

DEMOCRACY TAKING HOLD IN TRADITIONAL SOUTH AFRICA

INTRODUCTION

When the Constitutional Court hands down a unanimous judgment on an issue as divisive as the inherent tension between customary law and democracy in South Africa, we had best take heed.

Judgment was recently handed down in the matter of *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and others (CCT231/14) [2015] ZACC 25* and the implications for millions of South Africans appear significant.

RELEVANT LEGISLATION

Section 25(7) of the Constitution provides, in essence, that persons dispossessed of their land under apartheid laws, are entitled either to restitution or to other equitable redress.

To give effect to section 25(7), Parliament passed both the Restitution of Land Rights Act 22 of 1994 (“the Restitution Act”) and the Communal Property Associations Act 28 of 1996 (“the Associations Act”). The Restitution Act regulates the process involved in reclaiming land while the Associations Act provides for the establishment of communal associations that serve as the entities through which communities may hold reclaimed land.

THE DISPUTE

The Bakgatla-Ba-Kgafela Community (“the Community”) comprises 32 villages in the North West Province, an area endowed with vast mineral wealth. During apartheid, the Community had their land forcibly removed. They applied to have that land returned to them through the mechanisms provided for in the Restitution Act.

The Community sought to hold the land, once restored, through a communal property association, namely the Bakgatla-Ba-Kgafela Communal Property Association (“the Association”), and applied to the Department of Rural Development and Land Reform (“the Department”) for registration. Community members were overwhelmingly in favour of the land vesting in the Association as this would allow community members direct participation in decisions regarding the use and management of the land, and also in any proceeds flowing therefrom.

Both the Tribal Authority and the traditional leader of the area, Kgoshi Pilane, objected to the establishment of the Association and sought rather to have the land held in a trust to be controlled

by the Bakgatla-Ba-Kgafela Traditional Council. This would result in power over the land being concentrated in the hands of a select few to the exclusion of the Community. Where the land is to be held in a trust, as envisaged by the traditional leader, community members would have minimal involvement in any decision making regarding the land which, in terms of the Constitution, was to be restored to them.

Following Ministerial intervention, the dispute was temporarily resolved by the Association being provisionally registered; the rationale being that the dispute would be resolved within the ensuing 12 months while the Association was in existence.

The 12 month period lapsed without the dispute having been resolved or the Association being permanently registered. The Association then approached the Land Claims Court seeking, *inter alia*, that it be registered as a permanent association in terms of the Act and consequently that the restored land vest in the Association.

The Land Claims Court found in favour of the Association but on appeal, the Supreme Court of Appeal (“SCA”) found in favour of the Tribal Authority on the basis that the Association ceased to exist upon the effluxion of 12 months from the date of its provisional registration and thus lacked *locus standi*.

CONSTITUTIONAL COURT’S RULING

The Association applied for leave to appeal to the Constitutional Court which granted leave and upheld the appeal. The Court found that the SCA had been overly formalistic and erred in numerous respects. The Constitutional Court took the opportunity to voice its unequivocal support for democracy – quite possibly at the expense of customary law. The court went so far as to say that the Associations Act is “*a visionary piece of legislation passed to restore the dignity of traditional communities*” and “*the Act seeks to transform customary law and bring it in line with the Constitution.*”

Ultimately the Court ordered that the Association be registered permanently and that the land be held by the Association. This is plainly in line with democratic principles that empower traditional communities to take an active, participatory role in the management of communal property.

Of particular significance is paragraph 55 wherein the Court states “[w]here a traditional community or the majority of its members ... have chosen the democratic route... effect must be given to the wishes of the majority.”

IMPLICATIONS OF THE JUDGMENT

The Court's position can be summarised as follows: should a community elect to adopt a democratic system – even if the community falls squarely within an area deeply rooted in customary law – that election must be respected. This is in stark contrast to numerous aspects of customary law which, irrespective of the will of the majority, concentrate power in the hands of an often unelected few.

This certainly represents a long overdue step towards all South African's enjoying the rights conferred by the Constitution. It is worth noting that an estimated 17 million South Africans reside in areas over which a traditional authority exercises power and the implications of the judgment cannot be overstated.

Although not apparent from the text itself, the judgment has yet further implications that directly affect government policy. The Department's draft Communal Land Tenure Policy, which seeks to permit communal property associations only outside of former homelands, appears to be discouraging communal property associations and is in favour rather of land vesting in traditional leaders themselves. The judgment will surely prompt the Department to reconsider its stance and align itself with the findings of the Court to avoid further litigation on this point.

CONCLUSION

The judgment will have detractors who will presumably allege that the judiciary has diluted the role of customary law, and failed to take cognisance of the fact that the Constitution, in section 211, specifically recognises it. However, that is a misreading of the legislation which itself represents a clear shift towards the promotion of democracy in areas traditionally steeped in customary law. In this regard, see sections 7(2) and 8(2) of the Associations Act.

The Court merely interpreted the Associations Act which sets out the requirements for the registration of a communal property association and requires that if a community is in favour of land being held in such an association, that wish must be respected. Thus, if the area of law warrants criticism, it should be directed squarely at parliament, rather than at the judiciary.

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