

SOUTH AFRICA / JUDGMENT

Mathulini Communal Property Association and Others v Minister of Rural Development and Land Reform and Others (LCC 267/2017) [2018] ZALCC 31 (5 September 2018)

[2018] ZALCC 31

COURT

Land Claims Court

BEFORE

Canca

CASE / FILE NUMBER

LCC 267/2017

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Policy

IN THE LAND CLAIMS

COURT OF SOUTH AFRICA

HELD AT DURBAN

Before: Canca AJ

CASE

NO.: LCC 267/2017

In the matter between:

MATHULINI

COMMUNAL PROPERTY ASSOCIATION

1st

Applicant

INKOSI

BHEKIZIZWE NIVARD LUTHULI

2nd

Applicant

ALPHEUS

ZAKHELE MLOTSHWA

3rd

Applicant

BUSISIWE

BENEDICTOR
LUTHULI
4th
Applicant
NOBUHLE
PORTIA
MBILI
5th
Applicant
PG
SHEZI
6th
Applicant
NANA
ISABEL NGCOBO
7th
Applicant
NOKULUNGA
A MTESHANE
8th
Applicant
MOSHELI
LAWRENCE
MNGANGA
9th
Applicant
and
MINISTER
OF RURAL DEVELOPMENT AND 1st
Respondent
LAND
REFORM

DIRECTOR-GENERAL: LAND AFFAIRS
2nd
Respondent
REGIONAL
LAND CLAIMS COMMISSIONER, 3rd
Respondent
KWAZULU-NATAL
CHIEF
LAND CLAIMS COMMISSIONER
4th
Respondent
COMMISSION
ON RESTITUTION OF LAND RIGHTS
5th
Respondent
MANDLENKOSI
GENERAL RADEBE
6th

Respondent
BHEKI
EPHRAIM MLITA
7th
Respondent
NTUTHUKO
TREVOR NGOBESE
8th
Respondent
NCAMISILE
PRINCESS ZINDELA
9th
Respondent
BONGINKOSI
MERRIMEN
XULU
10th
Respondent
SINENGWE
CYPRIAN SITHOLE
11th
Respondent
ZONA
MARGARET
MACHI
12th
Respondent
FIKISILE
JOYCE MAKHATHINI
13th
Respondent
SIMPHIWE
MANSUET
MGCECE
14th
Respondent
MLONDI
CLIVE MSANE
15th
Respondent
GCINUMUZI
GOODWILL ZUMA
16th
Respondent
FIRST
RAND BANK LIMITED t/a FIRST NATIONAL BANK
17th
Respondent
Delivered on: 05
September 2018

JUDGMENT

CANCA AJ

Introduction

[1] The applicants, the Mathulini Communal Property Association, an entity established in terms of the Communal Property Association Act No 28 of 1996 (“the CPA”) and the second to ninth applicants, who allege that they are the lawfully appointed members of the CPA, seek an order in the following terms, namely:

1.1. that the following decisions and/or actions of the first and/or second and/or third and/or fourth respondents be reviewed and/or corrected and/or set aside:

1.1.1. the decision to register a new executive committee of the CPA, in terms whereof the executive shall consist of the sixth to sixteenth respondents with effect from 24 June 2017;

1.1.2. the election, at the Annual General Meeting (“AGM”) of the CPA held on 24 June 2017, of the sixth to sixteenth respondents as executive committee members of the CPA, and

1.1.3 . the aforesaid AGM as a valid AGM of the CPA.

2. setting aside the second respondent’s registration and appointment of the executive committee consisting of the sixth to sixteenth respondents.

3. a declarator that the second to ninth applicants constitute the valid, lawful and correct committee members of the CPA.

4. setting aside an order of this Court dated 26 October 2016 in terms whereof the second to ninth applicants, on the one hand, and the sixth to the sixteenth respondents, on the other hand, were interdicted and restrained from operating the following bank accounts:

4.1. The current account held at the First National Bank under account number 62404818900 in the name of the CPA;

4.2. The interest-bearing account held at the First National Bank under account number 74714815154 in the name of the CPA.

5. that the bank accounts mentioned in paragraph 4 above shall be operated by any two of the third, fourth and the fifth applicants, acting jointly and that any of the aforesaid persons may be substituted as signatories of the aforesaid bank accounts by the rest of the persons referred to in paragraph 3 above by the passing of a resolution to that effect in terms of the CPA’s constitution.

6. interdicting the respondents from meddling in the affairs of the CPA and its lawfully appointed committee, and

7. costs.

[2] The sixth to sixteenth respondents, who contend that they replaced the second to ninth applicants as the CPA's committee at an AGM held on 24 June 2017, oppose the application and have launched a counter application in which they seek an order declaring unlawful and invalid:

2.1. the first applicant's constitution dated 23 June 2012;

2.1.1 resolutions adopted at a General Meeting of the CPA held on 13 May 2017;

2.1.2 a notice of an Annual General Meeting of the first applicant scheduled for 6 December 2017, and

2.2. an order declaring that they are the first applicant's lawful committee.

[3] The first to fifth respondents are cited in their official capacities and are, individually and collectively, vested with powers, in terms of the Restitution of Land Rights Act, No. 22 of 1994, as amended ("the Restitution Act"), to deal with matters connected with the restitution of rights in land to persons and communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices.

[4] The first to fifth respondents initially signaled their intention to abide the Court's decision in this matter but changed their stance during the course of the hearing. The first, second, fourth and fifth respondents, but not the third, then sought to have an opposing affidavit admitted as part of the record. This request was denied for the reasons set out later in the judgment.

[5] The seventeenth respondent, a well-known South African bank, has elected to abide the Court's decision and was not represented at the hearing of the matter.

[6] At the hearing of the matter on 4 December 2017, Mr. Mfeka, for the six to sixteenth respondents, advanced an application which culminated in the Court referring to oral evidence the issue of the status of the first applicant's constitution. This evidence was heard on the 11th and 12th December 2017 but when the case for the applicants closed, Mr. Mfeka applied to re-open the hearing in order to lead the evidence of one more witness. The application was granted and the evidence of this witness was led on 12 March 2018. Heads of argument on the oral evidence were filed at Court on 22 March 2018.

CHRONOLOGY

Events preceding the formation of the CPA

[10] The second applicant, Inkosi Bhhekizizwe Nivard Luthuli ("Luthuli"), the Inkosi of the Luthuli tribe and the Mathulini Community ("the Community") testified that prior to lodging a claim for the restitution of rights in certain land, in terms of section 2(1)(d) of the Restitution Act, he caused the formation of the Mathulini Land Claim Committee, under the chairmanship

of the third applicant, to drive the Community's land claim which was eventually lodged on 30 June 1998. The claim was accepted as valid by the third and fifth respondents. Competing claims were also lodged timeously but these were later consolidated with that of the Mathulini Land Claim. The consolidated claim, involving approximately 205 erven and one hundred and eleven verified beneficiaries, was duly published in the Government Gazette of 6 February 2004.

- [11] Luthuli's further evidence was that the Community was initially advised to register a deed of trust as the land holding entity by an official in the employ of the second respondent. To that end, the Mathulini Community Trust was registered with the Master of the High Court on 1 April 2011, with eleven trustees, including himself, the third, fourth, fifth applicants as well as the sixteenth respondent, a Mr. SW Dlamini and five other persons, who, according to the papers, appear not to have played a further role in this matter.
- [12] According to Luthuli, the Community was subsequently advised to form the CPA as the land holding entity. He also stated that thereafter various workshops on the benefits of a communal property association were conducted by officials in the employ of the second and third respondents. These workshops also discussed the provisions of a draft constitution for the CPA.

The 23 June 2012 meeting

- [13] Following the workshops referred to in paragraph [12] above, a meeting of members of the Community was convened on 23 June 2012, where the constitution of the CPA was adopted and an interim committee of 11 members was elected in accordance with the provisions of that constitution. This committee consisted of the second to the ninth applicants, including the sixth and fifteenth respondents together with one ZH Shezi. Luthuli was appointed a permanent standing member of the committee by virtue of his position as the Inkosi of the Community. The interim committee was to serve in that capacity during the transitional period pending registration of the CPA and its first AGM, due to be held on 14 December later that year. The sixth respondent ("Radebe"), who was present at the meeting, was elected chairperson of this interim committee.
- [14] Radebe's evidence, both oral and documentary, was that he was a school principal and a sugar cane farmer who lived in the area. In brief summary, he testified that he was pressured into signing the constitution and did not have sufficient time to fully acquaint himself with its contents at the meeting of 23 June 2012, where it was adopted. However, he conceded during cross-examination that he was present when the provisions of the constitution were read out by an official from the third respondent's office. He further testified that he found a number of clauses in the constitution anomalous and subsequently raised his concerns at one of the committee's meetings during 2013.

- [15] Radebe's evidence in chief was contradicted by Bheki Ephraim Mlita ("Mlita"), a witness for Radebe. Mlita testified that he was present at the 23 June 2012 meeting where Radebe was elected chairperson. He also confirmed that the provisions of the CPA's constitution were read out at the meeting and added that those provisions were explained by the officiating official, who answered questions raised by community members on the constitution.
- [16] A further witness for Radebe and the seventh to sixteenth respondents, Ms. Nompilo Mhlongo (previously Ndlovu) ("Mhlongo"), an official in the office of the second respondent, testified that she was involved in the setting up the CPA and was present at the meeting of 23 June 2012 but that her recollection of the events of that day was not good. However, during cross examination she conceded that a report compiled and signed by her two days after that meeting correctly reflected what had transpired there.
- [17] It is convenient to quote the report as it succinctly sets out what transpired at that meeting. The relevant portions of the report read as follows:

“

Form CPA13

REPORT BY AUTHORISED OFFICER IN TERMS OF SECTION 7 (2) OF THE ACT

THE DISTRICT MANAGER

I, Nompilo Ndlovu, hereby declare that the following is a true account of the meeting held at Mathulini Tribal Court on the 23rd day of June 2012 and the matters relating thereto:

- (a) I was appointed as authorized officer in terms of section 1 read with section 7 (2) of the Act.
- (b) The notice of the meeting was sufficient in order to ensure the presence of the members of the community at the meeting, and took place in the following manner:

Opening prayer by Mr Xaba

Purpose of the meeting: It was explained that the purpose of the meeting was for the Community to adopt the constitution as well as elect members of the committee.

Roll call to ascertain attendance and eligibility for voting: The verified claimants were all represented at the meeting; there was also a group of about five households that are not on the verification list that was also present. They were noted and assured that their issues will be attended to by the soon to be elected Committee following procedure described in the constitution.

Going through the sections of the Constitution, explaining to the community what it implies and what is expected of them.

Adoption of the constitution by way of raising hands: Following the explanation of the Constitution, community members were asked to show by way of hands, if they wish to adopt or not. A good majority voted for the adoption of the Constitution.

Election of the committee by secret ballot: Those members eligible for voting as was established earlier in the meeting were asked to vote for the Committee

Introduction

of the committee: Members of the newly elected Committee were introduced to the Community closure

(c) One hundred and sixteen (116) members of the community were present at the meeting or legally represented, and the different interest groups in the community were represented. The following interests were represented:

- Males
- Females
- Claimant households who were not verified

(d) One hundred and eleven (111) members of the community voted in favour of accepting the constitution and five voted against it.

(e) The interests of the following persons or group of persons will probably be affected negatively as a result of the adoption of the constitution:

· N/A

(f) the views of the persons who did not agree were the following:

· They were not part of the processes or workshops that took place in the community where the constitution was developed and issues were discussed in great detail.

(g) The following matters, prescribed by the Minister, are relevant to the execution of the District Manager's discretion:

N/A

In witness of which I here below have attested my signature in Pietermaritzburg on the 25th day of June 2012

Signed by the authorized official in the presence of both of us at the same time who on his request in his presence and in each other's presence signed our names as witnesses."

[18] Dlamini, a witness who testified on behalf of the applicants, stated that he was a project officer formerly in the employ of the third respondent. His evidence was the following. He stated that he was tasked with assisting the Community with their land claim. According to him, when the claim was lodged there was an already established committee under the

chairmanship of third applicant, Alpheus Zakhele Mlotshwa (“Mlotshwa”). He stated that this committee’s object, as alluded to in paragraph [10] above, was to ensure the registration and prosecution of the Community’s land claim. He further stated that the third respondent (or “the RLCC”), worked with this committee during the initial phases of the claim, including the verification exercise. When the claim reached the stage where a legal entity to hold the claimed property had to be established, a trust was decided upon as the property holding entity and that the aforementioned eleven persons would be its initial trustees. However, prior to its registration, the RLCC was advised by second respondent to rather register a community property association. He also stated that the difference between the two entities was explained to and workshopped with members of the said committee with the assistance of Mhlongo, an official in the office of the second respondent. Input on what the constitution should contain was obtained from the committee. When Mhlongo was satisfied with the document, a meeting was called for the 23 June 2012, where the constitution would be explained to the Community and where a new committee would be elected.

- [19] Dlamini further stated that the contents of the constitution were duly explained to the attendees of the meeting, including the fact that Luthuli, as the Inkosi, would be a permanent member of the new committee and not subject to election. Only ten members could be nominated and elected, his testimony continued. He stated that two individuals were nominated for one position and that the one who secured a majority of votes would fill the position. After the ten persons were elected by the meeting, they, together with Luthuli, retired to a boardroom where they elected the office bearers amongst themselves. It was at this stage that Radebe was elected chairperson of the CPA. They then went back to the meeting where the newly elected office bearers were introduced to the Community. The meeting ended but the members of the committee remained behind and Mhlongo, again went through the constitution, explaining the duties of the various office bearers. Radebe, the newly elected secretary and two witnesses then signed the constitution. Dlamini then concluded his testimony by stating that he, as the official dealing with the claim, was unaware of any complaints from the community members regarding the contents of the constitution during his tenure with the RLCC which ended in October 2013.
- [20] During his oral testimony, Luthuli corroborated the evidence of Dlamini on all material respects, including that the constitution was read, explained and adopted at the community meeting held on 23 June 2012, where the office bearers were also elected.
- [21] In evaluating Radebe’s testimony, I find his evidence that he signed the constitution in a rush and without having read or understood its contents, untenable. The meeting where the constitution was adopted apparently started mid-morning and continued until approximately mid-afternoon. It is, in my view, improbable that a school principal and a businessman would sign an important document, such as a constitution of an organization he was about to chair, without understanding its contents. The improbability of this testimony is further borne out by his evidence during cross-examination that he reads important documents before signing them. Moreover, even if it was contended that Radebe

had insufficient time to acquaint himself with the constitution's contents, he had more than enough time to do so, given the duration of the meeting. Also, Radebe had approximately two months to acquaint himself with the contents of the constitution from the date he signed it and when it was eventually registered with the second respondent. Any concerns he might have had with the contents of the constitution could have been ventilated then. This calls into question his credibility and therefore renders his evidence unreliable. Moreover, the fact that Radebe's own witness contradicted him in stating that the contents of the constitution were explained to the meeting, bolsters this finding.

- [22] The testimonies of Mhlongo, Mlita, Dlamini and Luthuli show that the constitution was adopted at a properly constituted meeting. The versions of Mhlongo, Dlamini and Luthuli of what transpired at that meeting corroborate each other on all material aspects and is preferred to that tendered by Radebe.
- [23] The CPA and its constitution were subsequently registered with the second respondent on 7 and 14 August 2012 respectively.

The 14 December 2012 meeting

- [24] The CPA's inaugural AGM was held on the 14 December 2012. It was at this meeting where all the members of the interim committee elected at the general meeting of 23 June 2012 were unanimously elected as the CPA's executive committee, with Radebe as chairperson and the third applicant, the vice-chairperson. Their term of office commenced on that day and was, according to the CPA's constitution, to endure for five years until 13 December 2017.

Fued between two factions

- [25] The relationship between members of the committee soured. The cause of this appears to revolve around unhappiness amongst certain committee members with (i) a clause in the CPA's constitution which stipulates that 20% of the profits generated by the CPA should be paid to the Mathulini Tribal Authority for the benefit of the Mathulini Tribe and (ii) the presence of, in addition to Luthuli, two further Luthuli family members on the committee. Two factions emerged, one led by Luthuli and the other, calling itself the "concerned group", under the leadership of Radebe. The fued between the Luthuli faction and that of Radebe deteriorated to the extent that meetings convened by Radebe, in his capacity as chairperson of the CPA and ones called by the third applicant, who is empowered by the constitution to do so as the vice-chairperson of the CPA, was boycotted by members of the opposing faction.

- [26] The feud culminated in:

26.1 – A Court interdict granted on 11 September 2015.

This interdict was preceded by the following events. Luthuli accusing Radebe of attempting to unlawfully supplant the CPA and to usurp its committee, allegedly with the support of certain functionaries of the fourth and fifth respondents. In support, Luthuli cites an invitation, drafted

on the fifth respondent's letterhead, inviting members of the Community to a meeting on 12 September 2015, where a new committee of the CPA would be elected. This meeting was, however, postponed sine die following the launch by the CPA of an application for interdictory relief to this Court on 11 September 2015;

26.2 – General Meeting of the CPA held on 13 May 2017.

Radebe and those aligned to him boycotted this meeting and it therefore, chaired by the third applicant, in his capacity as the vice-chairperson of the CPA. The meeting resolved not to nominate Radebe, the fifteenth respondent and ZN Shezi, for re-election at the AGM scheduled for 6 December 2017. The rest of the committee members were nominated for election at that AGM. This meeting also removed Radebe as a signatory to the CPA's bank accounts.

26.3- AGM of the CPA held on 24 June 2017.

1. Radebe convened an AGM for this day which was also boycotted by Luthuli and members of the committee and the Community who were aligned to him. A new executive committee was elected at this meeting. Radebe, who retained his position as chairperson, alleges, inter alia, that him convening this meeting was in accordance with directives issued by this Court to the parties "to resolve the dispute." Reliance for this allegation is placed on a directive, in case number LCC181/2015, dated 11 September 2015. That matter postponed sine die a meeting called for 12 September 2015. The directive does not support Radebe's allegation and merely set out, inter alia, the dates by which the parties should file their papers. The new committee consists of Radebe and the seventh to sixteenth respondents. This committee also changed some of the signatories to the CPA's bank accounts with the seventeenth respondent, removing those members who were aligned to Luthuli. The applicants contend that this meeting was unlawful and that the decisions taken there invalid.
2. The procedure for convening and conducting the CPA's General Meetings and AGM is set out in clause 16 of its constitution. The provisions of clause 16, which are relevant in determining whether the decisions taken at the 24 June 2017 meeting were valid or not, are the following:

"16.1 The Chairperson or the Vice Chairperson shall have the authority to call the General Meetings

16.2

16.3 The Secretary of the Committee will be responsible for the issuing of notices of General Meetings, which must be in writing and be issued within one (1) month prior to the date of the meeting

16.4 A quorum of a General Meeting will consist of 50 Plus 1% of all the members of the Association

16.5 At the General Meeting members will deal with the business of the Association which will include but [sic] not limited to dispute resolution, finances, financial irregularities, elections, removal and substitution of Committee members and community rules

16.6 The Committee must call an Annual General according to [sic] same procedure set out in [sic] paragraphs above within twelve months of the date of their previous Annual General Meeting and with regard to the first Annual General Meeting such shall be called within twelve months of the first General Meeting of the Association whereat this constitution was adopted

16.7

16.8 The quorum for the Annual General Meeting and the number of votes necessary to make decisions shall be the same as required if the matter in question was being dealt with in a General Meeting

16.9 Each member has one (1) vote at a General Meeting

16.10 Voting shall take place by secret ballot. In the event that a secret ballot is not possible voting shall be by show of hands.”

3. It is evident from the above that Radebe, as the chairperson of the committee, had the authority to call the meeting held on 24 June 2017, as he was not removed as chairperson of the committee at the meeting of 13 May 2017. He was merely replaced as chairperson by the deputy chairperson for that particular meeting. It is not clear from the papers and the evidence whether the Secretary of the committee issued the notice for the meeting of 24 June 2017 and whether this was done within the period set out in sub-clause 16.3 of the constitution. However, it is improbable that the Secretary did so, as she is the fifth applicant in this matter and aligned to the Luthuli faction. The following is also not clear from the papers and was not canvassed during the leading of oral evidence, namely, whether (1) the meeting was quorate, (2) voting was by secret ballot or by a show of hands and (3) the Treasurer presented “an overview report of the general operations of the Association, in respect of the preceding year, as well as the plans for the

forthcoming year” as there are no minutes of the meeting. The three issues raised above on which there is no clarity are preemptory according to sub-clauses 16.4. 16.7 and 16.10 of the constitution. Luthuli alleges, without providing proof, that this meeting was not quorate and that a number of the members of the new committee are not members of the CPA.

4. Whilst Radebe had the authority to convene the meeting where the new committee was elected, he has failed to prove that the meeting was conducted in compliance with the provisions of the CPA’s constitution. It follows, therefore, that, absent the aforesaid

proof, the meeting held on 24 June 2017 was unlawful and that the decisions taken there were invalid. Consequently, the election of a new committee at that meeting and the decision to register it with the second respondent are also unlawful and invalid.

26.4- Disciplinary enquiry held on 5 October 2017.

Prior to this meeting, Radebe, the sixteenth respondent and ZH Shezi were accused by the committee, which was ostensibly replaced by the one elected on 24 June 2017, of breaching “their duties as members of the communal property association”. They were called to attend a disciplinary hearing, chaired by an attorney instructed by the CPA’s attorneys, set for 11 September

2017. They failed to attend this meeting as well as the one which was postponed to 5 October 2017. The enquiry proceeded in their absence. The enquiry recommended the termination of their membership of the CPA and its committee.

26.5 - Consent order dated 26 October 2017 under case number LCC 181/2015B

In this matter, Radebe, relying on his capacity as the chairperson of the committee of the CPA elected at the impugned AGM held on 24 June 2017 and registered with the appropriate authority on 21 September 2017, sought to freeze the bank accounts of the CPA. The faction aligned to Luthuli opposed the application but the protagonists eventually consented to an order in terms whereof, Luthuli and the third to ninth the applicants, on the one hand, and Radebe and the seventh to sixteenth respondents, on the other, would refrain from using or operating the CPA’s bank accounts held by the seventeenth respondent pending the outcome of this matter. The aforesaid consent order provides that:

1. Pending the launch and finalisation of an application by the Sixth Respondent and / or the Committee of the first applicant, comprising the following committee members:

1.1 Inkosi Bhekizizwe Nivard Luthuli;

1.2 Mr Alpheus Zakhele Mlotshwa;

1.3 Ms Busisiwe B. Luthuli;

1.4 Ms Nobuhle Portia Mbili;

1.5 Mr P. G. Shezi;

1.6 Mrs Nana Isabel Ngcobo;

1.7 Mrs Nokulunga A Mteshane; and

1.8 Mr Mosheil L. Mnganga.

To set aside the change in the membership of the Executive Committee of the Mathulini Communal Property Association by substituting the following persons, or registering the following persons as new committee members:

(a) Mandlenkosi General Radebe;

(b) Bheki Ephraim Mlita;

- (c) Ntuthuko Trevor Ngobese;
- (d) Ncamisile Princess Zindela;
- (e) Bonginkosi Merrimen Xulu;
- (f) Sinengwe Cyprian Sithole;
- (g) Zona Margaret Machi;
- (h) Fikisile Joyce Makhathini;
- (i) Simphiwe Mansuet Ngcece;
- (j) Mlondi Clive Msane; and
- (k) Gcinumuzi Goodwill Zuma.

The following bank accounts:

- (i) The current account held at the First National Bank under account number 62404818900 in the name of the Mathulini Communal Property Association; and
- (ii) The interest-bearing account held at the First National Bank under account number 74714815154 in the name of the Mathulini Communal Property Association;

Shall remain frozen and shall not be operated by any person, including the persons listed in paragraphs 1.1 to 1.8 above, and paragraphs

- (a) to (k) above.
2. The freezing of the accounts mentioned in paragraph 1 above, shall not affect the normal operations in respect of the said accounts in the normal course pertaining to the receiving of funds into the accounts, and the performing of operations by First National Bank in the normal course of administering the accounts for formal entries, such as these pertaining to interest and bank charges.
 3. The application referred to in paragraph 1 above shall be instituted on or before 6 November 2017.
 4. The answering affidavits shall be filed on or before 13 November 2017.
 5. The replying affidavit, if any, shall be filed on or before 20 November 2017.
 6. The rule nisi granted on 31 August 2017 is discharged.
 7. The costs of the application are reserved.
 8. A pre-trial conference shall be held on 23 November 2017.
 9. The matter is adjourned for hearing on 4 December 2017.

[27] The papers in this application were then filed at Court on 13 November 2017 and thereafter served on the respondents. The first to fifth respondents filed a notice to abide on 27 November 2017 and the hearing commenced on 4 December 2017.

Withdrawal of notice to abide by the first, second, fourth and fifth respondents and attempt to file an opposing affidavit.

[28] The papers in this matter were served on the State Attorney and the first to fifth respondents on 22 November 2017 and they filed a notice to abide five days later on 27 November 2017. Admission of the abovementioned affidavit as part of the record of this application was opposed by the applicants on a number of grounds. These included that the deponent (i) was not authorized to depose the affidavit, (ii) did not explain his failure to file the opposing affidavit timeously and (iii) failed to apply for condonation.

[29] The deponent of the State respondents' opposing affidavit, Mr. Makgalemela Josias Maake, was present in Court on 4 December 2017, when argument for and against referring the validity of the CPA's constitution to oral evidence. He also attended Court on 11 December 2017 when oral evidence was being tendered. It is also worth noting that the notice withdrawing the notice to abide, which was served on the parties on 7 December 2017, does not indicate whether the State respondents oppose the application.

[30] Following argument by Mr. Naidoo, for the applicants, and in view of the deponent's failure to explain the late filing of the affidavit as well as the failure to apply for condonation, the request to introduce the affidavit into the record was refused.

DISCUSSION

[31] It is convenient to first deal with the challenge to the CPA's constitution as a number of the prayers sought by the applicants appear to be dependent on the validity of the constitution.

Is the CPA's constitution valid?

[32] It is not disputed by the parties that:

32.1. the constitution was registered with the office of the second respondent on 14 August 2012; and

32.2. the CPA's constitution has not been changed.

[33] The main challenge to the validity of the constitution, as I understand it, revolves around the process which led to its adoption,

including Radebe's allegation that he was, inter alia, coerced into signing same without having adequately acquainted himself with its contents. There is, however, nothing in the evidence, both oral and that which is presented in the papers, that leads me to conclude that the CPA's constitution is unlawful and invalid. This is evident from the contents of paragraphs [13] to [22] above. Radebe, and the rest of the members of the so-called concerned group, appear, mostly to have taken umbrage at the influence of Luthuli (and members of his family) over the affairs of

the CPA. This is, possibly, due to him not having been part of the workshops where input into the contents of a draft constitution prepared by officials from the second respondent's office was sought from the representatives of the Community. These workshops preceded the meeting of 23 June 2012 where the constitution was adopted.

[34] The only conclusion, from a conspectus of all the evidence, is that the belated challenge to the validity of the constitution is motivated by the bad-blood between the protagonists. I find that the CPA's constitution is lawful and valid.

The review

[35] The review of the decisions and actions set out in paragraphs [1] and [2] above, sought by the applicants, has been dealt with comprehensively in sub-paragraph 26.3 supra. I therefore need not repeat same here.

Does Luthuli and the third to ninth applicants constitute the valid, lawful and correct committee members of the CPA?

[36] Luthuli and the third to ninth applicants also seek an order declaring them to be the CPA's valid, lawful and correct

committee. They allege that they were nominated for re-election to serve on the committee at the General Meeting held on 13 May 2017 which meeting appears to have been properly constituted as it was quorate and minuted.

[37] Having found that the election of the new committee at the meeting held on 24 June 2017 was unlawful, it would, ordinarily, have followed that the inaugural committee remained in place until its members were either re-elected or removed at an AGM. Had this litigation not intervened, the election of a new committee would have occurred at the AGM which was scheduled for 6 December 2017.

[38] However, because the aforementioned AGM did not take place, I am of the view that the term of office of the inaugural committee members ended on the expiry of five years from the date of their appointment. The relevant clause of the CPA's constitution reads as follows:

"The term of office of the Committee Members will be five (5) years. Members may be re-elected at the Annual General Meeting to continue to hold office in the Committee for another term."

[39] The constitution does not appear to provide for a situation such as the present, namely, where litigation or other interventions have prevented the timely appointment of a new committee. In the circumstances, I find that all the positions on the committee are vacant. In my view, the most practical manner in which to rectify this situation would be to direct the fourth respondent to instruct one or more of her officials to call a meeting for the election of committee members.

Are the third, fourth and fifth applicants the properly appointed signatories of the CPA's bank accounts?

[40] The second declarator sought by the applicants is that the abovementioned applicants be declared as the properly appointed

signatories of the CPA's bank accounts. The meeting of 13 May 2017 resolved to replace Radebe with the third applicant as a signatory to the CPA's bank accounts.

[41] The fourth and fifth applicants were appointed signatories to the CPA's bank accounts at the meeting held on 23 June 2012 and, as alluded to above, the third applicant replaced Radebe as a signatory at the meeting on 13 May 2017. Therefore, in the light of the finding that the meeting of 24 June 2017 (which sought to replace the previous signatories) was unlawful, it follows that the position of those signatories prior to the 23 June 2017 meeting remained unchanged until the expiry of their term of office on the committee in December

2017. This is so because sub-clause 17.5 of the constitution limits the signatories to the CPA's bank accounts to the Chairperson, the Treasurer and the Secretary. This sub-clause reads:

"The signatories of the Associations [sic] banking account will be the Chairperson, the Treasurer and the Secretary. All cheques made out of the Associations [sic] banking account must be signed by the Chairperson and the Treasurer or the Secretary. Two people must sign on [sic] the cheques for it to be valid."

[42] The constitution also does not appear to cater for a situation where there is a vacancy, albeit temporary, in the positions of chairperson, treasurer or secretary on the committee. Therefore, it is in the CPA's interest that the election of a new committee take place as soon as possible.

The interdict

[43] The applicants also pray that Radebe and the seventh to sixteenth respondents be interdicted and restrained "with immediate effect from meddling in the affairs of the first applicant and the committee of the first applicant ... and more particularly in relation to the functioning of the first applicant and its said committee in the ordinary course."

[44] The threshold requirements for the grant of an interdict are trite and need not be repeated. The applicants have not made out a case for the grant of an interdict on the papers but, in any event, this issue of an interdict is now moot given my finding that all the positions on the committee are vacant as from the expiry of the committee members' term of office in December 2017.

Rescission of this Court's order dated 26 October 2017.

[45] This Court, in case number LCC181/2015B, froze the CPA's current and interest-bearing bank accounts with the seventeenth

respondent on 26 October 2017 as alluded to in sub-paragraph 26.5 above. It also interdicted the protagonists from operating the said accounts pending the determination of this matter. The applicants pray that the aforesaid order be set aside.

[46] Having found that Luthuli and the third to ninth applicants are the properly elected members of the CPA and that the third, fourth and fifth applicants are the CPA's duly appointed signatories to its bank accounts with the seventeenth respondent, it is proper that the bank accounts now be unfrozen. Accordingly, the order dated 26 October 2017 must be set aside. The bank accounts are to be operated as directed in paragraph [42] above.

The counter application

[47] As alluded to in paragraph [2] above, Radebe, Mlita and the eighth to sixteenth respondents, in addition to having the CPA's

constitution declared unlawful and invalid, also seek an order declaring the resolutions adopted at the General Meeting held on 13 May 2017 and the notice calling for an annual general meeting of the first applicant on 6 December 2017, be declared unlawful and invalid.

[48] In sub-paragraph 26.3 above, I found that Radebe and those associated with him were unlawfully elected as the new members of the CPA's committee, that all decisions taken and the appointments made there to be invalid.

Costs

[49] The applicants seek a costs order against Radebe, Mlita and the eighth to sixteenth respondents. It is the practice of this Court not to grant costs orders except under special circumstances. I have not found any special circumstances which would justify a cost order in this matter. Accordingly, I will make no order as to costs.

Orders

[50] For the reasons set out above, I order as follows:

1. The constitution of the first applicant dated 23 June 2012 is declared lawful and valid.
2. All the positions on the first applicant's committee are declared vacant.
3. The fourth respondent is directed to appoint one or more of the officials employed by the fifth respondent to call a meeting for the election of a new committee of the first applicant, within a period of not more than 40 (forty) days from the date of this

judgment.

4. The first applicant's bank accounts held with the seventeenth respondent with numbers [,,,] and [...] are hereby declared

unfrozen but may be operated on only by signatories to be appointed by the new committee to be appointed at the next annual general

meeting.

5. The decision taken at the meeting held on 24 June 2017 to register a new committee for the first applicant is declared invalid.
6. The appointment of the seventh to fifteenth respondents as members of the first applicant's committee is declared invalid.
7. The order of this Court in LCC181/2015B dated 26 October 2017 interdicting the second to ninth applicants and the sixth to sixteenth respondents from operating the first applicant's bank accounts with numbers [...] and [...] held by the seventeenth respondent is uplifted.
8. The counter application, which seeks to have the resolutions adopted at the General Meeting of the first applicant held on 13 May 2017 and the notice calling for an annual general meeting scheduled for 6 December 2017 be declared unlawful and invalid, is dismissed.
9. The counter application which seeks to have the sixth to sixteenth respondents declared the first applicant's lawful committee is dismissed.
10. There is no order as to costs.

MP Canca

Acting Judge, Land Claims Court

Appearances:

For the applicants:

Advocate M Naidoo SC

Instructed by:

Bhengu and Rajagopal Attorneys INC,

Pinetown.

For the six to sixteenth respondents: Advocate NSV Mfeka

Instructed by:

M Mbatha Attorneys, Durban.

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