IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 2311/14

In the matter between:

BAKGATLA-BA-KGAFELA TRIBAL COMMUNITY PROPERTY ASSOCIATION	**APPLICANT**
and	
BAKGATLA-BA-KGAFELA TRIBAL AUTHORITY	**1ST RESPONDENT**
KGOSHI NYALALA MOLEFE JOHN PILANE	**2ND RESPONDENT**
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**3RD RESPONDENT**
DIRECTOR-GENERAL DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	**4TH RESPONDENT**

APPLICANT'S HEADS OF ARGUMENT

1.

INTRODUCTION

In this matter, the Applicant was successful in its application in the Land Claims Court (*court a quo*) before his Lordship Mr Justice Matojane who granted an order in the following terms:-

"1 The Applicant is declared an association that was established by a community as envisaged in the definitions 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 13th Respondent ;

3. The 13th 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".

See: Judgment of Matojane J; par 41; p 20.

2.

2.1 First and Second Respondents were granted leave to appeal to Supreme Court of Appeal by Matojane J.

2.2 The Supreme Court of Appeal set aside the order of the *court a quo* on the basis that Applicant had no *locus standi* because the provisional association registered in terms of section 5 of the Communal Property Associations Act 28 of 1996 (hereinafter referred to as "the Act") ceased to exist after the expiry of twelve months after registration.

See: SCA judgment; par 12; p 5

3.

LEAVE TO APPEAL:

3.1 Applicant applied for leave to appeal on two grounds:

3.1.1 That the Supreme Court of Appeal lacked jurisdiction to adjudicate the appeal in the absence of condonation being sought and granted;

3.1.2 That the interpretation of section 5 of the Communal Property Associations Act 28 of 1996 by the Supreme Court of Appeal is erroneous on the basis that it failed to interpret the Act in accordance with the spirit purport and objects of the Bill of Rights.

4

4.1 Although not abandoning the first ground of appeal, the second ground of appeal is pursued as the effect of judgment of the Supreme Court of Appeal are of the utmost importance for the Applicant and other communities who have registered provisional associations. Communities who are desirous of registering associations will also benefit from clarity provided by this Court. In addition the correct interpretation of the Act will guide the future conduct of State Organs that are mandated to deal with the restoration of land. A judgment of

this Honourable Court is sought on the merits of the application rather to have the process prolonged.

4.2 The failure of the Supreme Court of appeal to interpret the Act in accordance with the spirit, purport and objects of the Bill of Rights is a constitutional issue which this Court is called upon to determine. Similarly, the erroneous interpretation and application of the Act which has been enacted to give effect to the right to restoration of land to disadvantage communities is at the centre of this application because the rights of the community with regard to the land awarded to it is in issue. These are constitutional issues of importance.

4.3 It is therefore in the interest of justice that application for leave to appeal be granted to Applicant.

See: Fraser v ABSA Bank Ltd (National Director of Public Prosecutions as Amicus Curiae) 2007 (3) SA 484 CC at par 38 and the cases mentioned

5.

5.1 The Act provides for the establishment of "provisional associations" on the one hand and the establishment of permanent "associations" on the other. Different requirements are to be met for each to be registered.

5.2 The starting point is to have regard to the definitions of "association" and "provisional association" in section 1 of the Act.

An "association" means a communal property association which is

5.2.1 registered or

5.2.2 qualifies for registration in terms of section 8.

A "provisional association" is a provisional communal property association registered under Section 5.

5.3 The definition of an "association" is much wider than that of a "provisional association" in that a provisional association only comes into existence when it is registered as such. An "association" however may also come into existence when it qualifies for registration.

6.

6.1 A community (as opposed to a provisional association) may apply for registration of an association provided that the community complies or at least substantially complies with Section 8(a) – (f) of the Act.

6.2 If the Director General is satisfied that the association qualifies for registration he/she shall refer the application, together with its constitution and his/her written consent to the registration officer, who shall register the association. The registration officer has no discretion

not to register. Once the Director General is satisfied that the association qualifies for registration and has given his/her written consent.

6.3 Once an association qualifies for registration as an association as contemplated by section 8, read with the definition of "association", it comes into existence. Strictly speaking, registration is unnecessary for an association to come into existence.

7.

Section 5(4) 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 a 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;

(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".

8.

Upon a proper interpretation of Section 5 it is clear that once a provisional association is registered it may acquire the right to occupy and use land for a period of twelve months. The period of twelve months may be extended by Director-General in terms of Section 5(4)(a) for a further twelve months. The only effect on the period beyond twelve months is that the provisional association loses its right to use or alienate the land acquired in terms of Section 5(4)(b) but it nevertheless continues to exist.

See: Judgment of Matojane J; par 21; p 11.

9.

9.1 The Act makes provision for the mechanism by which a provisional association or an association may be deregistered or liquidated. Section 13(3) of the Act states:-

"(3) The Director-General may, upon written application by an association or provisional association, cause such an association or provisional association to be deregistered, if he or she is satisfied that-

(a) a resolution in favour of deregistration was adopted at a meeting attended by a substantial number of the members of the association of provisional association;

(b) the resolution was adopted by a majority of members present or represented at the meeting; and

(c) all relevant matters which reasonably have to be addressed prior to deregistration, including the way in which the assets and liabilities of the association or provisional association will be dealt with, have been addressed".

9.2 There is no express provision in the Act which limits the lifespan of a provisional association, other than the in accordance with Section 13 referred to above. There is good reason for Section 13. The legislator accepted that a provisional association will during its existence obtain rights and incur obligations.

9.3 A provisional association continues to exist as a *legal persona*, notwithstanding the expiry of twelve months or any period extended by the Director-General in terms of Section 5(4)(a) until it is deregistered after due process has been followed.

See: Judgment of Matojane J; par 21; p 11.

9.4 The view above is fortified by the provisions of Section 8(6)(f) of the Act which provides for deregistration, when a provisional association successfully applied for registration as an association in terms of Section 8(3) of the Act. It is clear therefore that the procedure prescribed by Section 13 must be followed to have it deregistered. It cannot simply cease to exist. The rights and obligations of the provisional association must be transferred to the association.

10.

10.1 In interpreting the provisions of any Act, the Court is required by Section 39(2) of the Constitution to adopt any reasonable interpretation that promotes the spirit, the purport and objects of the Bill of Rights. In this regard, we submit that in interpreting Section 5(4) of the Act, the Supreme Court of Appeal did not comply with the above constitutional requirement for the following reasons:-

10.1.1 the rights of Bakgatla-Ba-Kgafela in terms of Section 25(1), 25(5), 25(6) and 25(7) of the Constitution are affected by the decision of the Supreme Court of Appeal;

10.1.2 the effect of the judgment of the Supreme Court of Appeal is that the land that has been restored to the community in terms of Section 42D of the Restitution of the Land Rights Act 1994, has reverted back to the State by reason that

the provisional association has been found to have ceased to exist, despite not being deregistered.

***See: Ex Parte Jacobson: In Re Alex Jacobson Holdings (Pty) Ltd* 1984 (2) SA 368 W at 377 F – H**

***See also: Ex Parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 T at 476 F - G**

10.2 The land which has been restored to the community has fallen back to the State because of the vacuum created by the findings of the Supreme Court of Appeal. It simply turns the clock backward without due process and thereby denying the community their constitutional right to the restored land.

10.3 It is clear from the findings of the Supreme Court of Appeal that there has been "*comedy of errors*" by officials of the Third and Fourth Respondents in the course of their handling the application for registration of Bakgatla-Ba-Kgafela CPA. The observed comedy of errors cannot be regarded as a basis for denying Bakgatla Ba Kgafela community to have their CPA registered have their constitutional right to the land awarded to them taken away simply because their CPA is regarded as non-existent.

See: SCA judgment; par 13; p 6.

10.4 The First and Second Respondents never lodged a complaint in terms of Section 7(4) with the Director–General that they have been excluded or prejudiced from any process. Their dispute was not properly raised in terms of the Act and should not have been entertained. The Minister had no grounds to intervene. In addition the Director-General was obliged in terms of Section 8(4) to inform the community what steps to be taken if he was of the opinion that the association does not qualify for registration. He failed to do so.

11.

B <u>THE INTENTION FROM THE ONSET OF THE COMMUNITY TO REGISTER AN ASSOCIATION IN</u> <u>TERMS OF SECTION 8(3)</u>

11.1 It has always been the intention of Bakgatla-Ba-Kgafela Community to register an association as the legal entity through which they will hold their land in terms of Section 8(3) of CPA Act. In this regard, the Applicant maps out the scenario and the chronology of the events as they unfolded towards the registration of a CPA in terms of the above Section 8(3) of the Act.

11.2 The Third and Fourth Respondents appointed Mokonyane Inc during 2005. Its mandate/terms of reference were to facilitate a process for the establishment of a legal entity for Bakgatla-Ba-Kgafela Land Claim.

11.3 Mokonyane Inc conducted a number of workshops within the community to highlight the various options available to them regarding legal entities which they can use to hold a land on their behalf. The community chose a communal property association as the preferred legal entity.

See: Par 5.3; pp 290; vol 3.

Also see: Mr. Peter's evidence; line 15-21; pp 216; vol 3.

11.4 The constitution was properly adopted and that the community was a community which is as awarded a land claim under the Restitution of Land Rights Act of 1994 as required by Section 2 of the Act.

See: Mr Peter's evidence; line 13 – 17; pp 213; vol 3.

11.5 It is also clear from the above report that the intention of the community from the onset was to register an association in terms of Section 8(3) of the Act as opposed to a provisional association in terms of Section 5 of the Act.

See: Mr. Moyo evidence; line 15-18; pp64; vol 1.

See also: Mr. Sebape's evidence; line 14-20; pp 266.

11.6 Subsequent to the activities mentioned above, the Commission on Land Restitution Rights issued a memorandum titled "***Submission in***

terms of Section 42D of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994), Being the Settlement and Finalization in the Matter of Bakgatla-Ba-Kgafela Tribe concerning the farms Legkraal 45 JQ, Doornpoort 57 JQ, Schaapkraal 170 JP, Koedoesfontein 42 JQ, Kruisfontein 40 JQ, Saulspoort 38 JQ, Rooderand 46 JQ and Vogelstrusnek 173 JP in the Moses Kotane Municipal Area, Bojanala District, North West Province*."*

11.7 The memorandum states:-

"As per departmental policy, all restitution awards with land restoration as the selected desired option, a legal entity needs to be established accordingly. Hence the Bakgatla-Ba-Kgafela Communal Property was established and is chaired by Mr. Noah Moyo."

This internal memorandum confirms what is contained in Mokonyane report.

See: Memorandum; par 2.2.4; pp 298; vol4.

See also: Memorandum; par 9.13; pp 305; vol 4.

11.8 On or about 11th May 2007 Ms Mogae Provincial Chief Director (designated as an authorized officer in terms of Section (1)(ii) submitted to the Director General of Department of Land Affairs an

application by Applicant for registration of an association in terms of Section 8(3) of the Act. The heading of the memorandum stated: *"**Application for registration of Bakgatla-Ba-Kgafela Communal Property Association in terms of Section 8(3) of the Communal Property Association Act, 1996 (Act No. 28 of 1996**)."*

11.9 The essence of this memorandum was to place on record that the Bakgatla-Ba-Kgafela Community qualified for registration as an association by substantially complying with all the requirements of Section 8(2)(a) – (f) of the Act.

See: submission par 3.2 through to 3.5; pp 294; vol 3.

See also: Evidence of Mr. Sebape; line 5-14; pp 253; vol 3.

11.10 The submission and recommendation was also approved by the Director-General in terms of Section 8(3) of the Act on 10th September 2007. When the Director-General approved the registration of the association he signified that the association qualifies for registration as an association in terms of Section 8. As such an association came into existence in accordance with the definition of "association".

See: submission par 42; pp 295; vol 3.

See also: Evidence of Mr. Sebape; line 9-17; pp 253 and line 10 - 11;pp 268; vol 3.

And also*: Judgment of Matojane J; par 28; p 13.*

11.11 Thus it is submitted an association came into existence despite not being registered as such.

12.

UNLAWFUL INTERVENTION BY THE MINISTER

12.1 It is not in dispute that whilst Bakgatla-Ba-Kgafela Community overwhelmingly chose and voted in favour of a communal property association as a legal entity to hold land and property on their behalf, the First and Second Respondents were against a communal property association as a legal entity. They instead favored a trust.

12.2 Emanating from the above dispute the Minister sought to intervene. Her intervention was unlawful because it is unauthorized by the Act.

12.3 In her intervention the Minister instructed the Director-General to register a provisional association for a period of twelve months within which the community and the First and Second Respondents should resolved their dispute instead of an association in terms of Section 8(3) of the Act as applied for by the Applicant.

See: Evidence of Mr. Sebape; line 10-20; pp 281; vol 3.

12.4 The Minister did not have the authority to so intervene as she did. The process of registration of an association or provisional association is the responsibility of the Director General and the Registration Officer both in terms of Section **5** and **8** of the Act. The Minister has no role at all in the registration process. The registration of the provisional association has no effect on the legal position that obtained when the Director-General approved the registration of an association.

See: Judgment of Matojane J; par 28; p 13

13.

We submit that the Supreme Court of Appeal erred in giving legal recognition to the intervention of the Minister by indicating that the arrangement for twelve months within which the community was supposed to resolve their dispute was interim and therefore, upon expiry of twelve months the provisional CPA ceased to exist. The Supreme Court of appeal did not take the effect of the definition of an association into account. In that respect it erred.

See: SCA judgment; par 8; p 4 and par 12; p 5.

14.

CONCLUSION

14.1 Application by Bakgatla-Ba-Kgafela Community, for the registration of an association has always been in terms of Section 8(3) and that was the only application by this community that was submitted to the Director-General (Fourth Respondent) for consideration.

14.2 The intervention by the Minister that Bakgatla-Ba-Kgafela CPA should be registered as a provisional association was unlawful, as she did not have any authority in terms of the Act to disregard the decision of the Director General or to direct him to act contrary to the provisions of the Act.

14.3 A specific mechanism in terms of Section 13 of the Act has been created to deal with the deregistration of a provisional association or association. The Supreme Court of Appeal therefore, incorrectly held that the Applicant had no *locus standi* as it ceased to exist after the expiry of twelve months from the date of registration.

DATED AT PRETORIA ON THIS THE 28 DAY OF APRIL 2015.

G.C MULLER SC

COUNSEL FOR APPLICANT

DV N.A.R NOGPEPE

COUNSEL FOR APPLICANT

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT CASE NO: 2311/14

SCA CASE NO: 393/2013

LCC CASE NO: 80/2012

In the matter between:

BAKGATLA-BA-KGAFELA TRIBAL COMMUNITY PROPERTY ASSOCIATION	Applicant

and

BAKGATLA-BA-KGAFELA TRIBAL AUTHORITY	1st Respondent
KGOSI NYALALA MOLEFE JOHN PILANE	2nd Respondent
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	3rd Respondent
THE DIRECTOR-GENERAL DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	4th Respondent

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FIRST AND SECOND RESPONDENTS' HEADS OF ARGUMENT

INTRODUCTION

1. This matter has its genesis in the land that was restored to the

Bakgatla-Ba-Kgafela traditional community pursuant to the provisions of section 42D of the Restitution of Land Rights Act 22 of 1994 by the then Department of Agriculture and Land Affairs in 2006. Such land was subsequently transferred and registered in the name of the Applicant. At the heart of the matter is the factual enquiry whether the Applicant in respect of which such land was transferred and registered was provisionally or permanently registered as a Communal Property Association in terms of the relevant provisions of the Communal Property Associations Act 28 of 1996 ("the Act").[1] This in essence was a factual enquiry i.e. a fact-based one.

2. The Applicant launched an application in the Land Claims Court ("LCC") and cited as Respondents the Minister of Rural Development and Land Reform ("the Minister"); the Director-General Department of Rural Development and Land Reform ("the DG"); the Registration Officer of Communal Property Associations ("the Registration Officer") (hereinafter for convenience referred to as the "Department" or "State parties" as the case may) as well as the BAKGATLA-BA-KGAFELA TRIBAL AUTHORITY ("the Traditional Council") and Kgosi Nyalala Molefe John Pilane ("the

[1] Sections 5 and 8 of the Act govern the provisional or permanent registration of a communal property association respectively as more fully outlined hereinafter

Kgosi") and other Respondents.[2]

3. It in essence sought relief in the form of a declarator to the effect that it was permanently so registered as a CPA in terms of Section 8 of the Act, alternatively, had satisfied or met the requirements for such permanent registration and as such the Registration Officer should be directed to issue a certificate to the effect that Applicant was so permanently registered as a CPA pursuant to the provisions of Section 8(3) of the Act.

4. The LCC upheld such claim and issued an order to this effect in the following terms:

> *"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 1998;*
>
> *2. The Applicant was entitled to be registered permanently as an Association by the Thirteenth Respondent;*

[2] These other Respondents did not participate in the appeal before the Supreme Court of Appeal or before this Court. The Minister, the DG and the Registration Officer also did not participate in the appeal before the SCA.

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."*

5. The Traditional Council and the Kgosi with leave of the LCC appealed to the Supreme Court of Appeal which upheld the appeal and set aside the order of the LCC and replaced same with an order dismissing the application.

6. Subsequent to that the Applicant launched this application for leave to appeal to this Court in terms of Rule 19 of the Rules of this Court.

LEGISLATIVE FRAMEWORK

7. We deem it apposite prior to narrating the facts to outline the relevant legislative framework governing this case in order to put this matter into proper perspective. The establishment, registration and administration of communal property associations (CPA's) is

governed by the Act and the Regulations framed thereunder.[3]

8. Section 5 regulates the provisional registration of CPA's. Sec 5(3) provides thus:

> "*Upon registration of the provisional association –*
>
> *(a) The provisional association may <u>acquire a right to occupy and use land for a period of 12 months from the date of the registration of the provisional association</u>; Provided that the Director-General may extend the period 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 <u>shall not, until the registration of an association in terms of this Act, in any way alienate such right in land</u>;*
>
> *(c) the provisional association shall be a juristic person with the capacity to sue or be sued."* (our underlining)

[3] Regulations under the Communal Property Associations Act 28 of 1996 published under GN R1908 in GG17620 of 22 November 1996 (the "Regulations")

Subsection (5) thereof reads thus:

> *(5) If any provisional association fails to adopt a constitution within 12 months from the date of registration of a provisional association, the Minister may approve a draft constitution prepared by the Director-General for such provisional association, and cause the provisional association to be registered as an association in terms of this Act: Provided that the Director-General may extend the period of 12 months for a further period of 12 months if there is good cause for him or her to do so."*
> (our underlining)

9. Section 8 of the Act regulates the permanent registration of a CPA/ an association pursuant to the provisions of sec 8(a)-(f) of the Act. A community is entitled to apply for the permanent registration of an association subject to compliance or at least substantial compliance by the community with these provisions.

10. For purposes of the adjudication of this matter the relevant provisions of Section 8 provides thus:

"8 Registration of Associations

(1) The Director-General shall consider an application for registration of an association together with any prescribed information, the report referred to in section 7(2) and the constitution adopted by the association.

(2) An association shall qualify for registration if-

(a) the provision of this Act apply to the community concerned;

(b) the association has as its main objection 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.

(3)

(a) 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 BAKGATLA-BA-KGAFELA TRADITIONAL COMMUNITY

11. The Bakgatla-Ba-Kgafela traditional community (hereinafter interchangeably referred to as the "BBK traditional community or traditional community as the case may be) is a traditional community as so contemplated in the definition of *"traditional community"* of the Traditional Leadership and Governance Framework Act 41 of 2003 read with sec 2 thereof and that of the definition of "community" in the Act .[4]

12. The BBK traditional community/morafe is located in the North-West Province. It comprises mainly of 32 villages located throughout the Bojanala region within the Moses Kotane Local Municipality with its headquarters/main kgotla situated at Moruleng also referred to as Saulspoort. Its reigning senior traditional leader is Kgosi Nyalala Pilane.

[4] A *"Traditional Community"* is defined as a Traditional Community recognized as such in terms of section 2 which in terms of section 2(1) thereof is defined as a community that is subject to a system of a traditional leadership in terms of that community's customs and observes a system of customary law. The Setswana translation thereof is *Morafe.*

BACKGROUND

13. During 1998 the Kgosi acting for and on behalf of the BBK traditional community launched various land claims for restitution to the traditional community pursuant to the Restitution of Land Rights Act 22 of 1994 that are situated within the Pilanesberg National Game Park. Such land claims were successful. In terms of section 42D of the Restitution of Land Rights Act such land was restituted and awarded to the Traditional Community.

14. Subsequent to the award and restoration of such lands to the Traditional Community in terms of section 42D of the Restitution of Land Rights Act, the Department through its officials embarked on a process to educate members of the Traditional Community about the various legal entities in terms of which the Traditional Community may utilise to hold and manage such properties on behalf of the community. The upshot being that a disagreement ensued within members of the traditional community pertaining to whether a CPA or a Trust was the preferred legal entity for purposes of transfer and registration of the properties on behalf of the morafe.

15. In consequence of the different views prevailing within the

Traditional Community, a compromise was reached as a result of the intervention by the Minister that a provisional CPA be registered for a period of 12 months consisting of 16 members whose elected chairperson was a certain Mr Motshegare and its deputy chairperson being a certain Mr Moyo, the deponent to the Applicants' founding affidavit in the LCC.

16. The underlying reason thereof was to afford the traditional community an opportunity during the 12 month period to resolve their differences regarding the preferred legal entity to hold, manage and control such properties.

17. The upshot thereof is that on 10 September 2007 a provisional CPA was so registered by a certain Mr Jeff Sebape the Registration Officer of Communal Property Associations in terms of section 5 of the Act. A provisional certificate of registration was issued to this effect as provided for in sec 5(3) of the Act.

18. Subsequent thereto a series of events occurred culminating in an Annual General Meeting ("AGM") and the election of a new Executive Committee on or about 30 July 2011 after the Department had alerted the Applicant that the terms of office of the interim

executive committee of the provisional CPA of those members that were so elected in 2007 had expired.

19. In view of the Department's stance questing the validity of the resolutions so taken at this AGM, the Applicant adopted the attitude that it had complied with all the necessary requirements for permanent registration of the CPA in terms of sec 8 of the Act, demanding that the Department issue a certificate of registration to this effect, however to no avail. The Applicant then resorted to litigation before the LCC.

THE LITIGATION HISTORY

20. In the LCC the Applicant initially sought an order directing the Department to release its certificate of registration and interdicting and restraining the Kgosi from intimidating, interfering and/or influencing officials of the Department in their dealings with the Applicant.

21. In his founding affidavit Moyo, as the deponent thereto in his capacity as Chairperson thereof, averred or asserted that the Applicant was so permanently registered as an association by virtue

of having complied with the formalities so prescribed in terms of section 8 of the Act, hence seeking an order directing the Department to release such certificate of permanent registration.

22. The Department (then represented by its previous Acting Director-General) filed an answering affidavit opposing such relief on the basis that the Applicant was not permanently so registered but instead provisionally registered and annexed the provisional certificate of registration as proof thereof.

23. The Kgosi acting on his behalf and on behalf of the Traditional Council deposed to the answering affidavit resisting such claim likewise denying that the Applicant was so permanently registered as so claimed by Moyo in the founding papers contending that its 12 month provisional registration had expired in September 2008, it had no *locus standi* to institute proceedings seeking the relief claimed. In the replying papers Moyo persisted with the assertion that Applicant was so permanently registered as a CPA.

24. Subsequent thereto the Applicant amended its notice of motion abandoning the initial relief and instead sought the relief in the following terms:

24.1. An order declaring that the Bakgatla-Ba-Kgafela Communal Property Association is a duly registered Communal Property Association in terms of section 8 of the Communal Property Associations Act, No. 28 of 1996; alternatively

24.2. An order directing the 13th respondent (Registration Officer of Communal Property Associations) to register the Bakgatla-Ba-Kgafela Communal Property Association: CPA/07/2032/A as such in the manner prescribed by Act 28 of 1996;

24.3. *An order directing the 13th respondent to issue a certificate of registration as envisaged by section 8(3) of the abovementioned Act to the applicant.*

25. This was done without filing any supplementary affidavit in support of the new relief so sought. The matter then served before Loots AJ who referred the matter for hearing of oral evidence on certain defined issues, namely:

25.1. Whether the Bakgatla-Ba-Kgafela Communal Property Association ("the applicant") is an association that was established by a community as envisaged in the definition of

"community" in the Communal Property Association Act, No. 28 of 1996, ("the Act");

25.2. Whether the Act is applicable to the applicant in terms of section 2(1) thereof;

25.3. Whether the applicant was entitled to be registered as an association by the Registration Officer of Communal Property Associations in terms of the Act;

25.4. Whether the applicant has in fact been registered by the Registration Officer of Communal Property Associations as an association in terms of the Act; and

25.5. Whether any land has been registered in the name of the applicant following a successful land claim by the applicant.

26. The matter then served before Matojane J in the LCC. The LCC classified the issues raised into three categories. However for present purposes the *locus standi* one is relevant.

26.1. The *locus* point raised by the Respondents and in particular

the Kgosi and the Traditional Council/Authority to the effect that the Applicant lacked any *locus standi* by virtue of the fact that having been so provisionally registered for a period of 12 months on 10 September 2007 it had long ceased to exist in law after the expiration thereof on 9 September 2010, Applicant persisted with its claim of permanent registration. A factual enquiry then ensued to determine these issues.

26.2. The LCC dealt with the matter on the basis of the oral evidence tendered at the hearing to the exclusion of the evidence tendered in the affidavits.

27. In relation to the *locus standi* point, the Court held that notwithstanding an expiration of the 12 month period the Applicant did not cease to exist in law in that in terms of the provisions of section 5 (4) of the Act upon the expiration of the 12 month period a provisional association continued to exist in that all that it lost was the right to occupy and use property so registered in its name. As such it continued to exist as a juristic person.

28. In relation to the registration of the Applicant as a permanent CPA,

the LCC , placing reliance on certain impressions created by the Department, held that the Applicant had complied with the prescribed requirements in terms of section 8 of the Act for such permanent registration alternatively had substantively complied with such prescribed requirements entitling it to be so registered as a permanent association in terms of section 8 of the Act.

29. In the result, the LCC upheld the claim and issued the order foreshadowed above.

IN THE SUPREME COURT OF APPEAL

30. Being dissatisfied with this order, the Kgosi and the Traditional Council/Authority appealed to the Supreme Court of Appeal with leave of the LCC. The Department did not appeal such decision nor did it file any notice to the effect that it was abiding the decision of the LCC nor cross-appealed the failure of the LCC to refer the matter to mediation in terms of the relevant provision of the Restitution of Land Rights Act.

31. The SCA upheld the appeal and set aside the order of the LCC. The SCA decided the matter on the basis of all three sets of affidavits so

filed by the parties without having recourse to the oral evidence that was so tendered before Matojane J in the LCC.

32. The SCA held that on the basis of the evidentiary material so tender in the respective affidavits the Applicant had ceased to exist in law upon the expiration of the 12 month period after its provisional registration on 10 September 2007 and being a non-existent entity in law had no *locus standi* to institute the proceedings in the LCC with the attendant consequences that in terms of section 5(4) of the Act its lifespan had come to an end 12 months after its provisional registration on in September 2007 i.e. in September 2008.

THE DEPARTMENT CHANGING COURSE

33. In the Land Claims Court, the Department in its answering affidavit vehemently, and rigorously disputed Applicant's claim seeking the dismissal of the application. It persisted with challenging and disputing its claim of permanent registration or having complied with the requirements for entitling it to permanent registration in terms of the Act. In support hereof we refer to the whole of para 14, paras 7.1, 7.2, 7.6 – 7.9, 7.11, 7.13, 12.3, 13.1, 14.2, 14.4, 17, 19.1-19.2, 23.2, 25, 26 and 27.3 of its answering in the Land Claims Court to

this effect.

Furthermore we refer to the oral testimony of Mr Jeff Sebape the Registration Officer tendered at the hearing before Matojane J to this effect too. However in its affidavit before this Court the Department has changed tack, asserting *"neutrality"* in the matter. To compound matters it states that it acquiesce with the judgment and order of Matojane J outlined above, which sudden *volte-face* is completely inconsistent and in stark contrast to its persistent disputation that Applicant was so permanently registered or had met the requirements for such permanent registration, maintaining that it was only provisionally registered for a period of 12 months. Such sudden *volte-face* is unacceptable. In any event it is interesting to note that notwithstanding its assertion that it acquiesced in the judgment and order of the Land Claims Court, hence not appealing same to the SCA, it has since the delivery of the Judgment of the Land Claims Court on 14 June 2013 to date, failed to act in accordance therewith particularly as such order was directed at the Department. Such conduct on the part of the Department deserves strict censure by the Court in the form of a special costs' order.

THE ISSUES

34. On the issue challenging lack of jurisdiction on the part of the Supreme Court of Appeal to adjudicate the matter in the absence of condonation, the Applicant even though not abandoning same appears not to persist therewith. It suffices to point out that same has no merit nor raises any constitutional issue or a matter of public importance nor was same persisted with in the SCA. It is in any event unmeritorious.

35. At the centre of this appeal is the determination by the Supreme Court of Appeal that Applicant lacked *locus standi* by virtue of the fact that the provisional CPA registered in September 2007 in terms of section 5 of the Act ceased to exist in law after the expiry of the twelve months in September 2008 after registration thereof.

36. The Applicant contends that the Supreme Court of Appeal incorrectly interpreted section 5(4) of the Act, asserting that the 12 months period indicated in section 5(4) refers to the right of a provisional CPA to occupy and use land. Its interpretation thereof read in context is that once a provisional CPA is registered it continues in existence until it is deregistered or registered as a

permanent CPA.

37. Put otherwise the question for determination is whether the Supreme Court of Appeal was correct in overturning the order of the Land Claims Court so foreshadowed in paragraph 32 above and substituting it with an order dismissing the application.

LEAVE TO APPEAL

38. We respectfully submit that for the reasons set out in paras 10 to 13 inclusive of First and Second Respondents' opposing affidavit in this Court, this Court should be slow to find that this matter raises constitutional issues because the Applicant says so. Furthermore, as it appears that Applicant is not seeking any order from this Court in this matter, the function of this Court is not to give advice on differing contentions. [5] There being no prospects of success too, it will not be in the interest of justice to give leave. In the event of the Court granting leave, then we make the submissions on the merits of the matter as set out hereinafter.

[5] Director-General Department of Home Affairs v Mukhamadia 2014 (3) BCLR 306 (CC) para 33

NEW CAUSE OF ACTION

39. The Applicant's main cause of action raised for the first time in this Court is encapsulated in the following terms:

> *"The Supreme Court of Appeal has held that Applicant as provisional CPA was only registered for a period of twelve months in terms whereof it ceased to exist. The issue is whether the Supreme Court of Appeal correctly interpreted section 5(4) of the Communal Property Association Act 28 of 1996. Applicant's interpretation of the section read in context is that once a provisional CPA is registered it continues as such until it is deregistered or registered as a permanent CPA"*.

40. However, the amended claim as pleaded, ventilated and pursued in the LCC is in stark contrast to the one which this Court is now asked to entertain/adjudicate. In the LCC the Applicant claimed relief as so foreshadowed above.

41. In the opening statement of his judgment Matojane J states thus:

> *"The Applicant seeks an order declaring it to be a registered Communal Property Association in terms of section 8 of the Communal Property Act…"*

The SCA captured the issue thus:

> *"The respondent consisted of 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 s8 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."* [6] and crystallised it in paragraph 7 thereof in the following terms:

> *"At the heart of this appeal is the respondent's status; the order of the court below was founded on this issue alone."*

42. This important question must be considered within this context. The fundamental principle of fairness in our jurisprudence dictates that a party to litigation is enjoined to plead its cause of action in the Court of first instance in order to alert the opposing parties of the case

[6] SCA Judgment p3 para 4

they have to meet and the relief sought.[7]

43. Our jurisprudence does not permit a party to raise a constitutional complaint which was not pleaded at all. This principle was endorsed by the SCA in **Fischer v Ramahlele** [8]

44. The First and Second Respondents have resisted the attempt to do so, contending that entertaining or adjudicating same will be highly prejudicial to them having not been afforded any opportunity to deal squarely with the matter. Despite the fact that a Court of appeal is vested with a discretion to allow a party to do so, this cannot be done *in casu,* particularly as this new cause of action was not covered in the pleadings nor established by the facts on the record. Furthermore, this aspect of the case was not at all canvassed in the evidence of Mr Moyo (chairperson and sole witness of Applicant) who relentlessly pursued and consistently persisted at the trial with the clam that Applicant was permanently registered as a CPA alternatively satisfied the requirements prescribed for such registration and not the new cause of action pursued in this Court.

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[7] Prince v President Cape Law Society and Others 2001 (2) SA 388 (CC) para 22; Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) para 27
[8] 2014 (4) SA 614 (SCA) para 13; Rail Commuters Action Group v Transnet Ltd 2005 (2) SA 359 (CC); Crown Restaurant CC v Gold Reef City Theme Park 2008 (4) SA 16 (CC)

45. Even if the Court were to raise the new cause of action/point of law *mero motu,* this would in the circumstances be impermissible as same was not canvassed at all on the pleadings nor investigated at the trial (hearing of oral evidence) or can it be said that the failure to raise same was due to the common approach of the parties proceeding on a wrong understanding of the law. The parties having consciously made the choice of the issues to be adjudicated by the Court, such choice must be respected.[9]

46. It needs to be highlighted that despite the thesis/argument posited by the Applicant that upon the expiration of the 12 months period referred to in section 5(4) and in the absence of any extension thereof by the Director-General, the provisional CPA continued to exist the order of the Land Claims Court nonetheless cannot stand or be upheld and falls to be set aside as the SCA did, particularly in that such order contemplates the registration of a permanent and not a provisional CPA and the issuance of a certificate to this effect.

47. Paragraph 14.1 of the Applicant's Heads of Argument appears to contemplate of an order to this effect i.e. permanent registration of

[9] CUSA v Tao Ying Metal Industries & Others 2009 (2) SA 204 CC paras 67-68 Fischer v Ramahlele *supra* para 14

Applicant in terms of section 8(3) of the Act. This is completely wrong. It cannot be sustained or granted. In other words it is not only just and equitable but out of kilter with its claim or case presented to this Court. predicated on the continued existence of a provisional association whose lifespan/registration expired after the 12 month period.

SUBMISSIONS

48. An examination of the Act reveals that, it contemplates two kinds/forms of communal property associations, being a provisional one and a permanent one. A provisional association is defined as a CPA registered in terms of section 5 of the Act and a permanent association is defined in terms of section 1 read with section 8 of the Act as a CPA which is registered or qualifies for registration in terms of section 8. Different requirements are prescribed for the registration of each.

49. Proof of registration of a provisional CPA is evidenced by the issuance of a certificate to this effect in terms of section 5(3) whereas that for registration of a permanent CPA is evidenced by the issuance to this effect of a certificate in terms of section 8(3) of

the Act.

50. Section 5(4) read with 5(5) provides for the extension of the right of a provisional CPA to occupy and use land by the Director-General of the 12 months period for a further 12 months period on certain conditions. Once such period(s) expires, its registration lapses too.

51. This entails that the registration of a provisional CPA cannot exist in perpetuity. In other words the registration of a provisional CPA cannot in the circumstances have a perpetual existence as so contended by Applicant.

52. It will not only be contrary to common sense and logic but also to the legislative scheme and design of the Act to have a provisional CPA exist in perpetuity despite its period of registration having expired until formal deregistration as so contended by Applicant.

53. It is implicit from the argument/thesis advanced by Applicant concerning its contention of erroneous or incorrect interpretation by the Supreme Court of Appeal of the provisions of section 5(4) of the Act, that Applicant accepts the finding of the Supreme Court of Appeal that a provisional association was on the basis of the

evidentiary material before Court registered in September 2007 for a period of 12 months.

54. However, Applicant does not accept the finding that upon expiration of such 12 months period (in the absence of an extension by the Director-General for a further period of 12 months) such provisional association ceases to exist in law i.e. become a non-existent entity, asserting that it *"nevertheless continues to exist"*, contending that the only right it loses upon the expiration of the 12 months period is the right *"to occupy and use land"* acquired during this period.

55. We respectfully submit that this argument or construction is fundamentally flawed if not fallacious for the following reasons:

55.1. It cannot have been the intention of the legislature in creating two separate and distinct CPA's that a provisional association despite the expiration of its period of provisional registration will continue to have a perpetual existence as is a permanently registered association terms of section 8 of the Act.

55.2. The lifespan of a provisional association whose period of

registration has expired, cannot be perpetuated/prolonged unless so temporarily extended by the Director-General as so contemplated in section 5(4) read with section 5(5) of the Act.

55.3. If indeed the contention of the Applicant is to be accepted, the question remains: for how long and for what purpose must the lifespan of such provisional association be perpetuated.

55.4. Having due regard to the principle of legality, what is the source of the power to so perpetuate or prolong the lifespan of such provisional association.

55.5. Once the period of registration of a provisional association expires, in the absence of any extension by the Director-General, same ceases to exist in law. The Court has no power, authority or competence to resurrect or exhume same from the grave for whatever purpose however laudable or sacrosanct. To do so would in any event militate against the principle of legality.

55.6. Such construction is misguided and misconceived in that it would defeat the very purpose of restoration of such land as members of the community who are beneficiaries of such restored land will be deprived of the benefits of enjoying the rights of occupation and utilisation thereof.

56. The Applicant engages the protection of the rights contained in secs 25(1), 25(5) or 25(7) of the Constitution in an attempt to bolster its case. There is no violation in this case of these constitutional rights nor do the facts on record establish same for the following reasons:

56.1. The traditional community has not been deprived of their land nor can it be said that the application of the Act permits an arbitrary deprivation of their land;

56.2. No evidence has been tendered to prove that the State has failed to take reasonable legislative and other measures to foster conditions enabling the traditional community to gain access to the restored land;

56.3. The Department in terms of sect 42D of the Restitution of Land Rights Act has actually restituted the land in question

to the traditional community. In any event this aspect/cause of action was neither pleaded nor canvassed or investigated at the trial (hearing of oral evidence) in the Land Claims Court or in the Supreme Court of Appeal.

57. It is now trite that the core and/or fundamental tenet in legislative/statutory interpretation is that words be given their ordinary grammatical meaning unless such an interpretation can lead to absurdity. In so doing, the purpose, context and constitutional validity must always be considered.[10]

58. It is also a well-known interpretation tool that in seeking to ensure the purpose, context and constitutional validity of a legislation, it must also be borne in mind that a purposive interpretation must not be done in a manner that result in an undue straining of a legislative provision[11] or where the legislative text is not reasonably capable of providing a meaning that is sought to be attributed to it[12].

[10] Cool Ideas 1186 CC v Hubbard 2014 (4) SA 474 (CC)
[11] See Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO 2001 (1) SA 545 (CC) at para 24
[12] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at paras 23-24

59. It follows that since the legislature intended to have two different legal entities in the form of a provisional communal property association, limited to 12 months period and a permanent communal property association, which is perpetual unless dissolved, any interpretation of the provisions of section 5(4) of the CPA Act which seeks to breathe life to a provisional entity that has passed its lifespan would be an undue straining of the legislative provision which is clearly contrary to what the text of section 5(4) read with section 8 of the CPA Act provide.

60. The ordinary, plain and grammatical meaning of section 5(4) is that once a provisional CPA has reached 12 months without its lifespan having been extended by the Director-General for another 12 months, it follows that such a provisional CPA ceases to exist in law.

61. The provisions of section 5(4) are not capable of being read to mean something that is provided for elsewhere in the CPA Act, being that a provisional CPA does not cease to exist after 12 months but remains a perpetual entity. This is patently wrong and undue strain on the legislative text that is discouraged in the *Hyundai* case referred to above.

62. The above conclusion is also buttressed by the evidence that has been led in the Land Claims Court by Sebape which clearly indicates that the Registration Officer never at any stage did register any association in respect of the Bakgatla Ba Kgafela in terms of section 8 of the Act but the only association that was registered is the provisional Communal Property Association which was registered on 10 September 2007. This is common cause if not undisputed.

63. It is also clear from the evidence that what preceded the said registration was the intervention by the then Minister of the Department who sought consensus between the parties in consequence of the disagreement within the community as to the preferred legal entity i.e. a CPA or Trust to take transfer and registration of the land on behalf of the community.

64. Following such an intervention all parties then agreed that a provisional CPA would be registered for 12 months and it was indeed registered as such. The following year, that is 2008, some of the restituted properties were then transferred into the name of the provisional Communal Property Association as it will appear on the annexures to the disputed statement of facts as well as other

documents submitted of record.

65. It is important to highlight the fact that the land in question was at all times material hereto, held in trust on behalf of the BBK traditional community.

66. Following the transition period and after 1994 it was held in trust for the Bakgatla tribe by the minister of Agriculture and Land Affairs. After the registration thereof in 2008 in terms of section 42D of the Restitution of Land Rights Act of 1994, same was restored to the BBK traditional community.

67. Once the registration period of a provision association expires same (in the absence of the extension thereof by the Director-General) ceases to exist in law. Same being a non-existent entity in law there exists no need to seek the formal deregistration of a non-existent entity.

68. The notion or process of deregistration presupposes the existence in law of an entity being the object of such deregistration. As such the argument or contention by Applicant that deregistration of Applicant is required is indeed fallacious if not superfluous. In the

same vein no costs' order can be made against a non-existent entity in law, hence the SCA has made no costs' order against Applicant.

REMEDY

69. For the reasons articulated above, we respectfully submit, on behalf of the first and second respondents, that the application be dismissed with costs.

70. In the unlikely event that the above Honourable Court would be inclined to deal with the issue at hand and determine a solution out of the "comedy of errors" and to provide a solution to what transpired following the third and fourth respondent's continuance with the "charade of an existing CPA" which led to the registration of various properties into the name of a non-existent CPA, as stated above, we respectfully submit that the only long-lasting solution would be to seek and obtain the mandate of the community at large on whether there should be another communal property association which ought to be registered after following due processes as provided for in the CPA Act or whether a "similar entity" in the manner as sought by the first and second respondents, being a trust, is to be preferred over a communal property association.

71. We make the above submission on the basis that:

71.1. the provisional communal property association which was registered on 10 September 2007 ceased to exist following the expiry of the fixed period of its registration,

71.2. the former executive committee members of the non-existent association cannot, in law, give a mandate or instructions or authorise the transfer of its immovable properties to any third party,

71.3. the assets of the now defunct association have resorted back to the state, in this case, the third respondent, who was the previous owner in trust on behalf of the Bakgatla tribe.

72. It follows that any transfer of the immovable property to any third party must be a decision to be taken by morafe/the traditional community, who were the beneficiaries of the restitution process.

R. MOGAGABE SC

L. MOLOISANE-MONTSHO SC

K CHWARO

COUNSEL FOR THE FIRST AND SECOND RESPONDENTS

5 MAY 2015

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE CCT 231/14

In the matter between:-

BAKGATLA-BA-KGAFELA TRIBAL COMMUNITY PROPERTY ASSOCIATION	Applicant

and

BAKGATLA-BA-KGAFELA TRIBAL AUTHORITY	First Respondent
KGOSHI NYALALA MOLEFE JOHN PILANE	Second Respondent
THE MINISTER OF THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Third Respondent
THE DIRECTOR GENERAL FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	Fourth Respondent

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HEADS OF ARGUMENT ON BEHALF OF THIRD AND FOURTH RESPONDENTS

INDEX

INTRODUCTION:

1. The Bakgatla-Ba-Kgafela is a traditional community that lives in the North West Province. Although the present matter concerns one part of the land claims lodged on behalf of this community and various sub-communities within the larger traditional community, it is handy to consider the facts relating to this community as a whole as set out in the judgment of this Court in the matter of ***Pilane v Pilane***.

   See *Mmuthi Kgosietsile Pilane and Another v Nyalala John Molefe Pilane* [2013] ZACC 3 *at paras [2] to [5]*

   paras 3 and 4 of the judgment of the Land Claims Court (LCC), per Matojane J

   lines 13 to 20, p12, Vol 1 of record filed by Applicant

   lines 3 to 12, p28, Vol 1 of record filed by Applicant

lines 1 to 6, p 29, Vol 1 of record filed by Applicant

2. This case concerns the restoration of some 8000 hectares of land within the Pilanesberg Game Reserve in favour of the Bakgatla-Ba-Kgafela community ("the community") in terms of the provisions of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act).

See: table at para 15, p307, Vol 4 of record filed by Applicant

lines 10 to 12, p 30, Vol1 of record filed by Applicant

3. More specifically, the case involves the issue of what type of legal entity a community should use to receive the restored land, and the governance structures that will prevail after such restoration.

4. In the context of restitution claims, this question only arises at the very end of the processes provided by the Restitution Act. A legal entity is only created after the land claim has been found to be valid, either by agreement with the land owner or through the mediation or adjudication processes before the Land Claims Court.

After the land has been purchased or expropriated, whichever may be applicable, the claimant community must then receive the land in a corporate entity that has the necessary legal capacity to own land.

5. Our law provides a whole range of legal entities through which groupings of persons, including traditional communities, can own land. It is not necessary to consider all the details relating to the many different forms of legal entities in our law, save to note that the legislature created a very specific type of legal entity for purposes of communal land ownership, namely, the Communal Property Association Act, 28 of 1996 (the CPA Act). The CPA Act has a specific value system that underpins the CPAs created in term of it.

See: section 9 of the CPA Act

6. The CPA Act was tailor made for communal land ownership. However, at the same time, it is by no means the only legal entity able to serve the purpose of communal land ownership. The same principles found in

section 9 of the CPA Act, can be incorporated into a trust deed, or the constitution of a co-operative.

7. The legislature, in the Restitution Act, foresaw that the peculiar, and often complex, dynamics within communities required that a number of aspects be given specific attention before an award of restoration of land can be made.

8. The identity of the members of the community must be determined through a process that is called verification. This process happens by virtue of the provisions of section 10(4)(a) of the Restitution Act. This often involves determining who the actual dispossessed part of the community was historically. This process is crucial for the voting process.

9. Furthermore, the establishment of leadership structures must be facilitated to avoid arguments in respect of the legitimacy of leaders.

10. If there are any disputes in respect of who the legitimate leaders are within a community, the provisions of section

10(4) of the Restitution Act provide a mechanism through which the legitimate leaders of a community must be determined. These are functions performed by the relevant Regional Land Claims Commissioner (RLCC). These are not functions performed by the departmental staff or designated officials in terms of the CPA Act.

11. Before any land can be restored to a community, the LCC must, in terms of section 35(2)(c) determine the manner in which the restored rights are to be held. The Restitution Act does not prescribe a specific legal entity that must be used for the holding of such restored rights, but it does require that the court finally decide on the issue. The power in section 35(2)(a) strengthens the court's ability to lay down requirements that must be met by the established legal entity.

See: *order granted in In re Kranspoort Community 2000 (2) SA 124 (LCC) at para 123*
See also: *order granted in The Makuleke Community Concerning: Pafuri area of the Kruger National Park and Environs, Soutpansberg District, Northern Province [1998] ZALCC 26 (unreported)*

12. When a land claim in terms of the Restitution Act is settled, as opposed to adjudicated through the LCC, all aspects of the claim are, since 1997, settled by the Minister for Rural Development and Land Reform, the Third Respondent in this matter, in terms of section 42D of the Restitution Act. As a result of this shift to the Minister of settled matters after 1998, there is a dearth of authority dealing with the issue as to what type of legal entity should be established, and what the content of its founding document should be.

13. In such cases, it is for the Minister to approve of the legal entity created and to ensure that the legal entity complies with the provisions of the Restitution Act in general, and more specifically with the provisions of section 42D(2).

14. The establishment of who legitimately represents a community and what legal entity must be used to establish ownership and governance over restored land is obviously central to the entire restitution process. We respectfully submit that it therefore requires no argument to accept that the present matter raises important

constitutional issues. It involves the interpretation of legislation that gives effect to the rights in sections 25(6) and 25(7) of the Constitution.

See: *Kwalindile Community v King Sabata Dalindyebo Municipality 2013(6) SA 193 CC at para 33*

Alexkor Ltd v Richtersveld Community 2004 (4) SA 460 CC at para 23

Occupiers of Mooiplaats v Golden 2012 (2) SA 337 (CC) Thread Pty Ltd and others at para 3

15. As a communal property association will often be used for such restoration, the interpretation and application of the CPA Act therefore also involves constitutional issues. In fact the issues go wider than the Restitution Act, as the CPA Act will also be used for the realisation of section 25(6) rights and housing rights under section 26.

16. As this case illustrates, there is much legal uncertainty as to the role that traditional leadership structures must play in the governance of land restored through the Restitution Act. Legally and politically, it is a highly contested arena.

See in general: Tongoane v National Minister of Agriculture and Land Affairs 2010(6) SA 214 CC at paras 10 to 33

17. Apart from the inevitable tensions that will exist between traditional leadership structures and possible alternative structures, these tensions are further exacerbated by the parallel positions of land restored in terms of the Restitution Act, on the one hand, and land in communal areas in respect of which the tenure rights will be upgraded as required by section 25(6) of the Constitution.

See: Constitutional Law of South Africa, Woolman et al, LL, Chapter 26 on Traditional Leaders (Bennett & Murray), especially section 26.6(d) dealing with land

18. To quote from the latter reference in the introduction

Underlying all these difficulties are profoundly different understandings of government: on the one hand, those held by traditional leaders, and, on the other, those held by elected representatives in the new South African democracy. In modern states, governmental powers are regulated by various rules which are designed to guarantee what is probably the most important principle in a democracy: accountability to the citizen body. Customary law had no specific rules catering for

this principle, but the type of controls associated with a bureaucratic state were irrelevant to the personal style of government typical of traditional African society. A ruler's power was general and all-inclusive. It followed that the business of government was neither differentiated according to the western notions of executive, judicial and legislative functions nor allocated to separate institutions. Instead, all the functions of government were located in one body: the chief-in-council

and

Prior to 1994, local government elections were held only in urban areas and towns. See TE Scheepers, W du Plessis, C Rautenbach, J William & B de Wet 'Constitutional Provisions on the Role of Traditional Leaders and Elected Local Councillors at Rural Level' (1998) 19 Obiter 70. Traditional leaders were especially concerned about the possibility of losing their judicial powers and control over land affairs. Salaries were another controversial matter, for traditional leaders were paid more than municipal councillors and had more perquisites of office. See Oomen Tradition on the Move: Chiefs, Democracy and Change in Rural South Africa (2000) 13–14 and 40–3.

19. In the present matter, the land being restored within the Pilanesberg Game Reserve is adjacent to the communal land that will be governed by the communal land rights enactments.

20. Again, these tensions, and the manner in which they played out in the present matter, involve important constitutional issues.

21. Considering the important nature of the constitutional issues that this matter raises, we respectfully submit that leave to appeal should be granted irrespective of the merits of the Applicant's case.

THE POSITION OF THIRD AND FOURTH RESPONDENTS:

22. The Third and Fourth Respondents maintain, as they did in the LCC, that the disputes between the parties should be referred for mediation, either in terms of section 13 or section 35A of the Restitution Act.

23. Mediation as a tool to settle disputes is a central feature of land and housing legislation post-1994.

See: *Section 7 of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act, 19 of 1998 (PIE)*

Section 21 of the Extension of Security of Tenure Act 62 of 1997 (ESTA)

Section 36 Land Reform (Labour Tenants) Act 3 of 1996 (LTA)

Section 10 of the Communal Property Association Act 28 of 1996

24. The most important characteristic of mediation is that it allows the parties to a dispute to establish a settlement which they choose themselves, as opposed to an adjudicated position that is forced upon them, where the "winner takes all" principle often prevails.

25. The interactions between traditional leadership structures and their communities and sub-communities are complex. Even more complex, are the various relations that must be governed in respect of land ownership and land use.

26. It is therefore unlikely that any set of general rules can precisely determine the content of the governing structures for the myriad of situations that will present themselves.

27. The present matter is a good example. Although there were extensive processes during both 2005 and 2007 aimed at establishing a legal entity, it is clear that these processes could not settle the intractable disputes

between the traditional leadership structures, on the one hand, and the wishes of the community to establish a democratic legal entity.

28. As a result, the Department of Rural Development and Land Reform appointed a mediator in 2012 to address precisely these issues. This process was, however, not given any chance to progress as the Applicant approached the LCC with the application that is presently before this court.

See: *lines 11 to 13, p45, Vol 1 of record filed by Applicant.*

line 15, p 31 to line 21, p32, Vol 1 of record filed by Applicant

lines 15 to 19, p 52, Vol 1 of record filed by Applicant

lines 16 to 19, p83, Vol 1 of record filed by Applicant

lines 5 to 10, p90, Vol 1 of the record filed by Applicant

line 9, p92 to line 17, p94, Vol 1 of the record filed by Applicant

line 12, p73 to line 16, p74, Vol1 of the record file by Applicant

29. Although the Third and Fourth Respondents acquiesced in the judgment of the LCC, they did so primarily because the orders granted achieved a result which accorded with the results of the processes followed by the Regional Land Claims Commissioner in 2005 and 2007, coupled with the fact that the First and Second Respondents were accommodated in the communal property association established.

30. This acquiescence in the orders made does not mean that the Third and Fourth Respondents necessarily agreed with the reasoning of the judgment in all respects. The Third and Fourth Respondents must also manage the outfall of the extreme delays in the finalisation of Restitution claims, a matter over which they only have indirect influence. The order of the LCC achieved some progress in the long saga.

See: lines 8 to 13, p 88, Vol 1 of the record filed by Applicant

31. We respectfully submit that if, as we shall argue below, the SCA orders are set aside, the entire matter may be considered anew.

32. If the issues before the LCC are revisited, we submit that this is by definition a matter where mediation is called for.

33. As will be shown below, it may even be argued that mediation is required by law as there are a number of competing or overlapping land claims in this matter that must be settled in terms of the provisions of the Restitution Act. They have not formally been settled.

PRELIMINARY ISSUES: JURISDICTION AND *LOCUS STANDI*

34. Third and Fourth Respondents no longer persist in the question over the LCC's jurisdiction. Although we respectfully submit that the reliance on the matter of ***Mediterranean Shipping Co v Speedwell Shipping Co Ltd*** 1986 (4) SA 329 (D) at 333E-G is erroneous, we concede that the decisions taken in terms of the CPA Act are sufficiently linked to the restitution claim to vest

jurisdiction on the LCC in terms of section 22(2)(c) of the Restitution Act.

See: paras]15] - [18] of the LCC judgment

35. The impression cannot, with respect, be created that the LCC has jurisdiction over decisions made in terms of the CPA Act just because the parties may make such legal concessions. The LCC jurisdiction over the CPA Act is limited to cases where the CPA Act decisions are taken in consequence of the implementation of other laws that fall within the jurisdiction of the LCC.

36. The *Speedwell* matter *(supra)* concerns matters where the court does not have jurisdiction over the person of the defendant. The case applies to the High Court, a court that has plenary legal jurisdiction.

37. A court such as the LCC has circumscribed substantive jurisdiction. Neither the LCC, nor the parties to proceedings, can confer jurisdiction on the LCC that it does not otherwise have.

LOCUS STANDI

38. Although the Third and Fourth Respondents raised the issue of *locus standi* in the motion proceedings before the LCC, it abandoned that point and supported the Applicant's position during argument in the LCC.

39. The SCA judgment relies almost entirely on this legal point. For the rest, the SCA judgment deals with the facts of the matter in very broad brush strokes.

40. We respectfully submit that the SCA judgment is incorrect in its interpretation of section 5(4) of the CPA Act.

See: paras 11 to 14 of the SCA judgment

41. The SCA judgment, with respect, lacks a contextual and purposive approach to the interpretation of this section. It would also appear that the interpretation of the SCA fails to consider material provisions of the CPA Act.

42. As a starting point, the provisions of section 2 as well as the definitions of “an association” and a “community” must be considered.

43. From the provisions of section 2, it is apparent that the Act does not only apply to newly-formed groupings of persons who wish to own land communally. It can also apply to existing associations.

44. In fact, from the provisions of section 2, read with the definition of “community”, it is clear that the Act seeks to provide a statutory vehicle for the incorporation of communities and to create a governance structure for the community to govern its land. Such communities exist independently from the provisions of the CPA Act, and their existence would be unaffected should they not be registered in terms of the CPA Act.

45. The continued existence of the underlying unincorporated association of persons accords with our company law and law of voluntary associations. The CPA Act does not expressly provide that a CPA ceases to exist after 12

months. Quite the contrary, section 8(6)(f) only provides for deregistration of a provisional association once the CPA is finally registered. The only other section that provides for deregistration, is section 13(3) of the CPA Act.

46. The SCA judgment, in its first paragraph, respectfully misstates both the law and the relief sought in the LCC. In paragraph [1], the SCA introduces this issue as follows:

> "*in terms of which the respondent was declared to be an association established in terms of the Communal Property Association Act 28 of 1996.*"

47. The actual relief granted by the LCC correctly makes specific mention of the existing community. The actual relief granted was as follows:

> "*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 1998.* (our underlining)
>
> *2. The applicant was entitled to be registered permanently as an association by the thirteenth respondent.*"

48. The communities that are incorporated for purposes of the CPA Act may or may not have full legal capacity prior to their registration. The CPA Act also makes provision for the application of the CPA Act to so-called "similar entities" Nothing stops the community to apply for permanent registration at any time.

49. The Restitution Act and the CPA Act interact very specifically through provisions such as section 2(1)(a) of the CPA Act. In terms of the Restitution Act, a community is defined as:

> "*means any group of persons whose rights in land are derived from shared rules in determining access to land held in common by such group, and includes part of any such group*". (our underlining)

50. Many communities, and certainly almost all subcomponents of a community, will not have full legal capacity during the period when they pursue their land claim.

51. Full legal capacity is not a prerequisite for the institution of a land claim in terms of the Restitution Act. The SCA

judgment failed to appreciate the practices in the LCC, especially where it concerns the citation of such inchoate communities.

52. Even under high court procedures, entities such as trusts and partnerships are permitted to sue and be sued, despite their lack of separate legal personality.

53. Rule 10 of the Rules of the LCC has similar provisions to that of Rule 14 of the High Court.

54. What is required for purposes of the Restitution Act is neither incorporation nor separate legal personality. What is required is a group of persons who have a history of exercising land rights "*derived from shared rules determining access to land held in common*".

55. From the provisions of section 5(4)(a) and 5(4)(b), a provisional CPA may "*acquire rights in land*" but may not alienate such rights. The applicant community in this matter became the registered owner of a number of pieces of land in the Pilanesberg Nature Reserve. We can readily concede, for purposes of argument, that it is

not ideal to register land in the name of a provisional CPA.

56. However, the fact that such registration is not ideal is a very different matter altogether than the assertion that a provisional CPA stops existing in law if it is not converted into a permanent CPA within 12 months. Even worse, with respect, is the assertion that the underlying association has no *locus standi* to approach the court on any issue affecting the rights of its members.

57. Our law does not restrict standing when it comes to matter affecting constitutional rights, especially fundamental rights.

See: Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 CC at para 14

Rail Commuters Action Group v Transnet 2003 (5) SA 593 C at 554B to 557A

58. Section 5(4)(c) of the CPA Act would appear to provide in express terms that a provisional CPA is a juristic person.

59. It would appear that if a provisional CPA has not adopted a constitution after 12 months, that the members of the

community, that are also members of the provisional CPA, are no longer entitled to use the land as they would be during the first 12 months as is provided in section 5(4)(a). In other words, a provisional CPA does not cease to exist for all legal purposes after a period of 12 months. It only loses the right to use the land it acquired. Its existence for certain purposes is suspended, not extinguished.

60. In the present matter, the applicant community did in fact adopt a constitution for purposes of registration in terms of the CPA Act.

See: para 14 of the SCA judgment

61. We respectfully submit that the real issue before the LCC and the SCA was not whether the applicant community existed, nor what name it gave itself for purposes of citation, but rather whether the applicant community had been, or was entitled to be, registered as a permanent CPA. It is obvious from the LCC judgment that this is how the issues were finally formulated by the LCC. The LCC

accepted that there had not actually been final registration as asserted by Mr Moyo in his evidence.

See: paras 11, 12 and 27 of the LCC judgment

62. The findings of the LCC in paragraphs 36 and 40 of its judgment are contradictory. It is clear from the relief granted that the LCC found that all the requirements for permanent registration had been met, not that it had in fact been registered as a permanent CPA.

63. As we submit below, the problems that the applicant faced in the LCC, and continues to face, do not lie in the provisions of the CPA Act. Its problems lie in the provisions of the Restitution Act and the process in terms of which land claims are settled through this Act.

64. For these reasons, we respectfully submit that the SCA judgment was wrong, and that the appeal against the SCA judgment should succeed. The appeal before the SCA should have succeeded for different reasons and the SCA should, as the LCC should have done, referred all the disputes to mediation in terms of sections13(1)(a), (b)

and (d) of the Restitution Act, or section 35A in the alternative.

THE PROVISIONS OF THE RESTITUTION OF LAND RIGHTS ACT 22 OF 1994 THAT IMPACT ON THIS CASE:

65. Although it was inevitable that a legal entity be established for the Bakgatla-Ba-Kgafela community for purposes of receiving restored land, such a result must be reached in a lawful and procedurally fair manner.

66. Similarly, even though the evidence would suggest that there was overwhelming support in the applicant community for the creation of a communal property association in terms of the CPA Act, there are a number of preconditions to the implementation of such an express wish.

67. The starting point is, with respect, not the provisions of the CPA Act. In other cases dealing with discretionary land redistribution or in cases where a group of people wish to make use of the provisions of the CPA Act, the

establishment of a CPA may very well start and end within the provisions of this Act.

68. In such cases, the provisions of sections 2(1)(b) to (d) and 2(2) would be the starting point for the establishment of a legal entity and the registration of a CPA.

69. The present matter, however, has its origins in the Restitution Act. When dealing with a restitution claim, there must first be compliance with the provisions of the Restitution Act, before the processes in the CPA Act can be resorted to. Even where there is apparent duplication of processes, the Restitution Act must first be complied with.

70. From the findings of the LCC, as well as from the record, it is clear that the regional land claims commissioner for the North West Province implemented extensive processes to determine the wishes of the broader Bakgatla-Ba-Kgafela community. During 2005, this process was led by a staff member of the RLCC, being Mr Peter.

71. Mr Peter was assisted by a service provider, assumingly appointed in terms of section 9 of the Restitution Act, a Mr Mokonyane. Mokonyane understood his role to be limited to the Restitution Act, as appears from his report. His involvement was never meant to constitute compliance with the CPA Act

See: line 3, p 211, to line 11, p 219, Vol 3 of the record filed by the Applicant

Mokonyane report, p 287 to 292, Vol 3 of the record filed by the Applicant

72. As readily admitted by the Third and Fourth Respondents during the LCC proceedings, a whole range of errors were made in this matter and these Respondents, together with the Commission for the Restitution of Land Rights, sought an opportunity to correct all these errors. For instance, Mr Mokonyane was obviously a service provider in terms of section 9 of the Restitution Act. He was also working with RLCC staff, namely Mr Peter. Mokonyane was not an authorised officer as provided for in section 7(2) of the CPA Act.

73. In this way, confusion crept in between the provisions of the Restitution Act and the CPA Act.

See: lines 4 to 12, p 13 Vol 1 of the record filed by the Applicant

lines 5 to 15, p 217, Vol 3 of the record filed by the Applicant

74. In 2007 the department attempted to correct some of the mistakes through the appointment of an official, Ms Mosiapoa.

See: paras 25 to 27 of the LCC judgment

75. This was followed in 2012 by the appointment of a mediator. The mediator made no headway, as none of the parties considered themselves obligated to mediate.

See: line 5, p 69 to line 7, p71 Vol 3 of the record filed by the Applicant.

76. The purpose of the provisions of sections 10 to 14 of the Restitution Act is to create a process by which land claims are mediated and investigated by the Commission, and

then settled, if possible. If no such settlement is achieved, the matter must be referred to the LCC in terms of section 14. However, once an owner of land subject to a restitution claim admits the merits of the claim, and the state is prepared to acquire the land, it does not follow that a matter proceeds towards the settlement of the claim before the court or in terms of section 42D of the Act.

77. The relevant RLCC must ensure that all claims over the land have been identified and have been part of the settlement.

78. Until each individual claim is either settled or withdrawn, the particular land claimant is entitled to have his/her claim proceed in terms of the proceedings of the Restitution Act. Such is, with respect, axiomatic to the adjudication of justiciable disputes. The chief is entitled to a range of procedural rights, rights which he does not have to subject to the wishes of a majority. He can insist on adjudication, or if he so wishes, on mediation.

See: line 20, p 60 to line 2, p 6, Vol 1 of record filed by Applicant

lines 16 to 23, p 82, Vol 1 of the record filed by the Applicant.

79. Although the LCC correctly summed up the evidence in this matter, it completely failed to appreciate the interaction between the Restitution Act and the CPA Act.

80. The RLCC could not make the decision that the wishes of the chief can be ignored, simply because the overwhelming majority of the community wants a CPA. Such a decision does not fall within the jurisdiction of the RLCC. It is tantamount to making a decision in terms of section 10(4) of the Restitution Act.

See: Gamevest (Pty) Ltd v RLCC Northern Province and Mpumalanga 2003(1) SA 378 SCA at paras 6 and 7

81. As appears from the record, the chief also lodged a land claim. One aspect of such a claim (as with all claims) concerns the manner in which the land rights must be held as provided for in section 35(2)(c) of the Restitution Act.

82. Although the LCC has not previously had the opportunity to look at this type of dispute in detail, it is a very important aspect of any land claim. For this reason, the legislature has provided, in section 10(4), for the determination of legitimate leadership structures.

83. In addition, section 12(4) provides for a mechanism in terms of which the RLCC can ensure that all land claims proceed through the commission process at the same time.

84. Any order for restoration, which was made in terms of either section 35 by the LCC or in terms of section 42D by the Minister, is liable to be rescinded if it was made in circumstances where other claims have been lodged over that land. This is made clear in section 11(5) of the Restitution Act.

85. Whether the claim by the traditional leader of the Bakgatla-Ba-Kgafela (the First Respondent) has merits or not, was not the question to be answered by either the RLCC or the Minister at the time (2005 and 2007). His

claims in respect of an alternative legal entity remained a justiciable dispute which had to be settled or adjudicated in terms of the Restitution Act.

See: *lines 20 to 22, p 60, Vol 1 of the record filed by the Applicant*

Lines 16 to 19, p82, Vol 1 of the record filed by the Applicant

86. The RLCC should have referred this matter to mediation in terms of section 13 of the Restitution Act and, if that failed, should have referred the matter to the court in terms of section 14 of the Act.

87. The LCC, being seized with the application by the applicant, should similarly have referred these disputes to mediation in terms of section 35A of the Restitution Act and, if such mediation had failed, should then have adjudicated the dispute. If it is found that the matter is not ripe to be referred to mediation by the LCC, then the LCC should have ordered the RLCC to do so. The result is the same.

88. It was, at the very least, premature for the LCC to decide that the applicant community was entitled to the registration of a CPA. Even assuming that all its findings of fact are correct for purposes of the CPA Act, the issue is one of correct application of the law, more specifically, the provisions of the Restitution Act.

89. The number of other claimants that had launched land claims should also have been joined in either the RLCC processes or the LCC proceedings. It must, with respect, be clear at the end of the day that all land claims lodged have been dealt with in the same proceedings. The provisions of section 14(3A)(iii) of the Restitution Act would suggest that the matter couldn't even have been referred to the Minister as it must have been uncertain whether all the parties were party to the "agreement".

90. It is therefore respectfully submitted that the LCC did not correctly appreciate the manner in which the matter should have been dealt with. Admittedly, the Third and Fourth Respondents, and more particularly the RLCC for

the North West Province, were the cause of the series of errors.

THE POWERS OF THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM:

91. The LCC found that the intervention by the Minister was unlawful. The LCC did so by reference to the provisions of the CPA Act.

See: para 34 of the LCC judgment

92. Again, the LCC failed to appreciate the Minister's position in terms of the Restitution Act.

93. The Minister must, in terms of section 42D, ensure that an appropriate legal entity is established and that the constitution of such a legal entity complies with the provisions of the Restitution Act, and, if applicable, to the provisions of the CPA Act.

94. The Minister must deal with these issues before a section 42D agreement is entered into. There is, therefore,

nothing wrong with the Minister informing the parties that they should proceed to mediation on this aspect. The Minister must be satisfied that the provisions of section 42D(2) have been complied with. If the RLCC is of the opinion that section 42D(2) has not been complied with, then he/she must refer the matter to court as provided for by section 14(3A)(v).

95. On the face of it, it would appear that the provisions of the CPA Act can accommodate such mediation in terms of the Restitution Act. In other words, a provisional CPA is created pending finalisation of the mediation. Thereafter, the CPA may proceed to final registration whereafter the section 42D agreement can be finalised.

96. It would appear that the then Minister had such a process in mind. The Minister, as an administrative decision maker is not constrained by the formalities of court procedures. As long as she acts lawfully and in a procedurally fair manner, she remains well within her powers.

97. The involvement of the Minister in the intractable dispute between the chief and the CPA committee was therefore not only lawful, but probably called for.

98. What should not have happened was the issuing of a purported section 42D memorandum pursuant to that process. The section 42D memo must obviously await settlement of all aspects of the land claim. In addition, it would appear that the Minister was not made aware of various other land claims that existed. In any event, it would appear from the record that the Minister never signed either the 42D memo, nor an actual 42D agreement.

99. One should have understanding for the Minister's attempts to deal with this difficult dispute. The disputes between traditional leaders and proponents of purely majoritarian democratic processes for land governance would appear to be a problem that parliament itself has not yet been able to solve. At worst, the then Minister may have been over optimistic about the possibilities of the

groupings within the community sorting out their differences within 12 months.

See: *Tongoane* (*supra*) in general

100. The only manner in which this problem can be solved for the Bakgatla-Ba-Kgafela community is to have the issue referred to mediation. In this way, the community and their traditional structures can attempt to reach a settlement which is appropriate for their own circumstances. They will be lead in the process by an expert and senior mediator.

101. The present incumbent of the Second Respondent adopts the only position that is presently permissible. On the one hand, he must wait until Parliament has made new legislation concerning the governance of communal land as well as the manner in which tenure upgrade and land restoration must be synchronised.

102. The second respondent can only adopt the approach which he does in his affidavit responding to the

application for leave to appeal, namely that members of a community must determine for themselves the appropriate legal entity and, more specifically, the content of such an entity's constitution or deed of incorporation.

103. A community and its traditional leadership must obviously embark on good faith and meaningful negotiations before they can attempt to assert their respective views in court.

104. The Restitution Act leaves the choice of legal entity open for the court to decide on in the case of a dispute. It does not prescribe a specific legal entity. The Minister can also not prescribe a legal entity to a community. What is appropriate will depend on the facts of each case.

THE PROVISIONS OF THE TRADITIONAL LEADERSHIP AND GOVERNANCE FRAMEWORK ACT, 41 OF 2003:

105. The Traditional Leadership and Governance Framework Act (TLGFA) makes specific provision for a role for traditional councils or traditional leaders in respect of land administration. This function is provided for in section

20(1)(b). It is, of course, subject to the relevant national or provincial legislation.

106. Section 19 of the TLGFA contains a general provision which confers on traditional leaders those functions provided for in customary law and customs of a particular traditional community.

107. As follows from the provisions of sections 211 and 212 of the Constitution, section 20(2)(c) of the TLGFA ensures that the roles and functions of a traditional leader will always be subject to the Constitution and relevant legislation. Traditional structures should be granted reasonable accommodation in all issues that affect them.

108. It is not necessary for purposes of this matter to decide what the historical nature and extent was of control by traditional leadership structures over land and land administration. It is simply necessary for this matter to assert the basic principle that such leadership structures most certainly had some role to play.

See: *Tongoane* (*supra*) at para

109. It can be accepted for purposes of this case that the role that traditional leadership played in respect of land was severely distorted by years of colonial indirect rule as well as apartheid laws and administrative practices. Again, the disputes in this matter do not call for a final assessment of these matters.

110. If the parties to this matter fail to mediate their disputes, the issue will finally come before the LCC.

111. Also section 21(1)(a) of the TLGFA requires of traditional communities to attempt to solve their problems within customary law institutions. In other words, if a dispute arises about the role of traditional leaders in respect of land ownership, land allocation or land administration, it would appear to be statutorily prescribed that the community must attempt to settle the dispute internally.

112. The Applicant community is a traditional community, so much is common cause in this matter.

113. The Bakgatla-Ba-Kgafela community has simply not hitherto mediated their dispute, either in terms of any

legislation or in terms of customary law. They should be given the opportunity to do so.

114. The present matter does not involve a community that does not recognise the legitimacy of a previously imposed traditional authority. This case is therefore not comparable to the complaints aired by the communities in the Tongoane-matter. It is common cause in this case that the community recognises their status as a traditional community and their leadership structures, both in South Africa and Botswana.

115. Again, whether land is received in ownership via the provisions of section 25(6) or 25(7) of the Constitution, the fact remains that the role and function of a traditional authority must be considered in each instance.

116. Just as a CPA would have to recognise the powers of local authorities over their land, in a similar way they would have to recognise any powers which legislation might confer on a traditional council.

117. Unfortunately, the section 25(9) legislation that is required to implement the section 25(6) rights has not yet been passed and it will be some time before it is known what role, and when, a traditional council will play in respect of land administration. In the meantime community groupings should attempt to find solutions that are based on consensus within that community.

THE PROVISIONS OF THE COMMUNAL PROPERTY ASSOCIATION ACT 28 OF 1996

118. The CPA Act provides a tailor made structure for communities to own land communally.

119. The Act is available to communities as defined in section 1. These are communities who wish to own land in terms of shared rules under a written constitution as well as communities who are required to form an association.

120. When consideration is had to section 2 of the Act, it is clear that communities are only required to create a CPA if the LCC has so ordered (section 2(1)(a)) or communities that receive state assistance to acquire

property and where such receipt of land is conditional upon the creation of a CPA (section 1(1)(b)). For present purposes, the provisions of section 2(1)(c) can be left out of the present analysis.

121. It is clear from these provisions that there is no obligation on a community to use the CPA Act unless there is a court order or a state imposed condition to this effect.

122. This accords with the provisions of the Restitution Act which gives the LCC a broad discretion in this regard.

123. There is therefore no statutorily preferred legal entity that must be created for the restoration of land in terms of the Restitution Act or, for that matter, for the receipt of any land in respect of a discretionary redistribution programme.

124. What is central to the provisions of the CPA Act, is therefore the wishes of the community. But the wishes of the community may include the retention of their traditional leadership structures, and their customary laws relating to land allocation, use and administration.

125. Communities must be allowed to incorporate their contemporary customary laws into the fabric of the CPA constitution, subject of course to the Constitution and the principles and provisions of the CPA Act.

126. Land administration should be allowed to be adapted to modern circumstances in the same way that customary law has been so allowed in respect of succession and traditional leadership.

See in general: *Bhe v Magistrate, Khayelitsha 2005 (1) SA 850 CC*

Shilubana v Nwamitwa 2009(2) SA 66 CC

CONCLUSION

127. We respectfully submit that mediation is built into the architecture of post 1994 land legislation, and should be given a serious chance at resolving the disputes between the CPA committee, on the one hand, and the First and Second Respondents, on the other hand.

128. In addition, internal resolution of disputes is furthermore part of the DNA of customary law. If customary law is to be given appropriate standing in our constitutional order, it too should be given a chance to resolve the disputes between the disputants in the Bakgatla-Ba-Kgafela community.

129. We therefore respectfully submit that the following order should be made:

1. Leave to appeal against the judgment and order of the Supreme Court of Appeal should be granted.

2. The appeal should be upheld.

3. The order of the Supreme Court of Appeal should be replaced with the following order:

3.1 The appeal is upheld.

3.2 The order of the Land Claims Court is replaced with an order that the application be postponed to allow the parties to mediate the disputes

between them, alternatively, for the Regional Land Claims Commissioner for North West Province to refer the disputes to mediation in terms of section 13 of the Restitution of Land Rights Act 22 of 1994.

130. The Third and Fourth Respondents seek no order in respect of costs

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4 MAY 2015

LIST OF AUTHORITIES

1. *Alexkor Ltd v Richtersveld Community* 2004 (4) SA 460 CC

2. *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 850 CC

3. *Constitutional Law of South Africa,* Woolman et al, LL, Chapter 26 on Traditional Leaders (Bennett & Murray)

4. *Gamevest (Pty) Ltd v RLCC Northern Province and Mpumalanga* 2003 (1) SA 378 SCA

5. *In re Kranspoort Community* 2000 (2) SA 124 (LCC)

6. *Kwalindile Community v King Sabata Dalindyebo Municipality* 2013 (6) SA 193 CC

7. *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 CC

8. *Mediterranean Shipping Co v Speedwell Shipping Co Ltd* 1986 (4) SA 329 (D)

9. *Mmuthi Kgosietsile Pilane and Another v Nyalala John Molefe Pilane* [2013] ZACC 3

10. *Occupiers of Mooiplaats v Golden Thread Pty Ltd and others 2012 (2) SA 337 (CC)*

11. *Rail Commuters Action Group v Transnet* 2003 (5) SA 593 C

12. *Shilubana v Nwamitwa* 2009 (2) SA 66 CC

13. *The Makuleke Community Concerning: Pafuri Area of the Kruger National Park and Environs, Soutpansberg District, Northern Province* [1998] ZALCC 26 (unreported)

14. *Tongoane v National Minister of Agriculture and Land Affairs* 2010 (6) SA 214 CC