



NOTES ON THE BAKGATLA BA KGAFELA CPA COURT CASE

May 2015

On Thursday, 28 May 2015 the Constitutional Court will hear the case of *Bakgatla ba Kgafela Tribal CPA v Bakgatla ba Kgafela Tribal Authority and Others*. The case is about whether the Communal Property Association Act 28 of 1996 (the CPA Act) allows the Bakgatla ba Kgafela CPA – a provisional CPA – to continue to exist and hold land. The CPA has struggled for many years to get registered permanently as a result of serious administrative mismanagement by the Department of Rural Development and Land Reform (the Department) and the ongoing resistance to the establishment of a CPA by the traditional council in the area.

The case is characteristic of a number of problems faced by CPAs, including conflict with traditional councils, and the unwillingness or inability of the Department to register and provide institutional support to CPAs when claimant communities have chosen CPAs as the entity they want to manage their land.

This factsheet explains what the case is about and why it is important.

WHAT IS THE CASE ABOUT?

Background to the case

The Bakgatla ba Kgafela community brought a successful land claim over various pieces of land in the North West. This meant that they had to create a legal entity that was able to receive ownership of the land on behalf of the community. In 2005, the claimant community voted in favour of the creation of a **Communal Property Association (or CPA)** to hold the land, elected a committee to run the CPA and adopted a draft constitution. The community then made an application to have the CPA registered. However, the traditional council and traditional leader, Chief Nyalala Pilane, were unhappy about the decision to form a CPA. He wanted the community to create a trust instead.

WHAT ARE CPAs?

CPAs are landholding institutions created in terms of a national law called the CPA Act. Beneficiaries of the land reform, restitution and redistribution programmes who want to acquire, hold and manage land as a group can establish legal entities to do so. The CPA Act provides for government registration of CPAs and also government oversight to enforce the rights of ordinary members. An important feature of CPAs is that they operate according to democratic principles including fair and inclusive decision-making processes.

As a result of his intervention, Lulu Xingwane, the then Minister of Agriculture and Land Affairs, intervened by calling a meeting with the government officials and community representatives dealing with the registration of the CPA. The Minister suggested that the community register a **provisional CPA** in terms of section 5(4) of the CPA Act for 12 months (rather than a permanent CPA in terms of section 8 of the CPA Act). After some discussion, the Minister instructed the government officials to make sure that a provisional CPA was registered. Importantly, the community never changed the formal application process to apply for the registration of a provisional CPA.

On 10 September 2007, the Department registered the provisional CPA in line with the Minister's instruction. The Department did this even though there are memos that

show that the Department recommended that the CPA be permanently registered. In 2008 the land claimed by the community was transferred to the provisional CPA. Thereafter, the Department had almost no contact with the community. The Department did not help the community to convert the provisional CPA into a permanent CPA.

In 2012, the CPA became aware that the chief had authorised that a shopping centre be built on land that it owned. The CPA tried to block the construction by applying for an interdict in the Land Claims Court. In court the traditional council argued that section 5(4) of the CPA Act meant that a provisional CPA is only valid for 12 months – after 12 months, if the CPA has not been turned into a permanent CPA, it no longer exists. This, the chief argued, was what had happened to the Bakgatla ba Kgafela CPA. According to the chief, this meant that the Bakgatla ba Kgafela CPA did not have the legal standing or *locus standi* to interdict the construction of the shopping centre.

<p>DEFINITION: <i>Locus standi</i> or legal standing is the right to appear or become part of a court case. Before someone can become part of a court case, a person must have a direct and material (or important) interest in the case that is being heard by the court. If a person does not have <i>locus standi</i> then a court will not admit them or listen to their arguments.</p>
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Worried about what this meant for their legal status, the Bakgatla ba Kgafela CPA applied to the Land Claims Court for an order stating that it had been registered as a permanent CPA or that the CPA has **substantially complied** with the requirements to have a permanent CPA registered (and should therefore be recognised as a permanent CPA).

Land Claims Court

In the Land Claims Court, the Bakgatla ba Kgafela CPA won a significant victory. The judge said “The people have spoken” in choosing that they preferred a CPA to a Trust. He pointed to the extensive consultation in various villages that preceded the choice. The court rejected the technical argument that the CPA no longer existed. This meant that the CPA was still the owner of the land that had been transferred to it.

The court also found that the CPA had been permanently registered, because it clearly *should have been registered* in terms of the CPA Act. In fact, the only reason the CPA had not been registered as a permanent CPA was the administrative mismanagement by the Department and the unlawful interference by the Minister. In support of this decision, the court pointed out that the CPA had complied with most of the requirements for the registration of a permanent CPA and that the Department’s own memos showed that it recommended that a permanent CPA be registered.

Supreme Court of Appeal

The traditional council appealed to the Supreme Court of Appeal. The Supreme Court of Appeal set aside the decision of the Land Claims Court on the technical basis that the Bakgatla ba Kgafela CPA was a provisional CPA that no longer existed. The court therefore agreed with the arguments raised by the traditional council. As the court wrote (in paragraph 12):

In this case it is common cause that no extension had been sought from the Director-General on expiry of 12 months from the date of registration of the provisional CPA. The association had therefore ceased to exist...

Importantly, the court did not explain why it chose the traditional council's interpretation of section 5(4) of the CPA Act. In addition, the court failed to explain what this meant for the land that had been transferred to the Bakgatla ba Kgafela CPA. When the land was transferred to the CPA it became the owner of the land on behalf of the claimant community, but if the CPA no longer exists it's unclear who owns the land. This has important implications for the fulfilment of the Constitutional right to restitution of land rights.

RELEVANT SECTIONS OF THE CPA ACT

The CPA Act has two sections that regulate how government should register CPAs. These sections provide for two different types of CPAs – permanent CPAs and provisional CPAs. A lot of the argument before the Constitutional Court is likely to be about the interpretation of these sections.

Section 8 of the CPA Act empowers the government to register **permanent CPAs** if certain requirements are met. Some of these requirements are that the majority of land claim beneficiaries should agree about the creation of a CPA and that the beneficiaries should adopt a draft constitution. Importantly, this section allows government to register a permanent CPA even if the CPA does not comply with all of the requirement. All that is necessary is for the CPA to “substantially comply”. This means that as long as most of the requirements are met, government can register a permanent CPA.

Section 5(4) of the CPA Act provides for the registration of **provisional CPAs**. This section is important to the *Bakgatla ba Kgafela CPA* case as the community and the chief disagree about what this section means. This provision reads:

5(4) Upon registration of a provisional association-

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

This section has two possible interpretations. The first interpretation (which is what the Supreme Court of Appeal found) is that the existence of a provisional CPA comes to an end after 12 months (unless the CPA has applied for and been granted an extension). This would allow the government 12 months to register a permanent CPA. However, there is a serious problem with this interpretation. If the government fails to register a permanent CPA within 12 months and the provisional CPA comes to an end, the claimant community would have to start the process all over again. The impact of this interpretation is even more problematic in cases where land has been transferred to a provisional CPA. This is because it is uncertain what would happen to the land if a provisional CPA ceases to exist after 12 months.

The second interpretation (which is what the Land Claims Court found) is that after 12 months a provisional CPA continues to exist but loses its right to manage the land. Although this interpretation would cause difficulties for claimant communities, it

would mean that they would still own the land in cases where the government fails to register a permanent CPA within 12 months.

WHO IS AFFECTED BY THE CASE?

The case affects many more groups than just the Bakgatla ba Kgafela CPA. There are a number of CPAs around the country that will be negatively affected if the Supreme Court of Appeal's judgment stands. Provisional CPAs that have not been converted into permanent CPAs and have not applied for an extension in terms of the CPA Act would have to start from scratch in choosing a legal entity to hold their land. This would be the case even if the failure to register a permanent CPA was as a result of mismanagement by the Department. In cases where land has been transferred to provisional CPAs, the claimant communities stand to lose their land.

WHY IS THE CASE IMPORTANT?

The Bakgatla ba Kgafela CPA case may appear to be about the technical issue of whether or not provisional CPAs can continue to exist and hold land after 12 months, but, understood in context, the case has a much wider meaning. This is because the case is representative of a number of serious problems that exist in South Africa's land reform programme – issues that many CPAs struggle with daily. Some of the important issues that are highlighted by this case are:

- **Traditional leaders try to undermine the establishment, functioning and legitimacy of CPAs.** This is mainly because they see CPAs as challenging their authority. Traditional leaders do this despite the fact that claimant communities democratically choose CPAs as their preferred institution to hold land. This directly undermines rural people's ability to choose how they want to hold and manage their land.
- **The case represents a shift in the implementation of government policy in favour of traditional councils and traditional leaders.** In the last couple of years, government's proposed laws and policies have shifted away from democratically elected structures which people have chosen to hold land (such as CPAs) and towards traditional councils and traditional leaders as owners of land. This is perhaps most clear in the Department's new Draft Policy Paper on CPAs released in September 2014, which says that new CPAs will only be established "in areas where traditional authorities do not exist". The Bakgatla ba Kgafela CPA case also shows how government often prioritises the wishes of traditional leaders over those of land claim beneficiaries. In the case, the opposition and pressure from Chief Nyalala Pilane resulted in the Department registering the CPA as provisional and not permanent.
- **Serious administrative mismanagement by the Department.** The case highlights that the Department suffers from serious mismanagement in relation to CPAs and points to the fact that this mismanagement is not isolated to the Bakgatla ba Kgafela CPA but widespread. In the Land Claims Court, a Departmental official suggested that every interaction that the Department had with the CPA was mismanaged. The Supreme Court of Appeal also criticised the Department, saying that the Department's handling of the CPA's registration was "unfortunate" and amounted to "a comedy of errors". The court said that this was especially worrying because the community "relied on [the Department] for guidance". These statements show that the Department has failed to provide the necessary support to CPAs to enable these entities to function effectively. With

very limited support and oversight, CPAs cannot be faulted for their inability to fully comply with the strict provisions of the CPA Act and should not have to bear the negative consequences of the Department's inadequacy.

- **The right to tenure security and the ability of those who were dispossessed to have land restored to them.** The Constitution and the Restitution Act promise land to those who lost it. Government policy now favours transferring title to officially recognised traditional councils who generally represent much larger groups than those who actually lost land. This dilutes the rights of groups who lost the land and is inconsistent with the Constitution.