rules, more specifically rule 53 and 54 by not filing their responses.

15. Reference was made to correspondence between the instructing attorney and the Tribunal Secretariat. It was explained, on the part of the respondents that their understanding was that there was no need to file any response. Having perused such correspondence, we note that there was a misunderstanding on the part of the instructing attorney as to what was required of him in representing his clients.

16. It must be emphasized that it was incumbent for the respondents' legal representatives to have familiarised themselves with the Tribunal's processes and Rules. The objection raised by the applicants therefore has merit. The respondents' failure to comply demonstrates their lack of respect for the

[2] Page 45 of the PFA's decision

Tribunal's processes and procedures.

17. Although we do not condone non-compliance with the Rules, we are guided on the approach taken in **Trans-African Insurance Co Ltd v Maluleka** 1956 (2) SA 273 A at 278F, where Schreiner JA stated:

> "*No doubt parties and their legal advisors should not be encouraged to become slack in their absence of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."*

18. It was also pointed out that the respondents referred to new matter raised in their heads of argument, and which we take cognisance of.

19. It is for that reason that at the hearing, the Tribunal curtailed the issues for argument and requested counsel to make submissions on the core issues in dispute and accordingly exercised its discretion in terms of section 232 of the Financial Services Regulation Act ("*FSRA*").

20. In summary, the submissions made were the following:

    20.1 The damages suffered by the employer does not fall within the ambit of section 37D(1)(b)(ii) of the Pension Funds Act;

    20.2 The failure of the respondents to vacate the properties do not constitute misconduct as envisaged in the Pension Funds Act;

20.3 There was no element of dishonesty in the conduct of the employees.

20.4 There was an undertaking by the employer to allow the employees to remain on the properties for free until the outcome of the arbitration. They were, however, to agree to vacate their properties should they not be successful in the arbitration proceedings. In this regard there was reference to an email which we were not made privy to.

20.5 The respondents remained in occupation of their properties after the arbitration award was escalated to the Labour Court for further determination.

20.6 The judgments from the said court do not have bearing on the question of withholding the respondents' pension benefits. The judgments made provision for the recovery of the applicants' debt. Pursuant thereto the execution processes have already commenced and the properties have been resold.

20.7 Despite Momentum's principle stance on the matter, the applicants still refuse to release the pension benefits.

20.8 The failure to vacate properties does not constitute misconduct as envisaged in section 37D(1)(b)(ii). The remedy lies in processes set out in the PIE Act, moreover such proceedings had already been instituted in the Magistrate's Court.

C THE FUND:

21. At this juncture, it is opportune to refer to Momentum's (the Fund's) response of 30 June 2020. The Fund noted that the employers request to withhold the employees' withdrawal benefits was only made on 13 February 2020, despite the fact that they were being dismissed in 2017.

22. Consequently, the Fund's view was that the applicants failed to comply with the Fund Rules, more specifically clause 9.2 where the Fund was to be informed within 30 days after the members' termination of service. In fact, the Fund stated that it did not have record of any such correspondence from the employer regarding potential claims against the workers.

23. The Fund further recorded, for instance, that the last contribution received from the employer in respect of one of the employees, Mr Mudau was for December 2017[3]. The Fund did not receive any withdrawal notification from the employer or the member. The member only provided the Fund with the withdrawal claim on 5 May 2020.

24. It was emphasized that the requirements of section 37D(1)(b)(ii) have to be met before a Fund could deduct benefits due to its members and pay the employer. Such requirements include the following that:

- there must be a benefit payable by a pension or provident fund;

[3] Page 135, Part B of the record

- there must be an amount due by the member to his/her employer on the date of his/her retirement or on which he/she ceases to be a member of the Fund.
- the damage caused to the employer must be reason of theft, dishonesty, fraud or misconduct by the member. The term "*misconduct"* should be interpreted to mean conduct which contains an element of dishonesty and excludes negligent conduct.

- a member must either admit liability in writing to the employer or a judgment. The judgment has to be obtained in a court of law.

- the judgment or written admission of liability must relate to the compensation due in respect of the damage caused to the employer by the employer's dishonest conduct. Specific amount of compensation or damages suffered must be outlined in the written admission or judgment.

25. The Fund specifically made reference to its Rules, more specifically Rule 9.4.2 and which we find apt to reiterate herein:

26. Rule 9.4.2 of the Fund Rules provides for the withholding of benefits and reads as follows:

> "*9.4.2 The FUND may also withhold a portion of the whole of a MEMBER'S benefit with the intention of giving effect to such a deduction until the matter has been finally determined by a court of law or has been settled or formally withdrawn, but only if –*
>
> *9.4.2.1 In the event of an amount due by the MEMBER to his PARTICIPATING EMPLOYER as referred to in section 37D(1)(b)(II) of the ACT:*

9.4.2.1.1 the PARTICIPATING EMPLOYER informs the FUND in writing of a potential claim against the MEMBER no later than 30 days after the MEMBER'S termination of service, including the estimated amount, that is required the FUND to withhold; and

9.4.2.1.2 the TRUSTEES in their reasonable discretion are satisfied that the PARTICIPATING EMPLOYER has instituted or will institute legal proceedings against the MEMBER within a reasonable period and has not caused any unreasonable delays in bringing it to finalisation."

27. It is trite that the trustees in exercising their discretion have to be satisfied that the employer had or will be instituting legal proceedings against a member and within a reasonable period. The trustees were therefore required to consider whether there were any unreasonable delays.

28. At the time the Fund considered the matter, the Labour Court had not yet made a ruling on the status of the employees. It is further noted that the Fund requested further information from the employer regarding facts as to when the termination of their employment occurred, the nature and rand value of the damages suffered by the employer and the details of any civil and/or criminal proceedings against the employees.

29. Subsequently in further letters, the Fund acknowledged that the employer made *inter alia* the following information available to it namely:

29.1 The employees were dismissed in December 2017 for participating in an unprotected strike.

29.2 The members were allocated residential properties for which they had to make monthly instalments in terms of the respective sale agreements.

29.3 The sale agreement permitted employees to take occupation of the residential property and pay the purchase price, and associated costs over an agreed period.

29.4 The sale agreement further provided that if the members' employment were terminated for misconduct, the members would be allowed to secure funding of their properties from a recognised financial institution or in order to discharge their debt and obligations to the employer.

29.5 Subsequent to the members' dismissal, a compromise was reached between the employer and the union wherein the dismissed employees were allowed to remain on the allocated properties until finalisation of arbitration proceedings (referred to as a verbal agreement).

29.6 The arbitration award was in favour of the employer and the dismissals were confirmed. However the employees then took the matter up to the Labour Court challenging such award.

29.7 The employer continued with its processes in enforcing its rights relating to the verbal agreement between the parties by firstly issuing notices, cancelling the sale agreements, thereafter seeking the evictions or costs and the payment of any other moneys paid to the employer including legal costs. At the time the litigation was pending in the Magistrate's Court in Rustenburg as well.

29.8 The employer responded on 20 April 2020 and 21 April 2020, respectively, where it provided schedules of the amounts owed by the employees. The claims by the employer therefore relate to a sale of a residential property and the subsequent eviction costs.

30. Despite being placed with the aforesaid facts, the Fund still maintained the view that the employer's claim does not fall within section 37D(1)(b)(ii) of the Pension Funds Act, and therefore the Fund could not withhold the benefits of these members. The Fund maintains that the claims relate to the sale of residential property and eviction costs emanating therefrom.

31. We emphasize that since 30 June 2020, there was no further input from the Fund. From the correspondence, it is noted that the employer requested the Fund that it be given an opportunity to make submissions to the PFA and await the outcome of the determination of the PFA. The Fund agreed to this arrangement.

32. We are of the view that irrespective of this arrangement, the Fund was obliged to enquire from the employer as to the progress in the proceedings before Court in the last year. Moreover, by virtue of its fiduciary obligations towards its members and the employees.

E DOES THE MISCONDUCT FALL WITH THE AMBIT OF SECTION 37D(1)(b)(ii) OF THE PENSION FUNDS ACT?

33. The applicants argued that the misconduct had an element of dishonesty and emanated from the employment relationships. More specifically we note the following submissions:

33.1 The applicants' argument is premised on the fact that it was by virtue of the respondents' employment that they qualified to participate in the housing scheme. Such scheme was established by way of a collective

agreement between Royal Bafokeng and National Union Mineworkers (NUM). In other words, the housing agreements emanated from the employees' employment with the applicants. The verbal agreements were entered into a consequence of the said housing agreements.

33.2 When the employees became aware of the outcome of the arbitration, they were contractually bound to either to vacate the properties or pay all their monthly instalments and service charges if they remained in occupation. Instead they remained in unlawful occupation, and refused to pay the amounts due. Their failure to pay caused the applicants to suffer damages.

33.3 It was argued that such conduct was dishonest in that the employees had no intention to abide by the terms of the verbal agreement, more particularly it was never their intention to vacate the premises and pay the outstanding monthly amounts.

33.4 It was contended that the PFA's finding that since the members' claims against the complainants arose after their dismissal, such claims could not constitute workplace transgressions, is unsustainable.

33.5 The verbal agreements resulted due to the fact that the dismissals were challenged. The breach of such verbal agreements was therefore employment related.

33.6 Consequently, the damages caused to the applicants emanated from their dishonesty, misconduct and fraudulent misrepresentations.

34. It is common cause that there was a verbal agreement between the parties. Counsel for the respondents conceded to this fact.

35. It is our view that the verbal agreements emanated from the housing agreements with the employees. Such agreements were employment related and the alleged misconduct indeed arose from matters concerning the employment relationship. They are considered to be matters of mutual interest. Matters of mutual interest have the following characteristics:

- It must relate to the employment relationship between the employer and the employee.
- It must destroy the existing rights in the employment relationship.
- It must be a matter in the interest of both the employer and the employee and must concern the common good of the enterprise.[4]

36. However the applicants have to further demonstrate that the misconduct had an element of dishonesty. We are mindful that the term "*misconduct*" is generally defined as "*unacceptable or inappropriate behaviour of an employee.*" It is accepted that the types of misconduct an employee can commit are not exhaustive. Typical examples of misconduct (other than theft, dishonesty and fraud) could include physical assault on a co-worker or client, negligent or reckless conduct, failure to adhere to company policy and protocols, intentional damage to the employer's property, wilful endangering of the safety of others, intimidation, gross insubordination, unauthorised absenteeism and being under

[4] Vanachem Vanadium matter, para 14

the influence of drugs or alcohol.[5]

37. The term "*misconduct"* as envisaged in terms of section 37D(1)(b)(ii) of the Pension Funds Act has acquired a restrictive interpretation. As alluded to above, the High Court brought clarity as to the correct interpretation of the word "*misconduct*" as envisaged in section 37D(1)(b)(ii), in the matter of **Moodley**, the court confirmed that the word misconduct must be interpreted in light of the words theft, dishonesty and fraud that precede it and thus must be interpreted to include dishonest conduct, or conduct that at least contains an element of dishonesty.

38. This interpretation was adopted in **EH Charlton and 4 Others v The Tongaat-Hulett Pension Fund, Tongaat-Hulett Sugar Ltd and the Pension Funds Adjudicator**,[6] where it was illustrated for purposes of section 37D(1)(b)(ii), dishonest misconduct is required and it is not sufficient if the employee was merely negligent or even grossly negligent.

39. As already alluded to in the **Boshoff** matter – an employer's recourse against a pension fund is only available in limited rare cases, where the *causa* for the claim is an element of discreditable, untrustworthy conduct by the employee to his employer. Section 37D(1)(b)(ii) is exclusively reserved for employers who show that they are the victims of specific dishonourable workplace transgressions.

40. Having alluded to the aforesaid we are not convinced from the evidence before

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5 Vanachem Vanadium Products (Pty) Ltd v National Union of Mine Workers (Pty) Ltd [2014[9 BLLR 923 LC

6 Charlton and Others v Tongaat-Hulett Pension Fund (9438-05) [2006] ZAKZHC 15 (1 December 2006)

us that the element of dishonesty exists. In particular:

40.1 It could not be inferred from the record that the conduct of the employees by virtue of the verbal agreement was dishonest.

40.2 It is further noted that inititially the applicants sought the withholding of the funds based on "*misconduct*" only. In its letter dated 20 April 2020, Momentum was initially advised that the funds be withheld due to misconduct on the part of the employees.[7]

40.3 The applicants' understanding on their own version of section 37D(1)(b)(ii) was:- "*include any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member. On a plain reading of this section, this includes any such acts on the part of the employee…"*

40.4 The applicants further stated that "*it is logical to presume that occupying a property without having to pay for or contribute to such occupation constitutes a misconduct or at the very least unjustified enrichment and/or dishonesty."*[8]

40.5 Only in their subsequent letter of 12 May 2020, do the applicants refer to allegations of dishonesty – in stating that "*participating in an unprotected strike is an act of misconduct or at the very least contains an element of dishonesty in that they were fully aware that participating in such strike was unlawful."*[9]

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8 Page 159 of the record
9 Page 159 of the record

40.6 The arbitration award confirmed the dismissals but made no mention of dishonest conduct on the part of the employees.

41. It is trite that the element of dishonesty must be evident from the facts. We note the applicants have referred to various authorities illustrating circumstances where dishonesty is prevalent, more specifically to the Canadian authority of **Lynch and Co v United States Fidelity and Guaranty Co**[10] where in essence the distinction was drawn between reckless disobedient conduct as opposed to the intent to deceive or cheat, which constitutes acts of dishonesty.

42. It must be emphasised that the Fund cannot merely rely on allegations put before them by the employer - namely that the damage arose from the dishonest conduct of the employees.[11] There has to be sufficient proof of a *prima facie* case to permit the Fund to withhold pension benefits. The proof of dishonesty was required before a Fund could accept the existence of a *prima facie* right.[12]

43. In our view this conclusion can only be arrived at upon the Fund having consideration to all the facts, which would include the version of the employees in the subsequent court processes.

44. The applicants have placed information before this Tribunal which was not within the knowledge of the Fund as at 30 June 2020 when the Fund took the decision to withhold the employees' funds. Amongst other factors, the Fund has to be satisfied that an element of dishonesty from the facts before it.

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10 [1971] OR at 37, 38 Ont SG

11 Jeftha matter

12 Windybrow Centre for the Arts v Sanlam Life Insurance Ltd and Others (50395/2015) [2016] ZAGPPHC 225 (24 March 2016)

45. It is our view that the Fund has not had a proper opportunity to consider the matter post 30 June 2020. Various developments have occurred thereafter, particularly the PFA's decisions of 17 September 2020, the outcome of the Labour Court matter, if finalised, including the judgment orders that the employer obtained against the employers.

46. At all relevant times the Fund was required to apply its mind impartially, reasonably, appropriately and in a balanced manner. The Fund is aware that in complying with its fiduciary duties it is required to scrutinize the withholding of claims and carefully balance the financial prejudice of its members against the employers' claim.

47. The trustees of the Fund are further bound to observe and implement the rules of the Fund.[13] The trustees' powers and responsibilities as well as the rights and obligations of members and participating employers are governed by the rules, and the applicable legislation. The rules of the Fund form its constitution.[14]

48. Pension benefits are sacrosanct and are legally protected in the control of the relevant funds, except under certain circumstances. The balancing of both parties' interests demonstrates that section 37D(1)(b)(ii) cannot be interpreted solely for the the benefit of the employer. Conduct that does not amount to dishonesty or that relates to a breach of contract does not fall within the meaning of section 37D(1)(b)(ii) of the Pension Funds Act.

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13 SA Metal Group (Pty) Ltd v Deon Jeftha and Others Case No 20298/2018, dated 12 December 2019

14 Sasol Limited and Others v Chemical Industries National Provident Fund [2015] JOL 33910 SCA at para 13

49. It is further pointed out that during the hearing, counsel for the applicants conceded to the fact that the Fund had not responded since its June 2020 letter. Paragraph 11 of its notice to augment[15], is therefore inaccurate, wherein it was stated that Momentum had abandoned its initial position.

50. In our finding we deem it appropriate to set aside the decision of the PFA. This Tribunal's powers in its decision making is limited in terms of section 234(1)(a) of the FSRA.

51. Under these circumstances we make the following order that:

(1) The application for reconsideration is successful;

(2) the decision of the PFA is set aside and remitted back to the PFA for reconsideration in terms of section 234(1)(a) of the FSRA.

SIGNED at **PRETORIA** on this **21st** day of **SEPTEMBER 2021** on behalf of the Panel.

ADV H KOOVERJIE SC

With the Panel consisting also of:

W Ndinisa

Z Nkubungu-Shangisa

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