

SOUTH AFRICA / JUDGMENT

Coal of Africa Limited v Nekuvule (64389/2014) [2018] ZAGPPHC 708 (12 February 2018) [2018] ZAGPPHC 708

COURT

North Gauteng High Court, Pretoria

BEFORE

Ranchod

CASE / FILE NUMBER

64389/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

NOT REPORTABLE

(2)

NOT OF INTEREST TO

OTHER JUDGES

(3)

REVISED

CASE

NO: 64389/2014

12/2/2018

In the matter between:

COAL OF
AFRICA LIMITED
APPLICANT
and
JOSEPH
MUTHUPHEI NEKUVULE
RESPONDENT

In re:

In

the matter between:

JOSEPH
MUTHUPHEI NEKUVULE
FIRST APPLICANT
KUVULE
COMMUNITY
SECOND APPLICANT
COAL OF
AFRICA LIMITED
FIRST RESPONDENT
KING
TONY PETER MPHEPHU,
SECOND RESPONDENT
LIMPOPO
PROVINCE
HENRY
NTHAMBELENI MUSEKWA
THIRD RESPONDENT
COMMISSION
ON RESTITUTION OF
FOURTH RESPONDENT
LAND
LIMPOPO PROVINCE
MAKHADO
MUNICIPALITY
SIXTH RESPONDENT
PREMIER
OF
LIMPOPO
SEVENTH RESPONDENT
CHAIRMAN
OF THE NATIONAL HOUSE
EIGHT RESPONDENT
OF
TRADITIONAL LEADERS
COMMISSION
ON TRADITIONAL LEADERSHIP,
DISPUTES
AND
CLAIMS NINTH
RESPONDENT
SIMON
NEMULAMBWANE TENTH
RESPONDENT
PHINEAS
RADZILANI
MUDIMELI ELEVENTH
RESPONDENT
MINISTER
FOR CO-OPERATIVE
GOVERNANCE
HUMAN SETTLEMENTS AND

TRADITIONAL
AFFAIRS
TWELFTH RESPONDENT
THE
MINISTER OF MINERALS AND ENERGY
THIRTEENTH
RESPONDENT
MUSHOLOBI
COMMUNITY
FOURTEENTH RESPONDENT
THE
MAKUSHU COMMUNITY
FIFTEENTH RESPONDENT
THE
PFUMEMBE COMMUNITY
SIXTEENTH
RESPONDENT
THE
MPHEPHU RAMABULANA TRUST
SEVENTEENTH RESPONDENT

JUDGMENT

RANCHOD J:

[1] This is an interlocutory application by the first respondent in the main application, Coal of Africa Ltd (Coal), in terms of Rule 7(1) of the Uniform Rules of Court seeking an order in the following terms:

1. At the applicant's request in terms of Rule 6(5)(g), that the issue whether the respondent has the necessary authority to represent the Kuvule Community (the second applicant in the main application) is referred to oral evidence.
2. The respondent, Joseph Muthupehi Nekuvule, shall lead oral evidence as required to demonstrate his authority to represent the second

applicant in the main application. Thereafter, the respondent and all witnesses on his behalf shall be cross- examined and applicant shall then lead evidence in rebuttal on the question of the respondent's authority, after which those witnesses shall be cross-examined.

3. In respect of the authority issue, all the rules of trial shall apply save that there will be no need to file any further pleadings and the existing Rule 7 application papers shall serve as pleadings.
4. Costs of the Rule 7 application shall be determined by the trial court hearing the issue of authority.

- [2] The first applicant in the main application, Mr Joseph Muthupehi Nekuvule (Mr Nekuvule) opposes the application.
- [3] Coal says it concluded a Broad-Based Black Economic Empowerment (B-B BEE) deal with seven traditional communities affected by a coking coal mining operation known as the Makhado Project. The Makhado Project is located across five farms in the Limpopo Province. Seven traditional communities (the affected communities) reside on the five farms including the Kuvule community.
- [4] The main application has been brought by Mr Nekuvule to interdict Coal from concluding any commercial transaction in relation to the Makhado Project that would benefit anybody other than the Kuvule community. It appears from the founding affidavit that Mr Nekuvule seeks, inter alia, to prevent implementation of the B-B BEE transaction. In this, he purports to act on behalf of the Kuvule Community in his capacity as Headman of the Kuvule village. Mr Alfeus Oenga, of Denga Inc Attorneys (Denga), purports to act on behalf of both applicants.
- [5] Coal says it has good cause to dispute that either Mr Nekuvule or Denga has authority to represent the Kuvule Community in the main application for at least the following

reasons:

5.1 Coal has in the main application challenged Mr Nekuvule's authority to act as the Kuvule community's representative. The purported authority he provided in response was not only insufficient to establish such authority; it appeared to be irregularly created. Individual members of the community have come forward on oath to state that they have not authorised Mr Nekuvule to act for them as he claims.

5.2 On the affidavits as they currently stand in the main application, no authority has been proved. At the very least, a dispute of fact exists in the main application that must be resolved before Mr Nekuvule should be permitted to pursue a claim purportedly on behalf of the Kuvule community.

5.3 Instead of pursuing the dispute raised in the main application to its conclusion, as one would have expected, Mr Nekuvule has taken further steps based on these pending proceedings, persisting in his claim that he represents the Kuvule community. He launched an interlocutory application for access to a wide range of documents, including documents confidential to Coal, in an unfounded application under rule 35.

5.4 Who represents the Kuvule community is at the heart of the main application. Mr Nekuvule attempts in that application to challenge a B-B BEE deal which Coal had concluded with the affected communities, including the Kuvule community. The Kuvule community democratically

elected its own representatives to act on their behalf in consultations regarding that B-B BEE deal. Mr Nekuvule was not elected by the Kuvule community. The main application can accordingly not fairly be decided without first establishing whether Mr Nekuvule

indeed speaks for the Kuvule people, or whether their democratically elected representative speak for them.

- [6] Coal says it has engaged with the affected communities since 2008 regarding the establishment of the Makhado Project. In February 2012 a forum called the Makhado Colliery Community Consultative Forum (MCCCCF) was established to facilitate interaction between the affected communities and Coal regarding the Makhado Project.
- [7] Coal says the MCCCCF was established through a negotiated process facilitated by the government. The process involved, among other things, identifying the affected communities, agreeing to a constitution for the forum, and conducting democratic and independently monitored elections of community representatives based on an official voters roll. Each affected community is represented in the MCCCCF by five democratically elected members. The current landowners of the affected farms are also entitled to form part of the MCCCCF.
- [8] Apparently, the participation of the Kuvule community in the MCCCCF was the subject of earlier litigation. Because the Kuvule community fall under the auspices of the Musekwa's traditional leadership, it had initially not been afforded independent representation as an affected community on the MCCCCF.
- [9] The Kuvule community approached this court on two occasions in April and May 2012. They sought orders, among other things, to interdict the election of the MCCCCF representatives and to seek the independent representation of the Kuvule community. These orders were granted.
- [10] What is important to note in this regard is that Coal says Mr Nekuvule was not elected as a representative on the MCCCCF on behalf of the Kuvule community. Instead, he is represented at the MCCCCF by the democratically elected Kuvule representatives.
- [11] Coal says from October 2013 to 1 September 2014, Coal consulted with the affected communities regarding the B-8 BEE strategy for the Makhado Project, as contemplated by the Mineral and Petroleum Resources Development Act No. 28 of 2002 (MP.RDA) read together with the Mining Charter. Elected representatives of the Kuvule community participated in each of the relevant meetings.
- [12] In his answering affidavit, Mr Nekuvule does not pertinently deny this allegation of Coal in paragraph 18 of its founding affidavit. Instead, he responds "AD PARAGRAPHS 12 to 48" saying that he has "already dealt with the allegations in paragraphs 16 and 17 above" and then deals with an attendance register and signatures thereon regarding members of the Kuvule

Community who allegedly attended a meeting on 30 August 2015^[1] where he was authorised to represent them. I will revert to this aspect presently. But he does say, with regard to paragraphs 12·

to 48 that he denies "the allegations herein insofar as they are inconsistent with what I have said".

[13] On 2 September 2014 Mr Nekuvule launched the main application on an urgent basis and sought to interdict -

13.1 the establishment of a trust in respect of the 8-B BEE structure of the Mahado Project;

13.2 taking of resolutions in respect of the subject land for purposes of the Makhado Project; and

13.3 payment of any benefits and/or royalties and/or monies that emanate from the Makhado Project, to any trust and/or person and/or community other than the Kuvule community.

[14] Coal says further that having succeeded in his attempts to obtain the independent representation of the Kuvule community on the MCCCCF, at some cost and effort for all parties, it was surprising that Mr Nekuvule brought this application, purportedly on behalf of the Kuvule community, essentially to challenge the agreement reached between the affected communities and Coal at the MCCCCF.

[15] In his founding affidavit Mr Nekuvule alleged that he is authorised to act on behalf of the Kuvule community. He said he did not attach proof of his authority only so as not to encumber the application unduly. He offered to make proof of his authority available if required.

[16] Coal requested a copy of the written authorisation by the Kuvule Community. In response Mr Nekuvule furnished Coal with a document said to be a certified extract of the minute of a meeting of the members of the Kuvule Community held on 30 August 2014. The minute incorporates an attendance register.

[17] The attendance register purports to show the name, identity number and signature of community members, who, according to Mr Nekuvule attended the community meeting in which he was authorised to bring this application.

[18] In light of the Kuvule community's participation in the consultations under attack by Mr Nekuvule, Coal says it was surprised at the claim that the community had authorised a challenge to the community-based deal concluded at the MCCCCF by the Kuvule's democratically elected representatives.

[19] As a result, Coal enquired from members listed in the attendance register. At least 22 community members whose personal details and signatures appear on the attendance register furnished Coal with affidavits in which they deny having either attended the meeting or signed the register.

[20]

Mr Nekuvule did not file a replying affidavit in the main application hence the allegations by Coal remained unanswered as regards his authority to act on behalf of the Kuvule community. Coal then launched this Rule 7(1) application.

- [21] Mr Nekuvule filed an answering affidavit of about 27 pages (excluding the annexures). His submissions in opposing the Rule 7(1) application have been set out in his counsel's heads of argument. It is contended that in an application in the Land Claims Court under case number LCC 71/14 the Court declared Mr Nekuvule to be the legitimate representative of the Kuvule Community. That order has not been set aside, hence it remains valid and, so the argument went, Mr Nekuvule's right and authority to represent the Kuvule community remains intact as well as his right to instruct Denga Attorneys.
- [22] In my view, neither of the submissions withstand scrutiny. The fact that Mr Kuvule was recognised as the legitimate representative of the Kuvule Community in the LCC case does not necessarily mean that he has the authority to represent the community in another separate legal case. It may well be, for whatever reasons, that the community or some of its members may not want to litigate on an issue and therefore not provide the requisite authorisation. In this matter it goes further. Mr Nekuvule chose to prove his authority by furnishing a minute and the attendance register. At least twenty- two persons deny having attended the meeting and also their signatures in the attendance register.
- [23] Mr Nekuvule counters these allegations by saying that a representative of Coal had coerced some of the individuals to furnish the affidavits and in other instances bribing them by offering them jobs at Coal.
- [24] Clearly, there is a dispute of facts which cannot be resolved on the papers.
- [25] A further submission which was made by Mr Kuvule's counsel during oral argument was that a Headman of a tribe or community is automatically authorised to represent the community. I was referred to *Hlaneki v Commission on Restitution of Land Rights* [2006] All SA 633 (LCC) at 637 paras [7] and [BJ where Moloto J said -

'7 It is common cause that the claim form states that the claimant is the third applicant and that the basis on which the first applicant contended that he represented the third applicant is that he is the chief of the third applicant. It is also common cause that, with the form was submitted, among others, a document entitled "Gazankulu Wetgewende Vergadering: Sertifikaat van Regsmag: Kaptein Chabane Jackson Hlaneki." The body of this document grants Chief Chabane Jackson Hlaneki (the first applicant) civil and criminal jurisdiction over his tribe, the third applicant. The document was submitted in

substantiation of the contention that the first applicant represented the third applicant in submitting the claim form. None of the respondents queried the validity of the document or the chieftainship of the first applicant over the third applicant. Yet the second and third respondents decided the form did not comply with section 10(3).

8 It is important to note that section 10(3) calls for a "resolution or document" (my emphasis) in support of the contention that the actor represents the principal. It is a well-known fact, which this Court can take judicial notice of, that chiefs act as representatives of their tribes. A document showing that the first applicant acts on behalf of the third applicant by virtue of the powers and jurisdiction he has over the third applicant is sufficient proof of this representative capacity without necessarily necessitating a special resolution authorizing him to lodge the claim.'

[26] The case of Hlaneke can be distinguished from the present matter in that the court was clearly referring to the "Gazankulu Wetgewende Vergadering: Sertifikaat van Regsmag: Kaptein Chabane Jackson Hlaneke" as being the basis upon which it was not necessary in that case to provide a special resolution. That is not the case in this matter before me.

[27] In all the circumstances, a proper case has been made out by Coal for a referral to oral evidence regarding the issue of Mr Nekuvule's authority to represent the Kuvule Community in the main application.

[28] I make the following order -

1. At the applicant's request in terms of Rule 6(5)(g), the issue whether the respondent has the necessary authority to represent the Kuvule Community (the second applicant in the main application) is referred to oral evidence.
2. The respondent, Joseph Muthupehi Nekuvule, shall lead oral evidence as required to demonstrate his authority to represent the second applicant in the main application. Thereafter, the respondent and all witnesses on his behalf shall be cross-examined and applicant shall then lead evidence in rebuttal on the question of the respondent's authority, after which those witnesses shall be cross-examined.
3. In respect of the authority issue, all the rules of trial shall apply save that there will be no need to file any further pleadings and the existing Rule 7 application papers shall serve as pleadings.
4. Costs of the Rule 7 application shall be determined by the trial court hearing the issue of authority.

RANCHOD J

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant : Adv. G.M Ameer

Instructed by

: Edward Nathan Sonnenbergs

Counsel for the First Respondent : Adv. Shakoane SC

Instructed by

: Denga Inc.

Date heard

: 29 January 2018

Date delivered

: 12 February 2018

[1] This is probably an error and the correct year is 2014.

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