

SOUTH AFRICA / JUDGMENT

Leogale and Another v Diratsagae Communal Property Association and Another (M520/2021) [2023] ZANWHC 6 (7 February 2023)

[2023] ZANWHC 6**COURT**

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

M520/2021

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Source record**IN THE HIGH COURT HIGH****COURT OF SOUTH AFRICA****NORTH WEST DIVISION,****MAFIKENG****CASE NO: M520/2021****Reportable: NO****Circulate to Judges: NO****Circulate to Magistrates:**

NO

Circulate to Regional
Magistrates: NO**In the matter between:**

KGOSI CHIMANE

LEGOALE

First Applicant

BAKWENA BA MAAKA

TRADITIONAL

COUNCIL

Second Applicant

And

DIRATSAGAE COMMUNAL

PROPERTY

ASSOCIATION

First Respondent

MINISTER OF

AGRICULTURE, LAND REFORM

AND RURAL

DEVELOPMENT

Second Respondent

DIRECTOR GENERAL: AGRICULTURE,
LAND REFORM AND RURAL
DEVELOPMENT
ORDER
The application is
dismissed with costs.

JUDGMENT

PETERSEN J

Introduction

[1] This opposed application brought by the first applicant (Kgosi Legoale) and the second applicant (the applicants) against the first respondent (the CPA), the second respondent (the Minister) and the third respondent (the DG) came before me on 17 November 2022. The applicants seek relief in the following terms:

1. THAT the First Respondent (Diratsagae Communal Property Association CPA) is placed under administration of Third Respondent;
2. That the First Respondent be and hereby (sic) ordered to submit all documents in their possession including financial records (audited financial statements) for the financing year ending 2006-2011 to the Third Respondent and First Applicant, within five (5) days of the Order of this

Court;

3. That Third Respondent be and is hereby directed and ordered to undertake all operational functions of First Respondent which include the conclusion of the verification of beneficiaries for the purpose of the nominations and elections of New Executive Committee Members, in the alternative, the Third Respondent appoint an interim structure to undertake the functions of First Respondent subject to its control and oversight.
4. That the Honourable Court declare that the current First Respondent's Executive Committee Members term of office expired and their existence to hold office is unlawful and in direct breach of its constitution;
5. That the Honourable Court declare that the Third Respondent's conduct to exclude ex officio member Kgosi JC Legoale from its activities and functions is (sic) direct contravention of its Constitution;
6. That Third Respondent undertake an extensive forensic into the financial affairs and business interest of First Respondent and furnish hereto a forensic report to the Applicants upon completion of its investigation and such investigation to be completed within a period of Six (6) months of the Order of this Court;

7. That First Respondent be prohibited whilst the Forensic investigation is still pending as mentioned in paragraph 6 above from transacting from its official banking accounts held by any financial institution;
8. That Third Respondent conducts an investigation and assessment against First Respondent particularly whether it achieved its mandate and objective in terms of Clause 3, of its Constitution to the beneficiaries;
9. That whilst the investigation process by Third Respondent is pending under paragraphs 6, 7 and 8 above, no elections and appointment of the New Executive Committee Members should be undertaken, in the event same occurs, the Applicant will on an urgent basis approach Court and seek relief.
10. Further and/or alternative relief.
11. Costs of the application. '

Background

- [2] During 2004 the tribal community of Bakwena Ba Modimosama Ba Maaka (the Community) submitted a successful land claim in respect of the farms Koedoesfontein Portions 1, 2, 3, 4, 5 and 6; No 15 Farm Hartebeesfontein 431 JP; Farm Groenfontein 429 JP, Farm Deoraan laagte 319 JQ and Farm Gouvermentsground 430 JP, as a result of having been dispossessed thereof in terms of racial laws during

the apartheid regime.

- [3] On 04 March 1998, the CPA was registered with the Department of Land Affairs under registration number CPA/98/0042/A for the purpose of managing and controlling the affairs of the said farms for the benefit of the beneficiaries in terms of the Communal Property Associations Act 28 of 1996 (Communal Property Associations Act). In terms of the Constitution of the CPA which was drafted with

the assistance of the Minister and the amendments thereto ratified on 17 November 2007, the beneficiaries are defined as the Community as per family tree. Kgosi Legoale or his predecessor shall in terms of the Constitution at all times act as an ex officio member of the CPA, which shall be accountable to the community and shall where necessary (without in any way limiting its powers) refer issues to the community for approval and/or ratification.

- [4] Kgosi Legoale in the founding affidavit places particular emphasis on what he refers to as the mandate of the CPA as set out in paragraph 3 of its Constitution, where its aims and objectives are set out as follows:

"3. AIMS AND OBJECTIVES OF THE ASSOCIATION

3.1 The aims and objectives of the association is to acquire, hold, manage and control the properties on behalf of and for the benefit of the members of the Association.

3.2 To acquire in its name for the benefit and on behalf of its members properties whether movable or immovable;

3.3 To make provision for suitable infrastructural developments including but not limited to schools, clinics, roads, etc;

3.4 To ensure that members of the Association acquire appropriate skills to enable them to be self sufficient and self sustaining;

3.5 To liaise and cooperate with the Department(s) or any other organ of state in the acquisition and development of the properties;

(3.6 omitted)

3.7 To resettle the rightful descendants of Bakwena Ba Modimosama Ba Maaka who wish to relocate to Ratsagae;

3.8 To raise, receive and hold from any lawful source for the benefit of the members. "

The points in limine raised by the applicants

[5] This brings me to points in limine raised by the applicants and the CPA respectively. At the hearing of the matter, I admitted the further affidavit filed by the CPA insofar as the content thereof provides relevant evidence for the proper ventilation and adjudication of the matter. What remains is the point in limine that the deponent to the answering affidavit Mr Rodney Moshe Thakadu lacks locus standi in iudicio and accordingly lacks authority to represent the CPA in these proceedings.

[6] The applicants in challenging the authority of Mr Thakadu to represent the CPA is predicated on clause 10.1 of the CPA's Constitution which provides that "The members of the Committee shall hold office for a period of five (5) years ending at the 5th Annual General Meeting, and this procedure is repeated every five (5) years with the aim of members of the Association democratically electing Committee Members.

[7] The applicants contend that Mr Thakadu was initially appointed as Chairperson of the CPA on 26 July 2008 and continues to hold office to date. That being the case, he has held office for thirteen (13) years which is three (3) years beyond two terms of five (5) years each as envisaged by clause 10.1 of the Constitution of the CPA. On this basis the applicants contend that Mr Tshakadu lacks locus standi in iudicio to depose to the answering affidavit on behalf of the CPA, which is unlawful.

[8] The applicants place reliance on the Supreme Court of Appeal judgment of Makgoba and Others v Ledwaba NO and Others[1] in this regard, where Mocumie JA said:

"[16] It is clear from what is set out above that the Trust under the administration of the appellants has been dysfunctional and has for more than six years not served the needs of the beneficiaries it was created for and the community at large. The appellants abdicated their fiduciary responsibility and had to be removed from their office of trusteeship to allow new

trustees to be elected and run the Trust as it befits their office. To allow their continued presence in the office of the Trust would perpetuate the Trust being improperly administered and will be detrimental of the welfare of the beneficiaries, contrary to the provisions of clause 6.4 of the Trust Deed and the existing order of Mabuse J. "

- [9] The CPA does not dispute that the term of office of the previous executive committee which included Mr Tshakadu expired during February 2021 and that they remained in office whilst awaiting an AGM to be convened. The CPA in brief explains that it was unable to convene an AGM as a result of the Covid 19 lockdown Regulations which restricted gatherings in excess of certain proclaimed numbers.
- [10] The CPA highlights a lacuna in its Constitution and in the Communal Property Act in respect of the legal status of Executive Committee members whose terms of office had expired and remain in office until the election of a new Executive Committee. The Executive Committee whose actions the applicants seek to impugn in this application remained in office until the election of the new Executive Committee on 13 November 2021. The CPA contends, based on the lacuna, that it would lead to absurdity in the management of the CPA if the previous Executive Committee pending the election of the new Executive Committee did not continue to play an oversight role in the management of the CPA.
- [11] The CPA places reliance on a judgment of this Division where Hendricks J (as he then was) said the following in *Pilane and Another v Pheto and Others* [2] where the term of office of a Traditional Council had expired:

"[18] After listening to the arguments and evidence presented, I dismissed the application because it lacked substance. There can never be a lacuna in that no Traditional Council exists to run the affairs of the traditional community. Although their term of office expired on 24 September 2010, the members of the Traditional Council must remain in office until the process of re-composition of Traditional Council's is finalized.

- [19] This much was conceded to by Adv Bredenkamp SC on behalf of the Respondents, which concession was in my view well made. For the sake of good governance, a council whose term of office has expired should continue to be in existence until it is replaced by a newly elected council. In my view therefore, the contention by the Respondents that the Second Applicant lacks the necessary locus standi to bring this application, does not hold water. I find that the Second Applicant does have the necessary locus standi to bring this application.

(my emphasis)

- [12] Paragraph [16] of the Makgoba judgment supra as relied on by the applicants is distinguishable from the circumstances in the present application. When regard is had to the peculiar facts giving rise to the sentiments expressed at paragraph [16] of Makgoba and considers it in context, the distinction becomes clear. In Makgoba Mabuse J issued a declaratory as follows:

"[6] In 2015, the seventh respondent brought another application. On 24 November 2015 after hearing all parties, Mabuse J granted an order which reads:

'It is hereby declared that the term of office of the current Board of Trustees that was elected on 27 June 2010 and whose election was subsequently confirmed by the Master of the High Court on 27 October 2010 expired by effluxion of time at the end of a period of three years reckoned from 27 June 2010.'

[7] Notwithstanding the order, the appellants continued in office. They failed to hold the prescribed general meetings to account to the beneficiaries on the finances of the Trust and to pay out dividends equally to all the beneficiaries as set out in clause 9.2 of the Trust Deed. [31 They refused to relinquish their positions as the Trust Deed prescribed in clause 6.4[4] apparently on the basis of a contention that the termination of their office did not take effect until replacement trustees were elected at an annual general meeting which they alleged were made impossible to convene by the seventh respondent and its members. The Master intervened and asked the trustees to account by requesting documents from them. The Master's endeavours did not succeed. She was not satisfied with the response and decided to exercise her powers under s 20(2) (e) of the Trust Property Control Act 57, 1988 (the Act). She removed all the appellants including the second and third respondents from their office in a letter dated 22 February 2017.

..."

[13] In the present application unlike the circumstances in Makgoba the previous Executive Committee of the CPA, with due regard to the position of its Chairperson who exceeded the ten (10) year tenure as at 2018 already, have never refused to relinquish office and they remained in office brought about by circumstances beyond their control.

[14] The point in limine on locus standi accordingly stands to be dismissed.

The points in limine raised by the CPA

[15] Adv Moagi in her heads of argument did not persist in the points in limine raised by the CPA in respect of alleged non-compliance with clause 18 of the Constitution of the CPA nor the non-compliance by the applicants with Rule 41A of the Uniform Rules of Court. The focus was rather on the merits of the application.

The overarching relief sought by the applicants

[16] The overarching relief sought by the applicants is encapsulated in prayer 1 of the Notice of Motion in terms of which an order is sought that the CPA be placed under administration of the DG in terms of section 13(1) of the Communal Property Associations Act which provides that:

"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 where it would otherwise be just and equitable in the circumstances. "

[17] In *Dawson v Sydney on Vaal CPA and Another*[3], Van Tonder AJ provides a very useful matter exposition of the implications of section 13(1) of the Communal Property Associations Act, as follows:

"[146] From the Act itself, it is thus clear that an association may be placed under administration or liquidated in 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

[146.2] 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.

[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 an judgments expressly dealing with an application in terms of s 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 s 13 of the CPA Act .

[152] He referred to the unreported judgment of *Mathebula and Others v The Nwandlamhari Communal Property Association and Others* 120191 ZAGPPHC 201 (GP 90356/16: 9 May 2019), in which s 13 of the CPA Act was considered.

[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 an further evidence

[165] In APCO Africa Ponnar 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 Daffue J* relied on the judgment in *Rand Air (Pty) Ltd v Ray 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. .

[18] It is against the aforesaid background and applicable authorities that I proceed to consider the merits of the application.

The merits of the application

[19] Kgosi Legoale sets out the cause of his complaints under the following headings: Mismanagement of Business Affairs and Operations by First Respondent, Lack of Oversight and Mismanagement of Water Infrastructure Project, Lack of Adherence to Governance Process and Irregular Appointments of Executive Committee Members, Lack of Financial Disclosure and Transparency by First Respondent and Prejudice. It is apposite to note that the complaints are essentially directed at the Executive Committee of the CPA as at the date of launching of this application and not the present Executive Committee.

Mismanagement of Business Affairs and Operations by First Respondent

[20] Kgosi Legoale under this head of complaint deals in the main with his alleged exclusion from issues related to the affairs of the CPA. In particular, he states that the CPA continuously disregards and precludes his involvement as an ex officio member of the CPA by blatantly refusing to engage him on issues relating to finances, commercial matters and general matters affecting the beneficiaries. To this end he states that his exclusion is based on the CPA's reluctance to provide access to records related to the matters as aforesaid. Kgosi Legoale asserts what he claims is his right with reference to his role as Kgosi in the CPA as set out in the Constitution of the CPA. Kgosi Legoale goes on to assert his position as being permanent as opposed to the temporary status of the Executive Committee which is valid for five (5) years.

[21] Further to his alleged exclusion from the affairs of the CPA, Kgosi Legoale states that the CPA in the past had tendencies of inviting him to attend its AGM's without prior briefing or consultation. He did not accede to the invitations to attend the AGM's as he believed that the Executive Committee members sought his attendance as an ex officio member solely for the purpose sanctioning the activities of the CPA which were not brought to his attention formally prior to the said meetings. In this regard he attaches

letters addressed by himself to the CPA on 14 and 17 October 2015 respectively in which he voiced his displeasure.

[22] The CPA contends that Kgosi Legoale as an ex officio member of the Executive Committee is obliged to act in good faith and comply with the Constitution of the CPA. The CPA denies that it blatantly refused to engage Kgosi Legoale on issues relating to the finances, commercial and general matters affecting the beneficiaries. In this regard it emphasizes the common cause fact that Kgosi Legoale was invited to meetings of the CPA which he deliberately refused to attend.

[23] As to Kgosi Legoale's reason for refusing to attend the AGM of 17 October 2015, where he contended in writing that the Executive Committee ought to have discussed the notice of the AGM with his Traditional Council, the second applicant, prior to presenting the notice to members of the community, the CPA submits that such process is not sanctioned by clauses 12 to 14 of the CPA's Constitution.

[24] According to the CPA, the relationship with Kgosi Legoale appears to have disintegrated around 2015 when he authorised individuals who are not members of the CPA to utilise a certain portion of the restituted land (Doringlaagte 319 JP) without consulting the Executive Committee. The CPA pursuant to this alleged behaviour on the part of Kgosi Legoale caused a letter to be written to the Minister and DG to intervene in the conduct of Kgosi Legoale. Kgosi Legoale is said to have refused to co-operate with officials

from the Minister and DG's offices and the Executive Committee of the CPA accordingly proceeded, to evict the individuals who were

authorised by Kgosi Legoale to utilise certain portions of the affected farm.

[25] The CPA contends that post 2015, Kgosi Legoale did not attend any of its meetings. The Preamble to the Constitution of the CPA where Kgosi Legoale and his predecessors role in the CPA is set out, at most determines that he shall be an ex officio member of the CPA. In asserting his role in the Constitution, it goes further that the Association shall be accountable to the community and shall

where necessary (without in any way limiting its powers) refer issues to the community for approval and/or ratification.

[26] The reason for Kgosi Legoale refusing to attend the AGM on 17 October 2015 on the basis that his Traditional Council were not consulted on the notice for the AGM does not accord with the fact that the CPA "shall where necessary refer issues to the community for approval or ratification. " On the papers, the community were given the notice of the AGM, which by implication would have incorporated issues for approval by the community for ratification.

[27] The complaint by the applicants under the heading Mismanagement of Business Affairs and Operations by First Respondent therefore cannot be sustained.

Lack of Oversight and Mismanagement of Water Infrastructure Project

[28] The applicants under this complaint highlight the scourge of poverty, unemployment and lack of basic socio economic rights which include the right to adequate supply and distribution of water services, reticulation and sanitation. It is in dispute whether a water project which was consequently undertaken was at the behest of the applicants or identified by the CPA. Be that as it may, such water project was undertaken after the CPA during September 2013 invited quotations from potential contractors and consequently

appointed a contractor Afric Trading to undertake the water project.

[29] It is not in dispute that Afric Trading quoted an amount of R 157 822.35 which the CPA paid on or about 15 October

2013. The water project was handed over to the community and the CPA on 18 December 2015. The applicants contend that the water project had issues and was not complete upon handing over despite such an allegation by the CPA being denied. The applicants take issue with the CPA not concluding a service level agreement with AfricTrading and failing to exercise due care and skill including oversight over the water project.

[30] The CPA on the contrary contends that as a result of limited technical skill to implement the water project the Moses Kotane Municipality was approached by it to provide technical skill as required. The Municipality assisted by assigning a certain Mr Puso who advised and assisted the CPA to procure the services of a third party and to monitor the project. The CPA maintains that by doing so it implemented the project in good faith and in the best interest of the community.

- [31] The CPA maintains that once the project was handed over to the community, a generator which was part of the procurement was stolen and no criminal case was opened by the applicants and it had no oversight over the project at this stage. The CPA questions the bona fides or genuineness of this complaint considering the fact that the project was implemented in 2013 and were never raised with the Minister or DG at that stage. The applicants, however, contend that they caused a letter to be sent to the DG on 18 December 2015 in which they expressed their displeasure with the incomplete project.
- [32] The respective allegations by the applicants and the CPA in respect of the water project is at variance. On the version of the CPA it engaged the Moses Kotane Municipality to assist as it lacked the necessary technical skills to implement the water project and they obliged. There is no evidence to gainsay this evidence or suggest that blame for the failed water project should be attributed to the CPA.

Lack of Financial Disclosure and Transparency by First Respondent and Prejudice

- [33] Kgosi Legoale states that the last time he was placed in possession of financial statements of the CPA was during
2014. To this end he claims that there is a reluctance on the part of the CPA to furnish him with financial statements and records. It is inexplicable why Kgosi Legoale in the relief sought would seek an order that financial records (audited financial statements) be furnished to the DG for the financial years ending 2006 to 2011 if he has received such records until 2014. He further complains that no financial statements were tabled at an AGM in February 2021 and that such AGM was in fact not held. The issue as to why no AGM was held at the time has already been addressed earlier and merits no further attention.
- [34] The fact that Kgosi Legoale has not received financial records since 2015 is inextricably linked to his refusal to attend meetings or AGM's of the CPA since 2015 and not on his allegation of a reluctance on the part of the CPA. Nothing turns on this complaint having regard to the evidence.

Lack of Adherence to Governance Process and Irregular Appointments of Executive Committee Members

- [35] The applicants under this complaint take issue with the expired term of the CPA and the continued occupation of office of the Executive Committee. This complaint has been canvassed under the applicants' point in limine on locus standi and the evidence canvassed in the founding affidavit overlaps greatly with what was raised in the point in limine.
- [36] Whilst much was made about the dates of 13 October 2021 and 13 November 2021 when a new Executive Committee was elected and took office, the fact remains that a new Executive Committee is in place. Nothing in the papers suggests that the new Executive Committee is not competent to comply with its mandate in terms of the Constitution of the CPA. The relief sought by the applicants that no

elections take place until such time that the DG concludes an investigation sought by the applicants into the financial affairs of the CPA, has been overtaken by the election of a new Executive Committee. Nothing prevented the CPA from arranging for the election

of a new Executive Committee where that ensures continuity and giving effect to the mandate of the CPA in its Constitution. The complaints by the applicants after all relates to the previous Executive Committee and it is pure speculation as this early stage to suggest that the new Executive Committee will emulate what its predecessors in title allegedly did.

Conclusion

[37] Having regard the status quo which prevails with the new Executive Committee of the CPA having been installed, the relief sought by the applicants is moot. The application accordingly stands to be dismissed.

Costs

[38] In my view, if Rule 41A was complied with as required by law, the complaints in this matter would in all probability have been capable of resolution in the best interests of the community.

[39] Costs follow suit and the respondents are entitled to costs.

Order

[40] Consequently, the following order is made:

AH PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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Instructed by

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Date of Hearing

: 17 November 2022

Date of

Judgment

: 07 February 2023

[1] (054/2018)

[2018] ZASCA 181 (4 December 2018) at paragraph [16].

[2] (582/2011)

[2011] ZANWHC 63 (30 September 2011) at paragraphs [18]-[19]

[3] 2021

(6) SA 167 (NCK).

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