

SOUTH AFRICA / JUDGMENT

# Ba Ga Phadima and Another v Premier: Northern Cape and Others (1050/16) [2019] ZANCHC 52 (4 October 2019) [2019] ZANCHC 52

## COURT

Northern Cape High Court, Kimberley

## BEFORE

BM Pakati

## CASE / FILE NUMBER

1050/16

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| Judges:      | YES/NO<br>Circulate to                                                                                                                                       |
| Magistrates: | YES/NO<br>Circulate<br>to Regional Magistrates YES/NO<br>IN THE HIGH COURT OF SOUTH<br>AFRICA<br>(NORTHERN CAPE HIGH COURT,<br>KIMBELEY)<br>Case No: 1050/16 |
| Heard On:    | 17/05/2019                                                                                                                                                   |
| Delivered:   | 04/10/2019                                                                                                                                                   |

In the matter between:      BATLHARO BA GA PHADIMA  
                                         1st Applicant  
                                         SEPHIRI ISAAC  
                                         DIOKA  
                                         2nd  
                                         Applicant  
                                         And  
                                         THE PREMIER: NORTHERN CAPE  
                                         1st  
                                         Respondent  
                                         NORTHERN CAPE COMMITTEE OF  
                                         THE  
                                         2nd Respondent  
                                         COMMISSION TRADITIONAL LEADERS  
                                         DISPUTES AND CLAIMS  
                                         MORONI FAMILY  
                                         REPRESENTATIVES  
                                         3rd Respondent  
                                         SEABOY  
                                         LENTSHIKANG  
                                         4th Respondent

## JUDGMENT

PAKATI J

- [1] The first respondent, the Premier, Northern Cape Province (“the Premier”), applies in terms of Rule 30(2) (b) of the Uniform Rules of Court for an order declaring; (a) the notice of motion in counter-application issued on 20 September 2017 and (b) the review application in terms of Rule 53 by the 4th respondent, Mr Seaboy Lentshikang (Lentshikang), an irregular step and be struck out and set aside.
- [2] In response to the notice of motion in the counter-application filed by Lentshikang on 20 September 2017 the Premier filed a notice of intention to oppose same on 03 October 2017. Mr Ockert Jacobus Bester, Lentshikang’s attorney of record, filed an answering affidavit dated 26 October 2018.
- [3] The Premier contends that on closer inspection of the notice of motion filed by Lentshikang she is unable to comprehend the issues raised therein. Therefore she is not in a position to respond to it in that state until the irregularities are cured. After noticing these errors she served a notice in terms of Rule 30 (2) (b) on Lentshikang and other parties on 15 November 2017 and gave Lentshikang an opportunity to remove the cause of complaint within ten days from receipt of the said notice. Lentshikang instead filed a notice to oppose the application in terms of Rule 30(2) (b) on 29 November 2017.

- [4] Batlharo Ba Ga Phadima Royal Council, a core customary institution consisting of immediate relatives of the ruling family who had been so identified in terms of the customs of the Batlharo Ba Ga Phadima with its seat of Traditional House in Loopeng Village, Kudumane and Kgosi Sephiri Dioka (“Kgosi Dioka Sephiri”), an adult male in his capacity as the official acting Senior Traditional Leader/Kgosi of the Batlharo Ba Ga Phadima House are the first and second applicants in the main application. The Premier and the Commission established as such in terms of Chapter 12 of the Traditional Leadership Governance Framework Act (the Framework Act)[1], the Moroni Family Representatives (the Moroni Family), the house which the recommendation of the Commission has identified to be the correct genealogical house to rule over the Batlharo Ba Ga Phadima Traditional Community and Lentshikang are first to fourth respondents in this application. The Commission and the House of the Moroni have been cited as interested parties and they filed a notice to abide the decision of the Court on 03 October 2017. First and second applicants, first, second and third respondents are respondents in the counter-application. The second applicant

deposed to the affidavit in support of the counter-application. For convenience, I will refer to the parties as cited in the main application.

- [5] Lentshikang launched review proceedings in terms of Rule 53(1) (a) of the Uniform Rules of Court regarding an alleged decision taken by the Commission and sought the following orders:

*“1. That the recommendations of the Commission on Traditional Leadership Disputes and Claims (the second respondent), dated 27 March 2015 and relating to the position of the family of Seaboy Lentshikang (fourth respondent), as senior Traditional Leader of the Batlharo Ba Ga Phadima, be reviewed and set aside;*

2. That the recommendations and finding of the second respondent dated 27 March 2015, to the effect that the MORONI house is the genealogically correct house of the Chieftainship of the Batlharo Ba Ga Phadima to be reviewed and set aside;

3. That the second respondent forthwith recognise the fourth respondent’s brother, Disang Patrick Lentshikang as chief of the Batlharo Ba Ga Phadima Traditional Community after reconsidering the counter-application of the fourth respondent;
4. That the first respondent be ordered to recognise the fourth respondent’s brother, Disang Patrick Lentshikang, as Traditional Leader of the Batlharo Ba Ga Phadima Traditional Community as contemplated in section 13 of the Northern Cape Traditional Leadership, Governance and House of Traditional Leaders, Act 2 of 2007;
5. That any of the other respondents and applicants who oppose the granting of the order sought in this counter-application, be ordered the costs of this review application jointly and severally, the one paying the other to be absolved.”

[6] The Premier alleges that there were certain errors in the notice of motion filed by Lentshikang which needed his attention. She listed the following alleged errors as recorded in paragraphs 3.4.3 to 3.4.8 of the notice of motion:

*“3.4.3 Subsection 2 [of Rule 53] provides that “The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.*

3.4.4 The fourth respondent as an applicant in the counter-application has called upon the respondents to show good cause why the decision made by the second respondent should not be reviewed and set aside whereas the second respondent has not made any ‘decision’ but has made ‘recommendations’ to the first respondent. In fact, the second respondent does not have the authority to make a decision but is empowered to make only ‘recommendations’.

3.4.5 Moreover, the first, second and third orders sought by the fourth respondent in its counter-application clearly demonstrate that they are directed at the ‘recommendations’ of the second respondent and this is not in accordance with the prescripts of Rule 53 procedure which states in no uncertain terms that the respondents must show good cause why ‘a decision’ should not be reviewed and set aside. As stated above, the second respondent does not have the power to make a decision relating to traditional leadership disputes.

3.4.6 The notice of motion further cites the third respondent as ‘Moroni Family Representatives’ without any further clarification whether or not they have a right to sue or be sued as a body of persons. It would seem that the applicants ‘in the main application as well as in the counter-application

has clothed the ‘House of Moroni’ with a locus standi to be used as a ‘universitas’ or an unincorporated body of persons where it seemingly does not exist.

3.4.7 It is submitted that the ‘House of Moroni’ is neither a ‘universitas’ at common law nor an unincorporated body of persons contemplated in Rule 14 of the Uniform Rules of Court. It is thus unclear as to who are the ‘representatives’ of the Moroni Family and whether or not they have the necessary capacity to act on behalf of such a family in these proceedings as it is quite clear that they have a direct and substantial interest when regard is had to the orders sought in this application.

3.4.8 Therefore the citation of the third respondent does not accord with the prescripts of Rule 14 and/or 17 of the Uniform Rules of the High Court and the applicants in the main application as well as the fourth respondent in the counter-application should have cited members of the ‘House of Moroni’ in their personal capacity (ies) or at the very least, cite the Head of the Moroni Family.”

- [7] The Premier submits that she has been prejudiced by the conduct of Lentshikang and would experience difficulty in properly responding to the submissions made as the orders sought in the counter-application

were incompetent. She contends that the review application is an irregular step or procedure and should be withdrawn or dismissed.

- [8] Mr Ockert Jacobus Bester, a practising attorney of KBVS Attorneys, attorney of record of Lentshikang and deponent to the answering affidavit, denies that there were errors in Lentshikang's notice of motion. He states that in determining who the rightful traditional leaders of the Batlharo Ba Ga Phadima should be, was a quasi-judicial or administrative decision or function in that the Commission had to consider representations of interested parties. He submits that only Mr Sephiri, the second applicant, and Lentshikang made representations to the Commission. He submits further that if the notice of motion is read together with the supporting affidavit of Sephiri it would share clarity.
- [9] Lentshikang applies for condonation of the late filing of the answering affidavit deposed to by Mr Bester. In the same affidavit he raises a point in limine that the Premier "has no locus standi in iudicio in both the Second and Fourth Respondent's application for review against the Second Respondent's decision of its recommendation."

#### CONDONATION

- [10] Mr Bester explained that 'the main reason for the delay is that our client was not in the position to provide funds for this matter'.
- [11] The Premier contends that Lentshikang has failed to explain the entire delay which took him almost a year in filing his answering affidavit and take the Court into his confidence. According to the Premier the issue relating to the provision of funds arose during the hearing of the matter on 14 September 2018 when it was heard on an unopposed basis and the court gave Lentshikang an opportunity to organise funds and report back on 12 October 2018.
- [12] Notably, the founding affidavit was filed on 15 November 2017 and the notice to oppose, on 29 November 2017. The answering affidavit deposed to by Mr Bester dated 26 October 2018 was filed the same day, more than a year after filing the notice to oppose. The answering affidavit mentions lack of funds without detail as the reason why the answering affidavit was filed late. Other reasons could be gleaned for the first time from the heads of argument where Mr Bester mentions two reasons for the delay namely:

*"(a).a lack of funds, even up to now; (b) First and Second Respondents by the Commission attorneys just dumped the record of proceedings by the Commission at the Registrar of the above Honourable Court without serving a copy of it on the Fourth Respondent's attorney of record. The record consists of four volumes."*

Lentshikang alleges that his legal team had to peruse four volumes to see whether the documentation produced by him also formed part of the said volumes.

[13] Regarding condonation the Constitutional Court in *VAN WYK v UNITAS HOSPITAL* remarked:

*“[20] This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.*

[22] An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire

period of delay. And, what is more, the explanation given must be reasonable.” [2]

[14] The explanation tendered by Lentshikang does not even come close to the requirements as stated above. No explanatory affidavit for condonation was submitted. Mr Bester’s explanation as contained in the answering affidavit falls far short of these requirements. It is superficial and unconvincing. It amounts to saying that during the entire period of approximately over a year he was considering to answer to the Premier’s founding affidavit. He has not furnished any explanation as to how Lentshikang overcame his funding difficulty. On 14 September 2018 the matter was postponed to unopposed roll of 12 October 2018 for Lentshikang to report back on his efforts to attain legal representation. On 12 October 2018 he was represented by Mr Oosthuizen and the following order was granted:

*“1. That the matter is postponed sine die.*

2. That the 4th respondent files opposing papers on or before 26 October 2018.
3. That the applicant files replying papers on or before 09 November 2018.
4. That the applicant files Heads of Argument on or before 30 November 2018.
5. That the 4th respondent files Heads of Argument on or before 07 December 2018.
6. Costs in the application.”

[15] In my view, Lentshikang did not take this Court into his confidence and tell it how exactly he overcame his difficulty in raising funds. The delay is clearly inordinate. However, I will deal with the first respondent’s application in terms of Rule 30(2) (b) of the Uniform Rules of Court for the sake of finality.

POINT IN LIMINE

- [16] Lentshikang argues that the Premier has no locus standi regarding his and Sephiri's, review application against the Commission's recommendations because the Premier did not play a part in the preparation of the recommendations and/or was a party before such proceedings were held. He requests for an amendment of the notice of motion in the counter-application by deleting paragraph 4 (see note [5] supra).
- [17] The Premier submits that she has locus standi in this matter because Lentshikang also seeks an order against her in her official capacity. The Premier submits that what Lentshikang says that she did not have any part to play in the recommendation made by the Commission "is inexplicable and disingenuous to say the least."
- [18] In his notice of motion Lentshikang seeks an order against the Premier to recognise him as the rightful traditional leader of the Batlharo Ba Ga Phadima.
- [19] Rule 30 (1) (2) (a) and (b) of the Uniform Rules of Court provides:

*"30 Irregular proceedings*

- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
- (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if –
  - (a) The applicant has not himself taken a further step in the cause with knowledge of the irregularity;
  - (b) The applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause e of complaint within ten days."

The Premier alleges that she has not taken a further step.

- [20] In this matter the Premier has indeed not taken a further step in the proceedings. Instead of the fourth respondent taking the opportunity of removing the cause of complaint he asks the respondents including the Premier to show cause why the recommendations of the Commission and Premier should not be reviewed and set aside and the relief sought not be granted. In the notice of motion he states:

*"KINDLY TAKE NOTICE that the affidavit of George Ookame Sephiri together with its annexures will be used in support of this Counter-Application.*

KINDLY TAKE FURTHER NOTICE that the Applicants and First, Second and Third Respondents are hereby called upon in terms of Uniform Rule 53 (1) (a), to show good cause why the abovementioned decision of the CTLDC [Commission] and of the Second Respondent should not be reviewed and set aside, and the relief sought, should not be granted.

KINDLY TAKE FURTHER NOTICE that the First, Second and Third Respondents are called upon in terms of Rule 53 (1) (b) of the Rules of the above Honourable Court to despatch within 21 days after receipt of this Notice of Motion of the Counter-Application and the attachments thereto, to the Registrar of the above Honourable Court a record of all documents and all electronic records in NUMERICAL ORDER (including transcripts, any correspondence, memoranda, advices, recommendations and reports prepared by the functionaries and/or

employees of the First, Second and Third Respondents as the case may be and all information especially relating to the recommendation,

motivation and decision of the Second Respondent relating to the position of the Third and Fourth Respondents) and the finding that the Moroni House is the genealogically correct house of the Chieftainship of the Batlharo Ba Ga Phadima that is related to the making of the decision which is sought to be reviewed and set aside together with such further reasons as the First, Second and Third Respondents may be required by law or are desirable to provide and to notify the Fourth Respondent's Attorney that this has been done."

[21] The Premier derives her powers from various legislation namely, the Framework Act (as amended in 2009) the National Act read with the Northern Cape Traditional Leadership Governance and House of Traditional Leaders

Act[3] (the Traditional Leadership Act).

[22] In terms of section 11(1) (b) of the Framework Act the Premier is entrusted with the authority to recognise a traditional leader of a recognised community. Section 26(2) (b) of the Act provides:

*"26 Recommendation of Commission*

A recommendation of the Commission must, within two weeks of the recommendation having been made, be conveyed to-

(a)...

(b) the relevant provincial government and any other relevant functionary to which the recommendation of the Commission applies in accordance with applicable provincial legislation in so far as the consideration of the recommendation does not relate to the recognition or removal of a king or queen in terms of section 9, 9A or 10."

[23] It is therefore evident that the issues before this Court cannot be disposed of without the indulgence of the Premier as the one who made the decision which may be subject to review in these proceedings. Even if paragraph 4 of the prayers in the notice of motion would be amended taking into account the fourth respondent's notice of intention to amend its notice of motion filed on 06 September 2018 that would not change anything. Therefore to say that the Premier has no locus standi in these proceedings cannot stand.

[24] Lentshikang argues that the Commission called upon interested parties to make representations and by so doing was performing a quasi-judicial and/or administrative function as alluded to earlier. This, according to him, suggests that the said recommendations were

reviewable in terms of Rule 53 of the Uniform Rules of Court alternatively, by considering the representations from other parties

its conduct would amount to an administrative decision under the auspices of Promotion of Administrative Justice Act 3 of 2000 and therefore reviewable.

[25] For Lentshikang to suggest that the Commission was performing a quasi-judicial function and therefore its decision is reviewable is absurd. That is so because section 25 of the Framework Act provides that the Commission operates nationally in plenary and provincially in committees and has authority to investigate and make recommendations on any traditional leadership dispute and claim contemplated in subsection (2).

[26] Rule 53 of the Uniform Rules of Court provides:

*“Reviews*

(1) Save where any other law provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall

be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate,

presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties

affected-

(a) Calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside...” My emphasis

[27] Clearly ‘to investigate and make recommendations’ cannot be a decision subject to review. The Commission’s mandate is to call for submissions or representations from various parties on the information placed before it before finalising the recommendations thereby observing the audi alteram partem rule. Evidently, the orders sought by the fourth respondent in his counter-application are impossible in terms of Rule 53 because the second respondent can only make recommendations and not decisions.

[28] In his notice of motion Lentshikang also referred to the Moroni Family and cited them as “The Moroni Family Representatives” without any clarification as who this is and whether or not they have a right to sue and be sued. It is also clear that these people have an interest in the matter taking into account the orders he seeks.

[29] Rule 17(4) (b) of the Uniform Rules of Court provides:

*“(4) Every summons shall set forth*

*(a)...the surname and first names or initials of the defendant by which the defendant is known to the plaintiff, the defendant’s residence or place of business and, where known, the defendant’s occupation and employment address and, if the defendant is sued in any representative capacity, such capacity; and*

*(b) The full names, gender (if the plaintiff is a natural person) and occupation and the residence or place of business of the plaintiff,*

*and if the plaintiff sues in a representative capacity, such capacity.”*

See also *Bassett v Platt* 1954 (1) SA 264 (N).

[30] In the instant case the citation of the Moroni Family Representatives clearly does not accord with Rule 17.

[31] In my view, Lentshikang’s counter-application has to fail and the Premier’s application in terms of Rule 30(2) (b) has to succeed with costs.

In the circumstances I grant the following order

1. The fourth respondent’s (Seaboy Lentshikang’s) notice of motion issued and filed on 20 September 2017 is declared an irregular step as contemplated in Rule 30(2) (b) of the Uniform Rules of Court and is set aside.
2. The fourth respondent’s review application is declared an irregular step as contemplated in Rule 30(2) (b) of the Uniform Rules of Court and is set aside.
3. The fourth respondent is ordered to pay costs of the application on a scale as between party and party.

BM PAKATI

JUDGE-NORTHERN CAPE DIVISION, KIMBERLEY

On Behalf of the 1st Applicant : Adv K Nondwango

Instructed by: STATE

ATTORNEY

On Behalf of the 4th Respondent: Adv W Strydom

Instructed by: HUGO

MATHEWSON & OOSTHUIZEN

[1] The Traditional Leadership and Governance Framework Act, 41 of 2003.

[2]

[2007] ZACC 24; 2008 (2) SA 472 (CC) at p477 para [20] and [22]

[3] The Northern Cape Leadership Governance and House of Traditional Leaders Act, Gazette No. 1156 of 04 December 2007

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