

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH**

Case no. 3922/2015

In the matter between

MZWAMADODA GROOTBOOM

1st Applicant

ANDILE GROOTBOOM

2nd Applicant

NOMKHANGO DLOTHO

3rd Applicant

SPIWO MKHELE

4th Applicant

NOMAYEZA NKOSINKULU

5th Applicant

MONWABISI MLAMBO

6th Applicant

NONCEBA RHAMNCWANA

7th Applicant

JACOB BONISILE CEKISANI

8th Applicant

versus

ARCHIE MKELE

1st Respondent

LUYANDA MATIWANE

2nd Respondent

PHAZI ALLA

3rd Respondent

DEON PRINCE

4th Respondent

JOYCE SENSIE

5th Respondent

RONA SKOSANA

6th Respondent

LUYANDA JAM-JAM	7th Respondent
YOLISWA GROOTBOOM	8th Respondent
STEKANA SKOSANA	9th Respondent
MINISTER OF RURAL DEVELOPMENT & LAND AFFAIRS	10th Respondent
MEC FOR AGRICULTURE – EASTERN CAPE	11th Respondent
CW MALAN INCORPORATED ATTORNEYS	12th Respondent
ISIBANE COMMUNAL PROPERTY ASSOCIATION	13th Respondent

JUDGMENT

HARTLE J

[1] In this matter – which the 1st to 8th applicants (“the applicants”) describe as a “dispute between two executives”, they seek a declaratory order declaring them to be the properly elected members of the executive committee of the Isibane Communal Property Association, the 13th respondent herein (“Isibane”).¹ They seek a further order declaring the 1st to 8th respondents², constituting the former members of the executive committee of Isibane, to have been lawfully removed and substituted by their most recent election as members. They also seek ancillary relief flowing from the declaratory order which will place them in a position to effectively and practically manage the affairs of the association.

¹ The applicants claim that their official positions in the last appointed executive committee are: Chairperson, Deputy Chairperson, Secretary, Organizer, Treasurer and additional members respectively.

² I will assume that this includes the 9th respondent who, although cited as a party in the application and alleged also to have been a member of the substituted executive committee, is not referred to in the prayers in the notice of motion. This is but one example of many obvious errors in the applicants’ papers.

[2] The 1st respondent, in his own capacity as a member of Isibane and vice chairperson of the executive committee of Isibane, but also on behalf of the 2nd to the 9th respondents, and purportedly on behalf of Isibane itself, opposes the application on two bases essentially. He claims firstly that the applicants lack *locus standi* in these proceedings because, except for the 2nd and 4th applicants, they are not members of Isibane and therefore not eligible for office and, secondly, that the purported process followed by the applicants in “removing” the respondents and appointing themselves as the executive committee members of Isibane was unlawful.

[3] At the outset it should be stated that the 2nd to 9th respondents have not filed confirmatory affidavits. A person elected to office under the constitution of an organization has a personal right to the office and if someone wrongfully usurps the office he is entitled to sue as an individual. Even where a number of duly elected officers in combination have the right to conduct the affairs of an association then, if their offices are wrongfully usurped by other individuals, the rights which are infringed are personal rights and legal proceedings are properly taken by the persons concerned as individuals.³ Each of the 2nd to 9th respondents ought to have confirmed their willingness and desire to assert and protect their individual rights of office both individually and or as a group, but have not put up such confirmation. Further, insofar as the supposed opposition on behalf of the 13th respondent goes, no resolution has been put up by Isibane authorizing the 1st respondent’s involvement on this basis notwithstanding the applicants’ objection to his purported acting on the association’s behalf. It is trite that an association can

³Ntombela v Shibe 1949 3 SA 586 (N) 588; Sachs v Moore 1938 WLD 69 73.

only act through the agency of a duly authorized representative. I therefore conclude that the opposition is not supported by any of the respondents except the 1st respondent himself.

[4] The 10th and 11th respondents, included as interested parties, are the national Minister of Rural Development and Land Reform and the provincial MEC of Agriculture respectively. They are cited in their capacities as executive heads nominally responsible for those officials in their respective departments who have, according to the applicants, assisted the parties in resolving the dispute between them and the 1st to 9th respondents culminating in the applicants' election as executive members of Isibane.

[5] The complaints in the founding affidavit made against the substituted executive committee leading up to the intervention of the 10th and 11th respondent's officials include a failure on the part of the erstwhile committee to account to and include members in the "goings on" of Isibane; and to convene an annual general meeting since the election of the interim executive committee appointed contemporaneously with the registration of Isibane.

[6] The 12th respondent is a firm of attorneys in Jeffreys Bay who hold in trust certain funds constituting rental income collected on behalf of Isibane which the applicants pray be paid over to their attorneys so that they, as the executive body, can have the financial wherewithal to carry on the business of Isibane⁴.

[7] There is a dispute of fact on the papers concerning the lead up to the impasse which has made this application necessary and lots of finger pointing as to who is

⁴ It is common cause- although not explained why, that the association has not since its registration opened its own banking account in which to deposit the rental income collected.

to blame for the failure of Isibane’s precursor to the currently constituted entity (known as the Illima Communal Property Association), but these are not issues which it is necessary for this court to decide.⁵ The narrow question in my view is whether the applicants were properly elected as members of the executive committee of Isibane in substantial compliance with its constitution at the purported annual general meeting on 17 November 2012.

[8] Isibane was registered as a communal property association in terms of section 8(3) of the Communal Property Associations Act⁶ (“the CPAA”), evidently as a sequel to a land restitution claim of property in Hankey described as “the remaining extent of Farm Boschbok Koppen, Portion 1, Farm No. 182, situated at Boschbok Koppen” on 2 May 2002 under registration number CPA/02/0425/A⁷. Isibane is the registered owner of this property including three other farms held for the use and benefit of designated members of the Boschbok Koppen community which, it appears from official minutes of Isibane coincidentally filed in the present litigation, is land additional to the claim acquired for an extended community including former labourers and the tenants of the previous owners of the three farms ostensibly on one or other of the bases referred to in section 2 (1) of the CPAA.⁸

⁵Ineptitude and maladministration are among the allegations levelled against the erstwhile administrators of Illima, which although serious and warranting investigation, are not for this court to pronounce upon.

⁶No. 28 of 1996.

⁷According to Isibane’s constitution, however, the community which is to benefit from the registration of the communal property association is one envisaged pursuant to the provisions of section 2 (1) (b) of the CPAA, so there must be something more to the “back story” than just the culmination of a land redistribution claim.

⁸The precise details of the land redistribution claim and the manner in which the three additional properties came to be settled upon the relevant community are not clear. This information is evidently not known to the applicants, neither indeed who is currently included in the membership list of the extended community. Worryingly neither does the 1st respondent (even purporting to represent Isibane) appear to be able to refer with certainty to a current list of members, whereas this information would be critical to the management of Isibane. The registered constitution of Isibane refers to an “attached membership list (Annexure A)” which is required to be updated annually, but this attachment was ostensibly omitted upon registration of the association and has not been amended since the association was registered several years ago. The 10th and 11th respondents could have

[9] The CPAA establishes communal property associations for the purpose of holding land restored to communities through the land restitution process. The act was passed to give effect to the constitutional right of communities to restitution of land dispossessed in terms of discriminatory laws or practices of the apartheid regime.⁹ Whereas the restitution of Land Rights Act¹⁰ regulates the process of claiming restitution of land in the exercise of the constitutional right of individuals in communities to reclaim their lost land, the tandem CPAA creates the mechanisms in terms of which communities may possess land restored under the restitution process. The act embodies the entitlements (the rights owned by a community) and protection thereof in a new juristic person created in terms of this law.

[10] The CPAA derives its force from the Constitution to which it is inextricably linked. Section 25 (7) of the Constitution recognizes and protects rights in land which go beyond registered ownership.¹¹ Thus the CPAA creates a desired legal instrument (upon registration it is established as a juristic person with perpetual succession regardless of changes in its membership)¹² with the necessary safeguards in place through which previously disadvantaged members of the community may acquire and possess land that belongs indivisibly to the entire community. One of the ways in which this recognition and protection is afforded to members of traditional communities is through a written constitution by which

provided this information (and background information such as is relevant), but have not filed notices to oppose or to interpose to explain what the official position is as far as their records are concerned.

⁹ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* 2015 (6) SA 32 (CC), at par [1].

¹⁰ No. 22 of 1994.

¹¹ *Bakgatla-Ba-Kgafela Communal Property Association*, *supra* at par [18].

¹² Section 8 (6) (d) of the CPAA.

the association is governed, endorsed by the Department of Rural Development and Land Reform (“the Department”) which is responsible for the effective implementation of the CPAA. Upon registration of an association the constitution becomes a legally binding agreement between the association and its members and is deemed to be a matter of public knowledge.¹³ It is to that constitution that the court must look in order to determine whether the “removal” of the 1st to the 9th respondents and the substitution of the applicants in their place by the ensuing election were lawful.

[11] The CPAA aims to ensure that through approved governing vehicles, the relevant body/entity is managed in a manner which is non-discriminatory, equitable and democratic and is accountable to its members. The further objective of the act is to ensure that members of such institutions are protected against the abuse of power by other members.¹⁴

[12] The registration of permanent associations is approved by the Director-General of Rural Development and Land Reform in terms of the provisions of section 8 (2) of the CPAA which sets forth stringent requirements for eligibility, one of them being that the constitution adopted by the association complies with the principles set out in section 9.

[13] In *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others*,¹⁵ the Constitutional Court helpfully tabulated the five principles that underpin the democratic nature of associations established in terms of the CPAA as follows:

¹³ Section 8 (6)(e).

¹⁴ See Preamble to the Act.

¹⁵ The citation is at footnote 9 above.

“[25] ... The first principle is that an association’s constitution must embrace fair and inclusive decision-making processes that afford members the opportunity to participate in the association’s decisions. These include decisions to dispose of or encumber the association’s property, and termination of membership of any person on reasonable grounds, following a fair hearing.

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

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

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

[29] The last principle relates to accountability and transparency. The constitution must enable members to hold the association accountable by imposing fiduciary responsibilities on members of the executive committee in relation to the association and its general members. The constitution should require committees to exercise their powers

in the best interest of all members, without any advantage to themselves. Effective financial management must form part of the constitution's requirements, which must include opening a bank account in the name of the association into which all its cash should be deposited. The constitution must also require that the association's financial records be subjected to an independent verification annually.”¹⁶

[14] These principles safeguard the interest of members of traditional communities and empower them to participate meaningfully in the management of communal property by way of “participatory democracy” in the affairs of traditional communities. Through the desired legal instruments and minimum standards of governance “members of the community are afforded an equal voice in matters of the association and the property it holds on behalf of the community.”¹⁷

[15] Essential to the proper functioning of such an association, is the appointment of a managing group of persons with executive powers entrusted to them in accordance with its constitution. “Committee” is defined in the CPAA¹⁸ as “a committee elected by the members of an association to manage the affairs of that association”. Axiomatic to the effective management of a communal property association is that the appointment of its leaders carries the endorsement of its members following an election that is constitutionally compliant.

[16] Further integral to the successful implementation of the CPAA and the protection of the interests of members of the community through an association

¹⁶ Bakgatla-Ba-Kgafela Communal Property Association, *supra* at pars [25] – [29].

¹⁷ Bakgatla-Ba-Kgafela Communal Property Association, *supra* at par [30].

¹⁸ Section 1.

established for such a purpose is the advisory and oversight function which the Department plays in ensuring that previously disadvantaged members of traditional communities' rights of access to communal land are meaningfully realized and respected.

[17] The CPAA imposes various duties on the Director-General of the Department. In the main the act requires the incumbent and those who he authorizes to ensure that its objects are realized. Firstly he is charged with the responsibility of furnishing all traditional communities with information about the act which may take the form of pamphlets and other documents prepared and distributed by the Department in various communities. The documents must be in a language spoken in the particular community for them to be widely accessible.¹⁹

[18] Apart from making decisions concerning the eligibility of associations for registration under the act, whether provisionally or permanently subject to the strict criteria set forth in the CPAA, the Department offers assistance at the inception stage in the preparation of the association's draft constitution by appointing skilled persons or organizations acceptable to the community and with relevant knowledge or expertise to provide the necessary assistance and support to such community as well as suggesting amendments to proposed constitutions in order to ensure compliance with the provisions of section 9 of the CPAA. The Director-General does so by the designation of any officer in the Department or other suitable person to provide the community with such assistance as may be required and available for the preparation of the draft constitution. Oversight also comes in the form of an authorized officer of the department attending the association's meetings prescribed for the adoption of its constitution, by taking minutes of the

¹⁹ Bakgatla-Ba-Kgafela Communal Property Association, *supra* at par [46]. See also section 10 (1) of the CPAA.

proceedings, witnessing the adoption of the constitution and compiling a report setting out his or her observations in relations to certain key factors which aim at ensuring a fair and democratic process. (It should be noted however that no similar involvement is prescribed by the Department post registration, although in practice – and this is evident from random minutes co incidentally filed in the present application, officers appear to keep an active presence at meetings.)

[19] The Department (through the designated “Registration Officer”²⁰) also has a record keeping function and ensures transparency by providing members of the public with the information contained in the register and with a copy of the constitution of any registered association or similar entity.

[20] Once registration has been effected, the Director-General assumes other responsibilities in respect of a registered association.²¹

[21] The Director-General or Registration Officer issues certain prescribed certificates,²² which appear to constitute *prima facie* proof of the correctness of their contents.²³ These are no doubt necessary for objective clarity and confirmation of information collated concerning the associations or other entities registered under the act.

²⁰The incumbent is an officer of the Department appointed by the Director-General.

²¹ Bakgatla-Ba-Kgafela Communal Property Association, *supra* at par [49].

²² See section 8 (3) (a) of the CPAA which relates to the certificate of registration of the association itself, and section 14 (2) (b) which prescribes the issue of a certificate of termination of a member’s membership in accordance with the association’s constitution. In the case of Isibane this record of registration has not served the purpose it was intended to thereby especially since the list of members at the time of registration was not included.

²³ See section 14 (3) of the CPAA with reference to the certificate issued concerning the termination of membership of persons in prosecutions under the Trespass Act, No. 6 of 1959.

[22] The Director-General may inspect the affairs of the association to determine whether it continues to comply with the CPAA and its constitution.²⁴ In performing this function the Director-General may demand to be furnished with any relevant information.²⁵ The duty to provide information by an association is addressed in paragraph 6 of the regulations promulgated under the CPAA, read together with section 11 (1), which provides that associations are obliged, at prescribed times, to furnish prescribed documents and information to the Director-General in order to enable him “to monitor compliance with the provisions of the relevant constitution and (the CPAA)”.²⁶ Paragraph 6 (1) thereof provides in this regard, albeit not with any specificity as to content, that:

“A communal body must on request provide the Director-General and the Registration Officer respectively with all the information and documents to which each of them is entitled, or which each is required to possess in terms of the Act and these regulations, including the information and documents that are reasonably necessary for the purposes of the Act and Regulations.”²⁷

[23] Paragraph 8 of the regulations is particular relevant to an aspect raised by the parties which I deal with below and I digress to highlight these provisions which provide that the following categories of information fall to be furnished to the Director-General in respect of a registered association, evidently at the key moments indicated in the text below:-

²⁴ Section 11 (2) of the CPAA.

²⁵ Section 11 (3) of the CPAA.

²⁶ Government Notice R1908, Government Gazette GG17620 dated 22 November 1996. (“The Regulations”)

²⁷ See also paragraph 3 (2) of the Regulations which provides that the register is to contain the specified material and “other components” which the Registration Officer may consider “necessary or advisable” for the implementation of the CPAA and the Regulations.

- “8(a) the names and where readily available the identity numbers, and the addresses of the members of the body's governing body elected at the Annual General Meeting indicating what office (if any) is held by each of them;²⁸
- (b) the names and where readily available the identity numbers and the addresses of all new members whose names do not appear on the most recent membership list previously furnished to the Director-General;²⁹
- (c) copies of—
 - (i) the body's annual balance sheet or financial statements which have been independently verified as approved by the Director-General;³⁰ and
 - (ii) the minutes of all general meetings of the members of the body which were held since the registration of the body or the previous Annual General Meeting, including the minutes of the last Annual General Meeting;³¹
- (d) a list of all dealings in land or rights to land involving the body during the period since the registration of the body or the previous Annual General Meeting, which created, altered or extinguished any right to land held by the body itself or by any of its members;

²⁸ I suspect that it was in terms of this obligation that the Registration Officer provided a letter, albeit only of effect from 2 May 2014, more than eighteen months after the purported annual general meeting at which the applicants were appointed to office, recording a change of executive committee members of Isibane. Neither the applicants nor the departmental officials explain how or why this came about at the stage when it did. Left to speculation I suppose it was a desperate attempt on the part of the applicants, using the seal of office of the Department, to attempt (long after the fact) to give validity to their purported election as office bearers.

²⁹ As I remarked in the footnotes above it is not clear on anyone's version who the current members are. This information should readily be to hand by both the Registration Officer and the executive committee of a CPA.

³⁰ It is not clear if financial statements have ever been provided since inception. If that was the case it is unlikely that the 12th respondent would be collecting and holding funds on behalf of Isibane.

³¹ This information would be a vital indicator to determine if the association is being managed in accordance with its constitution and in terms of the provisions of the CPAA. A proper record would also in this instance have given objective clarity concerning a number of allegations related in this matter which, in the absence of a properly pleaded case on the part of the applicants, might have been useful.

- (e) any other information and documents required by the Director-General which he/she requires to enable him/her to carry out his/her duties in terms of the Act and these regulations.”

[24] In carrying out inspections the Director-General may peruse and make copies of any document relating to the affairs of an association and may also subpoena any person with relevant information.³²

[25] Perhaps the most important role which the Department has in keeping oversight of an association’s affairs is acting when any dispute arises within the body. The relevant provisions of the CPAA are set out below and demonstrate the level of involvement on its part under the leadership of the Director-General. Firstly, conciliation by skilled and credible officials or organizations is offered as a tool to assist community members with vested interests in an association’s affairs to resolve disputes. Section 10 provides in this regard that:

“(10)

(1)...

- (2) The Director-General may, of his or her own accord or at the request of a community, an association, a provisional association or any member thereof, appoint a conciliator acceptable to the parties to a dispute to assist in resolving any issues for the purpose of the preparation or adoption of a constitution or to resolve a dispute between an association or provisional association and its members or between members or committee members: Provided that if the parties to the dispute do not reach agreement on the person to be appointed, the Director-General may appoint a person who has adequate experience or knowledge in conciliating community disputes.

³² Section 11 (2).

- (3) A conciliator appointed in terms of subsection (2) shall attempt to resolve the dispute
 - (a) by mediating the dispute;
 - (b) by fact-finding relevant to the resolution of the dispute;
 - (c) by making a recommendation to the parties to the dispute;
 - (d) in any other manner that he or she considers appropriate.
- (4) The conciliator shall report to the Director-General and the parties on the result of his or her conciliation and make recommendations in relation thereto.
- (5) All discussions taking place and all disclosures and submissions made during the conciliation process shall be privileged, unless the parties agree to the contrary.
- (6) ...
- (7) ...
- (8) ...”

[26] Secondly, the Director-General may himself take certain steps to resolve disputes, aiming to do so in accordance with the provisions of the relevant association’s constitution. Sections 11 (6) and (7) provide as follows in this regard:

- “(6) If a dispute arises within an association or provisional association the Director-General may, of his or her own accord, or at the request of a member of the association or provisional association-
 - (a) undertake an enquiry into the activities of the association or provisional association, in which event he or she shall take reasonable steps to ensure that interested parties are made aware of the enquiry and of its outcome;
 - (b) advise the association or provisional association and the members of their respective rights and obligations;
 - (c) make a conciliator contemplated in section 10(2) available to assist in the resolution of the dispute;

- (d) require the members to conduct an election for a new committee, if the integrity, impartiality or effectiveness of the committee or any member of the committee is in question;
 - (e) initiate proceedings contemplated in section 13; or take such other reasonable measures as he or she considers appropriate in the circumstances.
- (7) When acting in terms of subsection (6) the Director-General shall be guided by the aim of resolving the dispute in accordance with the provisions of the constitution of the association.”

[27] The Director-General may also initiate proceedings to have an association placed under his administration or place it under liquidation where, because of insolvency or maladministration or for any other cause the association is unable to pay its debts or meet its obligations, or when it would otherwise be just and equitable in the circumstances to seek such relief.³³ It would appear that the Director-General might do so under circumstances where members are unable to resolve disputes among themselves or through the Department’s agency, which drag on interminably, and result in the association not being managed effectively.³⁴

[28] Finally, the Director-General may help any member of an association to challenge the validity of transactions which do not comply with section 12 of the CPAA.

[29] It is evident from the foregoing that the role of the Director-General and of the department is not a supine one but requires constant monitoring and particular oversight and involvement on its part to ensure the meaningful protection of the

³³ Section 13 (1) of the CPAA.

³⁴ Section 11 (6) (e) of the CPAA.

interests of members in respect of the exercise of their right of access to communal property and participatory democracy in the governing structure.³⁵ This is a Constitutional imperative in my view borne out by the preamble to the CPAA and the various provisions in the act requiring the Department's supervision over a particularly vulnerable member group, who let alone having experience of registered ownership of immovable property with its attendant obligations of any kind, are required to hold and manage their property interests through a very complex legal entity by the application of wieldy rules contained in the entity's constitution and in the provisions of the CPAA.

[30] The question though is where the fine line between the Department's oversight and the envisaged and desired autonomy of a communal association (which through the rigorous process of registration one assumes has established a fully-fledged democratic institution especially able and obliged to serve the needs of its vulnerable member group) begins and ends. As I will indicate below the Department's officials concerned in this instance perhaps lost sight of the restrictions on their capacity to involve themselves in the affairs of Isibane on an acceptable basis and, instead of empowering the association, may have unwittingly disabled it quite substantially given the manner in which the simmering tension between the "two executives" has dragged on for years now³⁶.

[31] The applicants rely for the relief they seek on two principal submissions. The first is that there was substantial compliance with the provisions of Isibane's

³⁵ See *Bakgatla-Ba-Kgafela Communal Property Association, supra*, at par [50] in which a reference is made to the "deep involvement" of the Director-General in ensuring that the objects of the CPAA are achieved.

³⁶ The prior executive appears to have ignored the election and has had 7 or 8 general meetings since then although apparently not an AGM. The applicants on the other hand, since the election, has ostensibly called no meetings whatsoever but has waited until recently to litigate to validate their election. 3 AGM's should have ensued thereafter rendering the issue of the validity of the election in 2012 quite irrelevant and academic yet volumes of papers have been exchanged in this litigation.

constitution in convening the annual general meeting at which they were elected. In stating this conclusion the applicants aver that: 1) proper notice of the meeting was given; 2) the majority of the families (who are members of Isibane) were represented at the meeting. (Only the 1st to the 9th respondents, who knew of the meeting, are alleged not to have attended it and consciously so); 3) the meeting was properly convened by Ms Goci, an official of the Department, who was entitled to do so, and to dissolve the prior executive, since she was appointed by the Director-General in terms of section 10(2) of the CPAA to conciliate the dispute that had its impetus in the 1st to the 9th respondents' neglect or refusal to convene "a meeting of (Isibane) since the date of their election"; and 4) that all decisions taken were by a majority of members present at the meeting.

[32] The 1st respondent refutes all of these grounds. He denies that proper notice was given of the meeting as required by Isibane's constitution. He rejects the notion that the 10th respondent resolved any disputes between the parties culminating in the supposed election of the applicants as members of the executive and in any event contends that Ms Goci was not authorized nor empowered to either convene the meeting or to dissolve the executive committee of which he was the vice chairperson. Despite not having being present at the impugned meeting he also denies that the meeting was properly constituted, quorum wise. He added another string to his bow by asserting that, except for the 2nd and 4th applicants, the other applicants are further not eligible for appointment to office because they are not members of Isibane.

[33] The second submission on which the applicants rely for the relief sought by them (which I will deal with first) is that since the Registration Officer of the 10th respondent "registered" the changes in the executive committee of Isibane to

reflect that the executive committee of Isibane is comprised of the applicants with effect from 2 May 2014, this makes it so, or at least constitutes the necessary proof of the substitution of the applicants in the place of the 1st to the 9th respondents as the executive committee. Mr Nobotana, who appeared on behalf of the applicants, contended that the issue of the letter by the Registration Officer dated 9 May 2014 constituted a valid administrative decision with legal effect which stands until it is set aside by order of court.³⁷

[34] At some stage the 1st to the 9th respondents were evidently advised to seek a declarator concerning the confusing impact of the so called registration of the purported change of executive committee members of Isibane, but by the launch of the present application the first respondent was firmly of the view that the act of registering the changes, inasmuch as it purported to constitute an administrative decision with the consequences contended for by the applicant, was *ultra vires* the CPAA. In the 1st respondent's view the recordal by the Registration Officer of a change of executive committee members was therefore to be regarded as *pro non scripto*.

[35] As indicated above, the regulations framed under the CPAA enjoin the communal body annually and within two months of the date of its annual general meeting to furnish the Director-General with the names and identity numbers and addresses of the members of the body's governing body elected at the annual general meeting indicating what office is held by each of them. It also enjoins the Director-General to receive this information evidently firstly as a record, secondly in the interests of transparency so that a public record is available which promotes accountability, and thirdly because it is necessary in my view for him to maintain

³⁷ The applicants contended that the 1st to the 9th respondents should indeed have filed a counter application challenging the 10th Respondent's "decision" to register the elections, otherwise it stood as being legally valid.

an oversight function to ensure that the objects of the CPAA are being achieved. For this reason I do not agree that the recordal is *pro non scripto* because it serves the necessary functions aforementioned. Indeed the 10th and 11th respondents would be failing the members of Isibane by not calling for or noting in the registry's files any changes to an executive committee following an association's annual general meeting within the prescribed time period. Why it did so in this instance some sixteen to eighteen months after the supposed annual general meeting, however, and without flagging with Isibane that its constitution in actual fact required a review of the management body in November each year is quite besides the fact that the changes are necessary to be recorded in order to give effect to the objects of the CPAA.

[36] As for the legal effect of the Registration Officer's letter dated 9 May 2014 it constitutes nothing more in my opinion than an acknowledgement that he has updated the Department's records at the behest of the applicants who asked him to note the purported change of executive committee members.³⁸ I am not in agreement that what the letter amounts to is an administrative decision which is required to be set aside or that it clothes the purported elections with any legitimacy. The validity or not of the appointment of the executive committee flows from the prescripts of the association's constitution and must be determined with reference to these requirements. Inasmuch as the letter may constitute a "certificate" (which is not pertinently called for under the provisions of either the CPAA or the regulations) it would at most provide *prima facie* evidence as to its

³⁸ See my comments in Footnote 28 above. It would be prudent in my view to prescribe who is authorized in a CPA to liaise with the Registration Officer and for that official to have to follow a process so that what filters through to the registry reflects what the members want it to and that it carries their approval. It is random almost two years after an election, when the next AGM is imminent, for the Registration Officer to receive and update the information which he did. If the Department was carrying out its monitoring functions it would have been aware of a dispute concerning which executive was the real McCoy and in fact that the erstwhile executive was (despite the election) carrying on business as usual.

contents. In this instance however the 1st respondent has denied the validity of the election of the applicants both from a substantive and procedural point of view. The refusal by the 1st to the 9th respondents to verify the impugned election was also apparent to the applicants long before the Registration Officer recorded the changes in the executive committee which were advised to him by the applicants.

[37] It is apposite at this stage to have regard to some of the provisions of Isibane's constitution which bear on the election of members to serve on the executive committee and the procedures for meetings etc.:

“6. Committee³⁹

- 6.1 The Committee, which is responsible for the implementation of the provisions of this Constitution subject to the aims and objectives thereof, undertakes the management of the affairs of the CPA subject to the instructions of the Members taken at any General Meeting as are consistent with the aims of the constitution.
- 6.2 An Interim Committee, comprising of those persons whose names and particulars are contained in Schedule “B” to this constitution, is hereby appointed to serve in this capacity until the holding of the first Annual General meeting after registration of this CPA with the Director-General of the Department of Land Affairs, provided that such Annual General meeting shall be held within 1 (one) year from date of registration.
- 6.3 At the Annual General Meeting persons are elected to form the Committee. The committee will consist of as many members as the Annual General Meeting deems fit. The appointment of Committee Members will be for a period of 1 (one) year ending at the following

³⁹“Committee” is defined in the constitution as “(t)hose persons elected as the Interim Committee Members in terms of Clause 6, and such other persons (including juristic persons) as may from time to time be elected and/or co-opted to serve as Committee Members in terms of Clause 6.”

annual General Meeting and this procedure is to be repeated yearly thereafter.⁴⁰ Members will ensure that Committee Members are elected democratically

- 6.4 The appointment of the Committee Members shall be done with due consideration of the following principles:
 - 6.4.1 Committee Members serving at any given time shall be persons who are individual members of household Members of the CPA.⁴¹
 - 6.4.2 No two or more members of the same household may hold office at the same time
 - 6.4.3 All future appointments of Committee Members shall be done with due consideration of the principles of representation as stated in the Act.
- 6.5 If at any time during the period of office of the committee, a vacancy should arise, whether in consequence of death, resignation, disqualification, removal, or for any other reason, the remaining Committee members shall co-opt a Member of the CPA as a Committee Member to fill the resultant vacancy for the balance of the period of office of the committee then serving, with due regard to the representational criteria, and the needs and exigencies of the committee.
- 6.6 The Committee's power of co-option as stated in Clause 6(v) shall be limited in so far as not more than 2 (two) Committee Members may be co-opted by the remaining Committee Members as aforesaid. In the event of the need arising for the co-option of more than 2 (two) Committee Members the remaining committee shall as soon as possible, convene a Special General Meeting for the purpose of electing and appointing such additional Committee members as may be necessary for the balance of the term of office of the committee then serving.

⁴⁰ One anyone's version the yearly repetition does not appear to have happened, and certainly not by the applicants since their purported election as the executive committee.

⁴¹ This requirement forms the basis for the 1st respondent's complaint against the 1st, 3rd and 5th to 8th applicants that they are not eligible for appointment to office but most of the names of the parties appear on a list of beneficiaries that circulated in relation to the land redistribution claim.

6.7 Retiring Committee Members shall be eligible for re-election. No members may serve on the committee for more than two consecutive times.

6.8(Not applicable)

6.9 The office of a Committee Member shall be vacated if she or he:
.....(Not applicable)

6.10 Notwithstanding anything to the contrary herein before contained:

6.10.1. A duly convened general meeting of members shall have the right to remove, substitute or appoint additional committee members, as it may deem appropriate.

6.10.2 No removal of a Committee Member shall be of force or effect, unless adopted at a Special General Meeting called on not less than 21 (twenty one) days' prior written notice, which shall state the intention to propose a Resolution for the removal of a Committee Member.

6.10.3 Provided that the rules of natural justice shall be adhered to when a Committee Member is removed; viz.:

.....(Not applicable)

6.11 Each Committee Member shall have the right to appoint any Member of the association, in writing, as her or his proxy to act during her or his absence.

6.12 Provided that when a Committee Member is absent for more than three months she or he will be removed as Committee Member.

6.13(Not applicable)

6.14(Not applicable)

7. **Committee Powers**

7.1

7.2

8. **Committee Meetings**

- 8.1 The Committee may arrange its meetings and execute its duties as it deems fit, subject to the following provisions:
 - 8.1.1 The Chairperson, Secretary, Treasurer and Disciplinary Officer are elected by the general membership and hold office for the term of office of the Committee.
 - 8.1.2 The Committee will meet monthly, but is obliged to convene a committee meeting on request of at least two (2) Members of the Committee. The notice of such a meeting must be in writing and must include an agenda and be dispatched at least seven (7) days before the meeting unless, in special circumstances, an urgent meeting is required, in which case notice shall be given in a manner prescribed by the Chairperson (or acting Chairperson when relevant).
- 8.2 The quorum required at committee meetings shall be 50% plus 1 member of Committee Members serving at any given time.
- 8.3 Each Committee Member will have one vote with all resolutions being taken by majority vote.
- 8.4 In the event of equality in votes the Chairperson will have a final and decisive vote.
- 8.5 Minutes are kept of all committee meetings and are to be signed by the Chairperson.
- 8.6 Minutes of all committee meetings shall be made available to any Member upon request.
- 8.7 A written resolution signed by the necessary quorum of Committee Members shall have the same validity as a decision taken by the Committee at a duly consisted committee meeting.
- 8.8 Members are entitled to attend committee meetings and the Chairperson may allow a Member to address the Committee at such a meeting.

- 8.9 A Committee Member who has a conflict of interest in a matter before the Committee shall declare her or his interest and recuse herself or himself from participating in that decision.

9-13

14. **General Meetings**

- 14.1 General Meetings of members are convened monthly, or whenever a need arises, in order to deal with the affairs of the CPA, including but not restricted to the appointment, removal and replacement of Committee Members, and guidance and commanding of the committee, and the handling of such other matters that require the consent of Members at a General Meeting as prescribed by the Act⁴² or this Constitution; with due regard that:

14.1.1 An Annual General Meeting shall be conducted within 21 (twenty-one) days prior notice to all Members whose names appear on the Membership list at any given time where reasonably possible.

14.1.2 A General Meeting shall be conducted within 7 (seven) days prior notice to all Members whose names appear on the Membership list at any given time where reasonably possible. Shorter notice may in exceptional circumstances be given subject to the approval of the Chairperson of the Committee.

15. **Annual General Meetings**

- 15.1 The first Annual General Meeting shall be conducted within one year reckoned from the date of registration of the CPA, and the subsequent Annual General Meetings will be held in November of each year.⁴³ The agenda of the Annual General Meeting shall include the following:

⁴² The Act referred to, according to paragraph 3 of the Constitution which list definitions, is the CPAA.

⁴³ Evidently a regular cycle of annual general meetings has not been sustained by the association.

15.1.1 The submission and approval of the written annual report by the committee.

15.1.2 The Financial Year report.

15.1.3 The election of the Committee members.

15.1.4 Such other matters deemed appropriate.

15.2

15.3

16. **Procedures at General Meetings**

16.1 Monthly general meetings shall be called by the Secretary.

16.2 The General Meeting may at any time be convened on request of any of the following:

16.2.1 The Chairperson or Acting Chairperson of the committee

16.2.2 Any two Committee members.

16.2.3 At least 10% of the members as reflected in the membership register at any given time.

16.3 The notice of the General Meetings shall be served in a manner as the committee may deem appropriate from time to time, provided that if the Secretary of the committee, after having been duly requested to call a meeting, omits to give notice that a meeting will be convened, the requester/s has the right to give notice of such meetings as mentioned above.

16.4 The Chairperson, or in her or his absence, the Acting Chairperson of the committee shall act as Chairperson at the General Meeting.

16.5 Except where a special resolution is required all decisions that are taken at a General Meeting shall be decided by simple majority vote of those present and entitled to vote.

16.6 In the event of an inequality in votes the Chairperson will have a casting vote.

16.7 A quorum for any decision to be taken at a General Meeting unless stated otherwise is:

16.7.1 Fifty percent of the Members as reflected in the Membership register at any given time.

16.8 In the event of a quorum not being present the meeting shall be adjourned for 7 (seven) days, during this time written notice shall be given to all the members in writing where reasonably possible. At the latter meeting the members present shall be deemed to constitute a quorum, provided that where a defined majority is required in terms of the Act a valid decision may not be taken unless such majority is obtained.

17. **Notice of General Meetings**

17.1 Notice of General meetings shall be given to all members of the CPA whose names are reflected on the membership list at any given time.

17.2 Notice of General Meetings will be served at the last known address of the member to some person apparently not less than 16 years of age and apparently residing there; the bona fide omission to give notice of a General Meeting will not cause the invalidity of the meeting.”

[38] The applicants assert that they were appointed by members present at an annual general meeting properly conducted and that this meeting was called by Ms Goci as a culmination of the resolve of a dispute. Although a removal of the 1st to the 9th respondents as members of the executive committee was alleged, this is not a ‘removal’ contemplated in clauses 6.10 or 6.12 of Isibane’s constitution and certainly no case was made out by the applicants that they purported to follow this route for which provision is made in the specified instances. The prayer in their notice of motion declaring the 1st to the 9th respondents to have been “lawfully removed” follows the allegation that Ms Goci at the purported annual general

meeting dissolved the executive committee for whatever reason she was prompted to do so. The applicants evidently simply assume that she was entitled to do so and to call the annual general meeting.

[39] It is apposite to refer to the minutes of the purported meeting prepared by the 3rd applicant and edited by the 1st applicant (who it seems took the lead at this gathering). They reveal that Ms Goci addressed those present under an item referred to on the agenda as “Regularizing of the CPA” following the opening of the meeting by the 2nd applicant:

“4. **Brief Background of the Meeting:**

- Mr Mzwamadoda Grootboom briefed the meeting that this meeting is the culmination of a series of meetings aimed at resolving the exclusion of the legitimate title deed holders (beneficiaries) of the farm Boschbokkoppes Farm No.182 as well as the legitimacy of the executive that is currently administering the affairs of the farm. He informs the meeting that the meeting was agreed upon by both the disputed executive of the CPA and us the representatives of the excluded beneficiaries (title deed holders) as well as the Legal Department of RD&LR at a meeting held at the offices of **Dept. of RD&LR** at their regional offices in Port Elizabeth in **September 2012**. Mr M Grootboom informs the meeting that this meeting was also sanctioned by both parties’ attorneys. The first meeting was held on **04 November 2012** and the whole executive of the **Isibane CPA** was not present and no apology was tendered to that effect. Mr Grootboom further informs the meeting that after the deliberations at the meeting of **04 November 2012** it was resolved that the follow up meeting be summoned where the executive of Isibane will be invited to the meeting and the responsibility was for the Department of

RD&LR to invite them to the meeting that was then scheduled for the **18 November 2012**.⁴⁴

5. Regularizing the CPA:

- * Ms Xolelwa Goci who is the legal manager of RD&LR informs the meeting that she was briefed by the officials who attended the meeting on 04 November 2012 that the executive was not present in the meeting. Ms Xolelwa Goci wanted to know if the executive was present so that the process of regularizing the CPA can proceed and the whole executive was again absent clearly ratifying the allegations made by the beneficiaries that no accountability from the executive since they took over the reign in 2006. *Ms Xolelwa Goci informs the meeting that the Isibane executive is officially dissolved. She further informed the meeting that she is not going to waste time as it is clear to them as the Department that the executive of Isibane is not accountable to the very same members they claim to be representing and that the meeting will proceed and the nine (9) member committee representing each family to be elected that will administer the affairs of the CPA.* The meeting agreed elected members to work closely with the Department to ensure that the CPA is regularized and that all beneficiaries benefit equally from land of their forefathers.

6. Election of Legitimate Structure:

- The elections were conducted by Ms Xolelwa Goci, Mr Siyabonga Ngxingolo, Ms Mafundityala all from the office of RD&LR.
- The nine (9) member committee was agreed upon by the meeting and that they will be elected from each family who has title deed so as to ensure accountability.
- The meeting resolved before the elections that both Mr Andile Grootboom and Mr Mzwamadoda Grootboom will form part of the nine (9) member committee as they have been tasked to challenge the legitimacy of the

⁴⁴ This date is apparently a mistake. It should have read 17 November 2012.

executive of Isibane and the exclusion of the beneficiaries from all the activities of the land since the year 2000.

- The following members (these include the eight applicants in these proceedings) ... were elected representing each family tree...” (Emphasis in italics added.)

[40] It is unnecessary for this court to determine whether there was any validity to the alleged dispute or what the precise nature thereof was as advised to the Department’s officials by the applicants. It is unfortunate that no affidavit was delivered by the 10th or 11th respondents in order to give an objective account of what problems were raised or whether the help of the Department was in fact solicited on a formal basis in terms of the provisions of section 10 (2) of the CPAA.⁴⁵ If that were the case one would have expected a formal request outlining the dispute which brings it within the ambit of the subsection, the appointment of an approved conciliator acceptable to all the parties to that dispute, and a conciliation process culminating in a report to the Director-General with that official’s recommendation to him. This is evidently what the inclusive provisions of subsection 10 require, not some casual handling of the matter at probably the most critical of a communal property association’s meetings.

⁴⁵ Ideally the CPAA ought to require of the Director-General of Rural Development and Land Reform (or the registration officer in his stead) to file a report for the court in all applications for authority or an order involving the performance of any act in the registry over which he holds charge involving a communal property association in the same manner as the Registrar of Deeds is expected, in terms of section 97 (1) of the Deeds Registries Act, No. 47 of 1937, to file a report in applications concerning property under his charge. In this instance the 10th and 11th respondents have not entered the fray, but a concise report of all relevant information bearing upon the matter, especially the current status of the association and steps taken by the department in compliance with its obligations pursuant to the CPAA would have gone a long toward obviating factual disputes and giving an objective picture of the association’s affairs. As will be gleaned from the judgment there is a dearth of information, left largely to the imagination, as to the circumstances under which the officials came to organize the impugned annual general meeting and conduct the elections under challenge.

[41] It appears from the contents of an email attached to the founding papers dating back to 31 October 2011 that a colleague of Ms Goci had referred a request to her from “beneficiaries of the farm” (the applicants align themselves with this group) to deal with on the basis that she was already “engaged with the beneficiaries” and because it was believed that she could “shed some light with regard to the issues if any was needed. The colleague, Ms Klaas (ostensibly from the Department), clarifies in the email that the aggrieved beneficiaries “are requesting the provincial office to facilitate a general meeting which needs to be convened so that new trustees can be appointed so that work progress at the (Bosch Boshhoek Koppen) farm can continue”. Whilst I am prepared to accept for present purposes that the applicants and those families they represent felt aggrieved - Indeed this is ostensibly an extremely emotive issue for them, and that this did indeed culminate in the Department’s involvement (I put it no higher than that) at the purported annual general meeting on 17 November 2012 on the basis reflected in the minutes, the facts do not establish in my view that a formal conciliation process in terms of the CPAA was properly commissioned or that the outcome (the convening of the annual general meeting and seeking to “regularize the CPA” by dissolving one executive and replacing it with another - assuming even for the moment that this election carried the blessing of the majority of members present at the meeting) is one permitted by the provisions of section 10 of the CPAA.

[42] Even the proper commissioning of a conciliator is limited to him or her attempting to resolve the dispute by mediation, or fact-finding relevant to its resolution or by making a recommendation to the parties to the dispute (as opposed to only one of those parties).⁴⁶

⁴⁶ Section 10 (3).

[43] I am not in agreement with the submission made on behalf of the applicants that the general provision in section 10 (3) (d) of the CPAA, namely that the conciliator may attempt to resolve the dispute “in any other manner that he or she considers appropriate” extends to or covers over Ms Goci purporting to “regularize” the association as she did, however well intentioned she might have been in this regard. It is apparent from the provisions of section 11 (6) of the CPAA that the power of even the Director-General himself is limited to *requiring the members to conduct an election for a new committee* once the integrity or impartiality or effectiveness of the committee or any member of the committee is called into question.⁴⁷

[44] The reason why Ms Goci’s convening of the annual general meeting and purported decision cannot be countenanced is quite apparent. The power to call an annual general meeting firstly reposes strictly in the executive leadership itself in terms of Isibane’s constitution. Secondly, once an office has been conferred, it can be revoked only in terms of an association’s constitution, in this instance (on the basis of the case pleaded by the applicants) by valid elections taking place at a properly constituted annual general meeting. Further, the provisions of the CPAA do not say what the applicants contend for. Ms Goci is simply not authorized by the provisions of the act to either convene the meeting, or to pronounce an executive committee disbanded. What the provisions of the act authorize her to do (assuming that she was called upon to act as a conciliator) is to conciliate a dispute within the ordinary meaning of that concept and then only in a manner consistent with what the association’s constitution dictates in this regard,⁴⁸ The governing

⁴⁷ See section 11(6)(e).

⁴⁸Section 10 (7) of the CPAA.

principles which the members have agreed to should not be ignored or overridden by highhanded officials.

[45] It is worth mentioning incidentally that Isibane's constitution has its own unique provisions for the mediation of disputes which require such between members to be undertaken by a disciplinary committee appointed by the committee and acting as a mediator, and between a member and the committee to be undertaken by members elected at a general meeting to mediate the dispute. Specific complaints of the abuse of power or the transgression of the constitution are to be addressed by a disciplinary committee appointed by the committee which may be referred to the general membership. If disputes and complaints cannot be resolved at either of those levels then and only in that event are the parties entitled to resort to outside mediation and, failing that, to litigation. Although somewhat ambiguously stated in the constitution, aggrieved members have the right to appeal (I suppose in the ordinary context of the word) to the Director-General and the court for "appropriate relief and redress." Finally, the costs of any mediation will be for the account of the parties to the dispute and will not be the responsibility of Isibane.

[46] Even when constitutional resort may be had to conciliation in terms of the CPAA, it is plain that this too follows a democratic process which respects the rights of both parties to the dispute. Although a member may ostensibly have the decision of the Director-General to conciliate the dispute foisted on him in the sense that he or she may not be in agreement that there is a dispute or at least on the terms complained of, that party is still entitled, for example, to be involved in the choice of an appropriate conciliator to be appointed.⁴⁹ The very concept of

⁴⁹ Section 10 (2) of the CPAA.

conciliation further requires the conscious involvement of both parties in the process who are evidently not obliged to accept the possible outcome suggested to them by the neutral third party conciliating the issues between them.⁵⁰ The role of the conciliator is limited to *assisting* in the resolution of the dispute in my view to the extent that the parties are prepared to go along with his or her suggestions regarding the manner in which the matter can be resolved. Whilst the shunning of the advice given or possible resolution of the dispute may result in the Director-General seeking an order of court placing the belabored association under his administration or being placed under liquidation if the particular malady (occasioned by the dispute) constitutes the requisite basis for such drastic action, a party is certainly not obliged to adopt what is proposed to him or her as an outcome. Axiomatically, the departmental official tasked with attempting to assist the parties to resolve a dispute cannot make a binding decision in this regard.

[47] I am satisfied therefore that the involvement of Ms Goci on the basis outlined in the minute constitutes an impermissible intervention which runs entirely contrary to the tenets of the CPAA which encourages and supports the autonomy of communal associations. Her pronouncement of the dissolution of the executive committee is of no legal effect and can simply be ignored in my view although it would appear prudent in all the circumstances to issue an appropriate declarator to this effect and to restore the *status quo ante* her purported dissolution of the executive committee of which the 1st to the 9th respondents were members.

[48] I need add, however, that although it is apparent from Isibane's constitution that meetings are not public, and although the CPAA does not prescribe nor

⁵⁰ Duhaimes's Law Dictionary defines "conciliation" as (a) form of alternative dispute resolution in which a neutral third party hears both sides and then issues a non-binding suggested resolution."

envisage the presence of the Department's officials at meetings once the communal property association has been registered and its constitution formally adopted, it does appear to be the trend – as I indicated above, for officials of the Department to keep a presence at meetings with a view to making or receiving reports, updating members on important information and, I expect, to keep a watching brief to facilitate the Department's oversight and monitoring functions prescribed by the CPAA. It would have been helpful had the 10th or 11th respondent's explained their position and role in this regard, which is unfortunately left for the court to speculate, but there would appear to be no objection to these officials either "facilitating" meetings or "conducting elections," provided this is done in my view with the consent of members and if the necessary objective distance is maintained. Their advice and guidance may be useful - and their particular skills which they bring empowering for the community, but they should not inhibit free and uninhibited discussion, expression of views or voting by members at meetings. In my view Ms Goci plainly overstepped the boundary of her permissible involvement.

[49] It may also be that it is acceptable and within the bounds of the CPAA for officials to assist administratively with the giving of notice of meetings (in practice they appear to involve themselves because transport must also be arranged for members to attend meetings), but where the association's constitution prescribes in whom the authority to convene reposes, notice must be given by the duly authorized person. It goes without saying that Ms. Goci is not such a person and was not entitled to convene the purported annual general meeting.

[50] Whilst being alive to the applicants' complaint that the 1st to the 9th respondents were being remiss in getting on with the calling of the annual general

meeting, their recourse in terms of the constitution was either to request the secretary to convene a general meeting as a prelude to forcing their hand by the subsequent convening of the mandated annual general meeting⁵¹, or to ask that their dispute be mediated, or to seek a mandamus from this court compelling the committee to hold the meeting. I have already expressed my view on Ms Goci's so-called conciliation falling short of the formal standard of such intervention. Properly availed however this was a desirable option open to the applicants to persuade the 1st to the 9th respondents of their fiduciary duty to follow the prescripts of the constitution. The Director-General could also have been prevailed upon to request the members to conduct an election in terms of the provisions of section (11) (6) (d) of the CPAA. Evidently however the only attempt made to "regularize" Isibane (apart from asking its attorneys to convene a meeting, which request on the 1st respondent's version it complied with) was through Ms Goci on the unlawful basis described above.

[51] It is trite that the failure to convene a meeting properly invalidates the transaction of business at it. In order that all persons obliged or entitled to be present at a meeting may fulfill their obligation or exercise their right as members, they must be accorded adequate opportunity to do so which requires that due notice be given of the time and place of the meeting and the nature of the business to be transacted⁵². One of the chief issues in this matter is whether the applicants have established on the papers that this requirement for the annual general meeting was met in all the circumstances.

⁵¹ In terms of Clause 16.2 of the constitution at least 10% of the members as reflected in the membership register can request a general meeting. If the secretary after having been duly requested fails to give notice that a meeting will be convened, the requester has the right, in terms of clause 16.3, to give notice of such meeting.

⁵² See Laws volume on "Meetings" and the authorities cited therein.

[52] The applicants have contented themselves with the assertion that “during September 2012” a meeting was held at the Land Restitution Commission at the offices of Land Affairs in Port Elizabeth with Ms Goci with a specific view to discussing the 1st to the 9th respondent’s exclusion of them from the affairs of Isibane and their failure to call an annual general meeting since registration of the communal property association. The applicants allege that it was agreed at this meeting that an annual general meeting would be held at Rooidraai, Hankey, on 4 November 2012. This is denied by the 1st respondent. The applicant on the other hand assert that this “arrangement” was known and sanctioned by the attorneys of both parties and that the 1st to the 9th respondents deliberately failed to attend the meeting despite having knowledge that it had been convened and that it was thereafter postponed to 17 November 2012 because of the respondents’ absence.

[53] No specific date is given and no minute of either meeting in September or on 4 November 2012 were made available to the court. The copy of the supposed notice of the meeting which was attached to the applicants’ founding papers and presented as the seminal proof of notice of the annual general meeting which culminated on 17 November 2102 is in fact the initial email message addressed by Ms Goci dated 12 September 2012 to the 1st respondent and the 1st applicant under the subject heading: “Meeting regarding Isibane claim.” It simply reads; “Please be advised that there will be a meeting regarding the above claim on Friday, the 14th day of September 2012 @ 09H00am at Land Affairs offices in Port Elizabeth, 66 Ring Road, 2nd Floor in Fairview Building.” This by no stretch of the imagination constitutes notice of an annual general meeting neither is it clear from it that this notice reached all who were entitled to notice of an annual meeting. Further, applying the well-known approach to be adopted in opposed applications containing factual disputes where final relief is sought, the denial of the 1st

respondent that any of the executive committee members agreed to the convening of an annual general meeting on 4 November 2012 must prevail especially where the applicants have not bothered to attach copies of the minutes of either the meeting of 14 September (the purpose of which the 1st applicant says was rather to discuss Isibane's acquisition of further land which would provide certain tenant and labourers of the land with rights in respect of Isibane's property) or 4 November 2012. (But even if agreement was reached by the parties to hold an annual general meeting it still had to be convened in compliance with the constitution.) In any event and even assuming that the 1st to the 9th respondents had deliberately absented themselves from a meeting which they agreed to attend on 4 November 2012, that meeting was unconstitutionally postponed to 17 November 2012. Ideally a new annual general meeting should have been convened on proper notice rather than seeking to breathe life into a process that, on the applicants' version, had come undone. I need add that despite the applicants' opportunistic reliance on the so called notice of annual general meeting, they have overlooked that the minute of 17 November 2012 records rather that it was "resolved" at the failed meeting of 4 November 2012 that a follow up meeting would be "summonsed" and that it would fall to the Department's officials to invite the 1st to the 9th respondents to this meeting. Implicit in this is that the applicants do not distinguish between meetings which may have focused on discussing a dispute as opposed to an annual general meeting which has its own requirements for validity in terms of the constitution.

[54] A further challenge raised by the 1st respondent (for the moment assuming that the meeting was properly convened) is that the applicants have also failed to put up proof that it was properly constituted. It is not clear why the applicants have not furnished a list of members present at the meeting to understand the context in

which the assertion is made that the elections were proper. Who is elected to form the committee is determined by members voting at the annual general meeting so it is critical to establish firstly that effective notice was given to all members entitled to attend, secondly that the persons present at the meeting are members entitled to vote, and thirdly, that the appropriate quorum was established.

[55] This is particularly relevant in the context of the challenge thrown up by the applicants attorneys in correspondence attached to the applicants' founding papers which identifies their clients as persons who "challenge the Constitution of Isibane by virtue of their exclusion as the legitimate beneficiaries to the land leased by Isibane". This is further complicated by the fact that neither of the executive committees - or the Department for that matter, holds current lists of membership. A further concern is that it is evident from the minutes which have been disclosed to this court, that other interested parties were contemplated as being added to the original community sought to benefit from the land redistribution claim and may therefore not have received notice of the meeting. Another area of concern is that the minutes of the purported annual general meeting suggest that the nine member committee elected there are representative of each family whereas there are ostensibly many more families who are members of Isibane. (This obviously calls into question whether everyone who is entitled to attend received notice of the meeting). The applicants merely content themselves in this regard with the assertion that it is entirely improbable that Ms Goci would have allowed anyone other than an eligible member to participate at the meeting, but it remains for the applicants to establish the alleged substantial compliance with Isibane's constitution in respect of the impugned election, which it has in my view failed to do.

[56] I am not satisfied on the number of bases referred to above that the applicants have established that the election of the applicants was in conformity with Isibane's constitution and accordingly their application must fail.

[57] It would however be prudent for this court (especially in the light of the obvious infringement of members' Constitutional right of access to community property)⁵³ to ensure by ordering appropriate alternative relief that the association be moved out of its moribund status by directing the executive committee comprising of the 1st to the 9th respondents to give timeous and adequate notice of the next anticipated annual general meeting to be held in November 2016 as provided for in Isibane's constitution. It is trite that a duly elected committee continues to hold office until it retires or is dismissed even though, where no steps are taken to elect a new committee, its term of office under the constitution of the organization has expired. The appropriate course of action to be adopted in such an instance, where a committee fails to put in motion the prescribed procedures for the election of a new committee after its own period of office has expired, is for the members of the organization to enforce the constitution by obtaining an order compelling it to do so. If the parties to this litigation have any sense of duty they will appreciate that such intervention by this court is necessary in all the circumstances. It also appears desirable that the membership list should be updated as is required by the constitution for objective clarity and that a banking account be opened in due course.

[58] The members have already been put to considerable disadvantage (even more so in my view since the 1st respondents suggests that business has continued

⁵³ For as long as the battle between the two executives rages on it is logical that members cannot enjoy the intended benefits by their access to the property, neither does participatory democracy mean anything to them when the leadership is dysfunctional.

as normal with the holding of the customary general meetings by his group as early as 8 days after the purported annual general meeting despite the alleged election of the applicants as office bearers), and should not have to endure this ambiguity any longer. It is with disappointment that our courts have had to reflect on “internecine disputes” between competing factions of traditional communities who instead of triumphantly enjoying the benefits won and recovered for them under the Land Distribution Act engage themselves in battles when it comes to managing the post-restitution process. In *Louw & Others v Richtersveld Agricultural Holdings Company (Pty) Ltd & Others*⁵⁴ the court noted with reference to the fallout between members of that community to whom land and mineral rights were restored resulting in court proceedings that “(t)he resort to litigation regrettably not only drains valuable financial resources but also has a...debilitating effect on efforts of the community to create a sustainable future from the mineral resources and the land for the community. Most importantly it ...creates divisions in a community which had courageously fought for decades to recover what is rightfully theirs.” The court expressed regret that the matter before it “sadly demonstrates that even the best intentions and the most meticulously crafted plans (envisaged by the statutory machinery put in place to implement these gains) can be undone by personal self-interest and avarice when it comes to managing the post-restitution process.”⁵⁵

[59] The community in dispute here would be well advised to adopt this salutary advice, put aside their differences, and begin to manage the affairs of Isibane in a professional manner that celebrates their communal ownership rather than detracts from it. Stewardship and a complete eschewing of any kind of self-interest are

⁵⁴[2010] JOL 26358 (NCK) at paragraph [2]

⁵⁵ At paragraph [1].

essential to the successful management of the community's interests through the governing body in order to attain the jealously guarded Constitutional vision of community ownership. Further, those elected as office bearers must be properly and fully supported in their various responsibilities. It is not an easy task to serve office in such an entity. On the contrary it requires a selfless zeal on the part of the individual member to realize the collective objects set forth in a communal property association's constitution.

[60] Before concluding I need reflect briefly on the 1st respondent's submission that the applicants had no *locus standi* to bring these proceedings. I find it unnecessary to determine the issue of the applicants' eligibility as members as such although I suspect from correspondence addressed to the 13th respondent's attorneys that the complaint of the applicants being "excluded" from Isibane runs deeper than a mere lack of accountability or keeping them in the loop regarding meetings. Be that as it may the contention on the applicants' behalf that the fact that the purported elections took place under the auspices of the Department carries with it the distinct probability that those elected are indeed eligible in terms of the membership criteria set forth in the 13th respondent's constitution has merit. Even absent a current membership record by any of the parties it is evident that the relevant officials have peculiar knowledge of this community and all its peccadilloes because tensions have been simmering for ages and it is unlikely that the officials who "conducted" the elections would have entertained the nomination of non-members. That aside, despite the challenge by the 1st respondent to their appointment as office bearers it cannot be gainsaid that they were appointed as a fact (under the assumption at least that the annual general meeting had been properly convened and that the officials were entitled to involve themselves on the basis which they did) and that this attracted certain personal rights to them to

maintain that the election of them under these circumstances was a valid one. Who else could have asserted these putative personal rights to office on their behalf but the applicants themselves?

[61] The applicants having failed to establish that the elections were valid and that they are as a consequence entitled to the relief which they seek, the 1st respondent is entitled to accost order against them. He should however bear the wasted costs occasioned by the postponement on 29 March 2016 since he sought an indulgence in order to file an answering affidavit which was by then already overdue for delivery. The reserved costs of 10 May 2106 were wasted but cannot be ascribed to either party since the matter was inadvertently placed on the unopposed roll instead of the opposed roll for that day. In fairness these costs should be borne by each party themselves and in consequence I will make no costs order regarding this set down.

[62] It would not be out of place to make some observations regarding the futility of these proceedings and the huge financial burden which will now redound to the applicants who sought to breathe life into the elections which were not valid to start with. Officials of the 10th and 11th respondents perhaps created the misconception that they were entitled to convene the meeting and to conduct the elections without regard to the rights of the 1st to the 9th respondents and that their endorsement thereof, by the subsequent “registration” of the changes in the registry, somehow gave it the hallmark of legitimacy. This is most unfortunate and an indictment of the Department which is expected to empower and promote associations through reliable information rather than to add to their confusion and uncertainty. If costs had been sought against them I might have entertained such relief on the basis of their misguided involvement in the affairs of the association

which led the applicants down this path. However the applicants sought legal advice and had numerous options open to them beside their recourse to this court years after the election. They could simply have waited until the next annual general meeting to see matters rectified particularly since it is not about them, but about Isibane and protecting the interests of all its members. Ultimately they litigated at their own peril and must live with this fact.

[63] A copy of this judgment should be made available to the 10th and 11th respondents who it is hoped will note the lessons learnt from this unfortunate debacle and revisit their peculiar but vitally significant role to be played in ensuring that the objects of the CPAA are realized.

[64] In the result I issue the following order:

1. The application is dismissed;
2. The purported decision of Ms Goci dated 17 November 2012 to dissolve the executive committee of the 13th respondent is set aside;
3. The reinstated executive committee of the 13th respondent (comprising of the 1st to the 9th respondents) is directed to give timeous and proper notice as provided for in its constitution of the next Annual General Meeting to be held in November 2016;
4. the 12th respondent is authorized to continue to retain the funds of the 13th respondent which are in its trust account until the latter has opened a banking account;
5. The 13th respondent is requested to update its membership list with the Registration Officer forthwith;

6. The applicants are directed to pay the 1st respondents costs of the application, except for the reserved costs of 29 March 2016 which are to be borne by the 1st respondent;
7. There will be no order regarding the reserved costs of 10 May 2016; and
8. The registrar is requested to make a copy of this judgment available to the 10th and 11th respondents.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 28 July 2016

DATE OF JUDGMENT: 27 September 2016

APPEARANCES:

For the applicants: Mr. Nobotana (instructed by Andile Ngqakayi Inc., Port Elizabeth).

For the 1st to 9th and 13th respondents: Mr. Williams (instructed by Liston Brewis & Co., Port Elizabeth).

