



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 231/14

In the matter between:

**BAKGATLA-BA-KGAFELA COMMUNAL
PROPERTY ASSOCIATION**

Applicant

and

BAKGATLA-BA-KGAFELA TRIBAL AUTHORITY

First Respondent

KGOSI NYALALA MOLEFE JOHN PILANE

Second Respondent

**MINISTER OF RURAL DEVELOPMENT
AND LAND REFORM**

Third Respondent

**DIRECTOR-GENERAL OF THE DEPARTMENT OF
RURAL DEVELOPMENT AND LAND REFORM**

Fourth Respondent

Neutral citation: *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* [2015] ZACC 25

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Molemela AJ, Nkabinde J, Theron AJ and Tshiqi AJ

Judgments: Jafta J (unanimous)

Heard on: 28 May 2015

Decided on: 20 August 2015

Summary: Communal Property Association Act 28 of 1996 — interpretation of section 5(4) — means provisional association loses right to use

land on expiry of 12 months from date of registration unless period is extended — provisional association does not cease to exist

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Land Claims Court):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The order of the Land Claims Court is re-instated.
5. The Minister of Rural Development and Land Reform and the Director-General of the Department of Rural Development and Land Reform are ordered to pay the costs of Bakgatla-Ba-Kgafela Communal Property Association in the Supreme Court of Appeal and this Court. Those costs are to include costs of two counsel where applicable.

JUDGMENT

JAFTA J:

Introduction

[1] This is an application for leave to appeal against an order of the Supreme Court of Appeal which overturned a judgment of the Land Claims Court. The matter concerns the interpretation and application of section 5 of the Communal Property

Association Act (Act).¹ The Act establishes communal property associations for the purpose of holding land restored to communities. It was passed to give effect to the constitutional right of communities to restitution of land dispossessed in terms of discriminatory laws or practices of the apartheid regime.

[2] The applicant is Bakgatla-Ba-Kgafela Communal Property Association (Association). The Association was established in terms of the Act. It cited as respondents, Bakgatla-Ba-Kgafela Tribal Authority (Tribal Authority) and Kgosi Nyalala Molefe John Pilane (Kgosi Pilane). The Minister of Rural Development and Land Reform (Minister) together with the Director-General of the Department (Director-General) were joined in this Court as the third and fourth respondents.

[3] Underlying the demand for the applicant's registration is the Bakgatla-Ba-Kgafela community's desire to regain ownership of the communal land it lost under apartheid rule. For decades restitution of land was the rallying point for the struggle against colonialism and apartheid. Regaining land ownership was the primary object of that struggle.² It is therefore not surprising that the Constitution guarantees land restitution and reform.³

Background

[4] The Community occupies 32 villages in the Moses Kotane Municipal area, North West Province. During the apartheid era, this Community was dispossessed of and forcibly removed from its land, on which a game reserve was established. Land dispossession and forced removals of black people from their land were commonplace

¹ 28 of 1996.

² Struggle songs like "*Sikhalela Izwe Lwethu*" (we mourn the loss of our land) were composed and sung by activists at meetings.

³ See section 25(7) of the Constitution. This section provides:

"A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."

in that era. To remedy this injustice, the Constitution guarantees the right of individuals and communities to reclaim their lost land.

[5] The Restitution of Land Rights Act⁴ regulates the process of claiming restitution of land in the exercise of this constitutional right. However this piece of legislation does not create mechanisms in terms of which communities may possess land restored under the restitution process. Those mechanisms are established by the Act.

[6] Acting in terms of the Restitution of Land Rights Act, the Community lodged a claim for the restitution of land it lost under the apartheid regime. The claim was approved by the Minister in October 2006 in terms of section 42D of the Restitution of Land Rights Act.⁵ Meanwhile, the Community had set in motion the process of establishing an association through which it intended to take possession of the restored land. Meetings were held in various villages which culminated in the adoption of a constitution for the Association on 3 December 2005. These meetings were held under the supervision of officials of the Department of Rural Development and Land Reform (Department) whose role was to advise the Community on the requirements of the Act.

[7] The application for the registration of the Association was submitted to the Department. The official who was charged with the responsibility of satisfying himself that the Association qualified for registration under the Act recommended its registration.⁶ However, the Association was not registered, owing to a dispute between the Community on the one hand, the Tribal Authority and Kgosi Pilane on

⁴ 22 of 1994.

⁵ Section 42D gives the Minister the power to settle a land claim if satisfied that a claimant is entitled to restitution.

⁶ Section 8(3)(a) of the Act provides:

“If the Director-General is satisfied that the association qualifies for registration he or she shall refer the application, constitution and his or her own written consent, to the Registration Officer, who shall register the association in the prescribed manner, allocate a registration number, and issue a certificate of registration.”

the other. The Tribal Authority and Kgosi Pilane preferred a trust as an entity through which the land was to be held, while the Community wanted an association.

[8] This dispute attracted the intervention of the Minister who suggested that a provisional association be registered to enable the parties to resolve the matter within a period of 12 months. The present Association which is the applicant in these proceedings was registered as a provisional association. The land was transferred and registered in the name of the Association.

[9] But the dispute between the Community, the Tribal Authority and Kgosi Pilane was not resolved within 12 months as was envisaged at the meeting with the Minister. Nor was Bakgatla-Ba-Kgafela Communal Property Association registered as a permanent association.

[10] In January 2011, the Director-General informed the Association that the term of office of members of its executive committee had lapsed and suggested that new members be elected. Meetings were held in various villages, leading up to the annual general meeting of 30 July 2011 which was attended by 29 out of the 32 villages. The Association's constitution was re-adopted at this annual general meeting. The meeting was held in the presence of a representative of the Department, an attorney in private practice, whose role was to see to it that the requirements of the Act were met.

[11] Having declared the meeting to have complied with the necessary requirements, the departmental representative completed the relevant form that contained a report to the Department. This report shows that notice of the meeting was widely published in the relevant villages. Eighty six people attended this annual general meeting and all voted in favour of the constitution. Notably, the report records "not applicable" against the column that requires an indication to be made if interests of other persons would be negatively affected by the adoption of the constitution.

Litigation history

[12] When the Department failed again to register the Association as a permanent one and issue a certificate, it instituted proceedings in the Land Claims Court. The initial relief sought by the Association was an order directing the Department to release the Association's certificate of registration and interdicting and restraining Kgosi Pilane from intimidating, interfering and influencing officials of the Department in their dealings with the Association. In its amended notice of motion, the Association abandoned the initial claim and instead sought a declaration to the effect that it was established in compliance with section 8 of the Act. It also sought an order directing the Director-General to effect permanent registration of the Association. The application was opposed by the Minister, the Tribal Authority and Kgosi Pilane.

[13] Apart from raising *in limine* points, the respondents disputed some of the facts alleged by the Association in its papers. In view of the dispute of facts, the Land Claims Court⁷ referred the matter for the hearing of oral evidence. Upon conclusion of the hearing, that Court dismissed as lacking merit, the points that it had no jurisdiction to hear the case and that the Association had no legal standing to institute the proceedings. The Court granted the following order:

- “1. The Applicant is declared an Association that was established by a community as envisaged in the definition of “Community” in the Communal Property Association Act 28 of 1996;
2. The Applicant was entitled to be registered permanently as an association by the Thirteenth Respondent;
3. The Thirteenth Respondent is directed to effect the permanent registration of the Bakgatla-Ba-Kgafela Communal Property Association: CPA/07/2032/A as such in the manner prescribed by Act 28 of 1996 and upon registration to issue a certificate of registration in terms of section 8(3) of such Act.”

⁷ *Bakgatla-Ba-Kgafela Communal Property Association v Minister of Rural Development and Land Reform and Others* [2013] ZALCC 16 per Matojane J.

In the Land Claims Court, the Director-General was the fourteenth respondent. It was he who was directed to register the Association.

Supreme Court of Appeal

[14] Dissatisfied with the order, the Tribal Authority and Kgosi Pilane appealed to the Supreme Court of Appeal. The Supreme Court of Appeal held that the Association's status was at the heart of the appeal and confined itself to deciding that issue only.⁸ In determining this issue, that Court based its decision squarely on section 5(4) of the Act which it construed to mean that a provisional association exists for a period of 12 months from the date of registration unless the Director-General extends the period for a further 12 months. Since it was common cause that no extension had been granted, the Supreme Court of Appeal concluded that the Association had ceased to exist on the expiry of 12 months.⁹ Consequently the order of the Land Claims Court was set aside.

Leave to appeal

[15] The Association seeks to appeal against the order of the Supreme Court of Appeal. For the Association to succeed, it must show that the matter falls within the jurisdiction of this Court and that it is in the interests of justice for leave to be granted. As stated earlier, this case concerns the interpretation and application of the provisions of the Act that was passed to give effect to the rights in section 25 of the Constitution. The interpretation of this legislation constitutes a constitutional issue.¹⁰

[16] The interests of justice favour granting leave. The matter raises a constitutional issue relating to the restitution of land, dispossessed under apartheid, to communities

⁸ *Bakgatla-Ba-Kgafela Tribal Authority v Bakgatla-Ba-Kgafela Tribal Communal Property Association* [2014] ZASCA 203 at para 7.

⁹ *Id* at para 12.

¹⁰ *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC); and *Dudley v City of Cape Town and Another* [2004] ZACC 4; 2005 (5) SA 429 (CC); 2004 (8) BCLR 805 (CC).

in the realisation of the right guaranteed under section 25(7) of the Constitution. This Court has not considered a case of this nature before. Moreover, it is likely that this Court will construe the relevant provisions differently. Consequently there are prospects of success and leave to appeal must be granted.

Issue

[17] The main issue arising from the judgment of the Supreme Court of Appeal is whether the Association had legal standing to institute these proceedings. The answer to this question depends on a proper interpretation of section 5(4) of the Act, which was the foundation of the conclusion reached by the Supreme Court of Appeal. But before construing the relevant provision, it is necessary to outline the scheme of the Act.

Scheme of the Act

[18] The Act derives its force from the Constitution to which it is inextricably linked.¹¹ In section 25(7), the Constitution recognises and protects rights in land which go beyond registered ownership.¹² Where it is possible, the Constitution entitles a community to claim restitution of the dispossessed land or equitable redress. The purpose of the Act is to enable communities to form communal property associations through which they may acquire and possess land that belongs indivisibly to the entire community.¹³

[19] There are two forms of associations that may be established in terms of the Act. They are a provisional association and a permanent association. Ordinarily a provisional association is created as a preliminary step to establishing a permanent

¹¹ See para 35 below.

¹² Above note 3.

¹³ The long title of the Act provides:

“To enable communities to form juristic persons, to be known as communal property association 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.”

association which must satisfy the more exacting requirements of section 8. A community that desires to register a provisional association must apply to the Director-General for registration.¹⁴ If the Director-General is satisfied that the provisional association qualifies to be registered, she must give written consent to the Registration Officer who must register the association.¹⁵

[20] A provisional association qualifies for registration only if it meets the requirements of section 5(2).¹⁶ The application for registration must show that the applicant community constitutes a community envisaged in section 2 of the Act. The application must also reflect the name of the provisional association, the names of its

¹⁴ See section 5(1) of the Act.

¹⁵ See section 5(3) of the Act.

¹⁶ Section 5(2) provides:

“An application for registration in terms of subsection (1) shall contain—

- a) the intended name of the provisional association;
- b) information demonstrating that the community is a community as contemplated in section 2;
- c) a clear identification of any land or right to land or other right which may be acquired by the provisional association;
- d) a list of names and, where readily available, identity numbers of the intended members of the provisional association: Provided that where it is not reasonably possible to provide the names of all intended members concerned, the application shall contain—
 - i. principles for the identification of other persons entitled to be members of the provisional association; and
 - ii. a procedure for resolving disputes regarding the right of other persons to be members of the provisional association;
- e) a list of the names of the interim committee democratically elected to represent the provisional association during the period prior to registration as an association;
- f) an undertaking signed by the members of the interim committee that, pending the adoption of the final constitution by the members of the provisional association in terms of section 7 and the registration thereof in terms of section 8, the provisional association will comply with the principles as stated in section 9;
- g) any other information reasonably required by the Director-General relating to the right to occupy and use land and the settlement of the community on such land.”

members and where readily available, their identity numbers. It must also identify in clear terms the land to be acquired by the provisional association.¹⁷

[21] Section 5(2)(e) and (f) demonstrates beyond any doubt that a provisional association enjoys a limited lifespan. These provisions require the application for registration to provide the names of the members of the interim committee who would be charged with the responsibility of representing the provisional association before it is registered as a permanent association. Members of the interim committee must, the section demands, be democratically elected. The interim committee must furnish an undertaking signed by the members, to the effect that pending the adoption of a constitution by members of the provisional association and the registration of the association in terms of section 8, the provisional association will comply with the principles stated in section 9 of the Act.

[22] Section 8 governs the registration of a permanent association. Therefore the reference in section 5(2)(f) to an undertaking that the provisional association will comply with section 9 pending registration in terms of section 8 means that the Act contemplates a conversion of a provisional association into a permanent one. This construction is further buttressed by section 5(4)(b), which precludes a provisional

¹⁷ Section 2(1) of the Act provides:

“The provisions of this Act shall apply to a community—

- a) which by order of the Land Claims Court is entitled to restitution under the restitution of Land Rights Act, 1994 (Act 22 of 1994), where that Court has ordered restitution on condition that an association be formed in accordance with the provisions of this Act;
- b) entitled to or receiving property or other assistance from the State in terms of an agreement or in terms of any law, on condition that an association be formed in accordance with the provisions of this Act;
- c) approved by the Minister in terms of subsection (2), and to which any property has been donated, sold or otherwise disposed of by any other person on condition that an association be formed in accordance with the provisions of this Act;
- d) approved by the Minister in terms of subsection (2), and which is a group acquiring land or acquiring rights to land and which wishes to form an association in accordance with the provisions of this Act.”

association from alienating rights in land before a permanent association is registered.¹⁸

[23] Registration of a permanent association is approved by the Director-General in terms of section 8. Such an application must be accompanied by a report compiled by an authorised official in terms of section 7(2) of the Act.¹⁹ The contents of this report relate to what happened at the meeting at which the association's constitution was adopted. They include whether there was proper and effective notice of the meeting; the number of members of the community present; the number of those who voted in favour of the constitution and the number of those who voted against it; views of dissenting persons; and whether the interests of any person are likely to be adversely affected by the adoption of the constitution. If the Director-General or her legal delegate is not satisfied that the application complies with the Act, she is obliged to inform the applicant community about the shortcomings in their application so that they can be rectified.²⁰ In addition, the Act requires the Director-General to assist the community to achieve a permanent registration of an association.²¹

¹⁸ Section 5(4) is quoted in para 37 below.

¹⁹ Section 7(2) reads:

“An authorised officer shall attend the meeting or meetings contemplated in subsection (1), to take minutes of the proceedings, to witness the adoption of the constitution and to prepare a report setting out his or her observations in relation to—

- a) whether the notice of the meeting was effective in ensuring the presence of members of the community at the meeting;
- b) the number of members of the community present at the meeting or validly represented at the meeting, and whether various interest groups in the community were represented at such meeting;
- c) the number of members of the community who voted in favour of and the number who voted against the adoption of the constitution or any specific provisions thereof;
- d) whether the interests of any person or group of persons are likely to be adversely affected as a result of the adoption of the constitution;
- e) the views of any dissenting person; and
- f) any other matter which the Minister may prescribe or which may be relevant to the exercise of the Director-General's discretion.”

²⁰ See section 8(4) of the Act.

²¹ See section 8(5) of the Act.

[24] An association qualifies to be registered in terms of section 8(2) if—

- “a) the provisions of this Act apply to the community concerned;
- b) the association has as its main object the holding of property in common;
- c) the constitution adopted by it complies with the principles set out in section 9;
- d) the constitution adopted by it deals with matters referred to in the Schedule;
- e) the meeting or meetings referred to in section 7 were attended by a substantial number of the members of the community; and
- f) the resolution to adopt the draft constitution was supported by the majority of the members of the community present or represented at the meeting or meetings: Provided that the Director-General may cause an association to be registered if he or she is satisfied that—
 - i. there has been substantial compliance with the provisions of paragraphs (a) to (f) of this subsection;
 - ii. the constitution reflects the view of the majority of the members of the association; and
 - iii. the constitution has been adopted through a process which was substantially fair and inclusive.”

[25] One of the essential requirements of section 8 is that the constitution of the association must comply with the principles in section 9 of the Act. This section lists five principles that underscore the democratic nature of associations established in terms of the Act. The first principle is that an association’s constitution must embrace fair and inclusive decision-making processes that afford members the opportunity to participate in the association’s decisions. These include decisions to dispose of or encumber the association’s property, and termination of membership of any person on reasonable grounds, following a fair hearing.

[26] The second principle is equality. An association's constitution must proscribe discrimination of any kind, irrespective of whether it is direct or indirect, in particular discrimination based on "race, gender, sex, ethnicity or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language".²² Notably, this equality clause does not leave room for fair discrimination. The only exception recognised is differentiation based on different classes of membership that existed before the Act was enacted. But even then, all members in a single class must enjoy equal rights.

[27] The third principle is that the constitution must create democratic processes that govern the manner in which the association's meetings are to be conducted. The constitution must confer upon all members the rights: to receive adequate notice of all general meetings; to attend, speak and vote at the meetings; to receive copies of minutes and records of decisions taken at those meetings; and to inspect and make copies of financial statements of the association.²³

[28] The fourth principle entails fair access to the property of the association. The constitution must require the association to obtain consent of the majority of the members before it can sell or encumber property. Further, the constitution must also require the association to manage property for the benefit of all members in a participatory and non-discriminatory manner. Members of the association may only be excluded from access to its property in accordance with the procedures set out in its constitution.²⁴

[29] The last principle relates to accountability and transparency. The constitution must enable members to hold the association accountable by imposing fiduciary responsibilities on members of the executive committee in relation to the association

²² See section 9(1)(b)(i) of the Act.

²³ See section 9(1)(c)(i) to (v) of the Act.

²⁴ See section 9(1)(d)(i) to (iii) of the Act.

and its general members. The constitution should require committees to exercise their powers in the best interest of all members, without any advantage to themselves. Effective financial management must form part of the constitution's requirements, which must include opening a bank account in the name of the association into which all its cash should be deposited. The constitution must also require that the association's financial records be subjected to an independent verification annually.

[30] There can be no doubt that these principles safeguard the interests of members of traditional communities and empower them to participate in the management of a communal property. The creation of an association introduces participatory democracy in the affairs of traditional communities. All members of the community are afforded an equal voice in matters of the association and the property it holds on behalf of the community.

[31] The Act is a visionary piece of legislation passed to restore the dignity of traditional communities. It also serves the purpose of transforming customary law practices. For example, in some traditional communities where communal land is held and controlled by a traditional leader, women are excluded from the allocation of land for individual occupation and use.²⁵ This practice is inconsistent with the equality clause in the Bill of Rights which prohibits discrimination based on, among other grounds, gender or marital status.²⁶ This inconsistency necessitates the development of customary law as mandated by section 39(2) of the Constitution.²⁷ This duty has been affirmed by this Court in a number of cases.²⁸ Customary law remains in force to the extent that it is in line with the Constitution and Acts of

²⁵ Bennett *Customary Law in South Africa* 1 ed (Juta and Company Ltd, Cape Town 2004) at 391.

²⁶ See sections 9(3) and 9(4) of the Constitution.

²⁷ Section 39(2) provides:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

²⁸ See for example *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC); *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC); *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC).

Parliament dealing with matters to which customary law applies. Under the Act unmarried women who are members of traditional communities enjoy rights equal to those held by men, when it comes to access to communal property, and management of the affairs of an association.

[32] The democratic principles set out in section 9 of the Act also curb the general power of removal in terms of which traditional leaders banished people from their neighbourhoods for political reasons and without any hearing.²⁹ Before the establishment of a democratic order in this country, courts held that banishment orders issued by traditional leaders were not contrary to the principles of natural justice despite the fact that those on whom such orders applied were not given a hearing before the orders were issued.³⁰ In later decisions the banishment orders issued by traditional leaders were called “trekpass” orders.³¹ The traditional leader was required to consult the tribal council only before issuing the order. The case law referred to here shows that, by executive decree, traditional leaders restrained the personal freedom of members of their communities. This brought about untold suffering to those on whom the trekpass orders applied.

[33] The Act seeks to transform customary law and bring it in line with the Constitution. At the same time, the Act extends the fruits of democracy to traditional communities that are still subject to customary law. This is the context in which these provisions must be read and understood.

Approach to statutory interpretation

[34] It is by now trite that section 39(2) of the Constitution has introduced a new approach to the interpretation of statutes. The section obliges courts to promote “the spirit, purport and objects of the Bill of Rights” when construing legislation. This new

²⁹ Above n 26 at 386-7.

³⁰ *Mokhatle and Others v Union Government* 1926 AD 71; *R v Mpanza* 1946 AD 763; *Kuena v Minister of Native Affairs* 1955 (4) SA 281 (T); *Lengisi v Minister of Native Affairs* 1956 (1) SA 786 (C); and *Masenya v Seleka Tribal Authority and Another* 1981 (1) SA 522 (T) (*Masenya*).

³¹ *Masenya* id at 524.

approach has been described as “a mandatory constitutional canon of statutory interpretation.”³² The duty to seek an interpretation that promotes the objects of the Bill of Rights arises even where the parties have not raised the issue because the obligation imposed by the section is, as was observed in *Phumelela*,³³ mandatory.³⁴

[35] Consistent with section 39(2), this Court laid down the right approach to construing legislation similar to the Act in *Goedgelegen Tropical Fruits*.³⁵ There, Moseneke DCJ reaffirmed the approach in these terms:

“It is by now trite that not only the empowering provision of the Constitution but also of the Restitution Act must be understood purposively because it is remedial legislation umbilically linked to the Constitution. Therefore, in construing ‘as a result of past racially discriminatory laws or practices’ in its setting of section 2(1) of the Restitution Act, we are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.”³⁶ (Footnotes omitted.)

[36] Therefore in construing section 5(4) of the Act, we are obliged not only to avoid an interpretation that clashes with the Bill of Rights but also to seek a meaning

³² *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 43.

³³ *Phumelela Gaming and Leisure Limited v Grundlingh and Others* [2006] ZACC 6; 2006 (8) BCLR 883 (CC).

³⁴ *Id* at paras 26-7.

³⁵ *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 53.

³⁶ *Id*.

of the section that promotes the rights of the Bakgatla-Ba-Kgafela Traditional Community to restitution of land. Had the Supreme Court of Appeal borne this duty in mind, it could have attached a different meaning to the section. A meaning that would be consonant with the purpose of the Act.

Meaning of section 5(4)

[37] Section 5(4) of the Act reads:

“Upon registration of a provisional association—

- (a) the provisional association may acquire a right to occupy and use land for a period of 12 months from the date of registration of the provisional association: Provided that the Director-General may extend the period of 12 months for a further period of 12 months only if he or she extends the period referred to in subsection (5) for a further period of 12 months;
- (b) the provisional association shall not, until the registration of an association in terms of this Act, in any way alienate such right in land;
- (c) the provisional association shall be a juristic person with the capacity to sue or be sued.”

[38] A closer examination of the text reveals that upon registration, a provisional association assumes a particular status in law. It is clothed with the legal standing to sue or be sued. The section further confers certain rights on the provisional association. It acquires the right to occupy and use the land identified in its application for registration. It will be recalled that the purpose of forming a provisional association is to acquire communal rights in land. But since registration of a provisional association constitutes a temporary measure, the right to occupy and use land may be exercised for a limited period of 12 months, pending registration of a permanent association.

[39] The applicant community is afforded time to comply with the requirements of section 8 which will enable it to obtain a permanent registration. But if, for example, a final constitution is not adopted by the community within 12 months, the Director-General may be requested to extend the period within which the provisional association occupies and uses the land for a further 12 months. However the Director-General's power to grant an extension depends on the condition that an extension is also granted in terms of section 5(5). It will be remembered that this section empowers the Director-General to give an extension for the purposes of adopting a final constitution so that a permanent registration may be granted.

[40] If the Director-General does not extend the period for the adoption of the constitution, she or he cannot grant an extension for the provisional association to continue to exercise the right to occupy and use the land, beyond the initial period of 12 months. Section 5(5) also authorises the Director-General to prepare a constitution for the provisional association where the association fails to adopt one. However, the constitution prepared by the Director-General must be approved by the Minister before a permanent registration is effected.

[41] The exercise of land rights by a provisional association does not include the right to alienate the land in question or the disposal of other rights. This is expressly precluded by section 5(4)(b) of the Act.

[42] In the context of section 5(4), reference to the period of 12 months is made simply in relation to the exercise of the right to occupy and use land. The section makes no mention of the provisional association's lifespan at all. Consequently, the Supreme Court of Appeal erred in assigning to the section the meaning that the provisional association ceases to exist upon the expiry of the initial 12 months, unless an extension is granted. As a result, the conclusion that the present Association did not have legal standing to institute these proceedings cannot be sustained.

[43] But the construction of section 5(4) is not the only ground that renders incorrect the Supreme Court of Appeal's finding on standing. The evidence on record shows plainly that at the time of the Minister's intervention, the constitution for the Association had been adopted and other requirements for registration had been met. The official to whom the power to approve registration was delegated, had recommended registration on being satisfied that the Association qualified for it.

[44] In terms of the definitions section of the Act, a permanent association "means a communal property association which is registered or qualifies for registration in terms of section 8". The plain meaning of this definition is that this type of an association comes into existence in two ways. The first is where it is registered in terms of section 8. The second is where it qualifies for registration in terms of that section and its registration is still to be effected. Therefore, on the face of the Act, the Association was established as soon as it qualified for registration.

[45] A proper reading of the definition of a permanent association indicates that where a provisional association was registered, at some point, the provisional association may co-exist with the permanent association. This would arise as soon as the requirements for permanent registration are met and before the application for its registration is made. From that moment it appears that the two associations would continue to exist side by side until deregistration of the provisional association. Section 13 of the Act empowers the Director-General to deregister a provisional association upon a written application for deregistration made to him or her. Such application must meet the conditions listed in section 13(2).³⁷ What is important though is the fact that a permanent association acquires rights only upon registration.³⁸

³⁷ Section 13(2) provides:

"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."

³⁸ See section 8(6) of the Act.

The assets of a provisional association are transferred to the permanent association at the time the provisional association is deregistered.³⁹

Duties of the Director-General

[46] The Act imposes various duties on the Director-General. In the main, the Act requires the Director-General to ensure that its objects are realised.⁴⁰ In implementing the Act, the Director-General is charged with the responsibility of furnishing all traditional communities with information about the Act. This may take the form of pamphlets and other documents prepared and distributed by the Director-General in various communities. These documents must be in the language spoken in a particular community for them to be widely accessible.

[47] If a traditional community contemplates adopting a constitution for an association, it must inform the Director-General, who must assign an authorised officer to attend the meeting where the constitution would be adopted. The authorised officer must compile a report on issues listed in section 7(2) and pertaining to the meeting. This report forms part of information considered in determining whether to register an association or not. If the constitution is not adopted because of some dispute, it falls on the Director-General to appoint a conciliator to facilitate resolution of the dispute.⁴¹ The Director-General is also mandated to appoint a suitably qualified person to assist a traditional community in drafting a constitution.⁴²

[48] Once the constitution is adopted, the relevant community must submit it, together with other prescribed information, to the Director-General. Any member of

³⁹ Section 8(6)(f) provides:

“Upon registration—

in the case of an application by a provisional association, the provisional association shall be deregistered and its assets transferred to the association.”

⁴⁰ Section 10 of the Act.

⁴¹ Section 10(2) of the Act.

⁴² Section 6(2) of the Act.

the community who has a complaint against the process leading up to the adoption of the constitution may lodge the complaint with the Director-General who may withhold registration of the association, pending the resolution of the complaint.⁴³ It is also the duty of the Director-General to examine a constitution submitted for registration to determine if it complies with the principles in section 9. The Director-General may suggest amendments to make that constitution compliant with section 9.⁴⁴ If a community fails to adopt a constitution during the currency of a provisional association, the Director-General is empowered to draft a constitution for that community.⁴⁵

[49] Once registration is effected, the Director-General assumes other responsibilities in respect of the registered association. She may inspect the affairs of the association to determine whether it continues to comply with the Act and its constitution.⁴⁶ In performing this function, the Director-General may demand to be furnished with any relevant information.⁴⁷ In carrying out inspections, the Director-General may peruse and make copies of any document relating to the affairs of an association and may also subpoena any person with relevant information.⁴⁸ If a dispute arises within an association, the Director-General must hold an enquiry or appoint a conciliator to assist in resolving the dispute.⁴⁹ She may even initiate proceedings to have an association placed under administration, if the association is unable to pay its debts.⁵⁰ The Director-General must help any member of an association to challenge the validity of transactions which do not comply with section 12 of the Act.

⁴³ Section 7(4) of the Act.

⁴⁴ Section 6(4) of the Act.

⁴⁵ Section 5(5) of the Act.

⁴⁶ Section 11(2) of the Act.

⁴⁷ Section 11(3) of the Act.

⁴⁸ *Id.*

⁴⁹ Section 11(6)(a) and (c) of the Act.

⁵⁰ Section 13(1) of the Act.

[50] All these obligations illustrate the deep involvement of the Director-General in ensuring that the objects of the Act are achieved. It is clear from the scheme of the Act that once a traditional community expresses a desire to form an association, the Director-General must do everything permissible to assist the community to accomplish its goal. She is required to make certain that every obstacle in the way of registration of an association is removed.

[51] In this matter, the Director-General did not approach the process of registration in the spirit demanded by the Act. He opposed registration on the basis of shortcomings without helping the community to remedy them. This conduct by the Director-General was not consistent with the recommendation made by his delegate. Under a mistaken understanding of the Act, the Director-General adopted a wholly inappropriate response to the Community's legitimate request for registration.

Remedy

[52] It follows that the order of the Supreme Court of Appeal must be set aside. The effect of this would be that the order of the Land Claims Court is revived. There appears to be no basis for this Court to interfere with factual findings made by the Land Claims Court that the requirements of section 8 were satisfied. Some of the crucial findings of that Court were accepted by the Supreme Court of Appeal, even though it narrowed down the issue before it to the question of standing.

[53] Moreover, the recommendation that the Association qualifies for registration constitutes an administrative action that remains in existence until set aside. For as long as it is not set aside the recommendation is capable of giving rise to a valid registration, regardless of whether the recommendation was valid or not. In *Kirland Investments*⁵¹ this Court emphasised the fact that void administrative actions may have legal consequences if not set aside and that officials may not disregard them. In that case Cameron J said:

⁵¹ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC).

“The question is thus whether, despite its vulnerability to review, the approval given to Kirland constituted administrative action. To argue otherwise is at odds with both the Constitution and PAJA, which proceed on the premise that administrators may err, and even that they may err grossly. When they do, their actions are not nullities. They exist in fact and may have legal consequences. The solution is to challenge the decision on review.”⁵²

[54] Although the Minister supported the setting aside of the order of the Supreme Court of Appeal, his counsel argued that the matter be referred to mediation. There is simply no legal basis for the request in the context of the present matter. Once an association qualifies to be registered, the Director-General or her delegate has no discretion but to register the association. The fact that a traditional leader or some members of the traditional community prefer a different entity to the association is not a justification for withholding registration and imposing mediation on the parties.

[55] Where a traditional community or the majority of its members as was the position in this case, have chosen the democratic route contemplated in the Act, effect must be given to the wishes of the majority. In his report in terms of section 7(2) of the Act, the Department’s representative recorded that there were no interests negatively affected by the adoption of the Association’s constitution. Accordingly, there is no impediment to the registration of the Association. Instead, by effecting registration, the Department would be creating a platform for democracy to flourish among the Bakgatla-Ba-Kgafela Traditional Community.

Costs

[56] As the Association has succeeded in this Court, I cannot think of any reason why it should not be awarded costs. The respondents did not advance any reason for denying the Association costs. However it is fair to order the Minister and the Director-General to pay those costs. It was the Minister’s intervention and the stance adopted by the Director-General subsequently which prevented the registration of the

⁵² Id at para 90.

Association. They should bear the costs both in this Court and in the Supreme Court of Appeal.

Order

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

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside.
4. The order of the Land Claims Court is re-instated.
5. The Minister of Rural Development and Land Reform and the Director-General of the Department of Rural Development and Land Reform are ordered to pay the costs of Bakgatla-Ba-Kgafela Communal Property Association in the Supreme Court of Appeal and this Court. Those costs are to include costs of two counsel where applicable.

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