

SOUTH AFRICA / JUDGMENT

Blackhill Engineering & Construction CC v Baolong Boora Tshidi Tribal Authority and Others (385/2009) [2012] ZANWHC 21 (31 May 2012)

[2012] ZANWHC 21

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

385/2009

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IN THE NORTH WEST HIGH COURT

(MAFIKENG)

CASE NO.: 385/2009

In the matter between:

BLACKHILL ENGINEERING &
CONSTRUCTION CC

.....APPLICANT

and

BAROLONG BOORA TSHIDI TRIBAL
AUTHORITY

.....1ST

RESPONDENT

LEKOKO

NORTH MINE (PTY) LTD2ND

RESPONDENT

LEKOKO SOUTH MINE (PTY) LTD

.....3RD

RESPONDENT

JUDGMENT

LANDMAN J:

Introduction

[1] Blackhill Engineering and Construction CC, the applicant launched an application against the Barolong Boora Tshidi Tribal Authority, the name by which the Barolong Boora Tshidi Traditional Council was previously known, the first respondent (I shall refer to it as the Tribal Authority and to its council as the Tribal Council), to compel it to sign a draft shareholders agreement (second agreement) which was required by Department of Minerals and Energy (DME) required this agreement as a final requirement before the second and third respondents may exercise their rights to mine in the area belonging to the first respondent, commonly known as Lekoko. Lekoko lies about 10 kilometres west of Mafikeng and straddles the Mafikeng/Vryburg Road.

[2] The application is premised upon the acquisition of mineral rights granted to it by the first respondent in terms of a series of resolutions which are annexed to the founding affidavit as “JAE1”, “JAE2” and “JAE3”. These

resolutions were taken by the Council of the Tribal Authority of the Barolong Boora Tshidi Tribe (the first respondent) on 6 July 2001, and 3 August 2001. In addition the applicant relies upon annexures “JAE4” and “JE1”.

[3] The first respondent’s defence is that the resolutions referred to above are invalid. The first respondent seeks, by means of a counter application, an order that the resolutions contained in annexures “JAE1”, “JAE2” and “JAE3” as well as the letter addressed to the Director: Minerals and Energy by the Barolong Boora-Tshidi Tribal Authority (annexure “JAE4”) be declared invalid.

The further facts

[4] On 9 July 2001, the Kgosi K J Montshioa of the first respondent endorsed a letter on behalf of the mining committee, confirming that the mining commission members will assist the mining companies (to be formed) with the necessary documents to obtain prospecting permits from the DME.

[5] On 16 July 2001 Mr Molema endorsed a tribal resolution, granting permission to Messers Lesogodi Lekoko and Phillip Kgengwe on behalf of the Tribal Authority to act as Directors of Lekoko South Mine (Pty) Ltd and Lekoko North Mine (Pty) Ltd.

[6] On 3 August 2001 the Tribal Authority addressed a letter (annexure “JAE4”) to the DME, confirming the grant of permission and the agreed shareholding. Annexure “JAE4” is endorsed by the mining convenor, Mr Thebe Mokgoetsi, and also on behalf of the Tribe by the Tribal Secretary, Molema.

- [7] On 8 November 2002, Mr Ronnie Tawaana, a councillor and chairperson of the Mining Commission endorsed a survey diagram on behalf of the Barolong Boora Thsidi Tribe (the Tribe).
- [8] The DME issued prospecting permits to second and third respondents.
- [9] During the quarter ending December 2002, 10 pits/trenches/ excavations were dug at Lekoko, and a quantity of about 13 000 tons of waste and gravel were excavated and treated.

Meeting to consider amended agreement

- [10] The only outstanding issue before implementation of the mining rights was the requirement by DME that a more formal shareholders agreement be drafted and agreed upon as the DME had raised the shareholding requirement a percentage point and insisted that a new shareholders agreement be concluded. Mr Weyers, a senior employee, of the applicant met with members of the Council including

Kgosi Montshioa to discuss the issue. The Kgosi asked for an opportunity to have the Tribal Authority's legal advisors peruse the document. This was acceptable to the applicant but nothing further was heard of the matter.

Referral to oral evidence

- [11] When the application was initially argued before me, I was induced to refer the counter application for oral evidence because the defence, that the resolutions were not preceded by a meeting of the tribe or the Lekoko ward or Village, was raised for the first time some eight years after the resolutions were signed.
- [12] I handed down a judgment on 29 July 2010 and ordered, inter alia, as follows:

"4. Evidence is to be heard on the issue of whether the provisions of section 31(a) of Act 23 of 1978 have been compiled with as regards the mining option.

5. ...

6. The applicant (respondent in the counter application) may call such witness as may be required provided it files affidavits as

directed by paragraph 7 of this order.

7. No further witness may be called save with leave of the Court provided that an affidavit setting out such witness's evidence

has been served...

- [13] Oral evidence was heard, during recess, on 2, 3, 4 and 5 April 2012. Thereafter both counsel filed written heads of argument in lieu of oral argument.

The impugned documents

[14] At this stage, it may be convenient, to set out the details of the three resolutions.

JAE 1

[15] The resolution attached as JAE 1 reads:

“At a duly constituted meeting of the BAROLONG BOORA TSHIDI TRIBAL AUTHORITY under chief JK Montshioa held at RATSHIDI on 06-07-001 in accordance with the usage and customs of the BAROLONG Tribe, it was resolved by the male members of the tribe present that. A TEMPORARY PERMISSION HAS BEEN GRANTED TO MR JAN ALBERTUS ENGELBRECHT ID 3910225015087 TO PROSPECT DIAMOND IN LEKOKO. WE HAVE NO OBJECTION TOWARDS THIS”

[16] The first resolution (JAE 1) is to the effect that:

the meeting was held on 6 July 2001 at Rashidi, the original Mahikeng, which lies to the west of the Imperial Reserve, which itself is next to the Town of Mahikeng, previously Mafikeng and before that Mafeking.

The venue was the Kgotla or tribal meeting place of the Barolong Boora Tshidi tribe of which Lekoko is one ward.

The meeting was attended by about 500 male tribesmen who all voted in favour of the resolutions.

It was resolved that Jan Albertus Engelbrecht is granted a temporary permission to prospect and mine diamonds in Lekoko.

The resolution was certified by Kgosi K J Montshioa as the “administrator Molopo”.

The place where the administrator of Molopo is to sign and put the stamp is left open.

The resolutions was signed by 5 councillors.

JAE 2

[17] The second resolution (JAE 2) differs from the first in that:

It was taken on 3 August 2001.

It was resolved that the second respondent, Lekoko North Mine (Pty) Ltd, is granted permission to prospect and mine at Lekoko.

JAE 3

[18] The third resolution is similar to the second one except that it grants the third respondent, Lekoko South Mine (Pty) Ltd, permission to prospect and mine at Lekoko.

The law

[19] The Bophuthatswana Traditional Authorities Act 23 of 1978 (the Act) has since been repealed. But it was current when the three resolutions in question were passed. Section 7 of the Act deals with meetings of the Tribal Authority, section 9 deals with the

obligation to minute meeting and section 31(a) deals with further requirements for the validity of resolutions. It is only necessary to quote extracts from sections 7 and 31.

“7. Meetings of tribal authority –

- (5) Subject to the provisions of this Act and of any by-laws the procedure to be followed at any meeting or other proceedings of a tribal authority including the meeting of any standing or occasional committee shall be in accordance with the laws and customs of the tribe concerned.”

“31 (a) Legal proceedings by and against tribal, community or regional authorities. – Any legal proceedings by or against a tribal, community or regional authority may be instituted by or against the chairman of that tribal, community or regional authority in his official capacity: Provided –

- (a) that a tribe or tribal authority and a community or community authority shall not be responsible for the personal obligations of a chief, chief’s deputy or headman nor shall the tribe or tribal authority or community or community authority in respect of the land occupied by the tribe, or community be bound in any way whatsoever by any contract entered into or liability incurred by any chief, chief’s deputy or headman unless it has been approved by the President after having been adopted at a meeting of the tribal or community authority concerned and confirmed at a meeting of the regional authority.”

[20] The land in question falls within the scope of the provisions of the Interim Protection of Informal Land Rights Act 31 of 1996 (the IPILRA). This is common cause. The IPILRA affects the custom and usage of the Tribe and its Tribal Authority.

“2. Deprivation of informal rights to land

- (1) Subject to the provisions of subsection (4), and the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law which provides for the expropriation of land or rights in land, no person may be deprived of any informal right to land without his or her consent.
- (2) Where land is held on a communal basis, a person may, subject to subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community.
- (3) Where the deprivation of a right in land in terms of subsection
- (2) is caused by a disposal of the land or a right in land by the community, the community shall pay appropriate compensation to any

person who is deprived of an informal right to land as a result of such disposal.

- (4) For the purposes of this section the custom and usage of a community shall be deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given sufficient notice, and in which they have had a reasonable opportunity to participate.”

Section 1 of this Act defines certain words or phrases.

“Community” has been defined to mean ‘any group or portion of person whose rights to land are derived from shared rules determining access to land held in common by such group’.

“informal right to land” means

‘(a) the use of , occupation of, or access to land in terms of:

(i) any tribal, customary or indigenous law or practice of a tribe;

(ii) the custom, usage or administrative practice in particular area or community, where the land question at any time vested in –

(aa) the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act 18 of 1936);

(bb) the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution

Act, 1971 (Act 21 of 1971); or

(cc) the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;

(b) the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary

established or appointed by or under an Act of Parliament or the holder of a public office;

(c) beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or

but does not include. . . .’

‘tribe’ includes –

‘(a) any community living and existing like a tribe; and

(b) any part of a tribe living and existing as a separate entity.

Section 1(2). It reads:

“(2) (a) This Act shall not confer on the holder of a real right to land, any rights in addition to those which he or she holds in that land.

- (b) The holder of an informal right in land shall be deemed to be an owner of land for the purposes of section 42 of the Minerals Act, 1991.”

Oral evidence

- [21] The first respondent called four witnesses while the applicant called only one witness. Their evidence may be summarised as follows:

Molema

- [22] Mr Rasenti Solomon Molema testified that he was a member of the Tribal Authority in 2001 and he is still the member. He was the secretary of the Tribal Authority at that time. The Barolong Boora Ratshidi includes amongst its members residents of various

areas or villages, including the Lekoko area, under the jurisdiction of Kgosi J K Montshioa.

- [23] Molema did not know of any meeting of the Barolong Boora Thsidi Tribe held at the Kgotla in connection with the granting of mining rights. All the members of the Barolong Tribal would have been invited to attend the meeting. During the voting males and

females are permitted to vote. Only those above 18 years are permitted to vote. The voting is done by show of hands. Malema did not know of any meeting held by the Lekoko ward or village which granted permission to the late Mr Engelbrecht or a company to be formed to prospect there.

- [24] The meetings of the Tribal Authority are held monthly in the boardroom of the Tribal Authority offices. The Tribal Authority at that time had only fifteen members.

- [25] He said a Mr Tholo takes minutes of the Tribal Council and it is his duty to submit them to the government. Tholo is not an employee of the Tribal Council. He is employed by the Department of Local Government and Traditional Affairs.

- [26] The Kgosana of the Lekoko area at that time was Leshogodi Anthony Lekoko. He is deceased. He was the son of Mrs Baitebadi Lekoko. L A Lekoko did not perform his duties full time as he was a member of the South African National Defence Force. Phillip Kgengwe acted as the headman during his absence.

Mrs Lekoko

- [27] Mrs Lekoko is currently the Kgosana of the area known as Lekoko. Her son, L A Lekoko the headman of Lekoko at that time, always informed her of meetings held in Lekoko and she attended when available. She had not been informed of a meeting held at Lekoko to permit Jan Engelbrecht to mine was discussed. She was not invited to such a meeting. She only met Jan Engelbrecht when she got a call and they arranged to meet at the offices of the Tribal Council. She was told to sign the agreement on behalf of her son but she refused to do so.

- [28] She has a residence at Ratshidi near the Kgotla at Ratshidi. No meeting was held at the Kgotla in respect of mining rights.

Mrs Marumo

[29] The third witness, Mrs Marumo said she was the administrator of Molopo in 2001. She represents government in the tribal meetings where resolutions are taken by the Tribe. One of her duties is to count the votes by registering the total number of people eligible to vote, the number of people in favour of the resolution and those against the resolution. When issues involve the land occupied by the Tribe she is also obliged to be present. But she counts the votes under the supervision of an official of the Provincial Department of Land Affairs. She said that whenever such a resolution is to be taken she must be present; even if it is at Lekoko. She would submit the resolutions to her superiors in the Department of Local Government and Traditional Affairs. She was unaware of the three resolutions, although the form on which the resolutions were recorded, was the one used by the Tribal Council. She was not present when these resolutions were taken. She would have signed them as the administrator of Molopo. She pointed out that

Kgosi J K Montshioa certified that he was the administrator. He is the Kgosi. He is not the administrator of the Tribe.

Tholo

[30] Mr Tholo testified that that he is employed by the Department of Traditional Affairs. He draws his salary from that department. He confirmed that his duties are to take minutes at the Tribal Council meetings. He commenced his work at the Tribal Authority office sometime after 2001. He was unable to bring the minutes of the meeting referred to above as the tribal offices were being renovated.

Kgengwe

[31] Mr Phillip Kgengwe testified that he is a resident of Lekoko. He was resident there in 2001. He acted as the kgosana when L A Lekoko was not available to discharge his duties. He was a member of the Tribal Authority from 2002 to 2010. The Tribal Council

had a membership of less than 20 at the time of his membership. The community of Lekoko consists of about 14 000 persons. He denied that he was a director of the second and third applicants. He did not attend any meeting of the directors. He has no knowledge about resolutions permitting him and L A Lekoko to be directors. He denied signing any consent form to be a director of the companies.

Weyers

[32] Mr Jacques Weyers testified that he administers the affairs of the applicants. He had no personal knowledge of whether any of the relevant meetings had been held. He handed in a document relating to the delegated authority received by him from the Department of Land Affairs North West during 2007. The document is a copy of "Confirmation of Farm Molopo Ratshidi 302 JO With Regards to Tribal Authority". It reads:

“1. This is to confirm that the owner of the above mentioned area is indeed the North West Provincial Government.

2. The Interim Protection of Informal Land Rights Act (Act 31 of 1996) grants the local government the authority to redistribute and allocate various informal land rights to various tribal authorities.
3. The above mentioned farm (Area) has duly been allocated to the Barolong Boora-Tshidi Tribal Authority.
4. The Minister of Land Affairs keeps the deeds for all informal land rights in a trust but authority is given to the owners to redistribute the lands.
5. Accordingly the area known as Molopo Ratshidi 302 JO has been given to the Barolong Boora-Tshidi Tribe, Private Bag X001, Ratshidi, Mmabatho, 2735.
6. Furthermore, the Barolong Boora-Tshidi Tribal Authority has the authority to determine various developments on any part of the area allocated to them through a process of Tribal Resolutions.”

Findings in respect of oral evidence

[33] None of the witnesses attended any relevant meeting of the Tribe or the Lekoko ward or Village. None of the witnesses had any knowledge that such meetings had been held. The oral evidence simply does not establish that any meetings of the Tribe or the Lekoko ward or Village were convened to vote on whether permission should be granted to Engelbrecht to prospect for diamonds on land in

the Lekoko area.

[34] The relevant resolutions were passed at two council meetings of the Tribal Authority. It is alleged that the members of the council accepted the word of the late headman Lekoko that meetings had been held but that it transpires that this was not the case.

[35] I doubt that it was only the late Lekoko who knew and put forward the untruth but the witnesses for the respondent were unshaken. Weyers had no personal knowledge of these matters. In so far as the resolutions record that a meeting was held at the Kgotla, which is located near the Tribal Authority offices, it is possible that other the members who signed the resolution knew this was untrue

but there is no evidence of this.

[36] The Kgosi signed the resolutions but did not testify. No explanation for his failure to testify was proffered.

The documentary evidence of meetings

- [37] The sole record that meetings were held by the Tribe or the Lekoko Village or ward, are the three resolutions passed by the Council of the Tribal Authority. These resolutions, in view of the Interim Protection of Informal Land Rights Act, depend for their validity, on at least a meeting of the Lekoko ward or Village. The mischief which this Act seeks to avoid is where leaders dispose of immovable assets of the community without the knowledge or consent of community members. It is thought that this mischief can be curbed by introducing elements of democracy which may or may not otherwise have existed.
- [38] Even if I were to find that the resolutions truly reflect the facts stated in them there is one unsurmountable obstacle which stops the applicant in its tracks.
- [39] The resolution records that the only members of the community who voted at the meetings were men. This does not reflect compliance with the Interim Protection of Informal Land Rights Act. There is no suggestion in the Act, nor since the new Constitutional Dispensation, could there be any lawful exclusion of female holders

of rights.

Applicant's submissions

[40] Mr Swart contended that:

- (a) On a proper analysis of annexure "JAE1", "JAE2" and "JAE3" it is clear that the resolutions:-
are resolutions of the tribal authority held at their usual place of meeting;
the resolutions all refer to the relevant area as Lekoko;
the resolutions record the requirements provided for in terms of section 9 of Bophuthatswana Traditional Authorities Act No 23 of 1978.
- (b) No attempt whatsoever has been made to call any meeting of the Lekoko community and/or the tribe to discuss the draft shareholders agreement and/or any issue relevant and/or pertinent to their defence/cause of action.
- (c) The very same people who confirmed that the tribal resolutions were duly taken in 2001, now attempt to interpret the very same resolutions from a technical point of view in order to circumvent their decision.
- (d) It is not in dispute that Tribal Authority meetings were held on the dates reflected in the resolutions and ex facie the resolutions due consideration was given to a meeting which was held at Lekoko where all the tribesmen were in favour of prospecting,

mining, the registration of companies, the appointment of directors and shareholding in the companies. On the first respondent's

version all such documentation should be in possession of Department of Land Affairs.

- (e) The first respondent further elected not to call any witnesses from either the Department of Land Affairs or DME.
- (f) The first respondent also elected not to call Kgosi Montshioa who signed the founding affidavit. The only inference that can be drawn from, is that he indeed indicated that the latest draft shareholders agreement was acceptable to him and the Tribal Authority, and that he merely wanted to refer it to his legal address to check whether there were any loopholes in the document.
- (g) Weyers confirmed the correctness of his affidavit and handed in documentation showing, that on a balance of probabilities, the people at Lekoko were paid during prospecting which actually took place. This is again proof that the community of Lekoko was well informed about the actions of the applicant. Weyers' testimony was basically unchallenged.

Respondent's other submissions

- [41] It is unnecessary for me to address the respondents' submission that the Barolong Boora Tshidi Tribe is not the owner of the land as the Provincial Government of the North West is the "owner" of the farm Molopo on which Lekoko is situated.

Conclusion

- [42] It follows that the resolutions, as they were not preceded by a decision of the majority of at least the Lekoko ward or Village, are invalid. A further consequence is that the letter dated 3 August 2001 from the Tribal Authority to the DME (annexure "JAE4")

is of no force and effect. The result is that the shareholders agreement which was originally entered into is also of no force and effect. The applicants are not entitled to the order they seek. The application must be dismissed and the counter application granted

Costs of 22 March 2012

- [43] I turn to deal with the costs reserved on 22 March

2012. The facts are as follows:

- (a) On 13 December 2011, the first respondent caused a "Notice of Set-down: Opposed Motion Roll" to be served on the applicants' attorneys. This was to enrol the application for the hearing of the oral evidence.
- (b) After the December holidays and on 18 January 2012, the applicants' attorneys faxed a letter to the State Attorney advising that they were of the opinion that this is a trial matter and not a motion and that the first respondent must accordingly apply

for a date of hearing and that 3 days will be required for this matter.

- (c) The matter had previously been set down for three days on the trial roll.

- (d) The first respondent again set the matter down on the opposed motion roll for Thursday 22 March 2012.
- (e) On 19 March 2012 the first respondent delivered a copy of its practice note to the applicants' attorneys stating clearly that the expected duration of the oral evidence was 2-3 days.
- (f) On 22 March 2012, a Judge ordered that the matter be removed from the Motion Roll and the Judge President ordered that it be enrolled for hearing from 2 April to 5 April 2012, as the matter had been referred to oral evidence.

Applicant's submissions on reserved costs

- [44] The applicant submits that the first respondent is solely responsible for the wasted costs incurred on 22 March 2012 because it set the application down on the normal opposed motion roll. The applicant seeks its wasted costs for 22 March 2012 on an attorney and client scale.

Respondents' submissions on reserved costs

- [45] Counsel for the respondent submits that:

- (a) the parties have a different interpretation of the court order. However, both parties agree that the Court ordered that the counter-application be referred for oral evidence on certain

issues.

- (b) the matter remains on the motion roll. However, oral evidence led. It is clear that the application has not been referred to trial but to oral evidence will be led. He points out that when an application is referred to trial the notice of motion and founding

affidavit would stand as the summons and particulars of claim and the Court would direct the further conduct or filling of the pleadings by the parties. It does not matter that the parties made discovery and held a pre-trial conference.

- (c) the purpose of the rules is to ensure that the litigation is conducted fairly and that the litigation is curtailed. The parties are entitled to use the rules in the conduct of the litigation.
- (d) the first respondent was therefore within its right as dominus litus to set the matter down for hearing on the opposed motion roll.

Evaluation

- [46] Motion matters are normally disposed of in a day or less. Where a motion, or more correctly, the referral of a dispute of fact arising in an application has been referred to oral evidence, the Court will normally be unable to hear oral evidence and other

motions. The parties required four days for leading oral evidence. It stand to reason that special arrangements must be made whether by adopting the procedure applicable to trials (Practice Direction 21) or by specifically drawing the registrar's attention to the nature of the proceedings

and its anticipated duration. It is entirely inappropriate to simply set the matter down on the opposed motion roll even though it retains its character as a motion. The first respondent imprudently set the matter down on the opposed role and must bear the consequences. The first respondent is therefore liable for the wasted costs. As the first respondent ignored good advice these costs should be on the attorney and client scale.

Remaining costs

[47] The applicant has been unsuccessful. The application must be dismissed and the counter application granted. But for eight years the first respondent allowed the applicant to incur financial expense under the reasonable impression that the necessary process had been followed and that the resolutions were valid and binding. Justice will be served by making no order for costs. I am not persuaded that the applicant's opposition to the counter application was unwarranted even though the first respondent has been successful.

[48] In the premises I make the following order:

1. (a) The application is dismissed.
- (b) There will be no order for costs.
2. (a) The counter application is granted and the resolutions which are annexed to the founding affidavit as "JAE1",
"JAE2" and "JAE3" and the letter addressed to the Director: Minerals and Energy by the Barolong Boora-Tshidi Tribal Authority (annexure "JAE4") are declared invalid.

A A LANDMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING : 2 – 5 APRIL 2012

DATE OF JUDGMENT : 31 MAY 2012

COUNSEL FOR APPLICANT : ADV A J SWART

COUNSEL FOR RESPONDENTS : ADV K M MOLEMOENG

ATTORNEYS FOR APPLICANT : SMIT & STANTON INC

ATTORNEYS FOR RESPONDENTS : STATE ATTORNEY

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