

SOUTH AFRICA / JUDGMENT

Babatas Communal Property Association v Lebatlang and Others (957/2019) [2019] ZANCHC 51 (4 October 2019)

[2019] ZANCHC 51

COURT

Northern Cape High Court, Kimberley

BEFORE

Pakati

CASE / FILE NUMBER

957/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE DIVISION, KIMBERLEY)

Case

No: 957/2019

Heard

on: 19/07/2019

Delivered

on: 04/10/2019

In

the matter between

BABATAS

COMMUNAL PROPERTY

1st Applicant

ASSOCIATION

(Registration Number:

CPA/11/1276/A)

LEBATLANG

KABELO

2nd Applicant

GASEHETE
JOSIAS
3rd Applicant
MANGWAKWE
KAGISO
4th Applicant
MAKGALANYANE
MASABATA
5th Applicant
BAITSOMEDI
MATLKALA
6th Applicant
MOHAMMED
AZALELAH
7th Applicant
KGALADI
LUCIA
8th Applicant
MOTSWAKADIKGWA
MABENA
9th Applicant
MOAMOGWE
JOSEPH
10th Applicant
OLYN
OBAKENG
11th Applicant
And
ABSA
BANK
1st Respondent
MEC
FOR AGRICULTURE, LAND REFORM
2nd Respondent
AND
RURAL DEVELOPMENT, NORTHERN
CAPE
PROVINCE
MATHEBULA
ONALERONA
3rd Respondent
KOTIE
TSHENOLO
4th Respondent

JUDGMENT

PAKATI J

INTRODUCTION

[1] This is an application for confirmation of an interim interdict granted on 03 May 2019 by Stanton AJ on an unopposed basis in the following terms:

“1. The 3rd and 4th Respondents be called upon to show cause on Friday 07 June 2019 at 09h30 or soon thereafter as Counsel may be heard, why the following

final relief should not be granted:

1.1 The Second – Eleventh Applicants are hereby declared to be validly elected as the First Applicant’s Executive Committee Members of the Applicant, at the General Meeting of the First Applicant held on 20 January 2018;

1.2 The First Respondent is hereby directed to grant the First Applicant immediate access and control of its cheque bank account number

4077534618, held with the First Respondent; and to change the signatories to the said account to the relevant nominees of the First

Applicant, immediately; and

1.3 The costs of this application shall be borne by the Third and Fourth Respondents, on an Attorney and own Client Scale; jointly and

severally, the one paying the other to be absolved.

2. The relief granted in paragraph 1, 1.1, 1.2 above shall operate as an interim interdict with immediate effect.

3. A copy of this order must be served on the 3rd and 4th Respondents personally.”

[2] On 29 April 2019 the first respondent, Absa Bank, filed a notice to abide the decision of the court. By agreement between the applicants and Absa Bank the applicants seek no costs order against Absa bank. Only Ms Mathebula Onalerona and Mr Kotie Tshenolo, third and fourth respondents, filed a notice to oppose dated 05 June

2019. On 07 June 2019 the rule was extended to 19 July 2019 when argument was heard and costs were reserved.

[3] Mr Kabelo Lebatlang, the second applicant deposed to the founding affidavit on behalf of the first applicant, Babatas Communal Property Association (the CPA). Messrs Gasehete Josias, Mangwakwe Kagiso, Makgalanyane Masabata, Baitsomedi Matlakala, third to sixth applicants, are deputy chairperson, secretary, deputy secretary and treasurer of the first

applicant respectively. The remainder of the applicants, Mr Mohammed Azalelah, Ms Kgaladi Lucia, Messrs Motswakadikgwa Mabena, Moamogwe Joseph and Olyn Obakeng are seventh to eleventh applicants respectively. They are additional members of the CPA.

- [4] The second respondent, the MEC Department of Agriculture Land Reform and Rural Development (the MEC), is cited in his official capacity and no relief is sought against him. Third and fourth respondents are members of the erstwhile executive committee of the CPA who were not elected into the current one.

FACTUAL

BACKGROUND

- [5] The CPA was established in terms of the provisions of the Communal Property Association Act (the Act)[1] and registered on 05 April 2011 in terms of section 8 (3) of the Act. Its last elections of the executive were held on 23 May 2015 with its term ending in May 2018. On 26 October 2015 the MEC's Provincial Shared Services Centre (PSSC) received a request for intervention to mediate between the members and the newly elected executive committee. According to the CPA constitution only bona fide members shall become eligible for membership of the executive committee. It transpired that some non-members of the newly elected committee had been elected to the executive and this was the main dispute between the parties. On 05 September 2016 the deputy chairperson of the CPA forwarded a letter to the MEC requesting intervention. This resulted in a series of mediation meetings being held in terms of section 10(2) of the Act. It was resolved that a new executive committee should be appointed.
- [6] The appointment of a conciliator by the Director-General is provided for by section 10(2) of the Act which empowers him (in this case, the Provincial Department of Land Affairs), inter alia, on his or her own accord request or at the request of the community, an association or any member thereof to appoint a conciliator acceptable to the parties to the dispute to assist in resolving any issues between the association and its members or community members.
- [7] If the parties to the dispute cannot reach an agreement on the person to be appointed, the relevant Director-General, may appoint a person who has adequate experience or knowledge to conciliate community disputes. In terms of section 10(3) a conciliator appointed in terms of section 10(1) is obliged to attempt to resolve the dispute by:
- 7.1 mediating the dispute;
 - 7.2 fact-finding relevant to the resolution of the dispute;
 - 7.3 making a recommendation to the parties to the dispute; and
 - 7.4 In any other manner she/he considers appropriate.

- [8] Section 10(4) for its own part enjoins the conciliator to report to the relevant Director-General and all parties to the dispute, on the result of his or her conciliation and make recommendations thereto. It is significant to point out that all discussions taking place and all disclosures and submissions made during conciliation are privileged unless the parties agree otherwise. It is for these reasons that the PSSC appointed a panellist to regularise the applicant. The Director-General may require the members to conduct an election for a new committee, if the integrity, impartiality or effectiveness of the committee or any member of the committee is in question hence an agreement was reached that an Annual General Meeting (AGM) should be held and focus on the elections instead of other provisions of the constitution.
- [9] In order to monitor compliance with the provisions of the constitution and the Act the MEC acts in terms of section 11(6) &
- (7) of the Act which provides:
- “(6) If a dispute arises within an association or provisional association the Director-General may, of his or her own accord, or at the request of a member of the association or provisional association-*
- (a) undertake an enquiry into the activities of the association or provisional association, in which event he or she shall take reasonable steps to ensure that interested parties are made aware of the enquiry and of its outcome;
 - (b) advise the association or provisional association and the members of their respective rights and obligations;
 - (c) make a conciliator contemplated in section 10(2) available to assist in the resolution of dispute;
 - (d) require the members to conduct an election for a new committee, if the integrity, impartiality or effectiveness of the committee or any member of the committee is in question;
 - (e) initiate proceedings contemplated in section 13; or
 - (f) Take such other reasonable measures as he or she considers appropriate in the circumstances.
- (7) When acting in terms of subsection (6) the Director-General shall be guided by the aim of resolving the dispute in accordance with the provisions of the constitution of the association.”
- [10] The AGM was convened on 25 November 2017 and 03 December 2017 and on both occasions a quorum could not be reached. On 20 January 2018 the AGM was again convened and it was quorate in terms of clause 19.8 of the CPA constitution. The results were generally accepted and complaints were only received after the AGM was adjourned. Clause 19.8 provides:

“The quorum for any general assembly shall not be less than half the members as recorded in the register. Should a quorum not be present within one hour after the time appointed for the meeting, it shall stand adjourned to the same day and the same time the following week.

Should a quorum not be present within one hour after the time appointed for such adjourned meeting, the adjourned meeting shall

stand adjourned to the same day at the same time the following week. At the second adjourned meeting such members as are present shall be deemed to form a quorum. This paragraph is subject to paragraph 18.3.1 [of the constitution].”

- [11] In the absence of any serious challenge the elections of the executive committee would not only be lawful but would have been conducted freely and fairly in an appropriate and quorate forum.
- [12] On 01 February 2018 a meeting was held to mediate on the complaints raised by the erstwhile members. A resolution that mediation should be conducted by the national office as the provincial officials were part of the impugned election process and might potentially be conflicted was taken. For impartiality and good governance the complainants were given an opportunity to detail and clarify their complaints, which they failed to do, the applicants argue.
- [13] On or about April 2018 the executive committee met with the PSSC and it was resolved that the general meeting should be called by the MEC to enable the community to carry on with the business of the CPA. On 12 May 2018 another meeting was held in order to attend to the complaints but it yielded no results and was postponed to 06 June
2018. On 06 June 2018 a list of members was verified by the officials from the MEC’s office. The complainants led by Ms Mathebula and Mr Kotie were disruptive and attacked the officials from the office of the MEC.
- [14] The applicants allege that it became clear to the PSSC that the complainants as well as third and fourth respondents were not interested in the dispute being resolved and it decided to register and confirm the newly elected members of the executive committee of the CPA. On 21 August 2018 the MEC also confirmed the appointed executive committee who would be serving in that portfolio for three years in compliance with the constitution and lapse on 19 January
2021. On 11 March 2019 the Provincial Head-Northern Cape Provincial Shared Service Centre Department of Rural Development and Land Reforms addressed a letter to OC Koikanyang Attorneys, the attorneys of record of the applicants, which records:

“ELECTIONS OF BABATAS CPA COMMITTEE

I refer to the above matter. As the Department responsible for CPAs in the Province of the Northern Cape, we hereby confirm that the elections of Babatas CPA Executive Committee were free and fair.”

- [15] Notably, the above decision was neither appealed against by the third and fourth respondents nor did they approach court for an order setting it aside. According to the applicants the respondents disrupted the smooth running of the CPA.
- [16] The applicants own Broughton and Hatnollds Farms over and above three other farms known as Farm Eildon, Shelford Skema; Farms Vredebron, Cropwell and Shelford Skema. The applicants allege that there were various agricultural operations that were undertaken on the abovementioned farms, namely agricultural produce and stock breeding. According to the applicants the CPA needs funds to effectively and successfully run the said operations as well as paying its labourers, administrative staff and electricity. After their appointment as executive committee members they allege that they could not transact on the CPA's account as Absa Bank informed them that the CPA's account had been frozen until the dispute between the parties has been resolved. On 12 October 2018 the applicants' attorney of record addressed a letter to Absa Bank advising it that the new executive committee had been appointed and therefore it should unfreeze the account. Absa Bank responded in a letter dated 16 October 2018 sent to Koikanyang Attorneys which reads:

“I confirm that a hold has been placed on the account until we have received confirmation that the dispute between you and the former

officials has been resolved. Please note that it is imperative that the bank is satisfied that the persons so representing Babatas

Communal Property Association is so authorised in terms of the constitution. Please note that the bank is under threat of legal action. Please find letter attached confirming same.

I thank you for the reference to Communal Property Association and now understand the involvement of the Department of Rural Development & Land Reform.

I have, however, read the act and cannot locate the provision empowering the Department to act on the association's behalf or to record the minutes of the AGM and the like. To expedite the resolution of the query please can you be so kind as to point same out to me as their involvement appears to be restricted to assistance in respect of the formation of the association's constitution.

There is a current dispute between the various members surrounding the appointment of the Chairperson, Secretary and Treasurer, we will require the following in addition to your mandate:

- (i) A dated resolution from the Babatas CPA Committee as the current resolution.
- (ii) A resolution and minutes of the Annual General Meeting “AGM” that the Chairperson, Secretary and Treasurer have been appointed as committee members at an (sic) as per Rule 13.1 of the Babatas constitution;

(iii) A resolution and the minutes of a general meeting appointing them as Chairperson, Secretary and Treasurer as required by Rule 12.3 of the Babatas Constitution.

Please note that the bank is not prepared to take the risk of allowing any person to provide the bank with instructions to close or withdraw funds unless the bank is satisfied that there has been compliance with our client's constitution. Please note that your dispute is not with the bank and we will welcome a court order authorising the legitimately appointed members to sign and do the necessary to access the account." My emphasis

[17] On 17 October 2018 the applicants' attorney of record again forwarded another letter to the bank in response to the letter dated 16 October

2018. He informed the bank that in terms of section 10 of the Act the department is authorised to be involved in the resolution of a community dispute and ensure that the object of the Act and the CPA constitution are adhered to. Furthermore he informed the bank that elections were held as per procedure and the results were announced by the Departmental official in charge of the elections immediately after the voting process by the members and the names of the new executive committee members were read out to the members; that there were no minutes of the meeting as it was strictly concerned with the election of new committee members and the Department produced a report of what transpired on 20 January 2018 as the body in charge of the election. He also explained that the dispute was self-created by some of the previous committee members who took part in the said elections but lost. However, Absa Bank still refused to unfreeze the account on 18 October 2018. It reiterated that it still needed to be satisfied that the election process was correctly followed, alternatively that there was mediation agreement. Although the Bank was informed of the procedure by Koikanyang Attorneys it still insisted on production of more information thereby refusing to unfreeze the account.

[18] The respondents raised, in limine, that there exists a dispute of fact as to whether or not the second to eleventh applicants were validly elected in January 2018 as members of the CPA executive committee and for that assertion they relied on Rule 6(5)

(g) of the Uniform Rules of Court.[2]

[19] According to the respondents the applicants should have foreseen the existence of a factual dispute between the parties. They allege that no minutes or attendance register and the verification list of members of the CPA who were present at the meeting was attached in support of their allegation that the meeting was quorate.

[20] The respondents allege further that the deponent to the founding affidavit has no authority to act on behalf of the members of the CPA. They rely on *Graham V Park Mews Body Corporate and Another* where it was held:

“[19] Whether a formal resolution is required in order to give an individual the necessary authority to act in legal proceedings on behalf of a juristic person, it seems, depends on the circumstances of each case.

- [20] In *Tattersall and another v Nedcor Bank Ltd* [1995] ZASCA 30; 1995 (3) SA 222 (A) at 228F-229D [also reported at [1995] 2 All SA 365 (A) – Ed], it was held that if according to the evidence it is clear who would be the person that would act on behalf of a juristic person, then that evidence would be sufficient to indicate that the person so mentioned would have the necessary authority. As stated in the words of Nedstadt JA “to hold otherwise would be carrying formality too far”.
- [21] This view was further shared by a Full Bench of this Court in *Mall (Cape) (Pty) Ltd v Merino Ko-operasie BPK* 1957 (2) SA 347 (C) and at 352 [also reported at [1957] 2 All SA 242 (C) – Ed] it was held that: “Each case must be considered on its own merits and the court must decide whether enough evidence has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf.

I, therefore, dismiss the argument that the second respondent lacked the necessary authority to act on behalf of the first respondent. The first respondent is, therefore properly before this court.” [3]

- [21] The issue to be determined is whether or not the second to eleventh applicants were validly elected as the CPA’s executive committee during the elections held on 20 January 2018 and whether or not the interim order granted on 03 May 2019 should be confirmed. The applicants maintain that the elections were free and fair and were therefore validly appointed as executive committee members. In the contrary the respondents insist that there is a ‘serious dispute of fact’ and request the Court to dismiss the application with costs.

LEGAL STANDING OF THE DEPONENT TO THE NOTICE OF MOTION

- [22] The respondents allege that the second applicant launched the application on behalf of the alleged newly elected executive committee of the CPA and not the members of the CPA. On 17 April 2019 the executive committee resolved that the second applicant, Mr Kabelo Lebatlang in his capacity as the chairperson, was authorised to sign all documents, affidavits, pleadings and notices to give effect to the institution of legal proceedings against Absa and other respondents. The said resolution was signed by ten other members which means that the majority of the executive committee members authorised Lebatlang to continue with these proceedings.
- [23] It is not provided for in the constitution and in the Act that a resolution would be taken by the members of the CPA and not the executive committee. Therefore the respondents’ argument in this regard cannot stand. In my view, Lebatlang was so authorised to act on behalf of the CPA members.

WHETHER OR NOT THERE EXISTS A DISPUTE OF FACT

[24] The respondents allege that there is a ‘serious dispute of fact’ in this matter as alluded to earlier. The applicants dispute this. Corbert JA in *PLASCON EVANS-PAINTS v VAN RIEBEECK PAINTS* held:

“It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.”[4]

[25] At 635C the learned Judge held further:

“Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on papers.”

[26] In my view, no dispute of fact exists in this matter. The respondents have raised a bare denial without factual foundation. They have not taken this Court into their confidence and explain the dispute of fact that they allege exists.

WHETHER OR NOT THE APPLICANTS WERE VALIDLY APPOINTED AS THE CPA’S EXECUTIVE COMMITTEE IN THE MEETING HELD ON 20 JANUARY 2018

[27] Clause 13 of the CPA constitution deals with the appointment of committee members. Sub-clauses 13.1 to 13.4 provide:

“13.1 Any person who is a member of the Association may become a Committee member at an annual general meeting subject to the appointments

procedure below.

13.2 At any general meeting of the members, the members may, subject to the provisions in this Constitution by a simple majority elect a Committee member.

13.3 Subject to paragraph 13.4 Committee members shall hold office for three (3) years from the date of election or until they are obliged to vacate in terms of clause 17.

13.4 The appointment of the initial Committee shall terminate at the first annual general meeting of members which takes place after registration of the Association with the Department of Rural Development and Land Reform. The initial Committee members shall be eligible for re-election.”

[28] On 21 August 2018 Mr JT Sebape, the registration Officer: Communal Property Institutions, forwarded a letter to the Department of Rural Development and Land Reform which records:

“CHANGE OF EXECUTIVE COMMITTEE MEMBERS OF BABATAS COMMUNAL PROPERTY ASSOCIATION, REGISTRATION NUMBER: (CPA/11/1276/A).

This serves to acknowledge receipt of your request sent to the Communal Property Institutions (CPI's) Registration Officer to register the new executive committee of Babatas Communal Property Association (CPA). It is with great pleasure to inform you that the changes have been recorded and the new executive committee of Babatas CPA is as follows with effect from the 20th January 2018:

NAME

ID NUMBER DESIGNATION

Lebatlang Kabelo 730412 5929 082 Chairperson

Gasehete Josias

481021 5291 087 Deputy Chairperson

Mangwakwe Kagiso 830703 5633 081 Secretary

Makgalenyane Masabata 880131 0651 081 Deputy

Secretary

Balcomedi Natlakala 850109 0939 082 Treasurer

Mohammed Azaela 661010 1981 082 Additional Member

Kgaladi Lucia

7611150729 082 Additional

Member

Motswakadikgwa Mabena 610922 5794 083 Additional

Member

Moamongwe Joseph 500416 5861 086 Additional Member

Olyn Obakeng

800209 5417 080 Additional Member

In terms of clause 13.3 of the CPA constitution the term of office for the executive committee is 03 (three) years, therefore the term of office for this executive committee shall lapse on the 19th January 2021."

[29] On 11 March 2019 Mr Kgotso Moeketsi, the Provincial Head, Northern Cape Provincial Shared Service Centre, Department of Rural Development and Land Reform, sent a letter to Mr Koikanyang and informed him that as the department is responsible for CPAs in the Northern Cape, the department informs him that "the elections of Babatas CPA Executive Committee were free and fair."

[30] Taking into account that the MEC had already endorsed and promulgated the new executive committee members appointed on 20 January 2018 he is not in a position to change his decision because he is *functus officio*. If the respondents feel aggrieved by the said elections and endorsement, as they seem to be, they should approach the Minister to uphold the appeal in whole or in part, rescind or vary the decision or dismiss the appeal as contemplated in section 16 of the Communal Property Association Act 28 of 1996[5]. For as long as the respondents have not done so, as in this case, the MEC's endorsement and promulgation as contained in the letter of 21 August 2018 stands and is valid. This position was confirmed by *MERAFONG CITY v ANGLOGOLD ASHANTI* where Cameron J held:

"[41] The import of Oudekraal and Kirland was that government cannot simply ignore an apparently binding ruling or decision on the basis that it is invalid. The validity of the decision has to be tested in appropriate proceedings. And the sole power to pronounce that the decision is defective, and therefore invalid, lies with the courts. Government itself has no authority to invalidate or ignore the decision. It remains legally effective

until properly set aside.

[42] The underlying principles are that the courts' role in determining legality is pre-eminent and exclusive; government officials, or anyone else for that matter, may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them; and, unless set aside, a decision erroneously taken may well continue to have lawful consequences. Mogoeng CJ explained this forcefully, referring to *Kirland*, in *Economic Freedom Fighters*. He pointed out that our constitutional order hinges on the rule of law:

'No decision grounded [in] the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help". Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained.'

The respondents have failed to take the matter to court for review or on appeal to the Minister and therefore the MEC's decision stands.

[31] Regarding access and control of its cheque bank account the applicants rely on Clause 21.2 of the constitution which provides:

"At the annual general meeting of the Association a budget of the Association shall be adopted for the income and expenditure for the ensuing financial year, and no funds shall be disbursed other than in accordance with such budget, provided that the members may by resolution in general meeting amend such budget from time to time."

[32] The primary objects of the association are recorded in clause 5 of the CPA constitution thus:

“5 OBJECTS OF ASSOCIATION

5.1 The primary object of the Association shall be to collectively acquire, hold and manage property in common on behalf of the members of the Association, for the purposes of, and subject to the terms of this Constitution and the Act.

5.2 The further objects of the Association shall be:

5.2.1 To manage and administer the Association's and its natural resources for the benefit of the members in accordance with the provisions of the Constitution, in a participatory and non-discriminatory manner.

5.2.2 To encourage economic self-reliance and self-sufficiency and the cultural and social well-being of the members of the Association and the dependants through farming or any other lawful business or activities and by improving and developing the standard of agricultural or other forms of economic production within the area where the Association operates, while protecting the environment as required by the law.

5.2.3 To raise, receive and hold funds, from any lawful source, for the benefit of the Association, and to manage, administer and disburse those funds in pursuance with the objects of the Association and for administrative purposes.

5.2.4 To conduct and operate any financial assistance or subsidy programme or project to achieve the primary objects of the Association of persons conducting such a programme or project, such activities to include but not limited to technical assistance, education and co-operative purchase to help farmers or business people increase production, lower production cost and market their products.

5.2.5 To guarantee, upon such conditions as the Association may determine the obligations of any person, including any Association of persons, in respect of any activity such persons may engage in and what are consistent with the primary objects of the Association.

5.2.6 The development of agriculture and opportunity for small scale agriculture and other job opportunities.

5.2.7 To execute any action as may serve to address poverty, unemployment, socio-economic needs and historical disadvantages among its members.

5.2.8 To foster an environment of co-operation and communication to reach a common objective amongst the members of the Association.”

[33] When Absa bank froze the CPA's bank account it defeated the whole purpose of the CPA having a bank account in order to maintain its primary objectives. The CPA has to have a bank account in terms of clause 3.3 of its constitution. Taking into consideration that the CPA runs more than three farms it would not be in a position to maintain its primary objectives if its account is frozen as it could not pay for necessary services. It also cannot meet its daily expenses incidental to the administration and management of the said farms.

Having no access to the CPA's bank account renders it impossible for the committee to manage the affairs of the Association. This, in my view, is prejudicial to the CPA.

- [34] Taking into account what I have stated hereinbefore it is clear that the application is urgent considering the need for the smooth running of the association. It is therefore incumbent upon the executive committee to exercise its powers pertaining to its office in compliance with the constitution of the CPA. In my view, the applicants have complied with the requirements for a final interdict namely, a clear right, an injury actually committed or reasonably apprehended and absence of similar protection by any other ordinary remedy.[6] The interim order granted on 03 May 2018 has to be confirmed.

COSTS

- [35] Mr Nxumalo, on behalf of the applicants, requested that the interim order granted on 03 May 2018 to be confirmed with costs on a scale as between attorney and own client alternatively an award of costs de bonis propriis because of the manner in which the respondents have dealt with their case regarding the issue of costs yet they were legally represented. He states that the respondents have not even responded to the request for the costs in the interim application. Ms Tyuthuza, for the third and fourth respondents, argued that the interim order be discharged with costs on attorney and client scale.
- [36] The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at.[7]
- [37] An award of attorney and own client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalise a person who has exercised a right to obtain a judicial decision on any complaint such party may have.[8] The court's discretion in this regard is not restricted to such conduct but it includes all cases in which special circumstances or considerations justify the granting of such order.[9]
- [38] The applicants request for costs on a scale as between attorney and own client in their notice of motion. Clause 1.3 of the order dated 03 May 2018 states that costs of the application would be borne by the third and fourth respondents on an attorney and own client scale jointly and severally, the one paying the other to be absolved. This order was served personally upon the respondents. In their notice of intention to oppose it shows that both respondents were legally represented by Mjila Attorneys, an experienced attorney. In paragraph 3 of the respondents' answering affidavit Tshenolo Kotiya, the deponent, confirms that when he deposed to the affidavit he did so pursuant to advice given to him by his legal representative. The respondents did not give reasons why they were not entitled to pay costs on attorney and own client scale. This issue was also not dealt with by the respondents in their heads of argument.

[39] Taking into account the facts of this case and the manner in which the respondents handled it thereby threatening the bank with legal action, an order of costs on a scale as between attorney and own client will be justified in the circumstances.

In the circumstances I grant the following order:

1. The interim order granted on 03 May 2018 is hereby confirmed.
2. The third and fourth respondents are ordered to pay costs of this application on a scale as between attorney and own client, jointly

and severally, the one paying the other to be absolved.

BM PAKATI

JUDGE – NORTHERN CAPE DIVISION, KIMBERLEY

On behalf of the Applicants: ADV NXUMALO

Instructed by:

LULAMA LOBI INC.

On behalf of the 3rd & 4th Respondents: ADV TYUTHUZA

Instructed by:

OFFICE OF THE STATE ATTORNEYS

[1] Communal Property Association Act 28 of 1996

[2] Rule 6(5) (g) of the Uniform Rules of Court provides: “Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the afore-going, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.”

[3]

[2012] 1 All SA 167 (WCC) at 174-175 paras 19, 20 & 21.

[4]

[1984] ZASCA 51; 1984 (3) SA 623 (AD) at 634H-I

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- [5] Section 16 provides: “Any person aggrieved by a decision of the Director-General may in the prescribed manner appeal to the Minister, who may uphold the appeal in whole or in part and rescind or vary the decision, or dismiss the appeal.”
- [6] Setlogelo v Setlogelo 1914 AD 221 at 227
- [7] Beinash v Wixley [1997] ZASCA 32; [1997] 2 All SA 241; 1997 (3) SA 721 (A) ; see also Norwich Union Fire Insurance Society Ltd v Tutt 1960 (4) SA 851 (A) at 854C-E
- [8] Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163 at 183-184
- [9] Rautenbach v Symington 1995 (4) SA 583 (O) at 588A-B
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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/babatas-communal-property-association-v-lebatlang-and-others-unknown-topic-anchc-2019--6a3ea5153b1caa912980c646>

Prepared on 13 October 2026 · Esheria