

SOUTH AFRICA / JUDGMENT

Mafate and Another v Bapo Ba Mogale Traditional Council and Others (M596/16) [2018] ZANWHC 46 (4 October 2018)

[2018] ZANWHC 46

COURT

North West High Court, Mafikeng

BEFORE

Gura

CASE / FILE NUMBER

M596/16

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: M596/16

In the matter between:

ABBHEY ABRAM MAFATE

First Applicant

TSHEPO REIELE MAAKANE

Second Applicant

And

THE BAPO BA MOGALE TRADITIONAL COUNCIL First Respondent

KGOSI BOB EDWARD MOGALE

Second Respondent

PREMIER OF THE NORTH WEST PROVINCE

Third Respondent

JUDGMENT.

GURA J:

Introduction

[1] This is an application to set aside the first respondent's ('Council') decision of 19 October 2016 to place the applicants on special leave, ('Special Leave Decision'). The applicants seeks to be reinstated and to be permitted to fully participate as democratically elected Council members[1] to fulfil all their duties with immediate effect. The applicants were first elected to the Council by their community in early

2014. They were shortly thereafter suspended by the Council in July 2014.

Background

[2] On 22 September 2016, my Sister – Djaje AJ (as she then was) reviewed and set aside this suspension as unlawful administrative action and ordered that the applicants be reinstated ('Reinstatement Judgment' and 'Reinstatement Order'). [2] In doing so, Djaje AJ accepted that the decision of the Council constitute administrative action[3] and found that the decision to suspend was ultra vires the powers of the Council. The court also found that the suspensions were irrational and procedurally unfair.

Council's failure to implement Reinstatement Order

[3] Djaje AJ ordered the Council on 22 September 2016 to reinstate the applicants on the Council and pay their Council remuneration. The Judge held that the Council's suspension of the applicants was both procedurally and substantively unlawful and set it aside. The full order reads:

"1. The decision by the first respondent on 1 July 2014 to suspend the first applicant is hereby reviewed and set aside.

2. The decision by the first respondent to suspend the second applicant is hereby reviewed and set aside.
3. The first and second applicants should be reinstated as members of the first respondent.
4. The first respondent is directed to pay to the applicants the remuneration they would have received in their capacity as members of the first respondent but for their suspension.
5. The first and second respondent to pay the costs of the application."

[4] What follows explains the resistance to the Court order by the respondents.

4.1 Since the Reinstatement Judgment was delivered on 22 September 2016, the applicants have had difficulty attending Council meetings, and were not informed about the dates and times of meetings;

4.2 Where the applicants subsequently tried to attend meetings, other members of the Council repeatedly tried to stop them from participating in meetings.

4.3 Some members of the Council attempted to deny the applicants entry to Council meetings.

4.4 The applicants had difficulty attending a Council meeting on 8 October 2016. As they were approaching the Council meeting room, a few security men told them that they could not enter, despite the applicants' insistence that they were entitled to be there as members of the Council. The security men blocked their passage to the meeting room and physically prevented them from attending the meeting.

4.5 A member of the Royal Council (not the Traditional Council), Mr Neo Moerane, intervened, apologised and asked the applicants to join a private meeting.

4.6 At first, three members of the Council were present. They told the applicants that they had received the Reinstatement Judgment and Order but "they and other members of the Council had not yet had an opportunity to discuss the implications of the judgment and therefore that the applicants should not attend that day's meeting between the Council and Adv Madonsela. The applicants objected to this and explained that the Court Order takes immediate effect. Mr Neo Moerane intervened again and motivated that the applicants should be permitted to join in the meeting which they subsequently did.

4.7 As the applicants were not informed when Council meetings were taking place despite having been reinstated, they arrived at the Royal Palace on 10 October 2016 to find out if there would be a meeting that day. Mr Boxer Mogale of the Council informed them that there would not be a meeting that day as Rangwane Mogale (who is not a member of the Council) was not able to attend and according to Mr Boxer Mogale, the Council cannot have a meeting in his absence. It is evident then, that the Council wished to prevent the applicants, as reinstated members, from attending its meetings, but would proceed with meetings without non-members attending.

4.8 In terms of section 11 of the NWA, only an ordinary majority of members is required for a quorum on the Council. At this stage the applicants were reinstated in terms of the Reinstatement Order but the Special Leave Decision had not yet been made or at least communicated to them. The applicants were not informed when the next meeting would be held and sought information about the meetings from their fellow community members.

4.9 The applicants again presented themselves for participation in Council meetings at the meeting venue on 19 October 2016. They were eventually permitted to enter the meeting but before the meeting began, a lawyer who they only know as Mr Kagiso addressed the Council on the terms of the Reinstatement Order.

4.10 According to the applicants, Mr Kagiso explained that the applicants won their case in this Court and that according to the court order "we should be remunerated for the period of our suspension but that the court order did not set aside the "charges" against us. He did not explain the nature of these charges and we have no knowledge of same to date, despite having addressed letters requesting the information"

4.11 The applicants were then informed that they were now on special leave and were handed the letters reflecting the Special Leave Decision outlined above. The applicants were told that they would be required to attend a disciplinary hearing in the future. No details of this hearing was ever provided. The applicants objected to the Special Leave Decision. The suspension letter dated 19 October 2016 reads:

“Kindly be advised that you are hereby placed on Special Leave with full pay pending consideration of charges being preferred against you and requisite disciplinary hearing by the office of the North West Provincial Legislature as required by the North West Traditional

Leaderships and Governance Act of 2005.

You will accordingly be notified of the consideration within a period not exceeding two months.”

4.12 Mr Gontse Molefe then stood up and told the applicants that they were not on good terms with the Council. That intimidated the applicants. They were then told to leave the meeting for the sake of their safety and as they were leaving, Mr Hilton Mokubung told them that they should not have an “attitude” about who is or is not a member of the Council.

The Council’s opposition

[5] The Council has never served and filed an answering affidavit to the applicant’s main founding affidavit. The only opposition on the merits from the Council’s papers is its answering affidavit to the applicant’s urgent supplementary affidavit. The Council’s case and factual version is therefore limited to the four corners of this answering affidavit.[4] The Council stated that the applicants were “disruptive” and that their alleged “disruptive behaviour culminated in a stormy” Council meeting on 19 October 2016. The Council claims that the “conduct of the applicants was so egregious that the South African Police Service had to be called, and the applicants escorted out of the meeting”.

It also states that the applicants are “insulting” and that they have “refused to participate in any remedial or disciplinary processes”.

The Framework Act

[6] The Traditional Leadership and Governance Framework Act 41 of 2003 (“Framework Act”) is the “primary authority or source of reference for anything relating to traditional leadership”. It provides that a traditional community that has been recognised by the Premier must “establish” a traditional council “in line with principles set out in provincial legislation”. [5] Section 1 of the Framework Act defines a “traditional council” as meaning “a council established in terms of section 3...” The Council is such a traditional council.

[7] In terms of section 3(2)(c)(i) of the Framework Act, 40% of the members of a traditional council must be members of the traditional community who have been democratically elected as members of the traditional council for a term of five years. The applicants are two of these community elected members. Section 4 of the Framework Act establishes the function of the traditional council which includes the administration of the affairs of the

traditional community and guiding traditional leaders in the performance of their functions, and identifying community needs.

The North West Act

- [8] In order to give effect to the provincial legislation referred to in section 3(1) of the Framework Act, the North West provincial legislature passed the North West Traditional Leadership and Governance Act 2 of 2005 ('NWA'). The NWA provides in section 6 that a traditional community recognised by the Premier must have a

traditional council constituted in accordance with the NWA read with the Framework Act. Section 6(3) of the NWA provides that the Premier must publish by notice in the Government Gazette the composition of a traditional council, reflecting the names of the members of the council.

- [9] Section 8 provides for four circumstances in terms of which a seat of a member in a traditional council shall become vacant: (a) at the death of such member; (b) if such member resigns; (c) if such member ceases to hold the position of a kgosi, kgosigadi or kgosana, as the case may be; or (d) if such member is disqualified in terms of section 7 of the NWA.
- [10] Section 7 of the NWA provides for the circumstances in terms of which members of the traditional council are disqualified from becoming or remaining a member of the traditional council. The following persons are disqualified in terms of the NWA: (a) a person who is under eighteen years of age; (b) an unrehabilitated insolvent; (c) a person who has been declared by a competent authority to be mentally incapable in terms of the Mental Health Care Act 17 of 2002; (d) a person who has been convicted of a criminal offence without the option of a fine; and (e) a person who has been removed from an office of trust on account of misconduct.
- [11] Section 9(3) provides that the Premier – not the traditional council – may take steps to ensure proper administration and good governance by traditional councils. Similarly, section 10(2) provides that the Premier may take the steps necessary to ensure the effective and efficient performance by traditional councils of their function. In addition, section 34 contemplates that the provincial government must monitor the work of traditional councils using whatever mechanism might be prescribed. There is however no further mechanisms, regulations or empowering provisions that provide how these powers are to be applied. Section 27(1) of the NWA indicates that there is a code of conduct which applies to traditional leaders and traditional councils. However, it does not prescribe what happens when a member of the traditional council breaches the code of conduct.

[12] The NWA does not make provision for the suspension of traditional council members or placing them on compulsory special leave, nor does it make provision for subjecting traditional council members to disciplinary processes by either the council itself or the provincial authorities. The NWA does not delegate any powers to the council or any other body to enact rules, regulations or by-laws allowing members of a traditional council to be suspended or subjected to disciplinary procedures.

PAJA

[13] The applicants allege that the decision taken by the Council to place them on compulsory special leave constitutes administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). This is in keeping with the decision by Djaje AJ in the previous case involving these parties. In any event, an assessment of the legal principles relating to the meaning of "administrative

action" shows that the Council's Special Leave Decision is an administrative action and thus subject to review under the PAJA.

[14] 'Administrative action' is defined in the PAJA as meaning:

"any decision taken ... by an organ of state, when ... exercising a public power or performing a public function in terms of any legislation ... which adversely affects the rights of any person and which has a direct, external legal effect ..."

[15] An 'organ of state' is defined as bearing the meaning assigned to it in section 239 of the Constitution.[6] There can be little doubt that the Council is an organ of state. It clearly exercises public power and performs a public function in terms of the Framework Act and the NWA. It is also noteworthy that the code of conduct in schedule II to the NWA indicates that the council must comply with the requirements set out in section 195 of the Constitution. That section deals with the basic value and principles governing the public administration.

[16] The Council was exercising 'public power' or performing a 'public function' when placing the applicants on special leave because:

16.1 It is the kind of action which demands public accountability.[7] That because of the important role that the council and its members play in serving the interests of the members of the community;

16.2 Related to that, it has been held that "[p]owers or functions that are 'public' in nature, in the ordinary meaning of the word, contemplates that they pertain 'to the people as a whole' or that they are exercised or performed 'on behalf of the community as a whole' (or at least a group or class of the public as a whole), which is pre-eminently the terrain of government.[8]

16.3 The consequences of the decision have an impact on the community given that they change the composition of the body governing that community;

16.4 The council has its origin in, and derives its powers from, the NWA and Framework Act; and

16.5 The council is funded by the state.[9]

43 The adversely affected rights in this case were the rights of the applicants to just administrative action.[10] The rights of the community to have councillors that act in their best interests and that are diligent, honest and transparent and comply with the principles of section 195 of the Constitution were also affected.[11]

Legality

[17] Legality is a fundamental constitutional value. The exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the rule of law.[12] In Scalabrini,[13] the SCA quoted Prof Hoexter with approval as follows:

“[T]he doctrine [of legality review] is in the process of evolution, and will continue to evolve, ‘quite possibly to the extent that it eventually encompasses all the grounds of review associated with “regular” administrative law. Meanwhile, the principle fairly easily covers all the grounds ordinarily associated with authority, jurisdiction and abuse of discretion: ... Here at least, the principle of legality is a mirror image of administrative law. It is administrative law “under another name.”

Legality requires inter alia lawfulness, reasonableness as well as rationality[14] in procedure and outcome[15]

Customary law in context

[18] Section 211 of the Constitution provides that customary law is subject to both the Constitution and any legislation that specifically deals with customary law, in this case the Framework Act and the NWA. Section 2(3) of the Framework Act requires traditional communities to transform and adapt customary law and customs relevant to the application of that Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution. Any customary law power purportedly exercised cannot override the principle of legality and specifically the fundamental Constitutional principle of audi alterem partem.

Common cause: Procedural unfairness

[19] The Council does not allege that it provided the applicants with:

19.1 a notice that the Decision is to be made;

19.2 the opportunity to be heard (audi alterem partem) or to consult in respect of the Special Leave Decision but instead first informed the applicants of the Special Leave Decision when they handed the notice to them and the decision was already made; or

19.3 detail as to the purported ‘charges’ against them.

The applicants have requested detail and reason several times without response.

- [20] The Council was obliged to apply the audi alteram partem principle by giving the applicants “adequate notice of the nature and purpose of the proposed administrative action”, as provided for in section 3(2)(b)(i) of PAJA. Failure to give notice to the affected party results in procedural unfairness which renders the administrative action reviewable. See, for example, Potgieter.[16]
- [21] Adequate notice has been interpreted as “sufficient information to enable a person to exercise his or her rights”. At common law, the right entails that the nature and purpose of the proposed action must be described with sufficient particularity to enable the affected person to properly realise his or her right to make representations.[17] Section 3(2)(b)(ii) requires an administrator to give the affected person “a reasonable opportunity to make representations”.
- [22] None of the applicants received a notice that the Council, or any other body, was contemplating subjecting them to disciplinary procedures. They did not receive any opportunity to make representation in respect of either disciplinary proceedings, the charges against them or the Council’s decision to be put on special leave. The requirements of procedural fairness, specifically audi, arises from the Constitution itself. As described by the Constitutional Court in Walele:[18]

“The normative value system of the Constitution imposes a duty on decision-makers to act fairly towards parties who are affected by their decision. The most important component of procedural fairness is the one expressed by the audi alteram partem principle (the audi principle) which requires that parties to be affected by an administrative decision be given a hearing before the decision is taken. What gives rise to the right to be heard is the negative impact of the decision on the rights or legitimate expectations of the person claiming to have been entitled to a hearing before the decision was taken.”

- [23] In Masetla, Ngcobo J described the fundamental nature of audi as follows:[19]

“The procedural aspect of the rule of law is generally expressed in the maxim audi alteram partem (the audi principle). The maxim provides that no one should be condemned unheard. It reflects a fundamental principle of fairness that underlies or ought to underlie any just and credible legal order. The maxim expresses a principle of natural justice. What underlies the maxim is the duty on the part of the decision-maker to act fairly. It provides an insurance against arbitrariness. Indeed, consultation prior to taking a decision ensures that the decision maker has all the facts prior to making a decision. This is essential to rationality, the sworn enemy of arbitrariness. This principle is triggered whenever a statute empowers a public official to make a decision which prejudicially affects the property, liberty or existing right of an individual.”

- [24] Even if I were to assume that Council had the power to place the applicants on special leave, the Constitution, PAJA and the principle of legality all prescribe minimum, mandatory standards for procedurally fair administrative action. The Council failed to comply with these minimum requirements. Accordingly, the decision to suspend the applicants was taken in a procedurally unfair manner and is subject to judicial review in terms of section 3(2)(b)(i) read with section 6(2)(c) of PAJA.

[25] No argument that customary law overrides these fundamental principles can succeed. No customary law principle to preclude audi and procedural unfairness can survive constitutional scrutiny. In any event, the Council has not discharged its burden (at least evidentiary) to prove which customary principle permits the Council to act procedurally unfairly. [20] Customary law, while not generally uniform, is in any event fundamentally consultative and consensus-seeking.[21]

Substantive unfairness

Lawfulness

[26] The Special Leave Decision has no authority in law. The Court will not countenance or be party to perpetuating unlawful conduct.[22] The exercise of the public power must be authorised by law, in that the administrator's power must be derived from an "empowering provision", namely a lawful empowering source (usually legislation).[23] Accordingly, administrators "may exercise no power and perform no function beyond that conferred upon them by law".[24]

[27] The principle that administrative action must be validly authorised in order to take administrative action is contained within two provisions of PAJA:

27.1 Section 6(2)(a)(i), which provides that administrative action is subject to judicial review where the administrator who took it "was not authorised to do so by the empowering provision"; and

27.2 Section 6(2)(a)(f), which provides that administrative action is subject to judicial review if "the action itself contravenes a law or is not authorised by the empowering provision".

[28] These sections read together require that "there must be a source of the authority for the taking of administrative action, and that the taking of such action must remain within the limits provided for in such source of authority".[25] Accordingly, whether an administrator's action, is authorised is a question which must be answered with reference to the empowering statute.[26] The empowering statute in the present case is the NWA, read with the Framework Act. As set out above, the NWA provides a closed list of circumstances in which the seat of a member of a traditional council in the North West may be vacated. Therefore, the only circumstances in which the seat of a member of the first respondent may be vacated are (a) at death of a member; (b) if the member resigns; (c) if the member ceases to hold the position of kgosi, kgosigadi or kgosana, as the case may be; or (d) if the member is disqualified in terms of section 7 of the NWA.

[29] A member may only be disqualified in one of the following circumstances; (a) he/she is under eighteen years of age; (b) he/she is an unrehabilitated insolvent; (c) he/she has been declared by a competent authority to be mentally incapable in terms of the Mental Health Care Act 17 of 2002; (d) he has been convicted of a criminal offence without the option of a fine; or (e) he/she has been removed from an office of trust on account of misconduct. None

of the above circumstances is applicable in the present case. Accordingly, there was no lawful basis for the applicants' community-elected seats on the Council to become vacant.

[30] The NWA does not empower a traditional council to suspend its members, place them on compulsory leave or subject them to disciplinary processes. The provision cited above makes it clear that the provincial authorities exercise oversight over traditional councils. The authority to make decisions regarding disciplining councillors is the provincial authority's terrain. In my view, the Council had no authority whatsoever to make the Special Leave Decision. The decision of Council to suspend the applicants is *ultra vires* because the Council exercised power which it did not have. Such decision falls to set aside.[27]

Conclusion

[31] It was due to the reasons aforesaid that after listening to argument on the day of hearing of this matter, the Court made this order:

"1. The first Respondent's decision to place the applicants on special leave is reviewed and set aside;

2. The first respondent is directed to:

2.1 Permit the applicants to attend and participate in its meetings;

2.2 Timeously notify the applicants of its meetings; and

2.3 Provide the applicants with access to the same documentation and information to which all other members of the first respondent are entitled.

3. The costs of this application to be paid jointly and severally by the first and second respondent

4. This order has immediate effect."

SAMKELO GURA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

APPEARANCES:

DATE OF HEARING:

07 DECEMBER 2017

DATE OF JUDGMENT: 04 OCTOBER 2018

COUNSEL FOR APPLICANT: ADV H DRAKE with MS MOLETE

COUNSEL FOR RESPONDENTS: NO APPEARENCE

ATTORNEYS FOR PLAINTIF: NKOMO & PARTNERS

ATTORNEYS FOR RESPONDENTS: STATE ATTORNEY

- [1] In terms of section 3(2)(c)(ii) of the Framework Act.
- [2] Mafate and another v Bapo ba Mogale Traditional Council and others (22 Sept 2016) (M139/2015), (Reinstatement judgment)
- [3] Reinstatement Judgment p 35 par 16.
- [4] Ebrahim v Georgoulas 1992 (2) SA 151 (B) at 153D.
- [5] Yende and Another v Premier, Mpumalanga Province (80576/2014) [2017] ZAGPPHC 84 (10 March 2017) par 47.
- [6] 'Organ of State' is defined in s239 of the Constitution as 'any other functionary or institution – (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising public power or performing a public function in terms of any legislation, but does not include a court of judicial officer.'
- [6] 'Organ of State' is defined in s239 of the Constitution as 'any other functionary or institution –
- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- (ii) exercising public power or performing a public function in terms of any legislation, but does not include a court of judicial officer.'
- [7] Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another 2010
- (5) SA 457 (SCA) at para 40.
- [8] Ibid at para 39
- [9] See Simunye Developers CC v Lovedale Public FET College [2010] ZAECGHC 121 (9 December 2010) at para 22
- [10] See Transnet Ltd v Goodmam Brothers (Pty) Ltd [2000] ZASCA 151; 2001 (1) SA 853 (SCA) at para 11-12.
- [11] See Schedule II to the NWA. For example of the application of PAJA to customary law, see e.g. Yende and Another v Premier, Mpumalanga Province (80576/2014) [2017] ZAGPPHC 84 (10 March 2017) (decision of the premier); Bapedi Marota Mamone v Commission on Traditional Leadership Dispute and Claims and Others 2015 (3) BCLR 268 (decision of the Commission on Traditional Leadership Dispute and Claims).
- [11] See Schedule II to the NWA. For example of the application of PAJA to customary law, see e.g.

Yende and Another v Premier, Mpumalanga Province (80576/2014) [2017] ZAGPPHC 84 (10 March 2017) (decision of the

premier); Bapedi Marota Mamone v Commission on Traditional Leadership Dispute and Claims and Others 2015 (3) BCLR 268 (decision of the Commission on Traditional Leadership Dispute and Claims).

[12] Albutt v Centre for the Study of Violence and Reconciliation 2010 (3) SA 293 (CC) par 49.

[13] Par 61

[14] Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa [2000] ZACC 1; 2000 (2) SA 674 (CC) par 85; Minister of Home Affairs and Others v Scalabrini Center, Cape Town 2013 (6) SA 421 (SCA) par 64.

[15] Democratic Alliance v President of the Republic of South Africa 2013 1 SA 248 par 34; Albutt, Supra paras 72 – 74.

[16] Potgieter v Howie 2014 (3) SA 336 (GP).

[17] See Heatherdale Farms v Deputy Minister of Agriculture 1980 (3) SA 476 (T) at 486.

[18] Walele v City of Cape Town [2008] ZACC 11; 2008 (6) SA 129 (CC) par 27.

[19] Masetlha v President of the Republic of South Africa [2007] ZACC 20; 2008 (1) SA 566 (CC) (quoted with approval in Walele par 27).

[20] MM v MN 2013 (4) SA 415 (CC) paras 23 – 24; 44 – 60;

[21] Pilane v Pilane 2013 (4) BCLR 431 (CC) para 71; 103; Shilubana v Nwamitwa 2009 (2) SA 66 (CC) par 56 ('Past practise will also not be decisive where the Constitution requires the development of the customary law in line with constitutional values.')

[22] Lester v Ndlambe Municipality [2014] 1 All SA 402 (SCA).

[23] See Hoexter, Cora Administrative Law in South Africa Juta 2 ed, 2012 at 255; Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council [1998] ZACC 17; 1999 (1) SA 374 paras 56 – 58.

[24] Fedsure at para 58

[25] Potgieter at para 31.

[26] Haris v Minister of Education 2001 (8) BCLR 796 (T) at 807F – 808C, confirmed on appeal by the Constitutional Court in Minister of Education v Harris 2001 (4) SA 1297 (CC).

[27] See for example Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA) at para 20.

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