HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 12106/07

In the matter between:

JACOB SKAAF First Applicant

AFFECTED AND INTERESTED MEMBERS OF THE OERSONSKRAAL COMMUNITY Second

Applicant

and

KHANYISA COMMUNAL PROPERTY ASSOCIATION First Respondent

BAKOPANE MINING EXPLORATION (PTY) LTD Second Respondent

STANLEY PAKADE Third Respondent

MLIBO GLADLY MGUDLWA Fourth Respondent

OERSONKRAAL MINING (PTY) LTD Fifth Respondent

HLOSI MINING (PTY) LTD Sixth Respondent

IDADA TRADING 167 (PTY) LTD Seventh Respondent

NARDUS SCHEEPERS Eighth Respondent

EPHRAIM MELEHO MOKOTO Ninth Respondent

DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM Tenth Respondent

***Case summary*: Contempt of Court Proceedings – Enforcement of prior court order – 74 members of communal property association established and registered in terms of the Communal Property Association Act 28 of 1996 seek enforcement of court order made in favour of the communal property association**

– members not acting on behalf of the association – lack *locus standi*. Application dismissed.

JUDGMENT

MEYER J

[1] The first applicant, Mr Jacob Skaaf, and the second applicant, a further 73 members of the Oersonskraal community (or, more accurately, the Khanyisa community), seek to enforce a court order that was granted by this court (Hartzenburg J) on 19 August 2008, by agreement between the parties to that application (the consent order). Khanyisa Communal Property Association (the Association) was the applicant, and Bakopane Mining Exploration (Pty) Ltd (Bakopane), Messrs Thabiso Pakade and Stanley Pakade (directors and shareholders of Bakopane), Oersonskraal Mining (Pty) Ltd (Oersonskraal), Hlosi Mining (Pty) Ltd (Hlosi), Idada Trading 167 (Pty) Ltd (Idada), Mr Nardus Scheepers (at the time a director of and shareholder in Hlosi and Idada) and Mr EM Mokoto (at the time he claimed to be the duly elected chairperson of the Association's committee) were the first to eighth respondents respectively. The present application is brought against the first respondent, the Association, the second respondent, Bakopane, the third respondent, Mr S Pakade, the fourth respondent, Mr MG Mgudlwa (presently a director of Bakopane), the fifth respondent, Oersonskraal, the sixth respondent, Hlosi, the seventh respondent, Idada, the eighth respondent, Mr Scheepers (he, according to the applicants, 'holds himself out as a director of' Hlosi), the ninth respondent, Mr EM Mokoto (a director of Oersonskraal) and the tenth respondent, the Department of Rural Development and Land Reform. The application is opposed by Bakopane, Mr S Pakade, Oersonskraal, Hlosi, Idada and Mr Scheepers.

[2] Instead of seeking the committal of those who are alleged to be in contempt of the consent order, the 74 applicants, relying on *Matjihabeng Local Municipality v Eskom Holdings Ltd and others* 2018 (1) SA 1 SA (CC), para 54, opted for declaratory and interdictory relief. There it was held:

'Not every court order warrants committal for contempt of court in civil proceedings. The relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, mandamus, and structural interdicts. All of these remedies play an important part in the enforcement of court orders in civil contempt proceedings. Their objective is to compel parties to comply with a court order. In some instances, the disregard of a court order may justify committal, as a sanction for past non-compliance. This is necessary because breaching a court order, wilfully and with *mala fides*, undermines the authority of the courts and thereby adversely affects the broader public interest. In the pertinent words of Cameron JA (as he then was) for the majority in *Fakie*:

"[W]hile the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard nullifies the authority of the courts and detracts from the rule of law."'
(Also see *S v Mammabolo (ETV and others Intervening)* 2001 (3) SA 409 (CC), para 14.)

[3] The Association is a communal property association registered in terms of s 8 of the Communal Property Associations Act 28 of 1996 (the Act). The Act enables disadvantaged communities to form juristic persons – communal property associations – through which to acquire, hold and manage property in common, on a basis agreed to by the members of the community in terms of a written constitution. A 'community' is defined to mean 'a group of persons, which wishes to have its rights to or in particular property determined by shared rules under a written constitution and which wishes or is required to form an association' (s 1). The 'holding of property in common' means 'the acquisition, holding and management of property by an association on behalf of its members, in accordance with the terms of a constitution' (s 1). A requirement for the

registration of an association is that the association has as its main object the holding of property in common.

[4] Section 8(6) of the Act provides as follows:

'Upon the registration of an association –

(a) The association shall be established as a juristic person, with the capacity to sue and be sued;

(b) The association may require rights and incur obligations in its own name in accordance with its constitution;

(c) The association may, subject to the provisions of its constitution –

(i) Acquire and dispose of immovable property and rural rights therein; and

(ii) Encumber such immovable property or real rights by mortgage, servitude or lease or in any other manner;

(d) The association shall have perpetual succession regardless of changes in its membership;

(e) The constitution shall be a legally binding agreement between the association and its members and shall be deemed to be a matter of public knowledge;

(f) In the case of an application by a provisional association, the provisional association shall be deregistered and its assets transferred to the association.

[5] It is the director-general of the Department of Rural Development and Land Reform (the director-general) to whom a community applies for registration of a communal property association (s 8) and it is the director–general that causes an association to be registered if satisfied that the association qualifies for registration.

The director–general is enjoined 'to monitor compliance with the provisions of the relevant constitution and this Act' (s 11). If a dispute arises within an association, the director general may, of his or her own accord, or at the request of a member of the association '(a) undertake an inquiry into the activities of the association; (b) advise the association or provisional association and the members of their respective rights and obligations; (c) make a reconsiliator contemplated in s10(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 s 13 [administration, liquidation and deregistration of the association]; or (f) take such other reasonable measures as he or she considers appropriate in the circumstances.'

[6] A communal property association for the Khanyisa disadvantaged community was established and registered in terms of s 8 of the Act. The Association adopted a constitution. The main objective of the association, in terms of clause 5 (i) of its constitution, is 'to hold the area known as the REMAINING EXTENT OF PORTION 1 OF THE FARM OERSONSKRAAL 250, district WOLMARANSTAD, NORTH WEST PROVINCE, Measuring 756,2923 (SEVEN FIVE SIX comma TWO NINE TWO THREE) hectares, Held by Deed of Transfer no T82458/1991 on behalf of and for the benefit of its Members subject to the conditions of this CONSTTUTION and the Act' (the Association's land). The Constitution provides *inter alia* for the establishment of a committee, which is responsible for the implementation of the provisions of the constitution and the management of the affairs of the Association, subject to the instructions of the members taken at a general meeting. Every member shall, *inter alia*, have the right to cast a vote at the general meeting (clause 13(i)(d)). The Oersonskraal community successfully claimed its land through the restitution of land process in terms of the Restitution of Land Rights Act, 1994. The community is represented by the Association.

[7] A mining right was granted to Oersonskraal in terms of s 23(1) of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) to mine and recover the minerals (alluvial diamonds) on and under the mining area on the Association's land for its own benefit and account. The mining right was initially granted for the period 30 September 2005 to 29 September 2010, but was subsequently extended to 9 July 2023. On 18 July 2005, the Association, Oersonskraal, Hlosi and Bakopane concluded a written shareholders' agreement aimed at regulating the legal relationship between them for purposes of conducting the mining activities on the Association's land (clause 3.1). Their shareholding in Oersonskraal is recorded to be Hlosi 65%, Bakopane 20% and the Association 15%. The shareholders' agreement defines Oersonskraal's business as 'the mining, beneficiating and sale of diamonds mined on the [Association's] property and all ancillary activities related and incidental to such mining, beneficiating and sale of diamonds' (clause 1.2.10). The shareholders agreed on their respective roles: the board of directors of Oersonskraal would be responsible for the management of Oersonskraal's business (clause 19); Hlosi for appointing a mining manager: operations to whom all employees of Oersonskraal report (clause 19); and Idada as the project manager and supplier of the mining operations and related activities (clause 23.9). The standard dividend policy is that dividends would be paid on a quarterly basis (clause 8). Oersonskraal would be committed to community upliftment by *inter alia* financially contributing a percentage of its monthly net profit to the Association (clause 17).

[8] During February 2007, Mr S Pakade, acting on behalf of Bakopane, brought certain machinery onto the Association's land, and commenced conducting mining operations, contrary to the provisions of the shareholders' agreement. The reason for Bakopane commencing with the mining operations was that members of the Association and Bakopane became frustrated by the fact that the mining activities did not commence in terms of the shareholders' agreement, as a result of problems which Manhattan Operations (Pty) Ltd (the predecessor in title of Idada) apparently experienced in complying with its obligations towards Oersonskraal. On 28 March

2007, the Association, Hlosi and Idada launched an interim interdict application against Bakopane and Messrs P. Pakade and S. Pakade to restrain Bakopane from undertaking the mining operations on the Association's land without the consent of the Association and in contravention of the shareholders' agreement, and, to account to the Association, Hlosi and Idada for its mining activities (the Interdict application). The late Mr Thembekile Malan Mkatshane, in his capacity as chairperson of the Association's committee, deposed to the founding affidavit in the interdict application. This court (Murphy J) granted the order sought on 11 April 2007 (the Murphy J order).

[9] On 11 July 2007, the Association, represented by its committee, brought an urgent application for contempt of court, *inter alia* against Bakopane, Hlosi and Idada, alleging that Hlosi and Idada, in contravention of the Murphy J order, joined Bakopane and continued with the mining operations on its land, also in contravention of the shareholders' agreement (the contempt of court application). The late Mr Mkatshane again represented the Association in his capacity as its chairperson of its committee. The matter was enrolled for hearing on 27 July 2007. This court (Poswa J) postponed the application *sine die* at the instance of Bakopane, Oersonskraal, Hlosi and Idada, to enable them to institute legal proceedings for the interpretation, variation and/or rescission of the Murphy J order.

[10] On 7 August 2007, Bakopane, Oersonskraal, Hlosi and Idada brought an application for the interpretation and variation of the Murphy J order (the variation application. On 13 August 2007, this court (Visser AJ) made the following order in the variation application:

'1. The application for a declaratory order, alternatively the variation or setting aside of the order of Murphy J, dated 11 April 2007, is dismissed

2. The applicants are ordered, jointly and severally, to pay the costs of the application.

3. It is declared that all respondents, mentioned in the order of Murphy J, dated 11 April 2007, are bound thereby.'

[11] Leave to appeal the Visser AJ order was sought, but refused in this court and in the Supreme Court of Appeal on petition. Mr Ephraim Mokoto (the ninth respondent in the present application) filed an affidavit in support of the application for leave to appeal to the Supreme Court of Appeal, in which he alleged that he was the newly elected chairperson – having been elected as such at a meeting of the Association held on 26 September 2007 – and that the Association was not opposing the application for leave to appeal. Leave to appeal was nevertheless refused. The strife between the two groups or committees within the Association – one led by Mr Mokoto and the other by the late Mr Mkatshane – each claiming to be the duly elected committee of the association, did not stop there. The intervention of the director–general was eventually sought.

[12] In order to bring finality to the interdict and the contempt of court applications, the Association launched yet another application against Bakopane, Messrs T Pakade and S Pakade, Oersonskraal, Hlosi, Idada, Mr Scheepers and Mr Mokoto on 1 August 2008. The founding affidavit was again deposed to by the late Mr Mkatshane on behalf of the Association. Therein he still maintained that he had been duly authorised by the Association's committee to represent the Association, and a resolution of the committee to that effect was annexed to the Association's founding affidavit. The relief claimed in the notice of motion *inter alia* was for a declarator that the respondents in that application were in contempt of the Murphy J order, the committal of Messrs T Pakade and S Pakade, Scheepers and Mokoto for contempt of court, and that the respondents in that application render 'a full account of diamonds, monies made and expended supported by vouchers, arising from the mining operations or activities conducted by the respondents on the properties since the inception of the mining activities' and a debatement of the account. The Association sought the following further relief:

‘5. Declaring that the committee of the applicant elected on 19 November 2006 is the only legitimate representative committee of the applicant until its term expires at the end of November 2008;

6. Declaring that all the resolutions taken by the eighth respondent [Mr Mokoto] and his group or alleged committee, or at its instigation including the resolution of 1 May 2008 to, inter alia, abandon all Court orders obtained by the Applicant including the interim interdict and attendant cost orders to be unlawful, invalid, and of no force and effect.’

[13] That application was resolved and by agreement between the parties this court (Hartzenburg J) on 19 August 2008 granted an order (the consent order), which in its presently relevant parts reads as follows:

‘2.1 A general meeting of the CPA [the Association] is to be arranged for the election of a committee on a date being not later than 9 November 2008, such date to be determined by the Director-General;

2.2 The Director-General is requested to act in terms of his powers as provided in the Act in order to enquire as to which persons qualify as members of the CPA and as to the composition of an up to date membership register of the CPA as intended in Regulation 8(b), read with clause 12 (viii) of the constitution of the CPA; the said register to be finalised by not later than 1 (one) week before the date of the AGM as determined by the Director-General;

2.3 The general meeting is to be conducted under the control and auspices of the Director-General;

2.4 Should the Director-General fail to assist as envisaged as above leave is granted to any of the parties who may be so advised, to approach the court on the papers filed of record in this matter, suitably supplemented, for a *mandamus* compelling same to act accordingly (but subject to any defence, whether based in fact or in law, upon which any official involved may rely).

3. Subject to paragraph 4, and until a committee has been elected as envisaged in paragraph 2, the respondents must render to the attorneys of record of both the committees alleged to be such in the papers a full account of diamonds, monies made and expended supported by vouchers, arising from such mining operations or activities which may have been conducted by any of them on the [Association's] property . . . since the inception of any such mining activities, including, but not limited to:

. . .

3.5 a debatement of the said account;

3.6 payment to the fourth respondent [Oersonskraal] of whatever amount appears to be due to it upon the debatement of the said account.

4. The accounting referred to in paragraph 3 will be rendered as follows:

4.1 The accounting pertaining to the period from the inception of mining operations will be delivered within 30 days of this order;

4.2 Subsequently it will be rendered within 30 days of each ensuing month.'

[14] Pursuant to the consent order, the director-general acted in terms of his powers as provided for in the Act, and a general meeting under his control and auspices was held on 12 July 2009. A committee comprising ten members was elected, and Mr Mokoto was appointed as the chairperson. New committees were elected at subsequent general meetings of the Association and the term of office of the last elected committee expired on 15 February 2014. The late Mr Mkatshane was appointed as the chairperson and Mr Mere the vice-chairperson of that last elected committee. It appears that there is at present no duly elected executive committee. Mr Skaaf, in the applicants' founding affidavit in the present application, states:

'12. This matter has a very long history, as appears from the case numbers above. In all the different stages to the conduct of this matter, the central figure that has been championing the cause of the Oersonskraal Community was Mr Thembekile Malan Mkatshane, the former chairperson of the first respondent [the Association].

13. In February 2015 Mr Mkatshane, sadly, passed on. Having died at such critical period in the issues that are the subject of the present and preceding applications, Mr Mkatshane left a void in terms of somebody to advance the interests of the community that he had, prior to his death, been passionate and committed about.

14. Prior to Mr Mkatshane's passing on, the first respondent had engaged the services of Sebeko Qoko Serage Attorneys. Subsequent to Mr Mkatshane's demise, nobody from the community was able to give meaningful instructions to the Erstwhile Attorneys in advancing this matter. Consequently, the matter has languished since the settlement order, with nobody assuming the role that had been played by Mr Mkatshane.'

[15] A restructuring in the shareholdings of the relevant companies occurred subsequent to the consent order. Mr Scheepers (the eighth respondent) used to be a shareholder in and director of Hlosi and Indaba, but he resigned as a director of each company after he had sold his shareholdings in each company. Idada became a wholly-owned subsidiary of Namakwa Diamonds Holdings (Pty) Ltd (Namakwa). Namakwa presently holds 74% of the shares in Hlosi, which in turn holds 65% of the shares in Oersonskraal. The balance of the shares in Oersonskraal are held by the Association (15%) and by Bakopane (20%).

[16] The 74 applicants in the present application describe themselves as 'Members of the Oersonskraal Community'. If it is accepted that they are members of the Association, they represent about 17.2% of the membership of 429. They seek an order in the following terms:

'1. pursuant to the order per the Honourable Hartzenburg J of 19 August 2008 under the above case number, the Director-General of the Department of Rural Development and Land Reform be ordered and compelled –

1.1 to arrange a general meeting of the Khanyisa Communal Property Association (the "CPA") on a date determined by the Director-General, within 90 days of this order;

1.2 to act in terms of his powers as provided for in the Communal Property Associations Act, No. 28 of 1996, as amended in order to enquire as to which persons qualify as members of the CPA and as to the composition of an up to date membership register of the CPA as intended in Regulation 8(b) read with clause 12(viii) of the constitution of the CPA; the said register to be finalised by no later than one week before the date of the general meeting as determined by the Director-General;

1.3 to ensure that the general meeting is conducted under the control and auspices of the Director-General;

2. the second to ninth respondents be ordered jointly and severally to render to the applicants through the applicant's attorneys of record a full account of diamonds, monies made and expended, supported by vouchers, arising from such mining operations or activities which were conducted by any of them or, in the case of the respondents cited being individuals, the entities of which such individual respondents were directors and / or managing minds, on the CPA property . . . since inception of any such mining activities;

3. the account in terms of order 2 above to include but not be limited to-

3.1 a full account of the quantity of all the diamonds mined, including the terms under which they were stored;

3.2 each and every monthly return (Form DME116) submitted to the Director of Mineral Economics in the department of mineral resources;

3.3 a copy of the register of unpolished diamonds won or recovered or disposed of;

3.4 each and every broker's note as proof of the sale of diamonds;

3.5 a debatement of the said account;

3.6 deposit of whatever amount appears to be due to the CPA into the trust account of the applicants' attorneys of record upon the debatement of the account and pending finalisation of the Director-General's enquiry as to which persons qualify as members of the CPA and as to the composition of an up to date membership register of the CPA in terms of order 1.2 above;

4. the account in terms of 2 above to be rendered within 30 days of this order;

5. costs of this application by the respondents, jointly and severally, the one paying the others to be absolved.'

[17] The applicants seek the relief in paragraph 1 of their notice of motion against the director-general of the Department of Rural Development and Land Reform pursuant to the consent order and on the basis that that order was not complied with, because the general meeting was not held by no later than 9 November 2008 (it was held on 12 July 2009) and an up to date membership register of the CPA was not prepared prior to the general meeting. However, the director-general was not a party to the proceedings in which the consent order was made and the consent order merely requested him to assist, as envisaged in paragraphs 2.1 – 2.3 thereof, failing which leave was granted to any of the parties to approach the court for a *mandamus* compelling the director-general to act in accordance with the order 'but subject to any defence, whether based in fact or in law, upon which any official involved may rely'. It is not suggested that any party to the consent order applied for such *mandamus* against the director-general to compose an up to date membership register of the CPA or to arrange for the holding of a general meeting on or before 9 November 2008 in order to elect a committee. Moreover, the fact is that such general meeting was held on 12 July 2009 under the control and auspices of the director-general and a committee was indeed elected. Committees were also elected in subsequent general meetings, the term of office of the last elected committee having expired on 15 February 2014. I nevertheless believe that a similar order should at this stage be granted; the Association is at present rudderless and

dysfunctional, and this has been the position since 15 February 2014, or since February 2015 when the late Mr Mkatshane passed on.

[18] Clause 22 of the Association's constitution affords any member or committee member or any other person having a material interest, to apply to court for appropriate relief or redress in the event of any refusal or failure on the part of the committee or the Association, *inter alia*, to implement the terms of the constitution in accordance with its intent and purpose. The fact that no committee has been elected since 15 February 2014 constitutes such failure on the part of the Association to implement the terms of the constitution in accordance with its intent and purpose. The applicants, therefore, have the requisite *locus standi* to seek an order compelling the director-general to intervene in and to arrange the holding of a general meeting, at which a committee is to be elected. Such relief, in my view, constitutes appropriate relief to redress the state of dysfunction in which the Association has found itself for the past few years.

[19] The case made out by the applicants in their founding affidavit was that no accounting was done and that no general meeting was arranged by the Department of Rural Development and Land Reform, which still leaves the CPA in a 'chaotic' state. Once the respondents' answering affidavits were filed, the applicants' case has been reduced to the complaints that the accounting supplied did not cover the period prior to May 2007; that no debatement took place; that a general meeting was held, but only on 12 July 2009; and that the director-general has failed to compose an up to date membership register of the CPA.

[20] The respondents who oppose the present application have a somewhat different version. They, *inter* alia, rely on the affidavit evidence of Mr Mokoto and of Mr Mere. Mr Mokoto states that he attended the general meeting on 12 July 2009 when an executive committee comprising ten members including himself was duly elected and that he was appointed as chairperson of the CPA. He states that the duly elected

executive committee accepted the accounting as had been rendered in terms of the consent order as sufficient and in due compliance therewith. Mr Mere, who was the vice–chairperson of the last elected committee of the CPA - the chairperson having been the late Mr Mkatshane - states that the term of office of that committee expired on 15 February 2014 and as vice-chairperson of the committee he was not made aware, whether from the records of the Association or otherwise, that the committee of the Association elected on 12 July 2009, or any of the subsequent appointed committees, were in any way dissatisfied with the compliance with the provisions of the consent order. He confirms that the committee of which he was the vice chairperson had no doubt that the consent order had been duly complied with by 12 July 2009, when a committee of the Association as contemplated in the consent order had been elected. It is furthermore the respondents' case that the two 'committees' were repeatedly invited to a debatement of the accounts, but they declined the invitations. The view I take of this case renders it unnecessary to attempt to resolve the factual disputes on the papers.

[21] The second to ninth respondents were not, in terms of the consent order, ordered to account to the present 74 applicants or to debate any such account with them. Instead, they were ordered to render accounts to the Association by means of rendering the accounts 'to the attorneys of record of both the committees alleged to be such in the papers' and only 'until a committee has been elected as envisaged in paragraph 2' of the consent order. Furthermore, it was the parties to the consent order which were ordered to debate the accounts amongst themselves. The consent order sought to resolve the conflicting claims of the two committees led by Mr Makoto and by the late Mr Mkatshane that each one is the duly appointed committee of the Association by providing for an election of a committee at a properly organised general meeting under the control and auspices of the Department of Rural Development and Land Reform. Until such time as the competing claims were settled by way of an election of the committee at a general meeting, the consent order provided for the accounting to be rendered to the Association by means of rendering the accounts to the attorneys of

record of both 'committees'. Although the accounting had to be rendered to both committees, it remained a process of accounting to the Association as such, and not of accounting to the individual members who aligned themselves with either of the two committees. Once the objective of electing a committee as contemplated in paragraph 2 of the consent order had been achieved, the consent order became discharged and the Association empowered to deal, through the committee thus elected, with any past, existing or future disputes relating to the mining operations on the Association's land. Once a properly elected single committee had been established, the obligation to account to both 'committees' fell away and insofar as it may have been wanting in any respect, it was for the Association's single elected committee to enforce the Association's rights.

[22] . The applicants brought this application because they state that it is not realistically possible to expect that all the different factions within the Oersonskraal community will adequately or at all be represented by the Association due 'to the clicks and divisions' within the Association. However, the Association's right to accounts and a debatement thereof arose from the mining rights awarded to Oersonskraal and the shareholders' agreement between Hlosi, Bakopane, the Association and Oersonskraal. The Association, in terms of s 8(6) of the Act, is a juristic person with perpetual succession regardless of changes in its membership. It acquires rights and incur obligations in its own name in accordance with its constitution. The 74 applicants in these proceedings are not acting on behalf of the Association. They, therefore, do not have the requisite *locus standi* to obtain the relief they claim in terms of paragraphs 2, 3 and 4 of their notice of motion. *LAWSA* Vol 4 part 2 para 192 states:

'It is an elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff, "because C is the party injured, and therefore the person in whom the cause of action is vested". This principle is usually referred to as the rule in *Voss v Harbottle* [(1843) 2 Hare 461] when applied to corporations, "but it has a wider scope that is fundamental to any rational system of jurisprudence"'.

(Footnotes omitted.)

[23] Finally, the matter of costs. Messrs Japie van Zyl Attorneys withdrew as attorneys of record for Bakopane, Mr S Pakade, Oersonskraal, Hlosi and Idada due to the attorneys not receiving further instructions from them regarding the opposition of this application. Oersonskraal, Hlosi and Idada are the main actors on the part of the respondents and Messrs Japie van Zyl Attorneys attempted up to the last possible moment to obtain instructions from them before withdrawing as the attorneys of record. Contrary to the practice and procedure of this court, no practice note and heads of arguments were filed prior to the hearing for Bakopane, Mr S Pakade, Oersonskraal, Hlosi and Idada. Messrs Japie van Zyl Attorneys, however, continued to represent Mr Scheepers, the eighth respondent, whose participation in the proceedings is negligible. Adv JW de Beer appeared at the hearing of this application for Bakopane, Mr S Pakade, Oersonskraal, Hlosi and Idada, and he argued the matter on their behalf without heads of argument. He essentially adopted the argument of Mr Scheepers.

[24] There seems to be a tendency of late for the provisions of the Practice Manual of this Division and of the Gauteng Local Division relating to the filing of practice notes and heads of argument in opposed motions to be disregarded, particularly by respondents. That practice must be firmly discouraged and the present is an appropriate case where that discouragement will take place. In this division, where there are so many opposed applications on the roll each week, the failure by parties to file practice notes and heads of argument places an unnecessary burden on the judges who need to prepare for the hearing of an opposed motions without knowing what arguments will be raised by the non-complying parties. The practice also infringes the right to a fair trial of complying parties, who, until the hearing, are left in the dark as to what arguments they need to meet and who are deprived of the opportunity to also consider the arguments in advance, to read and consider the case law on which reliance will be placed, to, if

necessary, undertake their own legal research, and to consider the counter-arguments and criticism against their own arguments.

[25] I, therefore, consider it appropriate in this instance to depart from the general rule that costs follow the event in so far as Bakopane, Mr S Pakade, Oersonskraal, Hlosi and Idada are concerned and to disallow their costs of opposition and to order the main actors - Oersonskraal, Hlosi and Idada – to pay Mr Scheepers' costs of opposition. In making this order I also take into account that the Oersonskraal community is disadvantaged and indigent. A reading of the voluminous record in this application gives one the sense of frustration which the members of that community has in not receiving any financial benefit in return for the diamond mining activities on their land. As far as the costs of two counsel for Mr Scheepers is concerned, I am of the view that neither the factual nor the legal difficulties in this case are such as to warrant the engagement of two counsel.

[26] The costs order which I propose to make – each party to pay his, her or its own costs and for Oersonskraal, Hlosi and Idada to pay the costs of Mr Scheepers - is made without first having heard Bakopane, Mr S Pakade, Oersonskraal, Hlosi, Idada and Mr Scheepers thereon, and it, therefore, is open to them, or their counsel, within a reasonable time, to be heard and to make representations for a variation of the costs orders. (See *LAWSA* Vol 3 Part 2 Second Edition para 298.)

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

1. The Director-General of the Department of Rural Development and Land Reform is ordered to:

1.1 arrange a general meeting of the Khanyisa Communal Property Association (the CPA) on a date determined by the Director-General, within 90 days of this order;

1.2 act in terms of his powers as provided for in the Communal Property Associations Act 28 of 1996, in order to enquire as to which persons qualify as members of the CPA and as to the composition of an up to date membership register of the CPA as contemplated in Regulation 8(b) read with clause 12 (viii) of the constitution of the CPA; the said register to be finalised by no later than one week before the date of the general meeting as determined by the Director-General;

1.3 ensure that the general meeting is conducted under the control and auspices of the Director-General.

2. The application against the other respondents is dismissed.

3. Except the eighth respondent, each party is to pay his, her or its own costs of the application.

4. The fifth, sixth and seventh respondents are to pay the eighth respondent's costs of opposing the application.

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P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	16 October 2018
Date of Judgment:	31 October 2018
Applicants' counsel:	Adv. B.P. Ngutshana
Instructed by:	Maoba Attorneys, Kwaggasrand, Pretoria
Counsel for 2nd, 3rd,	
5th,6th and 7th respondents:	Adv. L.W. de Beer
Counsel for 8th respondent:	Adv. R.J. Raadt SC (assisted by Adv J. Malan)
Instructed by:	Japie van Zyl Attorneys

C/o Couzyn Hertzog & Horak Inc., Brooklyn, Pretoria