



Centre for
**CONSTITUTIONAL
RIGHTS**

DEMOCRATISING DECISION-MAKING IN TRADITIONAL SPACES: BAKGATLA-BA-KGAFELA COMMUNAL PROPERTY ASSOCIATION V BAKGATLA-BA-KGAFELA TRIBAL AUTHORITY AND OTHERS

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The Constitutional Court (the Court) recently handed down judgment in a matter concerning the interpretation of the *Communal Property Association Act* (the Act), the key piece of legislation governing the manner in which communities may hold land restored in terms of the land restitution process. This is the first decision concerning the implementation of the Act. Importantly, the decision underscores the supremacy of the Constitution by requiring that any traditional laws or practices have to be in harmony with the Constitution.

A dispute arose after the Bakgatla Ba Kgafela community formed an association in terms of the Act in order to regain ownership of the communal land dispossessed under apartheid. The tribal authority on the one hand and Kgosi Pilane (the hereditary head of the traditional community) on the other hand preferred a trust as an entity through which the land was to be held, rather than a communal property association, as desired by the Community. The Department of Rural Development and Land Reform (the Department), had suggested that a provisional association be registered to enable all the parties to resolve the matter within 12 months. As a result, the land was transferred and registered in the name of the association.

However, the dispute involving the Community, the Tribal Authority and Kgosi Pilane was not resolved within 12 months, and the Department did not register them as a permanent association. When the term of office of members of the executive committee of the association lapsed, meetings were held in various villages, culminating with a well-attended general meeting. The association's constitution was re-adopted at the general meeting. Thereafter the Department's report indicated that everyone who had attended the meeting had voted in favour of the constitution and that no other person would be negatively affected by the adoption of the constitution.

In arriving at a decision, the Court considered that the Community had met the requirements of the Act. The members of the committee had been democratically elected; the contents of the Department's report stated that there had been proper and effective notice of the meeting; there had been no indication in the report that any individuals would be adversely affected by the adoption of the constitution. The Court also considered that the Department was required by the Act to assist the community in order to achieve a permanent registration of the association.

The Act underscores five democratic principles, namely that an association should include a fair process that enables members to fully participate in the decisions of the association. Secondly, on equality - the associations must proscribe discrimination of any kind. Another principle is that the constitution should have a democratic process governing the association's meetings. The fourth principle concerned the fair access to the property of the association and finally that the constitution should ensure accountability and transparency.

These principles ultimately protect the interests of members of traditional communities and further empower the members to take part in the management of a communal property.

The Court considered its obligation in terms of section 39(2) of the Constitution, when interpreting any legislation and when developing the common law or customary law to promote the spirit, purport and objects of the Bill of Rights. The Court considered that the main aim of the Act was to transform customary law to bring it in line with the Constitution while ensuring that democracy was the order of the day in communities living under customary law.

Importantly the Court made some vital pronouncements on how legislation should be interpreted - namely that an interpretation promoting the objects of the Bill of Rights should be preferred, over a merely textual or legalistic formulation. With this in mind, the Court held that the reference to the period of 12 months under the Act was in relation to the exercise of the right to occupy and use land rather than a reference to the lifespan of the association. Further, the Court ruled that the association had met all the requirements for registration and therefore should be registered as a permanent association.

The Court also criticised the Department's failure to assist the community to register the CPA and to gain control over its land. This emphasises the role of the state particularly in light of section 7(2) of the Constitution which obliges the state to "*respect, promote and fulfil the rights in the Bills of Rights*".

In rejecting a suggestion by the Traditional Council and the government that the case should be submitted for mediation, the Court made apparent that the wishes of traditional leaders should not trump the decisions of a majority in a community.

The importance of this decision cannot be understated. Where power goes unchallenged with little accountability, then human rights infringements are bound to occur. In a country where traditional leadership has come to be associated with unchecked power, incidents such as the exclusion of women from land allocation, as well as unilateral banishment have been commonplace. As such, the Act seeks to transform harmful traditional practices through bringing customary law in line with the Constitution. The decision reinforces the Constitution's founding values of ensuring accountability, responsiveness and openness.

Ultimately, in the words of Jaftha J, who wrote the unanimous decision: "*Where a traditional community or the majority of its members as was the position in this case, have chosen the democratic route contemplated in the Act, effect must be given to the wishes of the majority*".