

SOUTH AFRICA / JUDGMENT

Department of Agriculture, Land Reform and Rural
Development: Director General v Barolong Boo
Maiketso Communal Property Association and Others
(UM262/2023) [2024] ZANWHC 230 (11 September 2024)
[2024] ZANWHC 230

COURT

North West High Court, Mafikeng

BEFORE

Dibetso-Bodibe

CASE / FILE NUMBER

UM262/2023

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IN
THE HIGH COURT OF SOUTH AFRICA
NORTH
WEST PROVINCIAL DIVISION, MAHIKENG
Case
No.: UM262/2023

Reportable:	NO
	Circulate
	to Judges: NO
	Circulate
	to Magistrates: NO
	Circulate
	to Regional Magistrates: NO
	In
the matter between:	DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL

DEVELOPMENT:	DIRECTOR GENERAL
	Applicant
	and
	BAROLONG
	BOO MAIKETSO
	COMMUNAL
	PROPERTY ASSOCIATION
	(REG
	No CPA/08/1114/A
	1st
	Respondent
	GEORGE
	BOBIE MEYER
	2nd
	Respondent
	JENNY
	EJANG
	3rd
	Respondent
	KEINNEE
	RUTH MAKABOLANE
	4th
	Respondent
	SOLOMON
	OTLATHIBA LEKGARI
	5th
	Respondent
	KETSHEPAONE
	ISAAC MAAMOGWA
	6th
	Respondent
	NEDBANK
	(PTY) LTD
	7th
	Respondent
	FNB
	(PTY) LTD
	8th
	Respondent
	SANLAM
	(PTY) LTD
	9th
	Respondent
	PROVINCIAL
COMMANDER:	NORTH
	WEST PROVINCE SAPS
	10th
	Respondent

JUDGMENT

DIBETSO-BODIBE AJ

INTRODUCTION

- [1] Communal Property Associations (CPAs) came into being in terms of the Communal Property Association Act, 1996 (CPAA) for the purpose of holding land restored to indigenous communities through the land restitution process.
- [2] Once established through its constitution, a Communal Property Association (CPA) becomes a juristic person responsible for its day to day administration and management of its affairs.
- [3] Whilst the Director General (DG) for the Department of Agriculture, Land Reform and Rural Development (the Department) plays an oversight role in as far as the administration of the CPA is concerned, the Executive Committee (the EXCO) democratically elected by the members of the CPA is accountable for the proper management of the affairs of the CPA and is also a nexus between the CPA and the DG in terms of the CPAA.
- [4] The two roles, viz; the oversight role by the DG and that of management of the CPA by the EXCO if not well coordinated may be detrimental to the very objective of which the CPAs found their existence. The CPA as a juristic person must realise its independence and master proper administration processes through the oversight role and not interference from the DG or delegated departmental staff.
- [5] These roles, i.e. the internal role by the EXCO vis-à-vis the external role of the DG must, in my view, be formalised through the formation of rigorous regulations to the CPAA, so that the DG does not usurp the powers bestowed upon the EXCO and the latter does not undermine the role of the DG in terms of the CPAA.
- [6] In casu, the Parties seems to have grappled with these internal and external roles concerning the administration of the CPA and the democratic processes of convening general meetings and the disbandment of the EXCO.

THE RECONSIDERATION APPLICATION

- [7] This is an application brought on an urgent basis for reconsideration of the interim order granted by Mfenyana J on 22 December 2023, that the bank accounts of the 1st Respondent, Barolong Boo Maiketso Communal Property Association (BBM CPA) be frozen and that the 2nd to the 6th Respondents (the Respondents) be interdicted from accessing or performing any transactions on the BBM CPA's bank accounts. The interim order was executed with the return date of the rule nisi being 11 April
2024. The Respondents anticipated the return date of the rule nisi and the application became opposed and argued before me on 15 February 2024.

POINTS IN LIMINE

- [8] The parties raised preliminary points which I proceed to address before delving into the reconsideration application.

NOTICE IN TERMS OF RULE 7(1) AND RULE 30 OF THE UNIFORM RULES OF COURT

- [9] The Respondents served the Applicant with a notice in terms of Rule 7(1) challenging the authority of the deponent to the ex parte application and the Respondents in return served the Applicant with a notice in terms of Rule 30 to the effect that Rule 7(1) pertains to the authority of an attorney acting on behalf of a party not to a deponent to the affidavit.
- [10] The issue raised was decided by the Supreme Court of Appeal in *Unlawful Occupiers of the School Site v City of Johannesburg*[1] as follows:

“[14] ... the remedy of a Respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported

applicant, is provided for in rule 7(1)

... The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was a party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney...

The developed view adopted in Court Rule 7(1) is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally

be authorised. It is therefore sufficient to know whether or not the attorney acts with authority. As to when and how the attorney's

authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority.”

- [11] In the circumstances it is clear that no proof is required that the deponent be authorised and this, therefore, militate against the case of the Respondents.
- [12] Concerning the Applicant's notice in terms of Rule 7(1) wherein the authority of Kotze Low Swanepoel to represent the Respondents (2nd to 6th Respondents) was disputed, proper documentation of authority and power of attorney had been issued as per the Supreme Court of Appeal case of *Unlawful Occupiers of the School Site* cited under paragraph [10] above.

APPLICATION TO STRIKE OUT CERTAIN PORTIONS OF THE REPLYING AFFIDAVIT AND RULE 30 NOTICE

- [13] The Respondents filed an application to strike out certain portions of the Applicant's replying affidavit which portions raised new matters not contained in the founding affidavit contrary to the rules of court on applications. The Respondents further contended that the Applicant has failed to make out a case in his founding affidavit and cannot purport to do so under the replying affidavit as this amounts to an abuse of the court process. The Applicant filed a notice in terms of Rule 30 stating that the Respondents issued and served the application to strike out without providing the Applicant with the requisite notice contrary to the provisions of Rule 23(2)(a).
- [14] In his replying affidavit the Applicant provided proof that the Respondents withdrew monies from the Nedbank account belonging to the BBM CPA without approval by members of BBM CPA and contrary to the constitution. I agree with the Respondents' contention that this is tantamount to making one's case under reply which should have appeared in the founding affidavit. It is trite that an applicant must make out his case in the founding affidavit and cannot do so in reply.
- [15] In the circumstances the following paragraphs are hereby struck out from the replying affidavit in accordance with the notice of application to strike out: paragraph 2 together with annexures thereto, paragraph 6.4, 6.7, 7.6, 17.2, Annexures RGK-6 and RGK-7 together with any reference thereto in paragraph 3.2 and 3.3, Annexures RGK-12 together with any reference thereto under paragraph 15.5 and Annexure RGK-13 together with any reference thereto under paragraph 15.7.

THE EX PARTE ORDER AND ITS RECONSIDERATION IN TERMS OF RULE 6(12)(C) OF THE UNIFORM RULES OF COURT

- [16] The application by the Respondent is launched in terms of Rule 6(12)(c) for the reconsideration of the interim order granted ex parte on 22 December 2023. Relevant to the reconsideration application it was ordered as follows:
- [16.1] That the matter is heard as on of urgency in terms of Rule 6(12) of the Uniform Rules of Court and non-compliance with the prescribed forms and time limits for service of the documents as provided for in the Rules is hereby condoned.
- [16.2] That a rule nisi issued calling upon the Respondents to show cause on the 11 April 2024 at 10h00 or so soon thereafter as the matter may be heard why an order in the following terms should not be made final:
- (a) The 2nd to the 6th Respondents are hereby interdicted and/or restrained from interfering and/or accessing and/or performing any transactions on the BBM CPA's Bank accounts held by Nedbank (7th Respondent), First National Bank (8th Respondent) and Sanlam (9th Respondent) pending the election of a new executive committee.

- (b) Nedbank, First National Bank and Sanlam are ordered to freeze the bank accounts belonging to the BBM CPA pending the election of the new executive committee.
- (c) Nedbank, First National Bank and Sanlam are ordered to furnish the Applicant with the banking accounts statement and/or transacting records relating to the BBM CPA from the period May 2022 to the date of this order, within three (3) days from the date the order was issued.

[16.3] That the provisions of paragraphs (a), (b) and (c) shall operate as an interim order and interdict pending the return date of the rule nisi as aforesaid.

- [17] It is apt from the onset to deal with the main objective of Rule 6(12)(c) which provides that ‘a person against whom an order was granted in such person’s absence in an urgent application may by notice set the matter down for reconsideration.’ This Rule envisages a redetermination of the matter. This is so because the court that entertained the ex parte application in the absence of the Respondents did not enjoy the benefit of the argument from the Respondents.
- [18] “When an order has been granted in the absence of a party, as in the instant case, Rule 6(12)(c) provides a mechanism through which the imbalance of hearing only one side of the case can be corrected. It follows that the audi alteram partem principle and the provisions of section 34 of the Constitution form the bedrock of Rule 6(12)(c)[2].”
- [19] “The principle of audi alteram partem is sacrosanct in the South African legal system. Although, like all other constitutional values, it is not absolute, and must be flexible enough to prevent, inadvertent harm, the only times that a court shall consider a matter behind a litigant’s back are in exceptional circumstances. The phrase “exceptional circumstances” has regrettably through overuse, and the habits of hyperbole, lost much of its impact. To do that phrase justice, it must mean very rarely, only if a countervailing interest is so compelling that a compromise is sensible, and then a compromise that is parsimonious in the deviation allowed. The law on the procedure is well established[3].”
- [20] The Respondents contend that the Applicant –
- [20.1] did not make out a case in its founding affidavit for the relief sought,
- [20.2] failed to place primary and material facts before the court,
- [20.3] did not disclose grounds why the matter deserved to be heard on ex parte basis,
- [20.4] did not prove the averred facts and that what was placed before the court constituted allegations of secondary nature not bagged by any primary facts and that this is evident under para 5 of the founding affidavit wherein a general averment is made that ever since the election of the EXCO the Department had been inundated with complaints from members of the BBM CPA regarding the manner in which the BBM CPA is administered, this substantiated with no proof whatsoever,

[20.5] provided no proof in a form of an agenda or an attendance register of members who were present at the numerous general meetings between the Department and the members of BBM CPA in order to ascertain whether or not the meetings so attended constituted a quorum in terms of the CPAA read with the constitution of the BBM CPA,

[20.6] failed to conduct an investigation through the appointment of a conciliator and/or perform the necessary monitoring and inspection of the records of the BBM CPA in accordance with the provisions of sections 10 and 11 of the CPAA.

[20.7] failed to ensure compliance with the provisions of clause 16 of the constitution of the BBM CPA when it dissolved the EXCO and further that no minutes of the meeting were attached as proof. No averments are made that the general meeting comprised 70 percent of the members and further that there was notice given as prescribed by clause 16.

[20.8] failed to place any proof whatsoever 'as to what the DG considered if any at all or was this merely a matter of a meeting being held with some and as a result all of a sudden a disbandment occurred'.

[21] I agree with the contentions made by the Respondents that the Applicant's founding affidavit consists of allegations which were never tested by invoking the relevant provisions of the CPAA read with the constitution of BBM CPA. There is no evidence as to why the EXCO was not requested to submit the financial records to the DG for verification against the allegations of maladministration, misappropriation and embezzlement of the funds of BBM CPA.

[22] "TDM-1" which is an annexure to the founding affidavit headed "REGISTRATION OF EXECUTIVE COMMITTEE MEMBERS OF BAROLONG BOO MAIKETSO COMMUNAL PROPERTY ASSOCIATION" is proof of the appointment of EXCO members for a period of five (5) years effective from 15 May 2022. The EXCO consists of fifteen (15) members and the 2nd Respondent, G.B Meyer was appointed as Chairperson of the EXCO. One would have earnestly thought that the Applicant's founding affidavit would have been substantiated to a larger extent by the other members of the EXCO who are not before this Court as respondents but this was not the case.

[23] The following paragraphs which form the gist of the founding affidavit are just mere allegations with no shred of evidence in support thereof:

"5.4 Post the election, the Department has been inundated with complaints from members or beneficiaries of the association regarding the manner in which Barolong Boo Maiketso Communal Property Association is administered.

5.5 The primary complaints are that, there is maladministration, embezzlement of funds as well as suspending and replacing committee

members without following the due process.

5.6 The complaints against the executive committee culminated into numerous general meetings between the department and the members

and/or beneficiaries of the association wherein members reiterated their complaint about the manner in which the executive members are administering the association.

5.8 The conduct of the executive members that, being the second to the sixth Respondents, does not in anyway, confine itself with the spirit and purport of the proper management, transparent and accountability referred to in section 9 above.

5.9 The Director General of the Department, upon consideration of the complaints and in the interest of justice, invoked section 11(6)(d) read with section 11(6)(f) of the Communal Property Association Act, 1996.

5.11 The Department therein scheduled a general meeting with the members and/or beneficiaries of the association on the 06 December 2023.

5.12 At the said meeting the Department in consultation with the members and/or beneficiaries of the association took a resolution to dissolve the executive committee members (sic) with immediate effect.”

[24] It is clear from the preceeding paragraph that the Applicant received a deluge of unsubstantiated allegations without verification. In other words, the Applicant wrongly construed and elevated the “reports” and “concerns” by members of BBM CPA to the status of evidence of maladministration, improper conduct and misappropriation of funds by the EXCO, which is not.

[25] As alluded to under the heading “Introduction” above, the historical mishap of land deprivation of indigenous communities which is now being restored through the land restitution process and the establishment of CPAs demand that CPAs be nurtured through proper management of their affairs by the EXCO and strategic oversight by the DG and his assigned departmental staff. In casu, the Applicant applied the provisions of the CPAA mechanically without regard to the due processes involved.

[26] The role of the Applicant and that of the EXCO is critical for the prosperity of CPAs and once registration of a CPA is effected, the DG assumes other responsibilities in respect of the registered CPAs. He may inspect the affairs of the CPA to determine whether it continues to comply with the CPAA and its constitution. In performing this function, the DG may demand to be furnished with any relevant information. In carrying out inspections, the DG may peruse and make copies of any document relating to the affairs of the CPA and may also subpoena any person with relevant information. If a dispute arises within a CPA, the DG must hold an enquiry or appoint a conciliator to assist in resolving the dispute[4]. This is the broader scope under which the Applicant should have proceeded to handle the allegations of maladministration, misappropriation and embezzlement of funds of BBM CPA.

[27] On the other hand, the EXCO stand in a fiduciary relationship towards the BBM CPA and its members, must act in their best interests in the execution of its powers which include implementation of the programmes and projects in accordance with the resolutions of the general meeting[5]. The entire EXCO may be dissolved if 70 percent of the members pass a vote of no confidence at the general meeting. At least 14 days notice must have been given of such a meeting. The purpose of a meeting must be included in such a notice[6]. Annexure “TDM2” to the founding affidavit which is purportedly a notice of the dissolution of the EXCO does not comply

with the constitution. Even if it did comply, the DG in any event had failed to comply with the preliminary processes of verification of the said allegations in accordance with the powers vested in him in terms of the provisions of section 11 of the CPAA.

[28] The existing interim order has created an injustice to the Respondents because it was obtained in their absence on an urgent basis. The application ought to have been served on the Respondents because on the facts of the matter, the Applicant had failed to establish why the order had to be granted ex parte. It follows that the reconsideration application must succeed.

ORDER

[29] Having considered the papers and the submissions made before me, the following order is made:

- (1) The requirements of form and service as provided for in the rules, insofar as necessary, are dispensed with and the application for reconsideration of an ex parte order is heard as one of urgency in terms of the Uniform Rules of Court;
- (2) The order granted ex parte against the 2nd to the 6th Respondents on 22 December 2023 in their absence by Mfenyana J is hereby reconsidered as follows:

“The order of Mfenyana J granted on 22 December 2023 is hereby set aside.”

- (3) The Applicant is ordered to pay the costs of the reconsideration including that of the application to strike out.

O.Y DIBETSO-BODIBE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

Delivered: This judgment is prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

DATE OF HEARING: 15, 19, 26 January 2024 DATE OF JUDGMENT: 11 September 2024

APPEARANCES FOR THE APPLICANT: Adv N Jagga INSTRUCTED BY: Kotze Low & Swanepoel C/o R. Van Rooyen FOR THE RESPONDENT: State Attorney Mmabatho O Ramokhali

[1] Unlawful Occupiers of the School Site v City of Johannesburg (036/2004)

[2005] ZASCA 7 (17 March 2005)

[2] Industrial Development Corporation of South Africa Limited v Bokone Group of Companies (Pty) Ltd (2022-027186) [2023] ZAGPJHC 837 (24 July 2023) at para [56]

[3] South African Airways SOC v BDFM Publishers (Pty) Ltd and Others (2015/33205) [2015] ZAGPJHC 293 (17 December 2015)

[4] Section 11 of the CPAA

[5] Clause 14 of the constitution of BBM CPA

[6] Clause 16 of the constitution of BBM CPA

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