

SOUTH AFRICA / JUDGMENT

Morakadi and Another v Bakone Ba Masha Mokopole Communal Property Association and Others (HCAA39/2023) [2024] ZALMPPHC 161 (1 November 2024)

[2024] ZALMPPHC 161

COURT

Limpopo High Court, Polokwane

BEFORE

Bresler, Ngobeni, Ledwaba

CASE / FILE NUMBER

HCAA39/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

APPEAL

CASE NO: HCAA39/2023

COURT

A QUO CASE NO: 2854/2020

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED

DATE:

1 November 2024

SIGNATURE:

In

the matter between:

TSHEHLA
TSHUPJA MORAKADI
1ST
APPLICANT
PETER
MORGAN
2ND
APPLICANT
-and-
BAKONE
BA MASHA MOKOPOLE
COMMUNAL
PROPERTY ASSOCIATION
1ST
RESPONDENT
MAKOPOLE
TRIBAL AUTHORITY
2ND
RESPONDENT
8
GROUP (PTY) LTD
3RD
RESPONDENT
MINISTER
OF POLICE
4TH
RESPONDENT
ANY
UNLAWFUL TRESSPASSERS
5TH
RESPONDENT
THE
DIRECTOR OF RURAL
DEVELOPMENT
AND LAND REFORM
6TH
RESPONDENT/
JOINED
PARTY

JUDGMENT

BRESLER AJ:

Introduction:

- [1] The Appellants appeals against the judgment and order of the Honourable Madam Justice Naude-Odendaal handed down on the Counter Application on the 2nd of August 2023 in terms whereof the Counter Application was dismissed with cost.
- [2] It is apposite to note from the onset that the appeal lies against the Counter Application only. Leave to appeal against the judgment was sought and granted accordingly on the 1st of September 2023.
- [3] The Appeal is opposed by the First Respondent only.

The proceedings and judgment in the court a quo:

- [4] The First and Second Respondents applied for interdictory relief against inter alia the First and Second Appellants. The nature of these interdictory proceedings is not relevant to the current proceedings before court.
- [5] Suffice to state that the First and Second Appellants opposed the relief prayed for by the First and Second Respondents and simultaneously launched a Counter Application in terms whereof it was prayed that the First Respondent be placed under judicial administration in the hands of the Director-General of the Department of Land Affairs in terms of Section 13 of the Communal Property Association Act, Act 28 of 1996 (the 'CPA Act'), with ancillary relief thereto.
- [6] In the alternative the First and Second Appellants applied for the First Respondent to be dissolved, in which event the Trustees of the Tshehla Community Trust should be joined as Respondents to the Counter Application. The First and Second Appellant furthermore applied for declaratory relief to the effect that Portions 4, 5 and 6 of the Farm Kalkfontein 367KT be declared as the property of the Tshehla Community.
- [7] The Sixth Respondent / Joined party opposed the relief claimed in the Counter Application. The Sixth Respondent submitted that the procedure of placing a Communal Property Association is regulated by Section 13 of the CPA Act. The Application should be brought before a Magistrate's Court or a division of the Supreme Court by the Director-General or any other person or association having the required locus standi.
- [8] It is submitted by the Director-General that this entails a substantive application with detailed background information and full reasons necessitating the placing of the Association under administration. In the current matter, no substantial application was brought. According to the Sixth Respondent they are in the process of regularizing the First Respondent and no grounds exist for placing it under administration.
- [9] Likewise, the Sixth Respondent objected to the declaratory relief in as far as they submitted that no case has been made out justifying the granting thereof.

- [10] The Counter Application was opposed by the First and Second Respondent. The crux of their opposition was the fact that insufficient cause has been shown to warrant placing the First Respondent under administration.
- [11] The court a quo carefully analysed the facts of the matter with reference to Section 13 (1) of the CPA Act. Reference was pertinently made to the case of Dawson v Sydney of Vaal CPA and Another[1] where the Honourable Van Tonder AJ duly analysed the provisions of Section 13(1).
- [12] A comparison was drawn between administration in terms of Section 13 of the CPA Act and the applicable principles guiding a court in liquidating a company on the basis that a deadlock arose between the members thereof. Reference was made to the well-known cases of APCO Africa (Pty) Ltd & Another v APCO Worldwide[2] and Knipe & Others Kameelhoek (Pty) Ltd & Another[3]
- [13] The Court a quo then found that no case was made out that the First Respondent was unwilling or unable to pay its debts or unable to meet its obligations as a result of insolvency or maladministration or any other cause, or that it would otherwise be just and equitable for the First Respondent to be placed under administration. The Appellants failed to present sufficient evidence to substantiate the relief.
- [14] On this basis, the Counter Application was dismissed with costs.

In this court:

- [15] The Appeal is premised on the following grounds:

15.1 The Court a quo misdirected itself regarding the legal concept of a substantive application as contemplated in Section 13 of the CPA Act.

15.2 The Court a quo failed to consider the requirements of placing a Communal Property Association under administration, failed to consider the factual basis outlined in the Answering affidavit and failed to consider the solvency of the Communal Property Association in circumstances where:

15.2.1 The Chairperson was criminally convicted;

15.2.2 No Annual General Meetings were held;

15.2.3 No elections were held;

15.2.4 No audited financial statements were made available;

15.2.5 The Committee failed to hold disciplinary proceedings against members.

15.3 The Court a quo failed to apply its powers as contemplated in Section 172 of the Constitution in making a just and equitable decision considering the public importance of the dispute and considering its effect on members of the public.

- [16] The Appellants submitted that the Court a quo erred in as far as a substantial case has been made out for the joinder of the Director-General of the Department of Land Affairs (Sixth Respondent/ Joined party).
- [17] As to the Appellants submission that the Counter Application was a substantive application, the Appellants referred this Court to the provisions of Rule 6(7)(a) of the Uniform Rules of Court that stipulate that any party to proceedings may launch a counter application or join any parties to the application. According to the Appellants, the procedural requirements has therefore been met.
- [18] As to meeting the requirements for the granting of an administration order, the Appellants submitted that it is evident that the Third Respondent has abused his position as chief of the Masha people. The Appellants furthermore submitted that the Second and Third Respondents have caused the First Respondent not to hold free and fair elections.
- [19] The Appellants furthermore stated that in contravention of its own Constitution, the First Respondent failed and/or refused to remove the Kgoshi Masha Legwai Aron as a Committee member after his conviction and to date hereof.
- [20] The Appellants also stated that the administration of the First Respondent is riddled with nepotism and a lack of transparency. According to the Appellants, Kgoshi Masha Legwai Aron has effectively arrogated the First Respondent and governs same as he pleases. This is ample reason to place the First Respondent under administration.
- [21] The First Respondent persisted in its view that there was insufficient evidence before court to warrant the granting an order placing the First Respondent under administration. The First Respondent also reiterated that the Counter Application was opposed by the Sixth Respondent on the premise that there was no justification to place the First Respondent under administration. No basis has been set out rendering it just and equitable to grant the order as per the Counter Application.
- [22] Alternative mechanisms are available to address the alleged complaints against the incompetent leadership. There mechanisms have already been invoked by the Sixth Respondent in as far as they confirmed that regularization is already in progress.
- [23] The First Respondent furthermore submitted that is not just and equitable to place the First Respondent under administration purely at the whim of a minority that questions the leadership.

Applicable legal principles:

- [24] Section 16 of the Superior Court Act, Act 10 of 2013 governs appeals. It is trite law that an Appeal court may intervene where there is a serious misdirection as to the facts and/or the law.

[25] The crux of this matter is an analysis of the provisions of Section 13 of the CPA Act that states the following:

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.

[26] It is clear from the record that no evidence was presented of any unwillingness or inability to pay debts or unable to meet its obligations. A mere assumption of inability or unwillingness is not sufficient. What then remains to be determined is if it will be just and equitable to grant the order placing the First Respondent under administration.

[27] The requirements for placing a Communal Property Association under administration was extensively discussed in the matter of Dawson v Sydney on Vaal CPA and Another[4] referred to herein before. Of particular importance is the findings by Van Tonder AJ that maladministration is not an independent ground for placing a Communal Property Association under administration. It is only relevant as a contributing factor to determine if the Communal Property Association is unwilling or unable to meet its financial obligations. It may also be taken into consideration to determine if it is just and equitable to place the Communal Property Association under administration.

[28] The Honourable Van Tonder AJ furthermore found:

'[163] In view of the similarities in respect of the wording of the aforesaid Acts and the wording 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.

[29] It is additionally apposite to note that it is trite law that determining if a company should be wound up on the basis of it being just and equitable entails the exercise of a discretion by the presiding officer. In APCO Africa (Pty) Ltd and Another v APCO Worldwide Inc[5] the Supreme Court of Appeal addressed the concept of 'discretion' as thus:

'[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, emulated in Loch v 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 of the 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 outvoted 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. The second, usually called the deadlock principle, is derived from the Yenidje Tobacco Company case. It is founded on the analogy of partnership and is strictly confined to those small domestic companies in which, because of some arrangement, express, tacit or implied, there exists between the members in regard to the company's affairs a particular personal relationship of confidence and trust similar to that existing between partners in regard to the partnership business. If by conduct which is either wrongful or not as contemplated by the arrangement, one or more of the members destroys that relationship, the other member or members are entitled to claim that it is just and equitable that the company should be wound up. (See also *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another* 1967 (3) SA 131 (T) at 137; *Emphy and Another v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D) at 366H - 3678.) E

- [30] This case pertinently draws an analogy between a 'partnership relationship' and a 'small domestic company'. Essentially, it will be just and equitable to wind the company up if facts are present that would substantiate the dissolution of a partnership.
- [31] In casu, although allegations were made of misconduct against certain individuals, the Appellants did not make out a case that the loss of trust is present between all the members of the First Respondent.
- [32] In the APCO case *supra* the Court furthermore remarked:
- '[28] The true factual position, however, that may have arisen, is that there is deadlock and a complete breakdown in the relationship which makes the company unable to function in its current configuration. If there were a reasonable hope of tiding over the period of deep depression and of the company emerging from its current malaise to carry on at a profit, there may well have been insufficient reason for a court to wind up the company on the just and equitable provision.'
- [33] Can it be said that the First Respondent is unable to function in its current configuration and that there is no hope of tiding over the period of 'deep depression'? I think not.
- [34] The Sixth Respondent has already indicated that it is in the process of intervening in the dispute. Section 11(6) of the CPA Act makes specific provision for the Director-General to inter alia undertake an enquiry into the activities of the association or provisional association and require the members to conduct an election for a new committee if the integrity, impartiality or effectiveness of the committee or any member of the committee is in question.
- [35] This court's view is substantiated by the case of *Visser v An Exclusive Guest House (Pty) Ltd*[6] where the court inter alia found that winding up is the appropriate remedy where all the other available remedies has been exhausted or are no longer available to the parties.

[36] In this Court's view, that is one of the aspects that should be considered when a discretion is exercised to place the Association under administration. As aptly stated by TC Maloka and S Muthugulu-Ugoda[7], the

'... judicial discretion to grant the relief is not unbounded. It must be exercised judicially, on the principled basis, and in recognition of the court's disinclination to interfere lightly in the internal affairs of a company. Consequently, the applicant bears a formidable onus of establishing that a winding up order would be just and equitable'.

[37] In as far as the Appellants failed to indicate any substantial endeavour from their side to utilise the available remedies in the CPA Act, this Court cannot fault the court a quo in exercising its discretion against granting the relief. The information presented in the Counter Application is simply insufficient to find that it would be just and equitable to all parties concerned to place the First Respondent under administration. The complaint by the Appellants is largely founding on the misconduct of certain individuals. It does not appear that their view is supported by the majority of the members of the First Respondent.

[38] Had this matter related to a company, the relief envisaged in Section 163 of the Companies Act, Act 71 of 2008, comes to mind together with the authorities relating to relief from oppressive and prejudicial conduct. One cannot make an order of this magnitude, severely jeopardizing the well being of a whole community and disrupting and infringing their rights, just because of the dissatisfaction of a certain individual or a group of individuals.

[39] In the well-known words of Ponnai AJ[8]:

'There is no rule of universal application as to what is fair. The fairness envisaged is fairness to both sides. The matter can never be conclusively determined until all of the facts of a particular case are known.'

[40] In casu it was evident that the court a quo was not willing to exercise its discretion in granting the relief in the absence of 'all of the facts' being known. The Court a quo would have been lax in its duty if any order is made having such an extensive effect on a whole community without having a holistic view of all the relevant facts.

[41] The First Respondent referred to the case of Central Energy Fund SOC Ltd and Another v Venus Rays Trade (Pty) Ltd and Others[9] where the following was remarked:

'The exercise of a remedial discretion under s 172(1)(b) of the Constitution and s 8(1) of PAJA constitutes a discretion in the true sense. It may be interfered with on appeal only if this court is satisfied that it was not exercised judicially, or had been influenced by wrong principles or a misdirection of the facts, or if the court reached a decision which 'could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'. Put simply, the appellants must show that the High Court's remedial order is clearly at odds with the law.

[42] The Constitutional Court furthermore stated in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*:

'[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised -

'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'. [Footnote omitted.]

An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court.

[89] In Florence Moseneke DCJ stated:

'Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range. This principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision-making.'

[43] This Court does not find any basis to impugn the discretion exercised by the Court a quo. The Court a quo did not exercise its discretion at odds with the law. The appeal can therefore not succeed.

Costs:

[44] There is no reason why cost order should not follow the outcome of the proceedings. Having regard to the nature of the matter, the extent of the proceedings and the importance to the parties, costs should include the costs of two counsel, where so employed on Scale B.

Order:

[45] In the result the following order is made:

46.1 The Appeal is dismissed with costs including costs of two counsel where so employed on Scale B.

M BRESLER

ACTING JUDGE OF THE HIGH COURT,

I agree,

J NGOBENI

LGP LEDWABA

APPEARANCES:

FOR THE APPELLANTS: Adv. D Mphahlele Mr. A Masipa INSTRUCTED BY: Mphahlele & Masipa Inc info@mminca.com FOR THE FIRST RESPONDENT: Adv. MS Monene Adv. TV Ledwaba INSTRUCTED BY: MT Ramabala Attorneys admin@mtramabala.co.za DATE OF HEARING: 26 July 2024 DATE OF JUDGMENT: 1 November 2024

[1] 2021 (6) SA 167 (NCK)

[2] 2008 (5) SA 615 (SCA)

[3] 2014 (1) SA 52 (FB)

[4] 2021 (6) SA 167 (NCK)

[5]

[2008] ZASCA 64; 2008 (5) SA 615 (SCA) at 624J - 625 B

[6] 2022 JDR 0688(MN)

[7] TC Maloka & S Muthuguly-Ugodi, "The Deadlock Principle as a Ground for the Just and Equitable Winding Up of a Solvent Company: Thunder Cats Investments 92 (Pty) Ltd v Ngonjane Economic Prospecting Development (Pty) Ltd 2014 5 SA 1 (SCA)" PER/ PELJ 2016(19) DOI

[8] Louw and Others v Nel 2011 (2) SA 172 (SCA) at [31]

[9] 2022 (5) SA 56 (SCA) at [43]

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