

SOUTH AFRICA / JUDGMENT

MG Radebe & others v Mathulini Communal Property Association & others (LCC 267/2017F) [2021] ZALCC 5 (13 April 2021)

[2021] ZALCC 5

COURT
Land Claims Court

BEFORE
Potterill

CASE / FILE NUMBER
LCC 267/2017F

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IN
THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG
CASE
NO: LCC 267/2017F
Heard on: 16 March
2021
Delivered on: 13 April
2021
In the

matter between:

	MANDLEKONSI
	GENERAL RADEBE
	First
	Applicant
	BHEKI
	EPHRAIM MLITA
	Second
	Applicant
	NTUTHUKO
	TREVOR NGOBESE
	Third
	Applicant
	NCAMISILE
	PRINCESS ZINDELA
	Fourth
	Applicant
	BONGINKOSI

MERRIMEN XULU
Fifth
Applicant
SINENGWE
CYPRIAN SITHOLE
Sixth
Applicant
ZONA
MARGARET MACHI
Seventh
Applicant
FIKISILE
JOYCE MAKHATHINI
Eighth
Applicant
SIMPHIWE
MANSUET MGCECE
Ninth
Applicant
MLONDI
CLIVE MSANE
Tenth
Applicant
and
MATHULINI COMMUNAL
PROPERTY
ASSOCIATION
First
Respondent
INKOSI
BHEKIZIZWE NIVARD LUTHULI
Second Respondent
ALPHEUS
ZAKHELE MLOTSHWA
Third
Respondent
BUSISIWE
BENEDICTOR LUTHULI
Fourth
Respondent
NOBUHLE
PORTIA MBILI
Fifth
Respondent
PG
SHEZI
Sixth
Respondent
NANA
ISABEL NGCOBO
Seventh

Respondent
NOKULUNGA
A MTESHANE
Eighth
Respondent
MOSHELI
LAWRENCE MNGANGA
Ninth
Respondent
NTOMBIFUTHI
NDLOVU
Tenth
Respondent
BM
MZELEMU
Eleventh Respondent
MICHAEL
NGCOBO
Twelfth
Respondent
MINISTER OF RURAL
DEVELOPMENT AND
LAND
REFORM
Thirteenth Respondent
DIRECTOR
GENERAL: LAND AFFAIRS
Fourteenth
Respondent
REGIONAL LAND CLAIMS
COMMISSIONER,
KWAZULU-NATAL
Fifteenth Respondent
CHIEF
LAND CLAIMS COMMISSIONER
Sixteenth Respondent
COMMISSION ON
RESTITUTION OF LAND
RIGHTS
Seventeenth
Respondent
FIRST RAND BANK
LIMITED t/a
FIRST
NATIONAL BANK
Eighteenth
Respondent

JUDGMENT

POTTERILL J

- [1] Mr Radebe, supposedly acting on behalf of the other Applicants, to whom I will collectively refer to as “Radebe”, is seeking a declaration that the Annual General Meeting (“AGM”) of the First Respondent (“Mathulini”) was not held on 6 December 2017, alternatively that the AGM held on 6 December 2017 was unlawful and/or invalid and be set aside. Also sought to be set aside is the election of the Second to the Thirteenth Respondents and the termination of the membership to the Committee of Mathulini of Mr Radebe and two others. This Court must further declare that the Mathulini Committee is vacant and a new meeting must be called within 40 days of this order.
- [2] It is common cause that Radebe and Mathulini have an unfortunate history of a minimum of 11 encounters in Court. Two of these resultant judgments are germane to the decision this Court has to make. On 5 September 2018 Canca AJ delivered a judgment wherein inter alia the Court found that Mathulini’s constitution was valid, and that their bank accounts were to be unfrozen and operated only by signatories to be appointed by a new committee at the next AGM.[1] The counter-application of Radebe wherein inter alia the notice calling for the AGM scheduled for 6 December 2017 be declared invalid and unlawful was dismissed.
- [3] On 3 December 2018 Barnes AJ on an urgent basis amended the orders of Canca AJ by deleting paragraphs 2 and 3 of the order granted on 5 September 2018, which read as follows:
- “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.”[2]

Barnes AJ found these two orders given were a patent error and the order of Canca J could be varied to that extend. The petition against the judgment of Barnes AJ to the Supreme Court of Appeal was dismissed in July 2019.

DID THE AGM TAKE PLACE ON 6 DECEMBER 2017?

- [4] The simple answer to this question is; yes. In the application before Barnes AJ, Mathulini under oath declares that the meeting took place and Radebe did not oppose that. Barnes AJ found at para 18 that: “none of the respondents seriously dispute that the AGM was held on 6 December 2017. Some dispute the validity of the meeting but that is a different matter.”

4.1 The notice calling the AGM, the minutes of the AGM, and the attendance register was attached to the application before Barnes AJ.

4.2 In the founding affidavit before me there is no positive averment that the meeting was not held. In fact, the only averment is that “on a balance of probabilities the alleged AGM was not held on 6 December 2017”. The only facts on which these probabilities are seemingly based are that Radebe did not receive such notice, that Canca AJ found that the AGM had not been held and that Radebe as beneficiaries and members were prejudiced by not receiving a notice.

- [5] This Court has to apply the principles of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-5 and not the preponderance of probabilities test. This Court is however relieved of doing such exercise because the issue is *res judicata* before this Court. In paragraph 39 of the Barnes judgment the finding is made:

“In my view the appropriate relief is simply to vacate the paragraphs of the Order of Canca AJ which are premised on the error that was made, namely that the AGM scheduled for 6 December 2017 did not take place. It then follows as a matter of logic and law that those persons elected as committee members at the meeting of 6 December 2017 are the committee members of the first applicant.”

- [6] Seeking a declaratory order that the meeting did not take place is bad in law, shows bad faith and is frowned upon by this Court.

WAS THE AGM HELD ON 6 DECEMBER 2017 UNLAWFUL AND/ OR INVALID AND BE SET ASIDE?

- [7] The notice to hold the meeting was valid. This was decided by the Court in the Canca judgment. The Court expressly ordered as follows:

“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 to be declared unlawful and invalid, is dismissed.”

- [8] The main bones of contention were whether there was compliance with the Constitution of Mathulini requiring a quorum at the meeting and whether the meeting was called within 12 months of the date of the previous AGM of Mathulini with a month's notice.
- [9] The AGM of 6 December 2017 was held within 12 months of the last AGM, which was held on 24 June
2017. This is common cause, with Radebe raising the meeting held on 24 June 2017 under oath in the papers before Canca AJ, averring that the committee members were elected unlawfully at that meeting. Canca AJ confirmed this meeting in paragraph 5 of his order. Raising this time period as a bone of contention is *mala fide*, untruthful and an attempt to mislead the Court.
- [10] The notice of the AGM of 6 December 2017 was issued a month before the meeting as required. In the founding affidavit, a bald averment is made that there is non-compliance. The notice was attached to the papers before Canca AJ and to the answering affidavit before this Court. Despite the notice being attached, the Court is not enlightened as to why the notice does not comply with the month period. This is worrying because the date of 2 November 2017 is reflected, more than a month before the meeting. Making bald, untrue

avermments is unacceptable and punishable by law. This Court can refer the matter to the National Director of Public Prosecutions to investigate the prima facie perjury. Radebe most certainly, at the latest, in the hearing of Canca AJ, knew of this meeting.

[11] In terms of the Constitution of Mathulini, 50% plus 1 comprises a quorum. It is not denied that the official list of Mathulini reflects 111 members. A quorum thus requires 57 members. The attendance register reflects that 75 members attended the AGM of 6 December 2017.

[12] Radebe attached another list of members to the founding affidavit in this matter. This list is not the list of members compiled on 23 June 2012 that was lodged by the authorized officer with her report in terms of section 7(2) of the Communal Property Associations Act 28 of 1996, with the Fourteenth Respondent. This is the list that Radebe himself compiled and for which he was inter alia charged and found to be guilty of misconduct. No evidence or averment is made to the contrary in the reply of Radebe.

[13] This Court is satisfied that the AGM of 6 December 2017 was valid and lawful.

IS THE ELECTION OF THE SECOND TO THIRTEENTH RESPONDENTS TO THE COMMITTEE OF MATHULINI UNLAWFUL OR INVALID?

[14] In view of the finding that the AGM of 6 December 2017 was lawful and valid, this prayer is dismissed as this is the only basis in fact and law on which this prayer is sought. In any event, Barnes AJ pronounced at para 39 of her judgment that “those persons elected as committee members at the meeting of 6 December 2017 are the committee members of the first applicant [second to twelfth respondents in this matter].”

[15] The only other ground raised is that there was no duly appointed official at the meeting as required by the Constitution. There is no such requirement in the Constitution of Mathulini – this is a false averment.

IS MR RADEBE’S AND TWO OTHERS’ TERMINATION OF MEMBERSHIP OF THE MATHULINI COMMITTEE UNLAWFUL AND INVALID?

[16] Radebe in his reply at paragraph 43 is quite correct that if the meeting of 6 December 2017 is found to be unlawful or invalid then it follows logically that the termination of the membership to the Committee of Mathulini of Mr Radebe and two others must be set aside. As the meeting is declared valid and lawful, logically the termination of the membership must remain.

[17] This Court cannot declare a termination unlawful if it was based on a misconduct hearing. This Court has no facts to “review” such misconduct finding and is not asked to review such finding.

[18] This prayer must accordingly be dismissed.

PRAYERS 1(f) AND 1(g)

- [19] In the founding affidavit no facts are set out as to why the positions of the Mathulini Committee must be declared vacant. It can only be a result if the AGM of 6 December 2017 is set aside. As it is not set aside, this prayer requires no further comment from this Court and prayer 1(f) stands to be dismissed.
- [20] Likewise, ordering that a new meeting must be called for the election of a new committee has no factual foundation set out in the affidavit. But, in any event, this exact prayer was the prayer granted by Canca AJ (at para 3 of the order), which was deleted by Barnes AJ. There is simply no basis in fact or law to grant such order. This prayer is dismissed.

AUTHORITY OF RADEBE TO ACT ON BEHALF OF THE APPLICANTS

- [21] This issue would ordinarily be discussed first, but due to the constant strife, the issue of the validity of the meeting of 6 December 2017 had to be put to bed first or it would just lead to a further Court encounter.
- [22] Radebe was challenged in the answering affidavit and by delivering a Rule 7(2) notice to prove his authority to act on behalf of the other Applicants. If authority to act is challenged, then the Applicant must prove his authority. He has not done so. It matters not that the Respondents herein had not proceeded to enforce the Rule 7(2) notice. Their lack of enforcement does not excuse or shift the burden of proof of Radebe.
- [23] This Court finds that Radebe has not proven that he has authority to act on behalf of the Applicants.

COSTS

- [24] On behalf of Mathulini it was submitted that Radebe is to pay costs on an attorney and client scale. Attorney and client costs is granted where the Court shows it displeasure with a litigant when the litigant, for instance, acted mala fide, recklessly or dishonestly.
- [25] In this matter I find that Radebe made dishonest averments and acted mala fide. This application is further brought to hearing more than a year after the pleadings had closed and more than one and half years from the date on which the application was commenced. The replying affidavit was filed 5 months after the answering affidavit was served. In view of the nature of the remedy sought these time delays are exorbitant. Much of the application was brought on the

same issues that were already pronounced on by either Canca AJ or Barnes AJ rendering much of the application moot and rendering

averments untruthful. This is an appropriate matter where the Respondents should not be left out of pocket and attorney client

costs should be ordered to show the Court's displeasure.

- [26] I accordingly make the following order:

The application is dismissed with costs on an attorney and client scale.

POTTERILL J

Judge

Land Claims Court

APPEARANCES

Applicant: Adv N Mfeka, instructed by Mr M Mbatha

Respondents: Adv M Naidoo SC, instructed by Mrs L Alexander, Alexanders Inc

[1] Mathulini Communal Property Association and Others v Minister of Rural Development and Land Reform and Others

[2018] ZALCC 31.

[2] Mathulini Communal Property Association and Others v Minister of Rural Development and Land Reform and Others (LCC 267/2017) 3 December 2018 (unreported).

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Prepared on 12 October 2026 · Esheria