

SOUTH AFRICA / JUDGMENT

Nwandlamhari Communal Property Association v Matebula and Others (A265/2020) [2024] ZAGPPHC 588 (28 June 2024)

[2024] ZAGPPHC 588

COURT

North Gauteng High Court, Pretoria

BEFORE

Kubushi, Kooverjie, Mooki

CASE / FILE NUMBER

A265/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE NO: A265/2020

(1)

REPORTABLE: YES/NO

(2) OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE: 28 June 2024

SIGNATURE

In the matters between:-

NWANDLAMHARI

COMMUNAL PROPERTY ASSOCIATION

Appellant

vs

WELLINGTON

ZAMANI MATEBULA

First Respondent

RICHARD

MANGALISO NGOMANE

Second Respondent

SURPRISE

WELCOME NTIMANE
Third Respondent
KAIZER
MESHACK KHUMALO
Fourth Respondent
SIPHO
ORANCE MKHWANAZI
Fifth Respondent
FRANK
SOLLY MBUNGELA
Sixth Respondent
RULANI
HARRIET MAWELA
Seventh Respondent
THUYANI
SOUL DLAMINI
Eighth Respondent
MINISTER
OF LAND REFORM
Ninth Respondent
DIRECTOR-GENERAL
OF LAND REFORM
Tenth Respondent
CHIEF
LAND CLAIMS COMMISSIONER
Eleventh Respondent
REGIONAL
LAND CLAIMS COMMISSIONER
Twelfth Respondent

Coram: Kubushi J, Kooverjie J, et Mooki J
Heard
on: 12 June
2024

Delivered: 28 June 2024 - This
judgment was handed down electronically by circulation to the
parties' representatives by email, by being uploaded to
the CaseLines system
of the GD and by release to SAFLII. The date and time for hand-down
is deemed to be 15:00 on 28 June 2024.

ORDER

1.
The appeal is upheld with costs.

2.
Prayers 2, 8 and 9 of the order of the court a quo are hereby
set aside.

JUDGMENT

KOOVERJIE J (Kubushi J and Mooki J concurring)

[1] This appeal is instituted against three of the orders of the court a quo, namely prayers 2, 8 and 9. The appellant is a communal property association established in accordance with the provisions of the

Communal Property Association Act 28 of 1996 (“the CPAA”). The association was named the Nwandlamhari Communal Property Association (“the association”), and is referred to as “NCPA” in the papers.

[2] The first to the eighth respondents (“the respondents”) allege that they are beneficiaries of the association. Although the ninth to the twelfth respondents have been cited in their representative capacities, they did not participate in proceedings before the court a quo. The first to eighth respondents have also not opposed this appeal.

BACKGROUND

[3] The first to the eighth respondents, in the application before the court a quo, sought relief in terms of section 13 of the CPAA; requesting the court to place the appellant under the administration of the Director-General[1] together with other ancillary relief. The court a quo did not find justifiable grounds to place the appellant under administration. It however granted certain of the ancillary

relief sought by the respondents, directing the Director-General to become involved in the beneficiary verification process and to conduct an investigation regarding the dispute between beneficiaries and executive members of the association.

[4] The appellant was successful in acquiring the identified properties in terms of Section 35 of the Restitution of Land Rights Act No. 22 of 1994. The respondents’ discord with the association was that: it failed to comply with its constitution, inter alia, by failing to open a bank account in the association’s name; there was gross maladministration of the resources of the association, the funds were distributed to a few preferred beneficiaries hence leaving the other beneficiaries without recourse; the annual financial statements were not filed and further, the beneficiary verification process was not completed.

THE COMMUNAL PROPERTY ASSOCIATION ACT

[5] Before considering whether the specific orders granted by the court a quo were competent, it is necessary to appreciate the legislative environment in which the parties litigated.

- [6] The CPAA is derived from the Constitution.[2] Section 25(7) of the Constitution recognizes and protects rights in land which go beyond registered ownership. Where it is possible the Constitution entitles a community to claim restitution of the dispossessed land or equitable redress. The purpose of the CPAA is to enable communities to form communal property associations through which they may acquire and possess land that belongs to their community.[3]
- [7] Communities are required to form provisional associations and thereafter to apply to the Director-General for registration of their association. Registration of a permanent association is approved by the Director-General in terms of Section 8 of the CPAA.
- [8] An association is required to adopt its constitution[4] that should specifically comply with principles set out in Section 9 of the CPAA. Section 9 outlays various requirements that should be contained in a constitution. One of the prevailing requirements is that an association should ensure that there is accountability and transparency. Fiduciary responsibilities are imposed on members

of the executive committee. Further provision should be made for executive committees to exercise their powers in the best

interest of all members and without any advantage to themselves. Effective financial management is necessary and include the opening

of a bank account in the name of an association into which its cash should be deposited. A constitution must also make provision

for the association's financial records to be subjected to an independent verification process annually. In this way, the interests of the members are safeguarded and members are empowered to participate in the management of a communal property association.

GROUND OF APPEAL

- [9] As stated aforesaid, the appellant appeals three of the orders of the court a quo, namely prayer 2, prayer 8 and prayer 9.

PRAYER 2

- [10] In essence, prayer 2 ordered the association to submit documents and financial records to the Director-General. Prayer 2 stated:

“Prayer 2 is granted in that the CPAA is ordered to submit all documents in their possession including financial records to the Director-General

and also to be distributed to its membership within 30 days of the order of this court disseminated by publishing the statements on their website as well as a notice published on the availability either on their website or by request.”

- [11] The appellant's main contention, that the order in prayer 2 remains vague and cannot be enforced, has merit. It is evident that the wording "all documents" does not assist the party that is directed to comply with such order. The documents for submission should have been specified.
- [12] It is trite that court orders must be worded in a clear way. In this instance, the order as it stands is not capable of enforcement. The vagueness of the order places the appellant in a position where it may not be able to ascertain what documents should be submitted to the Director-General.
- [13] In *Eke vs Parsons*[5] the Constitutional Court emphasized that court orders must be framed in unambiguous terms and in a manner that it is capable of enforcement. Further, the court expressed that the order must give finality to the dispute between the parties and not leave compliance therewith in the discretion of the parties who are expected to comply with such an order. At paragraphs [73] and
- [74] the court stated:
- "[73] A court order must bring finality to the dispute or part of it to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced in the event of non-compliance.*
- [74] If an order is ambiguous, and enforceable, ineffective, inappropriate or lacks the element of bringing finality on a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court order must be effective and enforceable and that it must be formulated in a language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person on whom it applies the discretion to comply or disregard it."
- [14] The further argument raised was that since the court a quo did not find that the association had not submitted documents which included the financial records to the Director-General and/or even to its members, the order was incompetent, also has merit. In their papers, the respondents merely alleged that they doubted that the prescribed documents were provided to the Director-General by the executive[6]. However there was no evidence to substantiate such contention.
- [15] It was the appellant's contention that such an order could only have been granted if the appellant was placed under administration of the Director-General. This contention, in my view, is unassailable if consideration is given to the inspection and monitoring powers of the Director-General as contemplated in Section 11 of the CPAA, read with Section 9(e)(ii) of the CPAA.
- [16] Moreover, the said contention must be examined against the statutory provisions that make provision for the Director-General to gain access to documents of the association. The Director-General, as part of his/her monitoring and investigative functions (as set out in Section 11 of the CPAA),[7] is entitled to various documents and financial records. The CPAA

requires the Director-General to ensure that the objects of the Act are realised and further for the Director-General to intervene even if an association is not placed under administration.

- [17] As part of its continuous monitoring function, the Director-General is required to inspect the affairs of the association ensuring that it complies with the CPAA and its constitution. In performing this function, the Director-General is further entitled to various relevant information. The Director-General may peruse and make copies of any document relating to the affairs of the association and may also subpoena any person with relevant information. The various provisions of the CPAA illustrate that the Director-General should do everything permissible in order to ensure that the community accomplishes its goal.
- [18] Notably the order does not even direct the financial period for which the financial records should be furnished. The respondents alleged that the financial statements have not been presented since

2013. The appellant disputes this fact. In the premises, I find prayer 2 to be incompetent.

PRAYER 8 AND PRAYER 9

- [19] The appellant raised issue with prayers 8 and 9 which concern the issue of monies held in the bank account of the association. Prayer 8 reads:

“The sixth respondent is hereby ordered to furnish records of the NCPA monies that was held in the trust account to the Director-General

within 30 days from the order of this court.”

- [20] The appellant’s contention that the order granted was impermissible as no maladministration on the part of the appellant was established, has merit. The association was not faulted for the manner in which it dealt with the monies held in the trust account.
- [21] At paragraph [113] of its judgment, the court a quo found that there were no gross violations or maladministration of the resources of the association by the executive members. The court a quo also found that the allegations were not substantiated by any further evidence. Consequently, the court did not place the association under administration.[8]
- [22] Further in the judgment, at paragraph [103], the court noted that the monies were kept in the trust account of the attorneys and that the members agreed to this arrangement pending the association opening a bank account and an investment account.
- [23] The court further noted that although it was envisaged that funds would have been transferred by December 2014 into the association's account, the funds were in fact only transferred by January 2017. The court held the view that the failure not to open the bank account was not the fault of the present executive committee. Consequently, they could not be blamed for funds remaining in the attorneys’ trust account prior to it finally being transferred in the association's account. There was thus no basis, in my view, for the court to

have granted prayer 8.

[24] Prayer 9 stated:

“The Director-General will give directions as to all monies to be received on behalf of the NCPA from the date of the order of this court which will be banked in the CPA's bank account.”

[25] The appellant raised similar contentions as it did in respect of prayer 8. The core contention is that there was no factual basis for the court granting the order as no maladministration was found on the part of the appellant. It was also argued that the Director-General could only have given direction as to how the monies should be dealt with if the association was placed under administration. The order is therefore inconsistent with the law. Consequently, the order, as set out in prayer 9, also remains incompetent.

CONCLUSION

[26] In conclusion the appellant demonstrated that the orders being challenged were not justified. Therefore orders 2, 8 and 9 of the orders of the court a quo should be set aside. The appeal should therefore succeed with costs.

H KOOVERJIE

JUDGE OF THE HIGH COURT

I agree, and it is so ordered

M KUBUSHI

I agree,

O MOOKI

Appearances:

Counsel for the appellant: A de Vos SC Instructed by: Gilfillian du Plessis Inc Counsel for the first to eighth respondents: No appearance Attorneys for the ninth to twelfth respondents: No appearance Date heard: 12 June 2024 Date of Judgment: 28 June 2024

[1] In terms of Section 13 an association can be placed under administration of the Director-General when such association is unable to pay its debts or unable to meet its obligations because of insolvency, maladministration or for any other reason or where it is just and equitable to do so.

[2] Constitution of the Republic of South Africa

[3] Bakgatla – Ba Kgafela Property Association vs Tribal Authority and Others 2015 (6) SA 32 CC at paragraph [18]

- [4] “Constitution” means a constitution adopted in terms of Section 7 of the CPAA by an association
- [5] Eke v Parsons 2016 (3) SA (CC) at 64 where the court held: “The rule of law requires not only that a court order is couched in clear terms but also that its purpose is readily ascertainable from the language of the order. This is because disobedience of a court order constitutes a violation of the Constitution ...” See also Proxi Smart Services (Pty) Ltd vs Law Society of South Africa 2018 (5) SA 644 GP

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See also Proxi Smart Services (Pty) Ltd vs Law Society of South Africa 2018 (5) SA 644 GP

- [6] Paragraph

[103] of the judgment

- [7] Section 11(1), (2), (3)(a), (6), (6)(a), (b), (c), (d), (e) & 7 reads: 11

- (1) An association or provisional association registered under this Act shall, at the prescribed times, furnish prescribed documents and information to the Director-General in order to enable him or her to monitor compliance with the provisions of the relevant constitution and this Act. (2) The Director-General may undertake an inspection of the affairs of an association or provisional association. (3) The Director-General may, for the purposes of this section- (a) inspect and remove for copying any records, reports and other documents relating to the affairs of an association or provisional association. ... (6) If a dispute arises within an association or provisional association the Director-General may, of his or her own accord, or at the request of a member of the association or provisional association- (a) undertake an enquiry into the activities of the association or provisional association, in which event he or she shall take reasonable steps to ensure that interested parties are made aware of the enquiry and of its outcome; (b) advise the association or provisional association and the members of their respective rights and obligations; (c) make a conciliator contemplated in section 10(2) available to assist in the resolution of the dispute; (d) 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; (e) initiate proceedings contemplated in section 13; or take such other reasonable measures as he or she considers appropriate in the circumstances. (7) When acting in terms of subsection (6) the Director-General shall be guided by the aim of resolving the dispute in accordance with the provisions of the constitution of the association.

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...

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(b) advise the association or provisional association and the members of their respective rights and obligations;

(c) make a conciliator contemplated in section 10(2) available to assist in the resolution of the dispute;

(d) 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;

(e) initiate proceedings contemplated in section 13; or take such other reasonable measures as he or she considers appropriate in the circumstances.

(7) When acting in terms of subsection (6) the Director-General shall be guided by the aim of resolving the dispute in accordance with the provisions of the constitution of the association.

[8] The court expressed its concerns that the verification of the beneficiaries had not been finalised. There was therefore no basis established for the Director-General to indicate how the monies were to be dealt with until the election.

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