



**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 number: 3892/2021

In the matter between:

MABETA REFILOE ISHMAEL 1st Applicant

KHOMOEASERA TUMELO BARTHOLOMEN 2nd Applicant

KOETLE JOSEPH PHESHELA 3rd Applicant

NHLAPHO DINEO GLORIA 4th Applicant

PLAATJIE NAPO PETRUS 5th Applicant

SALEMANE LETHOLA REGINALD 6th Applicant

And

LEKGALONG COMMUNAL PROPERTY ASSOCIATION 1st Respondent

**ANY OTHER MEMBERS OF LEKGALONG COMMUNAL
PROPERTY ASSOCIATION** 2nd Respondent

**DIRECTOR GENERAL OF AGRICULTURE, RURAL
DEVELOPMENT AND LAND REFORM:
FREE STATE PROVINCE**

3rd Respondent

**MEC FOR DEPARTMENT OF AGRICULTURE,
RURAL DEVELOPMENT AND REFORM:
FREE STATE PROVINCE**

4th Respondent

HEARD ON: 24 MARCH 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: 05 MAY 2022

[1] The first respondent is a Communal Property Association (“The CPA”) established in terms of section 2(b) of the Communal Property Act 28 of 1996 (“The Act). It was established by the applicants and the second respondent as land claimants of the Bataung Community for the purpose of acquiring, holding and managing the land awarded to the Bataung Community in terms of the Restitution of Land Rights Act 22 of 1994.

[2] On 25 August 2021 the applicants (first, second and third applicants) as committee members and ordinary members (fourth, fifth and sixth applicants) respectively, launched an urgent application on an *ex parte* basis and on the grounds that the respondents were mismanaging the funds of the CPA and also disposing of its assets to the detriment of its members.

[3] A rule *nisi* returnable on 7 October 2021 was granted by Loubser, J interdicting and restraining the CPA and the other respondents from dissipating the assets of the CPA and from denying the applicants access to

the CPA's assets. The applicants were also granted an order for the appointment of an interim party to manage the assets of the CPA pending the resolution of the dispute between the parties, the dissolution of the CPA and that its assets be divided and shared equally between its members.

- [4] The application was opposed by the respondents. On the return date the application was postponed to 25 November 2021, then to 27 January 2022 and finally to 24 March 2022 for arguments on the opposed roll.
- [5] At the commencement of the hearing counsel for the applicants informed the court that he has been instructed to withdraw the application against all the respondents.
- [6] Counsel for the respondents were amenable to the withdrawal of the application as a result, the only issue which remained for determination is that of costs consequent upon the withdrawal of the application.
- [7] The applicants were of the view that the costs should be paid by the CPA on the grounds that in initiating the urgent application, the applicants were acting in their respective capacities as duly appointed committee members and ordinary members of the CPA to protect the interests of the CPA against the unlawful actions of the respondents who were mishandling the finances of the CPA and also dissipating its assets.
- [8] Counsel for the respondents argued to the contrary and averred that the applicants must pay the costs on a punitive scale.
- [9] It was argued by Mr Steenkamp who appeared for the CPA and the second respondent that the applicants' contention that in launching these proceedings they were acting on behalf of or for the benefit of the CPA cannot be true as the application was not instituted in the name of the CPA and nowhere in the applicants' founding affidavit is it alleged that the CPA is an interested party in

the proceedings. The CPA is cited as a respondent indicating that it is a party against whom the proceedings have been launched.

- [10] It was his submission that the application was doomed to fail from the onset as the applicants had no *locus standi* to institute these proceedings. In their founding affidavit, the applicants failed to allege and prove their authority to act on behalf of the CPA and at the time that the urgent application was launched the first, second and third applicants had been ousted as committee members of the CPA.
- [11] He further stated that the application was vexatious and unnecessary. In their founding affidavit the applicants levelled serious and unfounded allegations of dishonesty against the respondents. Furthermore, the constitution of the CPA (clause 19) provides for the referral of disputes between members or between members and the committee to mediation before referring the dispute to the Court. The CPA's suggestion to refer the matter to mediation was rebuffed by the applicants the instead forged ahead and filed voluminous papers only to later withdraw the application on the day of the hearing after the respondents have filed opposing affidavits and appointed counsel to argue the matter.
- [12] The respondents' counsel, Mr. Seneke was in agreement with Mr Steenkamp's contentions. He stated that the State does not ordinarily seek costs in litigation however, the applicants' conduct warrants a cost order against them on a punitive scale.
- [13] It was his submission that the application was misguided, the orders sought are in conflict with the Act, the constitution of the CPA and also detrimental to the rights of the members in that section 13 of the Act clearly sets out the procedure to be followed where the members seek to place the CPA under Administration on the basis of maladministration. The constitution of the CPA (clause 11.2) provides for the procedure to be followed to dissolve the CPA and the dissolution of the CPA for the purpose of sharing the assets would have been prejudicial to its the members as in terms of the constitution of the

CPA (clause 23.3.2) once the CPA is dissolved, its assets are diverted to another CPA.

- [14] Mr Seneke argued that all these factors, indicate clearly that in initiating these proceedings, the applicants were not acting in the interests of the CPA they were merely on the frolic of their own. They should therefore pay the costs herein.
- [15] It is trite that the position of a withdrawer of court proceedings is similar to that of a loser and the general position in that regard is that where a party loses he ought to pay the costs of the aborted proceedings, unless the court finds there are exceptional circumstances why the other party should not be entitled to its costs.¹
- [16] In its determination whether the other party should be deprived of its costs the court takes into consideration the conduct of the applicants and how it shaped the proceedings namely, whether the applicants' acted reasonably in launching the application and whether the subsequent withdrawal of the application was based on sound grounds.
- [17] In this matter, there were no exigent reasons for the applicants to launch these proceedings, on an urgent basis for that matter. The constitution of the CPA provides for the referral of the parties' disputes to mediation as an alternative to a costly litigation.
- [18] Serious allegations of impropriety and maladministration were levelled against the respondents in the applicants' affidavit. The respondents were thus entitled to come to court and respond to those allegations.

¹ Germishuys v Douglas Besproeiingsraad 1973 (3) SA 299 (NC) at 300D-E; Reuben Rosenblum Family Investments (Pty) Ltd and Another v Marsubar (Pty) Ltd (Forward Enterprises (Pty) Ltd and Others Intervening) 2003 (3) SA 547 (C) at 550C-E.

[19] As regards the withdrawal of the application, it appears the applicants arrogated to themselves a right to withdraw the application without providing any explanation as to enable the court to assess their motives. Reasons for withdrawal of the proceedings is also an important factor that the court takes into consideration when applying its discretion whether or not to deprive a party of its own costs.

[20] Having regard to the facts of this matter, I have found no exceptional reasons why the respondents should not be awarded the costs they incurred in opposing this application.

[21] It is trite that costs on a punitive scale are awarded as a mark of opprobrium of a litigant's unbecoming conduct and also as a deterrent to the would-be vexatious and unreasonable litigants. I'm of the view that the applicant's pursuit of an urgent application was reprehensible, wholly unreasonable and well within the type of conduct considered to warrant a cost order on a punitive scale.

ORDER

[22] For the reasons that I have set out above, I make the following order:

1. The applicants are liable jointly and severally one paying the other to be absolved, to pay the respondents' costs on attorney and client scale. Such costs to include the costs of counsel.

N.S. DANISO, J

APPEARANCES:

Counsel on behalf of the applicants:

Adv. T.J. Pela

Instructed by:

Ngcangiso & Associates

c/o Motaung Attorneys

BLOEMFONTEIN

Counsel on behalf of the respondents:

(1st and 2nd)

Instructed by:

Adv M.J.D. Steenkamp

Du Plooy Attorneys

BLOEMFONTEIN

Counsel on behalf of the respondents:

(3rd and 4th)

Instructed by:

Adv T.D. Seneke

State Attorneys

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