



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 939/2013
Not reportable

In the matter between:

**BAKGATLA-BA-KGAFELA TRIBAL
AUTHORITY**

FIRST APPELLANT

KGOSI NYALALA MOLEFE JOHN PILANE

SECOND APPELLANT

And

**BAKGATLA-BA-KGAFELA TRIBAL
COMMUNITY PROPERTY ASSOCIATION**

RESPONDENT

Neutral citation: *Bakgatla-Ba-Kgafela Tribal Authority v Bakgatla-Ba-Kgafela Tribal Communal Property Association* (939/13) [2014] ZASCA 203 (28 November 2014)

Coram: Lewis, Majiedt, Wallis and Pillay JJA and Dambuza AJA

Heard: 12 November 2014

Delivered: 28 November 2014

Summary: Provisional Communal Property Association registered in terms of s 5 of Community Property Association Act 28 of 1996 – 12 month period not extended - association ceased to exist – no Community Property Association registered in terms of s 8 of the Act.

ORDER

On appeal from: The Land Claims Court (Matojane J sitting as court of first instance)

1 The appeal is upheld, each party to pay its own costs.

2 The order of the Land Claims Court is set aside and is replaced with the following order:

‘The application is dismissed’.

JUDGMENT

DAMBUZA AJA (Lewis, Majiedt, Wallis and Pillay JJA concurring)

[1] This is an appeal with leave of the court a quo, against the judgment of Matojane J in the Land Claims Court (the LCC) in terms of which the respondent was declared to be an association established in terms of the Communal Property Association Act 28 of 1996 (the CPA Act). The order directed the Registration Officer of the Community Property Associations to effect registration of ‘Bakgatla-Ba-Kgafela Communal Property Association: CPA/07/2032/A’ as prescribed in the Act and to issue a registration certificate in terms thereof.

[2] The first appellant, the Bakgatla-Ba-Kgafela Tribal Authority, is a Traditional Council whose chairman is the second appellant, Kgosi Nyalala Molefe John Pilane. The Council exercises administrative authority over the Bakgatla-Ba-

Kgafela, a traditional community ('the community') comprising members from 32 sub-villages located within the Moses Kotane Municipal Area on the North East side of the Bojanala district in the North West Province.

[3] The background to the application brought in the LCC is the following: in October 2006 the Department of Rural Development and Land Reform (the Department of Land Affairs at the time) ('the Department') approved the restoration of lost land rights to the Bakgatla-Ba-Kgafela Community in respect of a land claim lodged by the Kgosi Pilane on behalf of the community. The land claim related to land in and around Moruleng, the community's headquarters. On finalisation of the land claim the land had to be transferred to a legal entity which would hold it on behalf of the community. A disagreement ensued between members of the community as to which of two legal entities, a Community Property Association (CPA) or a Trust, would be registered to take transfer of the land.

[4] The respondent consisted of the members of the community who favoured registration of a CPA. In both this court and the LCC their case was that the Bakgatla-Ba-Kgafela CPA was registered in terms of s 8 of the Act. However the Department refused to issue a registration certificate in respect of the CPA. An appeal to the office of the Minister of land affairs for intervention did not yield any results. It is against this background that an application was brought in the LCC, on an urgent basis, seeking, essentially, confirmation of the registration of the CPA and issue of the registration certificate in respect thereof.

[5] The appellants took issue with the respondent's locus standi and the merits. They insisted that no CPA was registered as alleged. They also contended that the

matter was not urgent and that the respondent should have simply requested the CPA registration certificate in terms of s 4 of the Regulations issued under the Act. They contended that their failure to do so rendered the application premature.

[6] The LCC referred the application for the hearing of oral evidence due to perceived disputes of fact on the papers. The oral evidence turned out to obfuscate the issues rather than clarify them. The case could have been decided on the papers alone. In the premises there was no need to refer to the oral evidence at all in this judgment.

[7] At the heart of this appeal is the respondent's status; the order of the court below was founded on this issue alone.

[8] It was common cause in the court a quo that because of the disagreement that prevailed in the community as to the legal entity that would take transfer of the land, the intervention of the Minister was solicited. Pursuant to her advice, an agreement was reached that a provisional CPA would be registered. On the common cause facts this was an interim arrangement, for 12 months, to give the community time to resolve their differences.¹

[9] The provisional CPA was registered on 10 September 2007. Thereafter nothing of significance happened, until January 2011 when Mr S H Gumbi, an official of the Department, alerted the respondent to the fact that the term of the interim executive committee of the provisional CPA had expired. Mr Gumbi then facilitated the holding of meetings with the aim of reviving the registration of the

¹Section 5(4) of the Act provides for registration of a provisional CPA. Its provisions are set out below.

CPA. Various meetings were held, culminating in an Annual General Meeting and election of an Executive Committee on 30 July 2011.

[10] In June 2011 the Department appointed a firm of attorneys to assist the respondent with further processes, including the verification of members of the beneficiary communities; ‘regularising the dysfunctional aspects of the CPA’; ascertaining whether ‘the CPA was under administration’; and a ‘change in committee members’. The Tribal Council did not participate in these elections and rejected the process. The Department questioned the validity of resolutions taken at the annual general meeting on the grounds that they failed to comply with prescribed procedures. It is at this stage that the respondent adopted the view that, in any event, all processes necessary for registration of a CPA under section 8 of the Act (a permanent CPA) had been complied with and demanded that the Department issue a registration certificate for the registered CPA, to no avail.

[11] Section 5(4) of the Act provides that:

‘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 the 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....’

[12] In this case it was common cause that no extension had been sought from the Director-General on expiry of 12 months from the date of registration of the provisional CPA. The association had therefore ceased to exist. There had also been no steps taken to comply with the requirements prescribed in section 8 of the Act for registration of a CPA.

[13] In insisting that it is a duly registered CPA, or that it is entitled to registration as such, the respondent relied on a distortion of the facts and the comedy of errors by the officials of the Department in handling the respondent's registration. Mr Lempone Noah Moyo (who describes himself as the chairperson of the Bakgatla-Ba-Kgafela CPA) deposed to the founding affidavit. In it he incorrectly alleged that the provisional CPA was registered in October 2006 and that thereafter the respondent complied with the requirements under s 8(2) of the Act for registration of the CPA, with the result that the CPA was duly registered on 10 September 2007. In support of this contention he relied on a recommendation made by the Provincial Chief Director of the Department, on 11 May 2007, in terms of s 8(3) of the Act, confirming that there had been substantial compliance with the provisions of s 8(2) and recommending registration of the CPA.²

[14] The correct position is that the provisional CPA, and not a permanent CPA was registered on 10 September 2007. That much is clear from the registration certificate which forms part of the record.

²Section 8(2) of the Act provides for registration of Communal Property Associations as follows:

'...(2) An association shall qualify for registration 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 the 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'.

The recommendation dated 11 May 2007 was prepared prior to the agreement to register a provisional CPA. Equally, the draft constitution that the respondent relied on was adopted on 29 August 2007, prior to registration of the provisional CPA. These documents were not evidence of compliance with the requirements of s 8(2). Mr Moyo was well aware of these facts because at the time he signed documents recording them and became a member of the committee of the provisional CPA on that basis.

[15] The respondent also relied on an incorrect registration number of the provincial CPA in the records kept by the Department. The correct registration number of the provincial CPA was 'CPA/07/1032/P'; the 'P' denoting the provisional status of the association. However, in some of the records of the Department the registration number was incorrectly recorded as 'CPA/O7/2032/A'; with the 'A' giving the impression that the CPA was permanently registered.

[16] The incorrect registration number appears in the Department's 2009/2010 'Communal Property Association Annual report' and was taken up in the LCC's order. The respondent contended that the (incorrect) registration number was proof that a CPA was registered in terms of s 8 of the Act. This argument could only mean that on 10 September 2007 the Registration officer registered both a provisional and a permanent CPA for the Bakgatla-Ba-Kgafela community. This contention is untenable. On the record only one registration certificate was issued, and that was in respect of the registration of a provisional CPA. Registration of the provisional CPA followed a resolution by members of the community that a provisional CPA would be registered. There is no evidence that any further steps were taken to either extend the life of the provisional CPA or to register a

permanent CPA. It would appear that the next step that was taken regarding the CPA was in 2011 when Mr Gumbi alerted the respondent to the lapse of the period for the executive committee that was appointed in 2007. Mr Moyo had been a member of that interim committee.

[17] It is unfortunate that long after the lapse of the provisional CPA the Department, on whom the community relied for guidance, still led the respondent to believe that they could forge ahead with the charade of an existing CPA. The meetings that were held from 2011 at the instance of and with the support of the Department were misdirected, insofar as they were intended to revive an executive committee of a CPA. No CPA was ever registered as provided for in s 8 of the Act. For these reasons the appeal must succeed.

[18] Consequently:

1 The appeal is upheld, each party to pay its own costs.

2 The order of the Land Claims Court is set aside and is replaced with the following order:

‘The application is dismissed’.

N Dambuza
Acting Judge of Appeal

APPEARANCES:

For Appellant: R Mogagabe SC (with him OK Chwaro)

Instructed by:
Mothuloe Attorneys, Johannesburg
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