



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 1426/2022

In the matter between:

ANTHONIE KRAALSHOEK

First Applicant

SARA MOSALA

Second Applicant

TAWANA JOHANNES RAMOCHELA

Third Applicant

JOHANNES MOKHADU LEPHOI

Fourth Applicant

RADITSHEGWANE BENNIE WOLF

Fifth Applicant

and

THE BETHANY COMMUNAL PROPERTY ASSOCIATION¹

First Respondent

**THE MINISTER OF RURAL DEVELOPMENT AND
LAND REFORM²**

Second Respondent

**THE DIRECTOR GENERAL: DEPARTMENT OF
RURAL DEVELOPMENT AND
LAND REFORM³**

Third Respondent

**THE PROVINCIAL REGISTRAR:
DEPARTMENT OF RURAL DEVELOPMENT
AND LAND REFORM⁴**

Fourth Respondent

CORAM: Opperman, J

¹ The "Bethany CPA" or "Association". Registration number 99/0072/A.

² The "Minister".

³ The "Director General".

⁴ The "Provincial Registrar".

HEARD ON: 18 August 2022

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 29 August 2022. The date and time for hand-down is deemed to be 29 August 2022 at 15h00.

SUMMARY Order to place an association under the administration of the Director-General in terms of section 13(1) of the *Communal Property Association Act 28 of 1996*.

JUDGMENT

INTRODUCTION

- [1] The case revolves around the Bethany Communal Property Association that was registered in terms of the *Communal Property Association Act 28 of 1996* in 2005.
- [2] The applicants, in summary, pursue three orders from this Court. Firstly, an order placing the Bethany CPA under administration, secondly, a structural interdict⁵ and lastly, a costs order against the third respondent, the Director General: Department of Rural Development and Land Reform.⁶
- [3] The Bethany CPA was established and registered subsequent to the restoration of ownership of land by order of the Land Claims Court of the farm Bethany No. 610 in the district of Edenburg, Free State Province consisting of approximately 5339⁷ (2016/2017) to 744, 1065⁸ (2018/2019) hectares. The Association consists of 339 members.⁹

⁵ A structural interdict is an order under which the court controls compliance with its order. Section 172(1)(b) of the Constitution, provides that *in constitutional matters* courts may grant “any order that is just and equitable”. It empowers courts to order structural interdicts.

⁶ Paragraph 5.8 of the Applicant's Heads of Argument.

⁷ See FA14 at page 95 of the Bundle. All reference will be to the Bundle except if otherwise indicated.

⁸ See FA15 at page 96.

⁹ See FA15 at page 96.

- [4] The application is in terms of section 13(1) of the *Communal Property Association Act* to place the first respondent, the Bethany CPA under administration of the third respondent; the Director General: Department of Rural and Land Reform, Free State Province.
- [5] The applicants are beneficiary members to the Association and they were represented, *pro bono*, on request of the Legal Practise Council of the Free State, by Phatshoane Henney Attorneys in Bloemfontein. Advocate Sander from the local Bar was briefed to conduct the case for the applicants on short notice since the erstwhile counsel has taken up an appointment as acting magistrate. Mr. M.J. Koenane from Koenane Attorneys represented the first respondent. The State Attorney represented the second to fourth respondents. Advocate T.M. Ngubane from the Bloemfontein Bar was instructed to represent the second and third respondents. It seems as if the fourth respondent did not partake in the litigation.
- [6] The Court must extent her appreciation to counsel for the wisdom and sanity they brought to a very difficult and potentially vile situation. The willingness of the litigants to come to the negotiation table and settle the matter must also be commended. *Batho pele* prevailed: “People first” and the insistence of this principle that resources for the people must be taken care off and preserved in service of the Constitution of the Republic of South Africa, 1998 and democracy.

THE REALITY OF THE BETHANY COMMUNAL PROPERTY AND THE LAW

- [7] The principles of the *Communal Property Association Act* are engrained in fair and inclusive decision-making processes. This to be executed by mature participants that perform the duties entrusted to them, by members and their own families, with due diligence and integrity. Equality of membership, accountability and transparency are vital to obtain and maintain a democratic process. Compliance with their mandate and the law and good governance are critical to the well-being of an Association. *In casu* the Association failed as far back as decades ago. I will discuss the issue hereunder.

[8] The success or failure of a communal property association is primarily the responsibility of its members. If they fail, the Association fail. The Legislator trusted the people in the instance to have the integrity and maturity to manage this valuable constitutional right. The *Communal Property Association Act* states in the preamble that it is:

To enable communities to form juristic persons, to be known as communal property Associations in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution; and to provide for matters connected therewith.

WHEREAS it is desirable that disadvantaged communities should be able to establish appropriate legal institutions through which they may acquire, hold and manage property in common;

AND WHEREAS it is necessary to ensure that such institutions are established and managed in a manner which is non-discriminatory, equitable and democratic and that such institutions be accountable to their members;

AND WHEREAS it is necessary to ensure that members of such institutions are protected against abuse of power by other members.

[9] The people failed their own Association as was described by the Project Officer in the Department of Agriculture, Rural Development and Land Reform at the Free State Shared Service Centre on 2 June 2022 and they had to assist with guidance.¹⁰ He described it as follows:

22. In the 2010/11 financial year, the First Respondent underwent a regularization process. Unfortunately, the process did not yield the desired results. Instead, the First Responded (sic) was plagued with a myriad of challenges as follows:

22.1 The First Respondent is not compliant with the Act, and this pose serious problems and threatens the sustainability of the land reform program;

22.2 *There are serious conflicts amongst the members of the First Respondent associated with, inter alia, power struggles, abuse of resources, infringement of their constitution and lack of transparency in their affairs;*(Accentuation added)

22.3 The Respondents have monitored the implementation of the Act since its enactment and has identified the following challenges, specific to the First Respondent including:

¹⁰ Paragraphs 22 to 24 of his affidavit on pages 248 to 251.

- 22.3.1 The creation of the First Respondent has resulted in families and communities with no relationship or joint history being bound together under this form of landholding structure;
 - 22.3.2 there are challenges of verification of beneficiaries;
 - 22.3.3 There are no mechanisms to control who comes and settles in the community and on the land;
 - 22.3.4 There is increased tenure insecurity for more vulnerable individuals (i.e., youth, women, the elderly and other persons already residing on land acquired by the First Respondent);
 - 22.3.5 Continuous conflict, and disputes amongst members arising from the inequality amongst members arising from inequality in economic benefits;
 - 22.3.6 The former Executive Committee's expired term of office and reluctance to convene Elective Annual General Meetings;
 - 22.3.7 Mismanagement of resources by the former Executive Committees;
 - 22.3.8 Multiple constitutions create conflict amongst members, neglect (sic) security of tenure for members and households, especially the descendants of the originally dispossessed persons;
 - 22.3.9 Verification lists that are disputed by community members.
- 22.4 One of the biggest challenges is the lack of capacity of the current CPA committee members to execute their functions as required by the Act and the First Respondent's Constitution. Amongst the First Respondent's general membership there are serious challenges with the members' ability to oversee the work of the former executive committee and hold them to account.
23. The First Respondent has failed to meet their reporting obligations and are unaccountable to members in conducting the CPAs (sic) business operations. When confronted with the need to report to the department in prescribed form and to account to their members, the First respondent is found wanting.
24. Sections 8 to 11 of the Act prescribe the information that every CPA must submit to the Third Respondent in each calendar year. Without capacity building and training, the levels of dysfunctionality and noncompliance with the legislation will continue unabated. It is for this reason that the Respondents made training a key priority to build the capacity of the CPAs (sic) to execute their functions.

- [10] The second and third respondents did indeed intervene and provided and partook in training and as recent as 7 April 2022,¹¹ mediation was initiated,¹² meetings with the first respondent and its members happened to assist them,¹³ the second and third respondents have assisted the election of a new committee and assisted the committee beyond what the legislation requires by sourcing electricity and other services. They remained available for guidance and oversight. It is clear that the second and third respondents complied with their legislative duties.
- [11] It is imperative that these Associations must function independent of the State. The State authorities may not usurp their independence; with independence comes responsibilities and the first respondent clearly struggled with their responsibilities and the governance of the Association. They have only themselves to blame.
- [12] There is an allegation that a letter was delivered to the first and second respondents by the applicants to intervene, but it is the case of the two respondents that they only gained sight of the letter upon receipt of the application. It is the case for the respondents that if the letter reached the relevant official, they would have responded as they did when the first respondent requested their intervention in 2017, 2018, 2019 and 2022. No reason existed for them to have ignored the letter especially if it was served by the Sheriff. The Court must accept this version of the respondents on the issue.¹⁴
- [13] The second and third respondents pray for the Association to be placed under administration and for the appointment of a Receiver to administer the affairs of the first respondent in line with the *Communal Property Association Act 28 of 1996*. They want for the first respondent to pay the costs of this application.
- [14] They correctly oppose the structural interdict. They are indeed correct when they state¹⁵ that prayers 2 to 15 of the notice of motion ask for the Court to enter the realm of the administration process assigned to the executive. It will also be against the interest of

¹¹ Paragraphs 25 to 31 on pages 251 to 254.

¹² Paragraphs 32 to 34 on pages 254 to 255.

¹³ Paragraphs 35 to 40 on pages 255 to 257.

¹⁴ *Plascon-Evans Paints (Pty) Ltd v Van Riebeck Paints (Pty) Ltd* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984).

¹⁵ Paragraph 17.1 at page 247.

justice and certainly cause confusion and conflict, to have two entities run the administration of the Association. The application for the structural interdict offends the separation of powers doctrine.

[15] Imperative is the fact that this is not a constitutional matter as envisaged in section 172¹⁶ of the Constitution. It is an application to put a self-admitted dysfunctional private entity under administration.

[16] The question is if this is a public interest case? It is indeed because it serves the purpose of the *Communal Property Association Act 28 of 1996*, the public of Edenburg and democracy in the country in general to ensure the effective governance of the Association.¹⁷

[17] In their founding affidavit the applicants state that they claim no specific relief against the second and fourth respondents and that they are cited in these proceedings as a result of their interest in the outcome of the litigation. Applicants, however, claim for costs orders against the second and fourth respondents to be paid jointly with any other respondent

¹⁶ 172. Powers of courts in constitutional matters. —

(1) When deciding a constitutional matter within its power, a court—

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

(2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

[Para. (a) substituted by s. 7 of the Constitution Seventeenth Amendment Act of 2012.]

- (b) *A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.*
- (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
- (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection. (Accentuation added)

¹⁷ 2020: Mokoko P. Sebola & Malemela A. Mamabolo, *Governing and managing communal land as a resource in South Africa: A case of selected communal property associations in Vhembe district, Limpopo Province*, University of Limpopo, South Africa, published in *The Business and Management Review*, Volume 11 Number 1, Conference proceedings of the Centre for Business & Economic Research, ICBED-2020, 20-22 August.

opposing the application, and in the event of opposition by the second and fourth respondents.¹⁸

[18] The second and third respondents did not oppose the application to place the first respondent under administration, but for to object to the *locus standi* of the applicants and the conflation by the applicants of the duties and powers of the executive, legislator and court. The *locus standi* issue apparently fell to the wayside when the matter was settled between the parties.

[19] The Project Officer in the Department of Agriculture, Rural Development and Land Reform at the Free State Shared Service Centre put it aptly when he stated in June this year that:

I pause to highlight that the Respondents have an oversight role and are not responsible for managing the affairs of the First Respondents which is an independent entity. It is unfathomable that the Respondents can be saddled with the legal costs of a member exercising its right in terms of section 13(1) of the Act. The basis upon which the prayer is sought is misdirected, untrue as will be explained in detail below; consequently, the prayer is unsustainable in law.¹⁹

[20] The second and third respondents are correct in their submission that the Court may not transgress and trespass into the realm of the executive in the instance. The *Communal Property Association Act* is also clear on the issue:

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 when it would otherwise be just and equitable in the circumstances. (Accentuation added)

¹⁸ Paragraph 3.5 on page 16.

¹⁹ Paragraph 20 at page 248.

- (2) The Director-General shall, pursuant to an administration order referred to in subsection (1), have such powers to manage the affairs of the association or provisional association as the Court, subject to the provisions of this Act, may determine.
- (3) The Director-General may, upon written application by an association or provisional association, cause such an association or provisional association to be deregistered, if he or she is satisfied that—
 - (a) a resolution in favour of deregistration was adopted at a meeting attended by a substantial number of the members of the association or provisional association;
 - (b) the resolution was adopted by a majority of members present or represented at the meeting; and
 - (c) all relevant matters which reasonably have to be addressed prior to deregistration, including the way in which the assets and liabilities of the association or provisional association will be dealt with, have been addressed.
- (4) Where the Court orders the liquidation of an association or provisional association, it shall make such order as to the distribution of the assets of the association or provisional association as it deems just and equitable, having considered any recommendations which the Director-General may make in this regard.
- (5) The Minister may prescribe the procedure to be followed in an application contemplated in subsection (1), and set out the powers and duties of the Director-General, the Registration Officer, the association, members and interested parties in those situations.

THE DRAFT SETTLEMENT ORDER

[21] The parties had a caucused and settled and presented the Court with a draft order. I am indeed indebted to them for this. Some issues however present in paragraphs 5, 6, 7 and 8. It involves the conflation of the duties of the *trias politica*²⁰ and the costs. This is the draft order as submitted to the Court:

Having heard the representatives for the parties, and by agreement between the parties, the following order is made: -

1. The First Respondent is placed under administration in terms of section 13(1) of the Communal Property Associations Act, 28 of 1996 (as amended);

²⁰ “Separation of powers, also referred to as *trias politica*, requires the separation of state government into three arms, namely, the legislature with law making functions, the executive with the duty to execute the law and the judiciary with the duty to interpret the law and resolve disputes which arise in terms of the law. In order for the separation of powers to apply effectively all three arms of government must be independent of each other.” <https://orcid.org/0000-0001-9683-2247>, <http://hdl.handle.net/10394/36723> accessed on 25 August 2022.

2. The First Respondent is ordered to submit all documents in its possession including financial records to the Third Respondent within 5 (FIVE) days of the order of this Court;
3. The Third Respondent is ordered to appoint a Receiver within 60 (SIXTY) days of this order;
4. The Receiver is granted the undermentioned powers in terms of section 13(2) of the Communal Property Associations Act, 28 of 1996 (as amended) and the regulations thereto, as well as the First Respondent's Constitution:
 - 4.1. To administer the affairs of the First Respondent temporarily until such time as a new executive committee of the First Respondent has been elected;
 - 4.2. To do all things necessary to maintain the affairs of the First Respondent in good and proper order and specifically to perform the following tasks:
 - 4.2.1. the day-to-day management of the affairs of the First Respondent;
 - 4.2.2. control of the First Respondent's bank account(s) and administration thereof;
 - 4.2.3. payment of the First Respondent's ordinary running expenses;
 - 4.2.4. maintenance and control of books, records and documents of the First Respondent;
 - 4.2.5. conducting verification of the membership lists and updating the register of members of the First Respondent, if necessary, within 3 (THREE) months from date of his/her appointment;
 - 4.2.6. mandate and instruct auditors on behalf of the First Respondent to prepare all outstanding financial statements of the First Respondent;
 - 4.2.7. convene (including determination of a date, time and venue), holding and chairing the annual general meeting or any other special general meeting and/or general meetings of the First Respondent deemed necessary for the fulfilment of his/her tasks;
 - 4.2.8. arrange an election of committee members to take place within a month after completing the membership verification process, or such other annual general meeting and/or special general meeting of the First Respondent;
 - 4.2.9. is entitled, in his/her sole discretion, to schedule the meetings referred to in this order, on the same day or on different days, as he/she deems fit and practicable;
 - 4.2.10. call for nominations for election of members to fill any vacant posts on the executive committee and/or any other committee of the First Respondent in terms of the First Respondent's Constitution, upon such terms as is deemed applicable and in compliance with the rules of natural justice;
 - 4.2.11. the Receiver shall, in his/her sole discretion, determine the nomination process to be followed, provided that it shall be fair and transparent;
 - 4.2.12. the Receiver shall determine any disputed issues in respect of the First Respondent's Constitution and effect the necessary amendments to it;

- 4.2.13. the Receiver is entitled to call for written submissions from the parties in the matters referred to in 4.2.11 and 4.2.12 supra and shall, if he/she deems fit, be entitled to seek independent advice and assistance from neutral third parties, including an opinion from legal practitioners, on the interpretation of the First Respondent's Constitution;
 - 4.2.14. engage the services of the Independent Electoral Commission of South Africa ("the IEC") or the Third Respondent to serve as election monitors;
 - 4.2.15. at the time when the election referred to herein above is called, the Receiver shall address written notice to the relevant Municipality and/or Municipalities and to the Regional Director: Department of Land Affairs, advising them of the impending election of committee members from the respective regions and requesting them to appoint representatives to serve on the committee of the First Respondent;
 - 4.2.16. to review and set aside any decision, resolution, contract, transaction, undertaking, agreement or the like, made by the executive committee and/or any member or the executive committee, past or present, acting in unison or individually, found by the Receiver to be contrary to the provisions of the First Respondent's Constitution, the provisions of the Communal Property Associations Act, 28 of 1996 (as amended) and/or any other statutory provision, or contrary to the best interest of the members and/or member beneficiaries of the First Respondent;
 - 4.2.17. engage the services of an attorney or counsel for assistance in the proper interpretation of the First Respondent's Constitution or any other legal requirements which the Receiver is required to observe, if deemed necessary by him/her; and
 - 4.2.18. approaching the Free State High Court, Bloemfontein for directions or other relief on any matter pertaining to his/her appointment or the fulfilment of his/her tasks as Receiver.
5. The Receiver is ordered to file a progress report on the execution of his powers referred to in prayer 4 with the Registrar of this Court and cause same to be served on all the parties hereto, within 4 (FOUR) months from date of his appointment;
 6. The parties are entitled to file their responses to the progress report compiled by the Receiver in terms of paragraph 5 hereof, within 1 (ONE) month after service thereof;
 7. The Receiver is ordered to file a final report on the execution of his powers referred to in prayer 4 with the Registrar of this Court and cause same to be served on all parties, within 3 (THREE) months from date of filing the initial progress report referred to in 5 above; and

8. Costs at the Court's discretion, following argument by legal representatives.

AD PARAGRAPHS 1, 2, 3 and 4

- [22] These instructions and orders are by agreement between the parties and in accordance with democratic governance. It does not clash with the *Communal Property Association Act* and administrative law. It may be allowed by agreement between the parties. The issue of the costs and payment of the outsourced services might be problematic. It should be for the account of the first respondent's estate under administration.

AD PARAGRAPHS 5, 6 & 7

- [23] It may not be allowed that the Receiver and the parties file their reports to the Court. It is not the Court's place and constitutional duty to administer the Association; this is the duty of the Director General and the Minister. The Receiver must thus file with the Director General and the Court will grant the Director-General, Minister, an association or provisional association or any member thereof, or any other interested person access to the Court in terms of section 34 of the Constitution, 1998 on the same papers duly amplified if judicial intervention is appropriate and essential.

COSTS FOR THIS APPLICATION

- [24] In *Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others* 1996 (2) SA 621 (CC) it crystallised that the two main principles of the approach to costs are that a judicial officer who hears a matter has wide discretion to decide on the parties' costs and that costs follow the outcome of a case.
- [25] The applicants *in casu* were substantially successful. The second and third respondents the same. They did not oppose the application for the placing under administration of the Bethany CPA and were found to be correct in their approach to constitutional administrative governance. They contributed to the settlement of the case and in the end agreed to the structural interdict to promote the effectiveness of the administration.
- [26] The first respondent opposed the applications:

Its members seek to retain full control of the Association and opposed declaratory and mandatory relief, as well as the structural [supervisor] interdicts to put this Association under the control of the Director General: Department of Rural Development and Land Reform [the Third Respondent] sought by the five applicants in accordance with section 13(1) of the said Act.²¹

They wanted for the mediation process to be finalised although it failed in the past. The first respondent did not want to relinquish power of the dire situation they caused and to the detriment of the mission. They caused the situation with willful bad governance and want for the Director General to bear the consequences. This is not how mature governance and responsibility are implemented; there has to be accountability and the Association will have to carry the load for its conduct.

[27] The wisdom of counsel for the Association that facilitated the settlement and draft order and the best outcome for the case, protected the Association from deregistration since the land was under maladministration and in dire straits. The second, third and fourth respondents will assist as far as possible financially to attain success for the association but the fact remains that as the Association argued; they must retain stewardship of the running of the Association, the Communal Association was established to enable communities to own land and manage their own land. The intention was to establish independent communities that run their own land.²² The current Association failed and have to bear the costs of the litigation if the basic rules of costs are adhered to.

[28] This is indeed litigation in public interest; it is in the interest of the country and its people that these Communal Associations succeed. The Biowatch Principle comes to the fore; the Constitutional Court, the Land Claims Court and the Labour Courts have adopted the principle that persons should not be deterred from enforcing their right because they fear that they will have to pay their opponent's costs as well as their own costs if they do not succeed.²³

²¹ Page 4 of the Heads of Argument of the first respondent.

²² Page 9 of the Heads of Argument of the first respondent.

²³ Theophilopoulos, Van Heerden & Boraine, *Legal Costs in Fundamental Principles of Civil Procedure, Third edition* (2015) 444 at 446, <https://hdl.handle.net/10520/EJC-e2228ac79>.

[29] Courts are not bound to follow the usual approach of the superior courts in awarding costs and it will give due weight to the constitutional obligation to promote the fundamental right of access to the courts in such a way that legitimate litigants will not be deterred from approaching the court to have a dispute settled for fear of an adverse cost order.²⁴

[30] The Constitutional Court in the *Biowatch* – case held at paragraph [11] that:

Thus, litigants should not be treated disadvantageously in making costs and related awards simply because they are pursuing commercial interests and have deep pockets. Nor should they be looked upon with favour because they are fighting for the poor and lack funds themselves. What matters is whether rich or poor, advantaged or disadvantaged, they are asserting rights protected by the Constitution.

The Constitutional Court warned against stubborn vexatiousness. The Constitutional Court warned that the above principles are not unqualified. At paragraph [15] and [16] it was warned that if an application is frivolous, vexatious or inappropriate the worthiness of its cause will not immunise it against an adverse cost order. Merely labelling the litigation as constitutional would not be enough to invoke the rule. The issues in the matter must genuinely and substantively be of a constitutional nature; I would add of public interest also.

[31] In the matter of *Maoko and Another v Telkom (Soc) Limited and Another* (15246/2019) [2020] ZAGPPHC 125 it was highlighted that the *Biowatch* Principle is not confined to litigation involving the state in the narrow sense of the word. It applies more broadly to public institutions and organs of state. It can be assumed that the principles in *Biowatch* could be applied to civil litigation between two private parties if the matter involves legitimate constitutional issues.

[32] The facts of the case dictates that the first respondent shall carry the costs for the applicants as well as themselves. The second, third and fourth respondents shall carry their own costs. The fourth respondent did oppose the application but did not join in the hearing of the matter.

²⁴ *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC) at paragraph [1].

[33] In conclusion; the draft settlement order will be confirmed but for the reporting to the Court and the first respondent will pay its own costs as well as that of the applicants. The other parties will carry their own costs.

ORDER

[34] Having heard counsel for the parties, and by agreement between the parties; the following order is made:

1. The first respondent is placed under administration in terms of section 13(1) of *the Communal Property Associations Act, 28 of 1996*.
2. The first respondent is ordered to submit all documents in its possession including financial records to the third respondent within 5 (Five) days of the date of the order of this Court.
3. The third respondent is ordered to appoint a Receiver within 60 (Sixty) days of the date of this order.
4. The Receiver is, by agreement between the parties, granted the undermentioned authority in terms of section 13(2) of the *Communal Property Associations Act, 28 of 1996* and the regulations thereto, as well as the first respondent's Constitution:
 - 4.1. To administer the affairs of the first respondent temporarily until such time as a new executive committee of the first respondent has been legally elected.
 - 4.2. To engage all processes and actions necessary to maintain the affairs of the first respondent in good and proper order and specifically to perform the following tasks:
 - 4.2.1. The day-to-day management of the affairs of the first respondent;
 - 4.2.2. exercise control over the first respondent's bank account(s) and administration thereof;
 - 4.2.3. payment of the first respondent's ordinary running expenses;
 - 4.2.4. maintenance and control of books, records and documents of the first respondent;

- 4.2.5. conducting verification of the membership lists and updating the register of members of the first respondent, if necessary, within 3 (three) months from date of his/her appointment;
- 4.2.6. mandate and instruct auditors on behalf of the first respondent to prepare all outstanding financial statements of the first respondent;
- 4.2.7. convene (including determination of a date, time and venue), holding and chairing the annual general meeting or any other special general meeting and/or general meetings of the first respondent deemed essential for the fulfilment of his/her tasks;
- 4.2.8. arrange an election of committee members to take place within a month after completing the membership verification process, or such other annual general meeting and/or special general meeting of the first respondent;
- 4.2.9. the Receiver is entitled, in his/her sole discretion, to schedule the meetings referred to in this order, on the same day or on different days, as he/she deems fit and practicable;
- 4.2.10. the Receiver may call for nominations for election of members to fill any vacant posts on the executive committee and/or any other committee of the first respondent in terms of the first respondent's Constitution, upon such terms as is deemed applicable and in compliance with the rules of natural justice;²⁵
- 4.2.11. the Receiver shall, in his/her sole discretion, determine the nomination process to be followed, provided that it shall be fair and transparent;

²⁵ The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The three main requirements of natural justice that must be met in every case are: adequate notice, fair hearing and no bias. Sometimes, all three of these concepts are grouped together as "the right to a fair hearing". Sahu, Manjeet Kumar, *Principle of Natural Justice in South Africa* (September 1, 2015). Available at SSRN: <https://ssrn.com/abstract=2765896> or <http://dx.doi.org/10.2139/ssrn.2765896> assessed on 25 August 2022.

- 4.2.12. the Receiver shall determine any disputed issues in respect of the first respondent's Constitution and effect the necessary amendments to it;
- 4.2.13. the Receiver is entitled to call for written submissions from the parties in the matters referred to in 4.2.11 and 4.2.12 *supra* and shall, if he/she deems fit, seek independent advice and assistance from neutral third parties, including an opinion from legal practitioners, on the interpretation of the first respondent's Constitution;
- 4.2.14. the Receiver may engage the services of the Independent Electoral Commission of South Africa ("the IEC") or the third respondent to serve as election monitors;
- 4.2.15. at the time when the election referred to herein above is called, the Receiver shall address a written notice to the relevant Municipality and/or Municipalities and to the Regional Director: Department of Rural Development and Land Reform, advising them of the impending election of committee members from the respective regions and requesting them to appoint representatives to serve on the committee of the first respondent;
- 4.2.16. the Receiver may review and set aside any decision, resolution, contract, transaction, undertaking, agreement or the like, made by the executive committee and/or any member or the executive committee, past or present, acting in unison or individually, found by the Receiver to be contrary to the provisions of the first respondent's Constitution, the provisions of *the Communal Property Associations Act, 28 of 1996* and/or any other statutory provision, or that is contrary to the best interest of the members and/or member beneficiaries of the first respondent and in accordance with the law;
- 4.2.17. the Receiver shall engage the services of an attorney or counsel for assistance in the proper interpretation of the first respondent's

Constitution or any other legal requirements which the Receiver is required to observe, if deemed necessary by him/her; and

4.2.18. the Receiver may approach the Free State High Court, Bloemfontein for directions or other relief on any matter pertaining to his/her appointment or the fulfilment of his/her tasks as Receiver.

5. The Receiver is ordered to file a progress report on the execution of his/her powers referred to in paragraph 4 with the Director General: Department of Rural Development and Land Reform and cause same to be served on all the parties hereto, within 4 (four) months from date of his/her appointment;
6. The parties are entitled to file their responses to the progress report compiled by the Receiver in terms of paragraph 5 hereof, within 1 (one) month after service thereof.
7. The Receiver is ordered to file a final report on the execution of his powers referred to in paragraph 4 with the Director General: Department of Rural Development and Land Reform and cause same to be served on all parties, within 3 (three) months from date of filing the initial progress report referred to in paragraph 5 above.
8. Permission is granted to the Director General: Department of Rural Development and Land Reform, the Minister: Department of Rural Development and Land Reform, an association or provisional association or any member thereof, or any other interested person to access the Court in terms of section 34 of the Constitution, 1998 on the same papers, duly augmented, if judicial intervention is suitable and essential and on the issues that served in this application.
9. Any costs incurred for the outsourcing to private services shall be for the account of the estate of the first respondent under administration.
10. The first respondent shall carry the costs of the applicants and their own costs. The second to fourth respondents shall carry their own costs.

APPEARANCES

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Ref: 574/202200304P3K