

SOUTH AFRICA / JUDGMENT

Dawson v Sidney on Vaal CPA and Another (603/2019) [2021] ZANCHC 2; [2021] 2 All SA 429 (NC); 2021 (6) SA 167 (NCK) (8 January 2021) [2021] ZANCHC 2

COURT

Northern Cape High Court, Kimberley

BEFORE

Van Tonder

CASE / FILE NUMBER

603/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape Division, Kimberley)

Case

number:	603/2019 Date
heard:	14/08/2020 In
the matter of:	Date
available:	08/01/2021 JASON DAWSON and Applicant SIDNEY ON VAAL CPA THE CHIEF DIRECTOR First Respondent DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM, NORTHERN CAPE PROVINCE Second

Respondent
Coram: Van
Tonder, AJ

JUDGMENT

VAN TONDER, AJ

[1] This is an application brought by the applicant in his capacity as a member of the first respondent for an order in the following terms:

1. Ordering that the first respondent be placed under Administration of the Director General: Land Affairs in terms of section 13(1) of the Communal Property Associations Act 28 of 1996;
2. Granting the under mentioned powers in terms of section 13(2) of the Communal Property Associations Act to the Director General: Land Affairs:

2.1. Appointing of a receiver as receiver of the first respondent to administer the affairs of the first respondent temporarily until such time as a new committee of the first respondent has been elected.

2.2. The receiver is authorised, during his temporary term of office, to do all things necessary to maintain the affairs of the first respondent in good and proper order, and is specifically authorised and instructed to perform the following tasks:

2.2.1. The day to day management of the affairs of the first respondent;

2.2.2. The control of the first respondent's bank account(s) and administration of same;

2.2.3. The payment of the first respondent's ordinary running expenses;

2.2.4. The maintenance and control of books, records and documents of the first respondent;

2.2.5. Updating the register of members of the first respondent in compliance with the first respondent's constitution, the Communal Property Associations Act (the CPA Act) and the Settlement Agreement provided that the receiver is specifically directed and authorised to table the updated members'

register for approval at the 2019 annual general meeting of the first respondent to be convened as set out herein below;

2.2.6. Mandating and instructing the auditors of the first respondent to prepare all outstanding financial statements of the first respondent;

2.2.7. Convening (including the determination of date, time and venue), holding and chairing the annual general meetings or any other meetings of the first respondent referred to herein below or which the receiver deems necessary for the fulfilment of his tasks;

2.2.8. Arranging an election of committee members to take place at the 2019 annual general meeting and to represent the respective constituencies in compliance with the first respondent's constitution, the CPA Act and the Settlement Agreement;

2.2.9. Engaging the services of the Independent Electoral Commission of South Africa (the IEC) or any other suitable body or person(s) to serve as election monitors;

2.2.10. Review and set aside any decision, resolution, contract, transaction, undertaking, agreement or the like, made by any of the executive committee or any of its members, past or present, acting in unison or individually, found by the receiver to be contrary to the provisions of the constitution of the first respondent, the provisions of the CPA Act, any other statutory provision, or the Settlement Agreement, or not in the best interest of the members of the first respondent;

2.2.11. Engaging the services of an attorney or counsel for assistance in the proper interpretation of the first respondent's constitution and any other legal requirements which the receiver is required to observe, if deemed necessary by him;

2.2.12. Approaching the High Court for directions or other relief on any matter pertaining to his appointment or the fulfilment of his tasks as receiver.

2.3. The receiver shall, as soon as is practicably possible:

2.3.1 Update the register of members of the first respondent as provided in 2.2.5 above.

2.3.2. Convene and hold the annual general meetings of the first respondent for 2019 at which the elections as envisaged herein shall take place.

2.3.3. Call for nominations for election of members to fill any vacant posts on the executive committee and/or any other committee of the first respondent in terms of clause 9 of the first respondent's constitution, upon such terms as is deem applicable and in compliance of the rules of natural justice.

2.4. The receiver shall, in his sole discretion, be entitled:

2.4.1. To schedule the meetings referred to above on the same day or on different days, as he deems fit and practicable;

2.4.2. To engage the assistance of the IEC or any other suitable body or person(s) to assist him in maintaining order at and monitoring the voting at any meetings of the first respondent.

2.5. As regards to the nomination of candidates to stand for election;

2.5.1. The receiver shall in his sole discretion determine the nomination process to be followed, provided that it shall be fair and transparent;

2.5.2. The receiver shall determine any disputed issues in respect of the first respondent's constitution

and effect the necessary amendments to it;

2.5.3. The receiver shall be entitled to call for written submissions from the parties in the matters referred to in 2.5.1 and 2.5.2, and shall, if he deems it fit, be entitled to seek independent advice and assistance from neutral third parties, including an opinion from senior council on the interpretation of the first respondent's constitution.

2.6. At the time when the election referred to above is called, the receiver shall address written notices to the Sidney on Vaal Municipality and to the Regional Director, Department of Land Affairs, advising them of the impending election of committee members from the respective regions and requesting them to appoint representatives to serve on the committee of the first respondent.

2.7. Following the appointment of the receiver in terms hereof:

2.7.1. He shall update the members register within a period of 1 (one) month from the date of this order and which register shall be submitted for approval at the 2019 annual general meeting;

2.7.2. He shall convene and hold the elections and annual general meetings within a period of 6 (six) months from the date of this order.

3. Costs of suit

[2] This application was preceded by an urgent application which was brought during March 2019, which urgent application was settled on the basis of interim relief pending the finalisation of the main application herein, which order was made on 12 April 2019, in inter alia the following terms:

2. That the first respondent undertakes to not declare, authorise, approve the financial statements nor hold an annual general meeting of the members until the main application is disposed of;
3. The first respondent undertakes that general meetings of members will be held for information purposes only. Any decisions that are required to be made by any such general meeting in terms of the constitution of the first respondent, shall be valid only if any such decisions are previously certified and approved for each of the parties, such approval shall not withheld unreasonably;
4. That the first respondent is authorised to make dividend payments to beneficiaries as set out in annexure "JD10" (being the December 2018 beneficiary payment list) to the applicant's founding affidavit, excluding such beneficiaries and amounts which are incorrectly and/or irregularly listed and/or disputed, which disputed beneficiaries and/or amounts shall be excluded from any payment;
5. All payment made shall be previously approved by the treasurer and the executive committee. Proof of all such payments shall be provided to the applicant's attorneys within seven (7) days from date of payment.

- [3] The remainder of the order dealt with the postponement of the main application, reserving the costs of the urgent application, time periods in respect of the filing of answering and replying affidavits, heads of argument and so forth.
- [4] The applicant essentially requests an order that the Sidney on Vaal Communal Property Association (the first respondent/CPA) be placed under the administration of the Director-General: Land Affairs, in terms of Section 13(1) of the Communal Property Associations Act 28 of 1996.
- [5] He also goes one step further and request an order that the Director General: Land Affairs be granted the powers by the court in terms of section 13(2) of the CPA Act, to appoint a receiver to exercise the powers on behalf of the Director General: Land Affairs, and for the receiver to take over the running of the CPA as set out in the notice of motion.
- [6] The applicant is a member of the CPA and was appointed by the executive committee as the CPA's Commercial Operations Officer since June 2017.
- [7] The basis upon which he brings the application is set out in his founding affidavit as follows:

“The grounds for the Application for the appointment of an Administrator is to stop the continued maladministration of the Association’s affairs by the Executive Committee and that it would consequently be just and equitable that the Association be placed under administration.”

- [8] The incidences of maladministration that the applicant relies upon are set out as the following:

[8.1.] Manipulation of the payment of dividends;

[8.2] Unauthorised payments;

[8.3] Conflict of interests by the members of the executive committee;

[8.4] Executive Committee not acting in the best interests of the Association;

[8.5] Lack of proper financial management.

- [9] The applicant indicated that three members of the executive committee, namely Mr. T. Swartz,

Chairman, Mr. H. Langeveldt, Deputy Chairman and Ms. L. Modise, Deputy Secretary, have been members of the CPA's executive

committee (in different positions) for the last three terms, since 2014.

MANIPULATION OF DIVIDEND PAYMENTS AND UNAUTHORISED PAYMENTS

- [10] Since an annual general meeting held in 2014 dividend payments were made to members of the first respondent from time to time.

- [11] The applicant alleges that the executive committee has manipulated

dividend payments as a result of which (current or former) members of the executive committee have unduly benefitted.

- [12] The applicant indicates that from the outset there was a problem with the identification and verification process of beneficiaries, as well as the whole process with which dividends have been paid, which resulted in many complaints regarding payment, non-payment and incorrect payment of dividends.
- [13] The applicant had conducted an investigation in respect of the process of identification and verification of beneficiaries, as well as the payment process itself. He has even compiled a report in which the executive committee have been notified of these “systemic failures” but that they have “done virtually nothing to rectify” it.
- [14] Prior to November 2015 beneficiaries of a single claim were all paid the same dividend amount, irrespective of how many individuals were part of that particular claim.
- [15] At an annual general meeting held on 28 November 2015, it was decided that dividends would be paid out strictly in accordance with the provisions of the CPA’s constitution, i.e., that the dividend amount would be paid to the head of each household.
- [16] Despite the aforesaid decision the dividends that were paid out in December 2015 were again paid by way of the dividend amount paid to each member instead of to the head of each household. This resulted in more dividends being paid than what should have been paid, resulting in unauthorised payments in excess of R400 000-00.
- [17] The correct manner of payment (in accordance with the constitution of the CPA) was only introduced during August 2018, after which each head of the household was paid the amount of the dividend,

whereupon he would divide it proportionately between members of the household, or the first respondent would pay out each portion of the dividend to the member of each household.

- [18] The Applicant also complained of dividend payments increasing from R9 million in 2016 to R16 million in 2017, as well as an increase in the wage bill of the first respondent from R800 000-00 in 2017 to R5.3 million in 2018.

CONFLICT OF INTEREST

- [19] The Applicant also alleges that Langeveld and Swartz have a conflict of interest in that in addition to serving on the executive committee of the CPA, they have also recently been appointed as directors of Scarlet Sun 15 (Pty) Ltd, which is a joint venture company in which the first respondent holds 51% shares, and Blue Dust (Pty) Ltd holds 49% shares.
- [20] Scarlet Sun 15 (Pty) Ltd conduct mining operations on the Than and Mozib farms, over which the first respondent holds mining rights.
- [21] The Applicant states that Langeveld and Swartz earn an additional

salary as directors and have supported or taken decisions in favour of Scarlet Sun 15 (Pty) Ltd, for example by signing a resolution to award the mining rights over the farm Droogeveld to Scarlet Sun 15 (Pty) Ltd, in the event of litigation regarding the rights being successful, and the rights eventually being awarded to the first respondent.

NOT ACTING IN THE BEST INTERESTS OF THE ASSOCIATION

[22] The Applicant referred to the fact that the Development account of the first respondent had been depleted from R20 million to an amount of R194-00 without any infrastructure developments having taken place. He indicated that funds are being moved between accounts without authorisation to the detriment of the members of the association as well as future generations.

[23] He alleges that the association's profit share in Scarlet Sun 15 (Pty) Ltd is not fully paid, and that there has been underpayment on a monthly basis since 2015.

[24] The applicant alleges that the CPA has entered into loan agreements with Scarlet Sun 15 (Pty) Ltd, in contravention of its constitution, and without any resolution to that effect by members of the CPA.

[25] In respect of the members of the executive committee, the applicant contends that:

[25.1] In March 2016 after signing a lease agreement in respect of cattle grazing rights, and receiving the first rental, the executive committee paid themselves an amount of R3 000-00 each without any authorisation to that effect.

[25.2] In March 2017 the members of the executive committee have unilaterally decided to increase their salaries with 40%, while other staff's salaries were only increased with 7%.

[25.3] That when Mr John Kale, a member of the executive committee passed away in November 2017, half of his bonus was paid to his estate and half to Rosy White (incoming member of the executive committee) in August 2018, despite the applicant's contention that the full bonus should be paid to Kale's estate.

[25.4] During March 2016, the executive committee decided to purchase immovable property from which it could operate its offices, without a mandate being obtained during the November 2015 AGM.

[25.5] In this same transaction the Applicant ascertained from Mr Swartz and Gerts of the executive committee that they had obtained a R200 000-00 "kickback" in respect of the property, which was paid into the account of Gerts, from where it was shared among the other members of the executive committee.

LACK OF PROPER FINANCIAL MANAGEMENT

[26] The applicant alleges that there have been numerous financial irregularities in respect of the association, as a result of which he reported the financial irregularities to the Directorate of Priority Crime Investigation (DPCI). [27] He also mentions that the audit reports for 2016 and 2017 was only received by him on 7 May 2018, after he had informed the auditors in April 2018, that he had reported the matter to the DPCI.

[28] The applicant also referred to the fact that the executive committee could not provide the required supporting documentation to the auditors to have the 2018 audit finalised.

[29] The applicant has also compiled a report on the financial irregularities, which recommendations have largely gone unnoticed and have not even been distributed to the members of the association or all the members of the executive committee.

[30] The applicant concludes as follows in his founding affidavit:

“The reluctance of the Executive Committee to address the

concerns raised in the reports as well as the total lack of the implementation of proper financial control mechanisms fostered an environment where the looting of the resources of the SOVCPA could and continue unabated.”

THE FIRST RESPONDENT’S ANSWERING AFFIDAVIT

[31] The first respondent filed its answering affidavit deposed to by the executive committee’s chairman, Mr Thomas Tommie Swartz, duly authorised by a resolution of the members of the executive committee, wherein it denies that there is any basis upon which the CPA should or could be placed under administration.

[32] The first respondent contend that the application is premature in that the applicant has failed to exhaust the internal remedy contained in section 10(2) of the Communal Property Association Act, before proceeding with his application.

[33] The first respondent also alleges that the applicant is mala fide and that his application is an abuse of process, because the applicant’s real intention is to prevent the CPA from continuing with, and finalising, its review and spoliation applications against Theta Mining (Pty) Ltd, in respect of a mining right that was granted to Theta Mining (Pty) Ltd, and not to the first respondent. If these proceedings were successful, and

the mining right over Droogeveldt farm is eventually awarded to the CPA, it would increase the amounts of dividends that the CPA could pay by millions of Rand.

[34] It accuses the applicant of trying to persuade members at a special business meeting held on 12 January 2019, to accept the terms of a proposed memorandum of understanding between the first respondent and Theta Mining (Pty) Ltd, which proposed agreement was not in the best interests of the first respondent, as a result of which the majority of the members rejected the terms thereof.

- [35] The deponent also points out that the applicant was since his appointment as the Commercial Operations Officer in June 2017 tasked with:
- [35.1] administering the financial affairs of the first respondent and to report to the executive committee.
- [35.2] the drafting of the financial statements of the first respondent in collaboration with the auditors.
- [35.3] revising and finalising the list of members and beneficiaries of the CPA.
- [36] Swartz mentions that since middle January 2019 the applicant has absconded and remaining absent from the first respondent's offices.
- [37] He alleges that the applicant is the author of the state of events that he complains of, in that he had failed to discharge his duties and responsibilities to the CPA, and that since his appointment he had the duty to rectify all the matters he now raises, but that he had failed to do so.
- [38] Swartz states that in view of the fact that the CPA makes dividends payments to 291 households by way of payments to about 778 eventual beneficiary recipients, which amounted to R2.2 million that was paid in March 2019, a small number of mistakes that have been made in the process are insignificant. He also bemoans the fact that the applicant was the only person approving the beneficiaries and the amounts paid, wherefore he submits the applicant could not now approach the court to place the first respondent under administration as a result of a few incidents that happened under his tenure.
- [39] Swartz disputed that it would be just and equitable to place the CPA under administration.
- [40] He stated that the dividend payments were made in the following manner:
- "All dividend payments are and were made to the members as decided by the members during general meetings and endorsed by the Exco in terms of a revised dividend list prepared by Dawson in 2017. This list was again revised in November 2018 as result of the adoption of new members on the Annual General Meeting (the AGM) of October 2018 and discrepancies on the list prepared by Dawson."*
- [41] Swartz also stated that at the special general meeting of the members of the CPA held at Kimberley on 17 August 2019, the members unanimously decided to oppose the application of Dawson and as such endorsed the decision of the executive committee to oppose the application.

- [42] Swartz indicated that the interim order in the urgent application to the effect that the CPA may not hold an annual general meeting or approve the financial statements pending the finalisation of the main application, was operating to the detriment of the CPA as a result of one disgruntled member (the applicant).
- [43] He also referred to actions implemented by the executive committee after the current executive committee was elected during October 2018.
- [44] Swartz stated that the applicant was in charge of the payments since June 2017, and that the applicant and the executive committee approved the list of beneficiaries as well as the amount payable to each beneficiary. The applicant had even prepared the dividends list and advised the executive committee to accept and approve the payments contained therein.
- [45] He alleged that the applicant had failed to comply with his duties in terms of his employment agreement, and was about to be disciplined for the irregularities that he had committed as the chief operations officer of the CPA. The applicant was specifically tasked to investigate all administrative, financial and risk assessments within the CPA, and to provide the executive committee with reports and documentary proof of all discrepancies that he had found, which he had failed to do.
- [46] The applicant was also the only person to access the first respondent's bank account and the only person to make the payments from the Payaccsys account, in accordance with the payment list prepared by the applicant, and which he advised the executive committee to accept.
- [47] Swartz also contended that granting an order placing the first respondent under administration would be to the detriment of the first respondent and its members, as the first respondent is conducting highly complicated court cases, mining activities, cattle and game farming activities, all of which are currently controlled by skilled people. He also expressed reservations regarding whether the department has the capability, and the necessary and able staff contingent, to take over the aforesaid operations.
- [48] He denies that the first respondent does not have strategic, business and operational plans in place, and contend that:
- "The affairs of the CPA may not be perfect, but they are sufficiently correct to entitle the CPA to administer itself. It is respectfully submitted that the Act does not require CPA's to conform with the high standard of perfection that is required of registered companies."*
- [49] He states that the executive committee did not simply ignore the 28 November 2015 resolution, but that the decision was taken to pay the dividends as per the 13 December 2014 decision after the executive committee had discussions with various constituencies of the first respondent namely Kimberley,

Barkley-West, Longlands, Delportshoop and Pampierstad. As a result, dividends were paid to every head of the household, as well as each first-generation descendant, and thereafter pro rata in respect of second-generation descendants and onwards, as was previously done.

- [50] Swartz indicated that the applicant was instructed to investigate all discrepancies pertaining to the dividend list and payments to beneficiaries in terms thereof. He also confirmed that the applicant had compiled a report in respect thereof, but alleges that the correctness of the applicant's report had to be verified, wherefore the applicant was requested to give full disclosure of all the allegations in his report, which he had failed to do. The applicant had subsequently provided the executive committee with the documents required, but had steadfastly failed to discuss it with the executive committee.
- [51] Swartz states that after the current executive committee was elected in October 2018, they decided that the (incorrect) list prepared by the applicant had to be audited by the executive committee after having been reviewed by the applicant, which should have been completed by 28 February 2019. As the applicant was mostly absent during December 2018 and January 2019, whereafter he absconded since 12 January 2019, this was not done.
- [52] The executive committee had however completed the task, and the revised list was attached as an annexure to the answering affidavit.
- [53] Swartz also denied that there was any dividend manipulation, and indicated that the method of payment that was implemented from 2014 until 2018, is not any indication of maladministration.
- [54] In respect of the alleged unauthorised payments of more than R400 000-00, Swartz indicated that the payments were made to the heads of the households, who then had to distribute it to the first-generation descendants. Fifteen people complained that they did not receive their dividend payments, whereafter payments were made to them.
- [55] In respect of the alleged increase in expenditure, Swartz points out that dividend payments increased from R9 million during 2016, to R16 million in 2017, whereas the number of households increased from 83 households initially to 203 households in 2017. He also refers to the fact that the 2016 and 2018 financial statements were approved by the members after the auditors had issued their audit opinion thereon.
- [56] He denies any maladministration and allege that the financial statements indicate the successful operation of the first respondent to the benefit of its members.
- [57] With regard to the alleged conflict of interest, Swartz states that it is important for the first respondent (as 51% shareholder) to have directors appointed to the board of Scarlet Sun 15(Pty) Ltd, in order to look after the first respondent's interests.

[58] A decision regarding who the first respondent would enter into an agreement with (in the event of it being granted mining rights on Droogeveldt) would have to be taken by the majority of the members of the first respondent at a special business meeting or a general meeting.

[59] In respect of the allegations that the executive committee is not acting in the best interests of the first respondent, Swartz states that all transfers of funds between accounts of the first respondent was done after consultation between the executive committee, the applicant and the auditors. The applicant had advised that the executive committee could make such withdrawals, subject to substituting the withdrawals with the same amounts from the loan account of the first respondent with Scarlet Sun 15 (Pty) Ltd.

[60] He also states that the withdrawal of funds from the Investec

development fund was done as a result of the fact that no specific projects were planned for that time, was done with the consent of members granted at general meetings, and was done bona fide and in the interest of all the beneficiaries. He however denied that the development fund was depleted as alleged.

[61] Swartz also stated that the applicant had compiled an operational

business intelligence report, which was continuously being addressed by the first respondent.

[62] Swartz also denied that Scarlet Sun 15 (Pty) Ltd was not making full payment of the first respondent's profit share therein.

[63] In respect of the amount of R3000-00 paid to executive committee

members, he indicated that this was done by the previous executive committee as a result of additional work, time and travelling spent on the project. This would also be put to the members of the first respondent at the next general meeting.

[64] With regard to the 40% increases in the (previous) executive

committee's salaries, this was approved by members as a result of the fact that executive committee members were in the full time employ of the first respondent as there was a substantial increase in the business of the first respondent, as well as a similar increase in the number of staff employed by it. It was also the previous executive committee's strategic, commercial and business guidance that put in place the lucrative mining agreement that provides the funds for the dividend payments.

[65] In respect of the alleged unauthorised purchase of immovable

property, Swartz denied this, and attached minutes of a members' meeting held on 28 November 2015, where the purchase was approved.

- [66] With regard to the “kickback” of R200 000-00 that was allegedly divided among the executive committee members, Swartz denies this, and states that Gerts on his own received an amount of R200 000-00. When the executive committee became aware of this, they decided to take disciplinary action against him, which was currently under investigation.
- [67] In response to the alleged lack of proper financial management Swartz denies that the 2016 and 2017 financial statements were only provided to the applicant in May 2018. He alleges that the 2016 statements were already at the applicant’s disposal at the November 2016 AGM, and that the 2016 and 2017 statements would have been approved at the 21 April 2018 annual general meeting, but for the fact that the applicant did not attend the meeting. As a result of his absence, the meeting was postponed to 12 May 2018.
- [68] The applicant also failed to attend the 12 May 2018 meeting, at which meeting the financial statements were accepted, with the proviso that all the shortcomings and discrepancies set out in the audit completion report would be addressed.
- [69] In view of the fact that it was the first time that the auditors had issued an audit completion report, the executive committee was initially unfamiliar with the process, but has all the documentation required for 2016 and 2017 been provided to the auditors during June
2019. This despite the fact that it was an enormous task to collect and compile the aforesaid documents, as the executive committee had to obtain information and documents from more than 50 people scattered over a large area.
- [70] In respect of the 2018 audit of the financial statements, Swartz admits that the executive committee was initially unable to provide the required documents. This was however subsequently obtained, and at the time of deposing to the answering affidavit only three items remained outstanding. With a few exceptions mentioned in Swartz’s affidavit, the 2018 statements could also be finalised at the time of deposing to the answering affidavit.
- [71] In answer to the allegation that the executive committee had failed to implement any of the applicant’s recommendations, Swartz states that the current executive committee had taken numerous steps to address the issues pertaining to the alleged irregularities. In this regard the applicant was requested to provide documents and explain the irregularities that he had identified. Only in July 2018 were the documents provided, but the applicant never explained the relevance of the documents as was agreed.
- [72] Swartz in therefore denies that there is any reason to place the first respondent under administration.
- [73] Swartz then request condonation for the late filing of the first respondent’s answering affidavit, which was necessitated by the need to obtain numerous documents and consult with various people spread over a large geographical area

THE PARTIES CONTENTIONS

- [74] Adv Raubenheimer on behalf of the applicant argued that it needed to be emphasized that the legislation in question is socio economic legislation with the purpose of empowering communities that were previously disempowered or dispossessed of land.
- [75] He also submitted that the type of communities involved, are traditionally poor communities with also a low rate of literacy and schooling, and that a CPA was not as highly regulated as a company.
- [76] He argued that if the system as created by the community does not work, or does not render results, because of the inherent risk of abuse, provision is made for the CPA to be placed under administration and that it would then resort under the Director General: Land Affairs.
- [77] Adv Raubenheimer argued that if any maladministration is conducted in respect of the administration of the CPA the Director General: Land Affairs should be in the position to get involved therein, in order to make sure that such maladministration is investigated and/or if necessary addressed and rectified.
- [78] He argued that in terms of Section 13(1)(A) of the CPA Act, a CPA can be placed under administration if it is
- a) insolvent or
 - b) under maladministration or
 - c) any other cause which results in the CPA being unwilling or unable to pay its debts or unable to meet its obligations or
 - d) if it is otherwise just and equitable to do so.
- [79] Adv Raubenheimer argued that the first basis for the application is because of maladministration as proliferated by the current executive committee of the first respondent.
- [80] He argued that the factual basis constituting the maladministration is premised on the following elements:
1. Manipulation of dividend payments;
 2. Unauthorised payments;
 3. Conflict of interest by executive committee members;
 4. Executive committee members acting contrary to the best interests of the association;
 5. Lack of proper financial management
- [81] He emphasized that the executive committee has a fiduciary

responsibility in the execution of their duties, and argued that the aforesaid elements are indications of the breach of the said

fiduciary duty.

- [82] He argued that it was difficult to determine who the beneficiaries of the CPA are, in respect of whom dividend payments needed to be made, and contrasted this with the position of the Companies Act in terms of which the company has to make a decision in respect of the declaring of a dividend on the audited financial statements of the company.
- [83] He submitted that it is trite that the first respondent does not have audited financial statements and have not had such statements for quite some time, and that despite this the aforesaid decisions were taken in respect of the payment of dividends.
- [84] He argued the fact that dividend payments were not only made to specific households but also to members of the households with the effect that the more members in a household, the bigger dividend was paid to such household.
- [85] He argued that the problem with that was that it opened the door for households to grow expediently in order to inflate the number of members thereof which would lead to significant overpayment.
- [86] He argued that the executive committee, despite being alerted did not rectify the position and that up to the day of argument there was no audited list of household beneficiaries in respect of dividends. He argued that there was a report compiled but that nothing has been done in order to rectify or finalise an audited list of beneficiaries.
- [87] He also argued that there was a problem in providing the auditors with the required documentation to obtain the financial statements.
- [88] He furthermore argued that the value of the land is due substantially to the fact that there are extremely rich diamond deposits on the land in question, and that companies are eager to mine these deposits, which lead to the executive committee that capitalises on this by facilitating payment of facilitation fees with the sole purpose to decide in favour of which company should conduct the mining therein.
- [89] Adv Raubenheimer argued that the Act and the Constitution of the CPA makes it clear that the executive committee is responsible for the creation of proper control systems, which they have failed to do in this instance.
- [90] Adv Raubenheimer argued that the second basis of the application is that it would be just and equitable to grant an order as set out in the Notice of Motion.
- [91] He submitted that the court needed to look at all the surrounding circumstances in order to decide whether it is just and equitable to order the first respondent to be placed in administration or not.

[92] He submitted that the facts as set out in his argument above, weighs clearly in favour of granting the order sought, compared to the facts against the granting of the order.

[93] He stressed the fact that the fact that there were no properly

functioning internal control measures, which was of paramount importance, and that the compliance systems in the first respondent

was for all intents and purposes non-existent.

[94] In other words that there was no compliancy or lacking or inadequate compliance with the provisions of the CPA Act and the constitution of the first respondent.

[95] In respect of the revised list of beneficiaries that was furnished by the first respondent, Adv Raubenheimer argued that this list did not take the position any further, as no indication was given as to what the underlining process was that were used to compile this list and to account whether it was reliable, or on what objective facts it was based.

[96] Adv Raubenheimer argued that firstly the fact that no audited

financial statements were available in order to declare dividends, and secondly that there was not sufficient information regarding whom the exact beneficiaries and members were, that these two aspects created the circumstances for a perfect storm for corruption and abuse.

[97] He argued that based on that the Court should interfere and place the first respondent under administration in order for the Director General to conduct the necessary investigations and take the necessary remedial action.

[98] Adv Raubenheimer indicated that he would not proceed with opposing the application for condonation for the late filing of the first respondents answering affidavit, and that he would also not persist with the point taken in respect of the lack of authority of the deponent to the first respondent answering affidavit.

[99] Adv Knoetze SC on behalf of the first respondent argued that this matter did not deal with a company or a high society organisation, but that this matter dealt with a communal property association, which has its own legislation and regulations regulating it.

[100] He argued that the applicant had high ideals and when he was unable to attain them, he felt dissatisfied, wherefore he now blames the executive committee for what he wanted to have done, but Adv Knoetze urged that that was not the test in these proceedings but that one should look at the CPA Act itself.

[101] He argued that the court have to consider the interest of the communal property

association and its members, and not the personal feelings of one member, in this instance the applicant.

- [102] Adv Knoetze SC argued that one should take cognisance of the preamble to the Act which plays a central role in the interpretation thereof, namely that the Act deals with communities that should be assisted to do which the Act allows them to do, namely to establish a CPA and to administrate it according to the community's wishes.
- [103] He argued that you cannot expect the members of the CPA to comply with the high level of regulation and requirements of, for instance the King Report, which is important when considering whether to put the CPA under administration, or allow the system to do as good as it can under the circumstances.
- [104] He argued that the Court should be inclined to ensure that the assistance required is rendered, and not to unnecessarily place the CPA under administration.
- [105] He further argued that the democratic principles as set out in Section 9 of the CPA Act is of particular importance in the interpretation of the Act.
- [106] He argued that people and members of the CPA should be free to manage themselves by democratic process as envisaged in the CPA Act.
- [107] He submitted that the applicant wanted to impose his views on what should be done in the CPA on the executive committee thereof, and that that this was not what the Act required.
- [108] He argued that the people ought to be allowed to govern themselves and that the people were satisfied with the manner in which it was currently done.
- [109] He argued that the applicant stood alone in his application and he was not able to find anybody to join him as an applicant.
- [110] He submitted that the views of the applicant were not shared by the other members of the CPA, and emphasised the fact that the applicant is attempting to place the CPA under administration based on one man's (the applicant's) ideals and aspirations.
- [111] Mr Knoetze SC argued that maladministration (as mentioned in section 13(1) of the CPA Act) does not stand separate, but that it forms part of the factors which may result in the CPA being unwilling or unable to pay its debts or unable to meet its obligations.
- [112] He argued that applicant's approach to the matter namely that maladministration as such and by itself, can justify a court to place the CPA under administration as just an equitable in the circumstances, is patently wrong.
- [113] Adv Knoetze SC argued that there were no allegations whatsoever that the CPA is unwilling or unable to pay its debts, wherefore maladministration cannot be a defining factor.
- [114] At most maladministration can be one of the factors that the Court ought to consider in deciding whether it is just equitable to place the first respondent under administration.

- [115] He referred to the case of Mathebula and Others v The Nwandlamhari Communal Property Association and Others, in which Section 13 of the CPA Act was considered.[1]
- [116] He argued that in that matter the complaints made against the executive committee was far more serious than in the present matter and that the Court did not place the CPA under administration.
- [117] Mr Knoetze SC argued that this supported his argument that a CPA should be dealt with understanding and sympathy.
- [118] Mr Knoetze SC argued that some of the allegations upon which the applicant relied in order to bring this application referred to events that happened five years ago.
- [119] He argued that the CPA should be assisted, without summarily taking away the fact that they govern themselves.
- [120] Mr. Knoetze SC argued that the applicant has not availed himself of the existing remedies in terms of Section 10 and 11 of the CPA Act, and argued that courts these days are extremely strict when internal remedies are available and not utilized by litigants coming to Court.
- [121] Mr Knoetze also referred to Section 14 of the Act indicating that if the applicant's allegations were true, that would constitute criminal offences in terms of Section 14 which despite the fact that the applicant has laid criminal charges long ago, the expert unit of the SAPS has not found any untoward acts perpetrated by the executive committee.
- [122] Mr Knoetze SC argued that in order to determine the meaning of the term "just and equitable" in Section 13(1) it would be helpful to take note of the similarities between Section 13(1) and certain provisions of the Companies Act 71 of 2008.
- [123] Especially in view of the fact that there are currently no judgements and/or legislation and/or regulation dealing with when it would be considered to be just and equitable to place a CPA under administration.
- [124] He also argued that an applicant who relied on the just and equitable provision must not have been wrongfully responsible for the situation that has arisen.
- [125] In this regard Mr Knoetze SC argued that the applicant cannot rely on lack of procedures and so forth, of which he was part and parcel of, and/or at the very least involved with, to succeed with an application where he was partly responsible for the situation that involved.
- [126] Adv Knoetze SC argued that the applicant was responsible and tasked with the review of the dividend list of beneficiaries, especially in view of the fact that the incidents complaint of took place about four years ago.

- [127] Adv Knoetze argued that the present executive committee was elected during October 2018, and that the Court could not order the CPA to be placed under administration for acts that were conducted by the previous executive committee prior to the election of the current executive committee.
- [128] Adv Knoetze SC argued that the complaints levied by the applicant, was either part and parcel of his duties, or transpired long ago, before present CPA was elected.
- [129] In respect of the alleged conflict of interest in respect of two members of the exco being directors on the mining company, Adv Knoetze SC argued that it was only fit and proper that members of the executive committee were in fact directors in the mining company, in order to safeguard the first respondent's position and its interests, in view of the fact that the CPA is the majority shareholder of the said company.
- [130] He reiterated that the mining activities were the only real income of the CPA, and that nothing was kept secret from its members.
- [131] He submitted that this linked to the fact that if there was in fact a problem the applicant could have availed himself and the problem could have been solved by way of the internal remedies, without the necessity to place the CPA under administration.
- [132] Adv Knoetze SC argued that if there were more people that supported the applicant, they could have demanded a general meeting and elected a new committee.
- [133] Adv Raubenheimer in reply indicated that that could only take place in terms of the constitution if the chairman and the deputy chairman as well as two executive committee members together with ten other members called for such a general meeting.
- [134] Adv Knoetze SC argued that if the applicant has availed himself of the aforesaid procedure, this application would have been unnecessary as the relief being sought in respect of the selection of a new committee, could have been dealt with by exercising the applicant's rights in terms of the constitution.
- [135] Adv Knoetze SC also stressed that if the Director General agreed with the applicant, or shared his concerns, the Director General could have asked for a special meeting to elect a new executive committee in terms of the provisions of the Act.
- [136] Adv Knoetze SC referred to the fact that the deponent Swartz explains the delay in finalising the financial statements, and referred to the fact that only three items were required to finalised the 2018 reports. He stated that there were a number of cogent reasons as to why the financial statements were not prepared sooner, but that that constituted no need for an administrator to be appointed for that reason.
- [137] Adv Knoetze SC questioned the powers of the administrator, indicating

that the relief sought does not say how long the administrator would be appointed, and for how long the administrator would be in control, neither as to what must happen for the administrator to no longer to be in control of the CPA.

[138] He also criticized the fact that no indication is given as to who must give effect to the order if the application is granted.

[139] In respect of costs Adv Knoetze SC argued that the applicant should be ordered to pay the costs as it is not a constitutional matter as one cannot argue that the applicant brought the application in the interest of the CPA, as the application was lacking in too many instances to show such an intention.

LEGISLATIVE FRAMEWORK

[140] The applicant contend that the first respondent should be placed under administration firstly, as a result of maladministration, and secondly on the basis that it would be just and equitable for it to be placed under administration.

[141] The preamble to the CPA act sets out its aims as follows:

To enable communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution; and to provide for matters connected therewith.

WHEREAS it is desirable that disadvantaged communities should be able to establish appropriate legal institutions through which they may acquire, hold and manage property in common;

AND WHEREAS it is necessary to ensure that such institutions are established and managed in a manner which is non-discriminatory, equitable and democratic and that such institutions be accountable to their members;

AND WHEREAS it is necessary to ensure that members of such institutions are protected against abuse of power by other members;

[142] In the Bakgatla decision, Jafta J indicated that the CPA act is a visionary piece of legislation passed to restore the dignity of traditional communities, and proceeded to state that the Act should be interpreted as follows:

[34] It is by now trite that section 39(2) of the Constitution has introduced a new approach to the interpretation of statutes. The section obliges courts to promote “the spirit, purport and objects of the Bill of Rights” when construing legislation. This new approach has been described as “a mandatory constitutional canon of statutory interpretation.” The duty to seek an interpretation that promotes the objects of the Bill of Rights arises even where the

parties have not raised the issue because the obligation imposed by the section is, as was observed in Phumelela, mandatory.

.....

[36] Therefore in construing section 5(4) of the Act, we are obliged not only to avoid an interpretation that clashes with the Bill of Rights but also to seek a meaning of the section that promotes the rights of the Bakgatla-BaKgafela Traditional Community to restitution of land. Had the Supreme Court of Appeal borne this duty in mind, it could have attached a different meaning to the section. A meaning that would be consonant with the purpose of the Act.”[2]

[143] Section 13 of the Communal Property Associations Act provides as follows:

13. Administration, liquidation and deregistration.—

- (1) A division of the Supreme Court or a Magistrate’s Court having jurisdiction in respect of the area in which the property of the association is situated or the area in which the land which may be acquired by a provisional association is situated, may, on application made by the Director-General, an association or provisional association or any member thereof, or any other interested person, place the association or provisional association under the administration of the Director-General or grant a liquidation order in respect of an association or provisional association, where the association or provisional association, because of insolvency or maladministration or for any other cause is unwilling or unable to pay its debts or is unable to meet its obligations, or when it would otherwise be just and equitable in the circumstances.
- (2) The Director-General shall, pursuant to an administration order referred to in subsection (1), have such powers to manage the affairs of the association or provisional association as the Court, subject to the provisions of this Act, may determine.
- (3) The Director-General may, upon written application by an association or provisional association, cause such an association or provisional association to be deregistered, if he or she is satisfied that—
 - (a) a resolution in favour of deregistration was adopted at a meeting attended by a substantial number of the members of the association or provisional association;
 - (b) the resolution was adopted by a majority of members present or represented at the meeting; and
 - (c) all relevant matters which reasonably have to be addressed prior to deregistration, including the way in which the assets and liabilities of the association or provisional association will be dealt with, have been addressed.

- (4) Where the Court orders the liquidation of an association or provisional association, it shall make such order as to the distribution of the assets of the association or provisional association as it deems just and equitable, having considered any recommendations which the Director-General may make in this regard.
- (5) The Minister may prescribe the procedure to be followed in an application contemplated in subsection (1), and set out the powers and duties of the Director-General, the Registration Officer, the association, members and interested parties in those situations.[3]

[144] The Minister has published regulations under the Act, in Government Notice R1908 of 22 November 1996, but the regulations do not deal with the procedures to be followed in an application under section 13(1).

[145] From the express wording of section 13(1) of the act, it is clear that an association may be placed under the administration of the Director General:

“..., where the association or provisional association, because of insolvency or maladministration or for any other cause is unwilling or unable to pay its debts or is unable to meet its obligations, or when it would otherwise be just and equitable in the circumstances.”

[146] From the act itself, it is thus clear that an association may be placed under administration or liquidated in the circumstances where:

[146.1] the association is unwilling or unable to pay its debts or is unable to meet its obligations, as a result of insolvency, or maladministration or any other cause, or

[146.1] when it would be otherwise just and equitable to do so.

[147] Maladministration in itself, is thus not an independent ground for placing a CPA under administration, as it is only relevant as a factor contributing to the association being unwilling or unable to pay its debts or unable to meet its obligations.

[148] In the present matter, there is no question that the association is able to not only pay its debts and meet its obligations, but is also in a position to pay dividends to the members of the association, more particularly to the heads of the families and the first generation descendants of the claimants.

[149] However, subject to the circumstances of the case, maladministration may very well be a factor influencing the decision as to whether it would be just and equitable to place the association under administration or not.

[150] Neither the Court, nor the parties' counsel were able to find any judgments expressly dealing with an application in terms of Section 13(1) of the CPA Act.

[151] On the day of the hearing of the matter Adv Knoetze SC was able to refer the Court to a judgment dealing with an application in terms of Section 13 of the CPA Act.

[152] He referred to the unreported judgment of *Mathebula and Others v The Nwandlamhari Communal Property Association and Others*, in which Section 13 of the CPA Act was considered.[4]

[153] In that matter similar allegations were also made in regard to problems with verifying who the legitimate beneficiaries of the association were, financial statements not being prepared, as well as gross maladministration and squandering of financial resources, etc. Despite the serious allegations Khumalo J however dismissed the application and stated as follows:

“[113] The Applicants have also accused the NCPA EC of gross violations or maladministration of the resources of the NCPA by the executive members which has resulted in the squandering of funds and as a result obliged them to take the necessary steps. The allegations have not been substantiated with any further evidence except for the distribution of the benefits that has

occurred discriminatorily without any proven resolution or policy adopted by the members. The two payments as indicated happened during the period of the initial EC and the second one during the transient EC. As it is the period that elections are supposed to take place, it is not necessary that all the affairs of the NCPA be placed under administration which in any case lies with the courts located in the Mpumalanga area. If the verification process has been finalised the Director General can proceed with the arrangements for the AGM.” [5]

[154] As also referred to in the *Mathebula* judgment, insofar as there are disputes of fact, the matter stands to be adjudicated on those facts set out by the applicant that are admitted by the respondent, as well as the respondent’s factual allegations (unless the respondent’s version was rejected on the papers).[6]

[155] As set out by the Supreme Court of Appeal (as it then was) in the matter of *Fakie NO v CCII Systems (Pty) Ltd* in the words of Cameron JA:

*“[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this Court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a judge should not allow a respondent to raise “fictitious” disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be “a bona fide dispute of fact on a material matter”. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van**

Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

- [56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to be, a respondent's version can be rejected in motion proceedings only if it is "fictitious" or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence.”[7]
- [156] The remaining question is whether it would be just and equitable to place the first respondent under administration, and if so, what powers should be granted in such an order.
- [157] Adv Knoetze SC argued that the liquidation of a CPA in terms of section 13(1) of the CPA act corresponds with the process whereby a company is liquidated in terms of the provisions of chapter XIV of the Companies Act 61 of
1973. He also submitted that the placing of a CPA under administration corresponds with the placing of a company under business rescue in terms of Chapter 6 of the Companies Act, 71 of 2008.
- [158] He also submitted that cognisance should be taken of section 81 of the Companies Act, 71 of 2008, in respect of liquidating a company on the basis that it is just and equitable to do so, in the event of the company being able to pay its debts.
- [159] I find this argument very persuasive.
- [160] Section 344 of the Companies Act, 61 of 1973 provides as follows:
- “344. *Circumstances in which company may be wound up by Court.*—
- A company may be wound up by the Court if—
- (h) it appears to the Court that it is just and equitable that the company should be wound up.”
- [161] Section 81 of the Companies Act, 71 of 2008 also provides as follows:
- “81. *Winding-up of solvent companies by court order.*—
- (1) A court may order a solvent company to be wound up if—
-
- (c) one or more of the company’s creditors have applied to the court for an order to wind up the company on the grounds that—
- (i); or
- (ii) it is otherwise just and equitable for the company to be wound up;
- (d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that— (ii); or

(iii) it is otherwise just and equitable for the company to be wound up;”

[162] In respect of business rescue proceedings, section 131 of the Companies Act, 71 of 2008 also provides as follows:

“131. Court order to begin business rescue proceedings.—

- (1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.
- (4) After considering an application in terms of subsection (1), the court may—
 - (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that— (ii); or
- (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or
- (b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.”

[163] In view of the similarities in respect of the wording of the aforesaid acts and the wording of section 13 of the CPA act, I am of the view that the principles relating to companies, in respect of the test for it being just and equitable to place a company under liquidation or business rescue, can be applied to communal property associations as well.

[164] In the matter of Erasmus v Pentamed[8], Nestadt J (as he then was) gave a detailed analysis of the meaning and ambit of “just and equitable” as used in section 344(h) of the Companies Act, 61 of 1973 and its predecessor, as follows:

“The meaning and ambit of 'just and equitable' as used in s 344 (h) and its predecessor, s 111 (g) of the 1926 Companies Act (an expression, incidentally, also appearing in s 97 (1), 252 (3) and 427 (1) of the present Act), has been considered in many cases; and the same applies in respect of the corresponding sections of the various successive English Companies Acts. Not surprisingly our Courts have drawn guidance from English decisions in this regard. The main principles which emerge are, so it seems to me, the following:

- (i) 'Just and equitable', unlike the preceding subparagraphs of s 344 postulates not facts, but only a broad conclusion of law, justice and equity (per TROLLIP J, as he then was, in *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 136H; see, too, Henochsberg on The Companies Act 3rd ed at 598 - 9). It is not to be interpreted so as to only include matters ejusdem generis the other grounds specified in s 344 (Emphy's case at 365H; Henochsberg at 600). It is to be contrasted with an application under s 252 in which regard oppression has to be shown (Aspek Pipe

Co case supra at 526 - 527).

(ii) It affords the Court a wide judicial discretion in the exercise whereof, however, certain other sections of the Act must be taken account of. They are:

- (a) Section 347 (2) (broadly similar to the old s 117 (2)) which provides, in effect, that, if some other remedy is available to the applicant and he is acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy, the application may be refused. Section 252 (corresponding to s 111 bis of the 1926 Act) provides such an alternative remedy. The onus of proving its availability and the applicant's unreasonableness as aforesaid lies on the person opposing the winding-up order (Moosa's case *supra*; Henochsberg at 614).
- (b) In terms of s 354 (2) (the successor to the old s 120) regard is to be had, in relation to applications to windup generally, *inter alia*, to the wishes of the majority of shareholders (Moosa's case *supra* at

149A; Henochsberg (op cit at 624)).

(iii) The sub-section is applicable to a variety of situations. In what follows attention is restricted to those cases where a winding-up of a solvent company at the instance of a member is sought.

(iv) As TROLLIP J, dealing with this sort of case, further pointed out in Moosa's case at 137A, the Courts have in the course of time evolved certain general principles which are useful as guides in particular cases for, and provide examples of, the exercise of the discretion referred to. On the other hand the tendency to create categories or headings under which cases must be brought if the 'just and equitable' principle is to apply, is wrong; the generality of those words is not to be thus reduced (Ebrahimi v Westbourne Galleries Ltd 1973 AC 360 (HL) at 374 - 5; Re A and BC Chewing Gum Ltd (1975) 1 All ER 1017 (CA) at 1027; Emphy's case at 367C - D).

- (v) One class of case, probably the most important and certainly the most relevant, applies to what have been termed small, domestic, private companies.
- (a) It occurs where there is a breach of some basic, material obligation existing between the members which renders it just and equitable, judged according to broad common-sense considerations, that the company be wound-up.

The rule is based on the fact that

'a limited company is more than a mere legal entity, with a personality in law of its own; that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se*

which are not necessarily submerged in the company structure' (per Lord WILBERFORCE in the Westbourne Galleries case at 379B - C).

- (b) Very often (perhaps usually) the source of the obligation is the existence between members of what has loosely, though inaccurately (the Westbourne Galleries case at 380A - B) been called a quasi partnership in this sense that prior to the formation of the company there was

a pre-existing partnership, the obligations of which it is reasonable to suppose continue to underly the new company structure (the Westbourne Galleries case at 379 - 80). This, however, is not a requirement and I do not read Moosa's case or Emphy's case as holding otherwise. It is not necessary, as I understand the authorities, and more particularly the Westbourne Galleries case especially at 379G - 380B, that the shareholders of the company in question be, in substance, partners. They were not in the A and BC Chewing Gum case, yet an obligation not to exclude the applicant from the management of the company was held to exist and,

it having been breached, it was held just and equitable to wind-up the company. The obligation can, in the words of TROLLIP J in Moosa's case at 137H, arise from any 'arrangement (whether express tacit or implied' between the members.

- (c) The breach may take the form, inter alia, of conduct which destroys or, possibly, seriously impairs the personal relationship of confidence, friendly co-operation or trust which it was agreed or contemplated would exist between members regarding the running of the company's affairs. Hereunder would fall the two principles, respectively emanating from *Loch v John Blackwood Ltd* 1924 AC 783 (PC) and *In re Yenidje Tobacco Co Ltd* (1916) 2 Ch 426 (CA) and referred to in Moosa's case at 137. Mere dissatisfaction at being outvoted on the business affairs of the company would, however, normally not suffice, at least in the absence of fraud (*Loch's case* at 788 - 9; *Taylor v Welkom Theatres (Pty) Ltd and Others* 1954 (3) SA 339 (O) at 351D - G). The Court must guard against allowing s 344 (h) to become a launching platform, at the instance of minority shareholders, for the unwarranted interference in the internal management of a company acting within its powers (*Taylor's case* at 352B - D; *Hart's case* at 467D - E).
- (d) Such conduct may be constituted by, eg, constant quarrelling between the shareholders (*Yenidje Tobacco's case*); adultery by one director with the other's wife (*Lawrence v Lawrich Motors (Pty) Ltd* 1948 (2) SA 1029 (W)); a lack of probity, or unfair or 'burdensome, harsh and wrongful' conduct by controlling shareholders in managing the company (Moosa's case at 137G; *Hart's case* at 467C - D). In relation to 'partnership companies' the general rule is that a winding-up may be ordered if such facts are shown as would justify a dissolution of the partnership between them (*Westbourne Galleries case* at 375C - D; *Emphy's case* at 366A). It has been applied, not only in the cases just mentioned, but in many others, some of which are referred to in *Taylor's case* at 346 fin - 349D. (See too *Marshall v Marshall (Pty) Ltd and Others* 1954 (3) SA 571 (N)).
- (e)
- (i)

(vii) Thirdly, where, whatever the size of the company, its substratum has ceased to exist in the sense that the principal or main or specific object or distinct purpose for which the company was formed or which constitutes the foundation of the company can no longer be carried out at all or fully, or that such main purpose has failed altogether (per HORWITZ J in Taylor's case at 350C; see, too, *Re Baku Consolidated Oil Fields Ltd* (1944) 1 All ER 24 (Ch).

(viii) An applicant who relies on the just and equitable provision must not have been wrongfully responsible for the situation which has arisen (Emphy's case at 368 fin)."

(Emphasis added)

[165] In *Apco Africa*[9], Ponnann JA phrased the first principle guiding a court to exercise its discretion as follows:

"[19] There are two distinct principles that guide a court in exercising its discretion to wind up a domestic company which is in the nature of a partnership. The first, enunciated in Loch v John Blackwood (supra) (at 788), is that it may be just and equitable for a company to be wound up where there is a justifiable lack of confidence in the conduct and management of the company's affairs grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. That lack of confidence is not justifiable if it springs merely from dissatisfaction at being out-voted on the business affairs or on what is called the domestic policy of the company, but is justifiable if in addition there is a lack of probity in the director's conduct of those affairs."

[166] In the matter of *Knipe v Kameelhoek*[10], Daffue J, relied on the judgment in *Rand Air (Pty) Ltd v Rasy Bester Investments (Pty) Ltd* 1985 (2) SA 345 (W) at 350C-H and went on to indicate that:

"[24] A domestic company or quasi-partnership, or a company akin to partnership may be liquidated due to a complete breakdown in the relationship, of reasonableness, good faith, trust, honesty and mutual confidence which should exist between the directors and/or shareholders thereof."

CONCLUSION

[167] By applying the aforesaid principles to the facts of the matter, the court has to decide whether it would be just and equitable to place the association under the administration of the Director General: Land

Affairs in terms of section 13(1) of the CPA Act.

[168] For purposes of deciding this matter, I will adjudicate the matter on the basis that the applicant is not precluded from proceeding with his application in terms section 13(1), without having first exhausted the remedies contained in section 10(2) to 10(5) or section 11(6) and 11(7) of the CPA Act, without reaching a decision thereon or making a finding to that effect.

[169] In view of the fact the current executive committee was elected during October 2018, the allegations and complaints levelled against the previous executive committees, prior to October 2018, can in my view not be relied upon as a basis to place the first respondent under administration as a result of the conduct of its current executive committee.[11]

[170] It is common cause that since August 2018, the dividends have in fact been paid out in accordance with the constitution namely that a dividend is paid to each household head, who distributes or divides the said dividend to the other member of his household.

[171] Despite this, Mr Raubenheimer contended that the list of beneficiaries was still wrong, wherefore the dividend payments would in any event not be correct.

[172] In this regard, as set out above, unless I find a reason to reject the first respondent's version on the papers as palpably farfetched and untenable, the matter must be adjudicated essentially on the first respondent's version. I cannot find any allegations in the first respondent's answering affidavit so inherently untenable and/or farfetched that I can reject it.

[173] In respect of the allegations regarding the manipulation of dividend payments and the making of unauthorised payments, the conduct and events complained of relate to events that have taken place prior to October 2018.

[174] The dividends have been paid out in the correct manner since August 2018, and the executive committee have since reviewed and updated the list of members and beneficiaries.

[175] The increases in the amounts of dividends being paid, the increase of the wage bill, as well as the increases in respect of the salaries all took place during 2017 prior to the election of the current executive committee, and even if this was not the case, these events were duly explained by the executive committee.

[176] The fact that two members of the executive committee are also directors of Scarlet Sun 15 (Pty) Ltd, conducting the mining operations can hardly be described as a conflict of interest. Especially in view of the fact that the first respondent holds 51% of the shareholding in the company, as a result of which the first respondent has to protect its interest in respect of the day-to-day management of the company.

[177] The events upon which the applicant relies to substantiate his allegations that the executive committee is not acting in the best interest of the association, already took place during 2016 and 2017, i.e., again

before the current executive committee was elected.

[178] These events (the increases of the executive committee's salaries, the grazing rights agreement, the purchase of the immovable property, the alleged kickback received etc.) were also fully explained by the executive committee.

[179] Also these events took place while the applicant was appointed and acting as the first respondent's Commercial Operations Manager, wherefore these events transpired while the applicant was to a large extent in control of, or at the very least involved with, running the day-to-day operations of the CPA.

[180] As a result of this the applicant cannot now rely on these events to succeed with an application to place the CPA under administration, where he was also (at the very least partly) responsible for the situation that resulted.

[181] The alleged lack of financial management of the association is denied by the executive committee, who alleges that since the new executive committee was elected during October 2018 the new executive committee has resolved

the majority of difficulties in respect of obtaining the audited financial statements of the association, which statements reflect the fact that the association is in a healthy financial position and being administered properly by the executive committee.

[182] The operational business intelligence report, which was compiled by the applicant, was also according to the executive committee, continuously being addressed by the first respondent.

[183] In view of the aforesaid, the Applicant has failed to establish that it would be just and equitable for the first respondent to be placed under the administration of the Director General: Land Affairs, as envisaged in section 13(1) of the CPA Act.

[184] I therefore make an order in the following terms:-

1. The late filing of the first respondent's answering affidavit is condoned.
2. The application is dismissed.
3. The applicant is ordered to pay the costs of the application, including the costs of the urgent application that were reserved.

AG VAN TONDER

ACTING JUDGE

On behalf of the Applicant: Adv. E. Raubenheimer (oio Engelsman Magabane Inc)

On behalf of First Respondent: Adv. B. Knoetze SC (oio Van de Wall Inc)

[1] Mathebula and Others v The Nwandlamhari Communal Property Association and Others (90356/16) [2019] ZAGPPHC 201 (9 May 2019)

[1] Mathebula and Others v The Nwandlamhari Communal Property Association and Others (90356/16) [2019]

ZAGPPHC 201 (9 May 2019)

- [2] Bakgatla -Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others 2015
- (6) SA 32 (CC) at par 34 and 36 also reported as 2015 (10) BCLR 1139 (CC)
- [2] Bakgatla -Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others 2015
- (6) SA 32 (CC) at par 34 and 36 also reported as 2015 (10) BCLR 1139 (CC)
- [3] Communal Property Associations Act No 28 of 1996 section 13
- [4] Mathebula and Others v The Nwandlamhari Communal Property Association and Others (90356/16) [2019] ZAGPPHC 201 (9 May 2019)
- [4] Mathebula and Others v The Nwandlamhari Communal Property Association and Others (90356/16) [2019]
- [5] Mathebula and Others v The Nwandlamhari Communal Property Association and Others (90356/16) [2019] ZAGPPHC 201 (9 May 2019) at

par 113

- [6] Mathebula and Others v The Nwandlamhari Communal Property Association and Others (90356/16) [2019] ZAGPPHC 201 (9 May 2019) at par 82-85
- [6] Mathebula and Others v The Nwandlamhari Communal Property Association and Others (90356/16) [2019]

ZAGPPHC 201 (9 May 2019) at par 82-85

- [7] Fakie NO v CCII Systems (Pty ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at par 55-56
- [8] Erasmus v Pentamed Investments (Pty) Ltd 1982 (1) SA 178 (WLD) at 181A-185E
- [9] Apco Africa (Pty) Ltd & Another v Apco Worldwide Inc [2008] ZASCA 64; 2008 (5) SA 615 (SCA) at 624J – 625B also reported as [2008] 4 All SA 1 (SCA)
- [10] Knipe & Others v Kameelhoek (Pty) Ltd & Another 2014 (1) SA 52 (FB) at 62G
- [11] Mathebula and Others v The Nwandlamhari Communal Property Association and Others (90356/16) [2019] ZAGPPHC 201 (9 May 2019) at

par 108 and 110

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