

SOUTH AFRICA / JUDGMENT

Mamadi and Another v Premier Limpopo Province and Others (4052/2018) [2020] ZALMPPHC 97 (26 November 2020) [2020] ZALMPPHC 97

COURT

Limpopo High Court, Polokwane

BEFORE

EM Makgoba

CASE / FILE NUMBER

4052/2018

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO
DIVISION, POLOKWANE)
(1)

REPORTABLE: YES/NO
(2)
OF
INTEREST TO THE JUDGES: YES/NO
(3)
REVISED
CASE
NO: 4052/2018
In

the matter between:

MADIDIMALO
KILSON MAMADI
FIRST
APPLICANT
BABIRWA
BA- GA -
MAMADI
ROYAL FAMILY
SECOND
APPLICANT
and
PREMIER
LIMPOPO PROVINCE
FIRST RESPONDENT
MEC
FOR COGHSTA, LIMPOPO
SECOND RESPONDENT
LIMPOPO
HOUSE OF TRADITIONAL LEADERS
THIRD RESPONDENT
COMMISSION
ON TRADITIONAL LEADERSHIP DISPUTES
FOURTH RESPONDENT
AND
CLAIMS
ABOREKWE
THOMAS MAMADI
FIFTH RESPONDENT
BABIRWA
BA MAMADI ROYAL COUNCIL
SIXTH RESPONDENT

JUDGMENT

MAKGOBA JP

[1] This matter concerns a long-standing dispute over the traditional leadership lineage of the Babirwa-Ba-Ga-Mamadi Traditional Community

("the Mamadi Community"). The matter before this Court is an application wherein the Applicants seek to review and set aside certain acts, together with declaratory and substituting relief in consequence.

[2] The Applicants seek the following sustentative relief, per their amended notice of motion dated 16 March 2019:

1. That the decision of the Premier taken on the 1st June 2018, not to recognise the identification of the First Applicant as the Acting Traditional Leader be reviewed, set aside and/

corrected.

2. That it be declared that the first Applicant qualifies to assume the position of an Acting Traditional Leader in terms of section 15 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005.
3. That the First Respondent be compelled to recognise the First Applicant as the Acting Senior Traditional Leader of the Babirwa-ba-ga-Mamadi traditional community.
4. That the recommendations of Commission on Traditional Leadership Disputes established in terms of section 26A (1) of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 be declared null and void.
5. That the decision of the Premier to recognise the Fifth Respondent as the Acting Senior Traditional Leader as per decision taken on the 20th September 2018 be reviewed, set aside and nullified.

- [3] The application is brought in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") and is opposed by the First, Second, Third and Fifth Respondents. In essence there are three acts that are sought to be reviewed and set aside, namely:

3.1. the First Respondent's (Premier's) decision not to recognise the First Applicant as Acting Traditional Leader;

3.2. the recommendations of the Fourth Respondent (the Commission); and

3.3. the decision of the Premier to recognise the Fifth Respondent as the Acting Senior Traditional Leader.

- [4] In challenging the aforesaid three decisions in this matter, the Applicants contend that

4.1. the Premier failed to recognise the First Applicant, Madidimalo Kilson Mamadi ("Kilson") as Acting Traditional Leader of the Mamadi Community as contemplated by section 15 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005. The contention is that the Premier's failure or refusal to recognise Kilson was based on the recommendations of the Commission on Traditional Leadership Disputes and Claims ("the Kgatla Commission"), which found that in terms of the Mamadi customary law of succession, Kilson did not qualify to claim the Mamadi traditional leadership; and

4.2. subsequently recognised the Fifth Respondent, Aborekwe Thomas Mamadi ("Aborekwe") as the Acting Senior Traditional Leader, again based on the findings of the Kgatla Commission and the resolution that was adopted by the Babirwa-Ba-Ga-Mamadi Royal Family.

[5] The First Second and Third Respondents ("the Government Repondents") oppose this application on the basis, firstly, of two preliminary issues, which, if the Court accepts, will dispose of this application:

5.1. The first preliminary point is that the Applicants do not have the necessary locus standi to institute this application on behalf of the Mamadi Royal Family, and

5.2. the second is that this application raises substantive dispute of facts which cannot be decided on the papers.

The Fifth Respondent joins issue on the aspect of a dispute of facts. The Fifth Respondent contends that there are several averments, key to the Applicant's case, which are disputed by the Respondents, and consequentially render the application incapable of resolution on affidavit alone.

Lack of Locus Standi: Applicants

[6] The Respondents contend that the people who make up the Second Applicant are just a group of individuals without any defined roles, who for strange reasons include Kilson's own children. The Respondents argue that this is a congregation that has been put in place to satisfy Kilson's thirst to become a traditional leader. By definition of Royal Family, the institution is composed of the " immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom and includes, where applicable, other family members who are close relatives of the ruling family" .

[7] It is placed under dispute that the Second Applicant constitutes a Royal Family collective or body that has been properly constituted or organised. This dispute stands unsettled on the papers. On this basis the Respondents contend that the Second Applicant does not have the locus standi to bring this application on behalf of the real Royal Family. It is further placed in dispute that the genealogy set out by the

Applicants is accurate. The findings made by Kgatla Commission (as will be shown later in this judgment) were unequivocally that the genealogy as set out by Kilson is not an accurate depiction of the royal lineage. Accordingly, in this matter, it is disputed that the individuals who identify themselves as the Second Applicant, the ostensible royal family, are indeed the royal family of the Mamadi Community.

[8] The Applicants clothe themselves with the title of "Royal Family" while choosing to refer to a structure that supports Aborekwe as "Royal Council". This is another aspect of material dispute of facts in that the so-called Royal Council is not recognized in terms of customs and/or the traditional leadership legislation. This material dispute of facts cannot be resolved on affidavit alone.

- [9] The Government Respondents alluded in their answering affidavit that the Second Applicant is not the legitimate Royal Family. According to the genealogy annexed as "NN4" to their answering affidavit, the descendants of Matshopa, from whence Kilson descends, are not entitled to the chieftaincy of the Mamadi Traditional Community.
- [10] The existence of material dispute of facts in this matter cannot be denied on any reasonable grounds. In my view this dispute was always foreseeable owing to the fact that the Applicants contest being the legitimate structure of the community's leadership. The Respondents submit that on this basis alone, this application should be dismissed.

FACTUAL

BACKGROUND

- [11] The factual background relating to the chieftaincy of the Mamadi Community is set out hereunder as depicted by each of the contesting

parties in this matter. There are different versions given by each contesting party.

Applicants' Version

- [12] The Applicants set out the genealogy and chieftainship of the Mamadi Community as follows:

Kgoshi Madidimalo married as his candle wife (masechaba) Ndiyeng and together they produced two sons, Ramphefu and Maphula. Ramphefu would have been identified as Kgoshi and successor to his father but he predeceased his parents.

By the time Ramphefu died he had already married and had two sons, Ramotshabi and Mabetha.

Ramotshabi was appointed as Kgoshi succeeding his grandfather, Madidimalo. Ramotshabi abandoned the community and moved to the direction of the then Rhodesia (Zimbabwe) and never returned or traced.

- [13] After the disappearance of Ramotshabi, Maphula, the second son of Madidimalo acted as Kgoshi. After the death of Maphula the younger brother of Ramotshabi, namely Mabetha acted as Kgoshi. Mabetha was identified as a seed raiser to father his brother's (Ramotshabi) children with Dorothy Mabu Mamadi: Dorothy Mabu had been married as a candle wife to revive the house of Ramotshabi. However, Mabetha died before he could bear children as a seed raiser with Dorothy Mabu.
- [14] Masetha Frank Mamadi, a member of the royal family was appointed as acting Kgoshi. He is the son of Marema. Marema is the son of Matshopa, the latter being the third wife of the late Kgoshi Madidimalo. Masetha Frank Mamadi was identified as seed raiser to father children of his halfbrother Ramotshabi with the candle wife, Mabu Dorothy Mamadi.

- [15] Out of the relationship between Masetha Frank Mamadi and Dorothy Mabu Mamadi two sons were born, namely Molatelo Warrick Mamadi and Madidimalo Kislou Mamadi (the First Applicant). Frank Mamadi and the candle wife Dorothy Mabu relocated to Eldorado, an area under Kgoshi Malebogo. During the years 1979-1984 the Government allocated a farm, Taaibosch to the Mamadi tribe. Frank Mamadi and the candle wife together with their children moved to the new farm, Taaibosch where Frank Mamadi continued to rule the community as an acting Kgoshi.
- [16] When Frank Mamadi died Warrick Mamadi was appointed as Kgoshi of the Mamadi community. He was not in good terms with the then government because he was a member of AZAPO. In 1985 Warrick Mamadi was removed as Kgoshi by the commissioner, Bonema. The property of Warrick and his siblings were burnt and they were forcefully removed from their homestead. Moraka Lucas Mamadi (deceased) was then appointed as acting Kgoshi of the Mamadi Community in 1985.
- [17] After the death of Warrick Mamadi his younger brother Madidimalo Kislou (First Applicant) pursued his deceased brother's fight for the chieftaincy of the Mamadi Community. Kislou Mamadi was appointed as Acting Kgoshi by the royal family and inaugurated by the community. Moraka Lucas Mamadi died in 2010 and thereafter his younger brother Aborekwe Thomas Mamadi (Fifth Respondent) identified himself as Kgoshi and followed his deceased brother's footsteps.
- [18] The traditional leadership dispute of the Mamadi Community was referred to the Kgatla Commission wherein the two factions' disputes and claims were investigated. The recommendations of the Commission were forwarded to the Premier on 28 May 2017 and on 13 June 2017 the Premier approved and accepted the Commission's recommendations. The Premier refused to recognize the First Applicant as an acting Kgoshi and on 4 July 2018 the Applicants launched the present application before this Court.
- [19] The crucial issue that emanates from the version of the Applicants is whether the First Applicant's mother, Dorothy Mabu Mamadi was indeed married as a candle wife (masechaba) to revive the house of Ramotshabi. The contrary version of the Respondents (as will be shown hereunder) is that when Mabetha (younger brother of Ramotshabi) took over the traditional leadership he married a candle wife by the name of MmaMoyahabo from whence the lineage of chieftaincy developed until the position presently held by the Fifth Respondent.
- [20] One more crucial aspect emanating from the First Applicant's version is his attempt to distance the descendants of Mabetha (younger brother to Ramotshabi) from the Ramotshabi and Mabetha lineage. The First Applicant contends that Joel Thokampe (Mabetha's son with his second wife, MmaSephuma) was not a biological son of Mabetha because he came with his another MmaSephuma from Bokgalaka (Zimbabwe) and also that Mabetha and MmaSephuma lived together as concubines as no lobola was ever paid by Mabetha. This allegation is vehemently denied by the Respondents. The Kgatla Commission rejected such

allegation and referred to the allegation as a falsification of evidence. The version of the Respondents hereunder will show that Joel Thokampe was the legitimate son of Mabetha and the father of Lucas Moraka Mamadi and Aborekwe Thomas Mamadi. Again, there is a material dispute of fact in this regard.

Respondents' Version

[21] According to the version of the Respondents, the genealogy and traditional leadership of the Mamadi Community is as set out in Annexure "NN4" to the First, Second and Third Respondents answering affidavit. For the sake of convenience and ease of reference a printout of Annexure "NN4" is attached hereto and same forms part of this judgment.

[See PDF Version for Annexure NN4]

[22] The following appears from Annexure "NN4": Kgoshi Madidimalo had three wives, Ndiyeng (the senior wife and masechaba), second wife, Malebepe and the third wife Matshopa. Ramphefu and Maphula are the sons of Kgoshi Madidimalo with Ndiyeng. Ramotshabi and Mabetha were born of the house of Ndiyeng the candle wife. After the disappearance of Ramotshabi, Mabetha became the Kgoshi. He married MmaMoyahabo as masechaba to restore the lineage of Ramotshabi.

[23] In the union between Mabetha and MmaMoyahabo, Mabokwana Joseph was born. Despite his physical impairment, Mabokwana Joseph was the authentic heir in the Mamadi dynasty. He died at a young age. In the absence of males from the first house of MmaMoyahabo, males from the second house of MmaSephuma are destined to revive the lineage of Mabokwana Joseph. It is within the prescripts of the customary law of succession of the Mamadi Community for descendants of MmaSephuma to revitalize the lineage of Mabokwana Joseph.

[24] Joel Thokampe is the son of Mabetha with the latter's second wife, MmaSephuma. Hence Joel Thokampe took over from Mabetha as acting Kgoshi after the death of Mabetha. Lucas Moraka Mamadi and Aborekwe Thomas Mamadi are sons of Joel Thokampe. After the death of Joel Thokampe his eldest son, Lucas Moraka was appointed acting Kgoshi in 1985. Lucas Moraka died in 2010 and left behind two wives, Margaret and Cathrine. Only Catherine has a child with Lucas Moraka, namely Lerato, who is still a minor and for whom Aborekwe Thomas is acting Kgoshi since 2018.

[25] It is to be noted on the genealogy, Annexure "NN4" that the First Applicant, Madidimalo Kison belongs to the house of Matshopa, the third and junior wife of Kgoshi Madidimalo. It is common cause that of the three wives of Kgoshi Madidimalo, Ndiyeng is the candle wife. Madidimalo Kison is the son of Mabetha Frank Mamadi. The latter is the son of Marema, out of the house of Matshopa, the latter being the junior house of Kgoshi Madidimalo.

- [26] The Respondents deny that Mabu Dorothy was married as masechaba and aver that she was merely the wife of Masetha Frank. The Kgatla Commission in its finding stated that the issue of Mabu Dorothy having married as a masechaba is highly contentious. That it is unheard-of for a tribe to have parallel candle wives.
- [27] Accordingly, this Court is faced with two mutually destructive versions, one propagated by the Applicants that Mabu Dorothy was a candle wife and the other version of the respondents that MmaMoyahabo (wife of Mabetha) was married as a masechaba or candle wife. This dispute of facts cannot be resolved on papers before me.

Findings of the Kgatla Commission

- [28] Having heard evidence presented before it and analyzing such evidence, the Commission made the following findings:

28.1. The Mamadi senior traditional leadership is characterized by intermittent cessations. After the disappearance of Ramotshabi, there was a period of cessation. Other cessation occurred after the deaths of Mabetha, Joel Thokampe and Lucas Moraka Mamadi. The latter died in 2010.

28.2. In terms of the Mamadi customary law of succession, the house of Ndiyeng is the rightful one for chieftainship than the house of Matshopa.

28.3. The allegation of illegitimacy of Joel Thokampe cannot be authenticated. Madidimalo Kison Mamadi is not a credible witness. His evidence is characterized with flaws.

28.4. To a greater extent customary law has been followed correctly. In terms of Mamadi Customary law of succession Madidimalo Kison does not qualify to claim Mamadi chieftainship. He is the descendant of Matshopa.

28.5. The genealogy presented by Madidimalo Kison is very shallow, wanting and misleading compared to the one submitted by the respondent, Aborekwe Thomas Mamadi which is comprehensive and elaborate.

- [29] It is appropriate to refer to the criticism leveled against the First Applicant by the Kgatla Commission in its report. It reads thus:

"The claimant, Madidimalo Kison is not au fait with the history of Mamadi. In the genealogy that he presented to the Commission for instance, he describes Kgoshi Maphula to be from the "smaller house". This is void of the truth. The genealogy of his father Masetha Frank shows Maphula to be the younger brother of Mphefu and son of Ndiyeng, the masechaba. Again, Madidimalo Kison describes Mabetha as younger brother to Maphula. According to Masetha Frank however, Mabetha is the younger brother of Ramotshabi and not Maphula The evidence of Madidimalo Kison is unreliable[1]."

- [30] It is clear from the evidence of the First Applicant as quoted above, that the First Applicant attempted to do all he could in order to remove the Mabetha lineage away from the lineage of Ramotshabi so as to show that the Mamadi Chieftaincy was never along the Mabetha lineage. This aspect perpetuates the dispute of facts in this matter.

DISPUTE OF FACTS

- [31] At the hearing of this matter on 15 October 2020 and during oral submission I raised a question to the Counsel for the Applicants concerning the numerous disputes of facts raised by the Respondents, the substance of which cannot be decided on the papers. Counsel conceded to the existence of material disputes of facts and thus rendering the issue common cause between the parties. When asked how to resolve the issue, Counsel submitted that since Rule 53 of the Uniform Rules of Court prescribed that judicial reviews could only be made on application, the Applicants did not have a choice but to follow the procedure despite the existence of the disputes.
- [32] Counsel for the Applicants further submitted that since a litigant is not given a choice as to how to bring a judicial review, the Court confronted with material disputes of facts should not adopt a robust approach by dismissing the application, but is expected to refer the matter to oral evidence.
- [33] This Court then made it clear to the parties that due to the clear dispute of fact, it could not determine the application on the affidavits before it, and requested the parties to prepare supplementary heads of argument on the above question in respect of the appropriate remedy in the circumstances, that is, whether a dismissal of the application or referral to oral evidence would be appropriate. I am indebted to all Counsel for their assistance with the heads of argument submitted.
- [34] The Respondents submitted that the matter should be dismissed as a referral to oral evidence would be inappropriate in the circumstances. The Respondents submit further that the referral of the matter to oral evidence as desired by the Applicants is not only opportunistic but incorrect in law.

The Law regarding Dispute of

Facts

- [35] The starting point in respect of a dispute of fact in motion proceedings wherein final relief is sought is the following passage from Plascon

- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd[2]

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order".

This is regardless whether the relief is sought through the procedure laid out under Rule 6 or 53 of the Uniform Rules of Court.

In terms of the Plascon - Evans rule, the facts deposed to by the respondent, unless they are uncreditworthy, far - fetched or untenable, are to be accepted for purposes of determining whether a case has been made out for the relief claimed by the Applicant - See *Marais and Another NNO v Maposa and Others*[3].

[36] Ultimately, where a litigant ought reasonably to have anticipated that issues of dispute of fact would arise in the proceeding and elects to proceed on motion nonetheless, the appropriate order is that the application is dismissed with costs -*Adbro Investment Co Ltd v Minister of Interior*[4].

It is however possible for a litigant who recognizes that a dispute will arise on the papers in the review, to apply for referral on the disputed issues to the hearing of oral evidence. Such request for hearing of oral evidence should be made at the outset of the proceedings and not in the middle of the hearing of the matter, particularly in circumstances where the dispute was known by the applicant, as it was so in *casu*.

[37] In *Minister of Land Affairs and Agriculture v D&F Wevell Trust*[5] the Court stated the following regarding the timing of the request for a referral to oral evidence:

"... This argument comes down to the following:

the respondents require a referral to evidence or to trial in the hope that they would thereby obtain the necessary evidence to substantiate their defence. Should they have presented evidence of probative value in their affidavits sufficient to defeat the Applicant's case, I would on that evidence have dismissed the application.

Fact is, the evidence was insufficient. The respondents cannot ask for a referral to evidence or to trial in order to make up shortcomings in their own case". (my underlining)

See also *De Reszke v Maras and Others* [2006] 2 ALL SA 115 (SCA) where it was held that the general rule of practice remains that an application to refer for oral evidence should be made prior to argument on the merits.

[38] Rule 6(5)(g) of the Uniform Rules of the High Court provides that:

"Where an application cannot properly be decided on affidavit the Court may dismiss the application or make such order as to it seems meet with a view to ensuring just and expeditious decision. In particular, but without effecting the generality of a foregoing, it may direct that oral evidence be heard on specific issues with a view to resolving any dispute of fact and to that may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleading or definition of issues or otherwise."

In *Stellenbosch Farmers Winery Ltd v. Stellenvale Winery Pty Ltd*[6] it was held that:

"Where there is a dispute as to facts a final interdict should be granted on notice of motion proceedings if the facts stated by the Respondent together with the admitted facts in the Applicants affidavits justify such an order."

In simplified terms the matter is as a general rule to be decided on the Respondent's evidence and not on the Applicant's evidence.

See: Plascon - Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd (Supra)

[39] What is much more important and also relevant for the purposes of this matter is the further basic and procedural rule or principle that in the case of a foreseeable dispute of facts, which cannot be resolved upon the papers, an application can be dismissed solely for that reason.

That rule or principle has been explained as follows in the well-known judgment of Murray AJP in Room Hire Co (Pty) Ltd v. Jeppe Street Mansions (Pty) Ltd[7] which can be regarded as the locus classicus:

"It is obvious that a claimant who elects to proceed on motion runs the risk that a dispute of fact may be shown to exist. In that event (as is indicated *infra*) the Court has a discretion as to the future course of the proceedings. If it does not consider the case such that the dispute of fact can properly be determined by calling *viva voce* evidence under Rule 9, the parties may be sent to trial in the ordinary way either on the affidavits as constituting the Pleadings, or with a direction that Pleadings are to be filed.

Or the application may even be dismissed with costs, particularly when the Applicant should have realized when launching his application

that a serious dispute of fact was bound to develop. It is certainly not proper that an Applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply Rule 9 to what is essentially the subject of an ordinary trial action."

See also Adbro Investment Co Ltd v Minister of Interior (Supra) .

[40] The Supreme Court of Appeal summarized the position as follows in *Lombaard v. Dropcorp CC*[8]

"[31] Motion proceedings are not designed or intended to resolve dispute of fact. Therefore, if a party has knowledge of a material and bona fide dispute, or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed."

Was the Applicant compelled to proceed on motion under Rule 53?

[41] At the hearing of the matter, and in response to questioning from the Court, Counsel for the Applicants argued that the Applicants were compelled to bring the applicant on motion in terms of Uniform Rule 53 and relied on a portion of the commentary on Uniform Rule 53 contained in Erasmus and which reads as follows:

"A party who is obliged by the subrule to bring proceeding by way of notice of motion, in the event of a conflict of fact arising on the papers which can be resolved only by oral evidence, cannot be penalized on the basis that he should have anticipated the conflicts and proceeded in another way. Similarly, a party who seeks to discharge an onus of proof which rests upon him by asking for an opportunity to adduce oral evidence or to cross examine deponents to answering affidavits, should not lightly be deprived of that opportunity in view of the fact that such a party was obliged to proceed by way of notice of motion proceeding.[9]

It was argued that the provisions of Uniform Rule 53 are peremptory and that, accordingly, the matter should be referred to oral evidence because the Applicants were compelled by Uniform Rule 53 to approach the Court on motion and should not be penalized due to the ensuing dispute of fact.

[42] I disagree. The learned authors of Erasmus go further to state that:

"The provisions of this subrule are not peremptory and in appropriate circumstance the Court is entitled to condone noncompliance with the provisions by, for example , hearing review proceedings brought by way of summons or by way of motion under Rule 6"

A party is not compelled to proceed on motion in terms of Uniform Rules 53. In *Nelson Mandela Bay Metro v. Erastyle*[10] Goosen J analysed the position and found that review proceedings may be brought by way of an action, and concluded that "a plaintiff is not obliged to proceed in terms of Rule 53" and consequentially, "it is not required to seek condonation for its so-called non-compliance with that procedure[11]"

See also *Jockey Club of SA v. Forbes* [1992] ZASCA 237; 1993 (1) SA 649 (A) at 661 E- F.

[43] In the present case the Applicants elected to proceed on motion at their own peril and ought not be allowed to seek refuge in the language of Uniform Rule 53 despite the authority to the contrary.

[44] The present matter is to be determined against the backdrop of the orders sought by the Applicant in the amended notice of motion. The Applicants essentially seek an order to review and set aside:

44.1. The Premier's failure or refusal to recognise the First Applicant as acting Senior Traditional Leader; and

44.2. The Premier's recognition of Aborekwe Thomas Mamadi as Senior Traditional Leader.

In Paragraph 1.2 of the notice of motion, the Applicants seek a declaratory order that First Applicant actually qualifies to assume the position of a traditional leader. If the court finds in the Applicants' favour, the next prayer is for the Premier to be compelled to recognise First Applicant as acting traditional leader.

Furthermore, the Applicants seek a declaratory order to the effect that the Kgatla Commission's report is null and void.

[45] Against this backdrop Counsel for the Government Respondents correctly submits that the declaratory orders sought by the Applicants, read in context with the remainder of the orders they seek, are capable of being obtained in action proceedings. I agree. In the circumstances action procedure was to be preferred where it appeared inevitable that the matter raises material disputes of fact which are not determinable in motion proceedings.

[46] In my view Rule 53 merely regulates the manner in which the review proceedings are to be brought before a Court and does not seek to restrict or change the law relating to how dispute of facts are dealt with. The Applicants in casu had a choice of procedure to use when approaching this Court.

Should the Court refer the matter to oral evidence or dismiss the Application?

[47] The Respondents argued that, in the circumstances of the present matter, it would not be appropriate to refer the matter to oral evidence and that, accordingly, the matter should be dismissed.

The Fifth Respondent submits that the dispute of facts was foreseeable by the Applicants prior to the launch of the application, or at the very least since it was clearly raised by the Fifth Respondent in his answering affidavit served on the Applicants on 10 May 2019.[12]

The Fifth Respondent relies on the authority of *Room Hire (Supra)* where it was stated that

".. application may be dismissed with costs, particularly when the applicant should have realized when launching his application that a serious dispute of fact was bound to develop. It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into the disputed facts not capable of easy ascertainment what is essentially the subject of an ordinary trial action.[13]

See also *Lombaard v Droproba CC and Others* 2010 (5) SA 1 (SCA) at 11.

[48] The general rule of practice is that an application to refer for oral evidence should be made prior to argument on the merits.[14]

In *Law Society, Northern Provinces v Magami*[15] the Supreme Court of Appeal re-affirmed the general rule as follows:

"An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the Applicant is failing to convince the Court on the papers or on appeal. The circumstances must be exceptional before a Court will permit an Applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail. "

In the present matter, no application for referral to oral evidence was made in limine but only when Counsel for the Applicants was engaged by the Court during the hearing on the merits.

[49] In his further submissions that this matter should be referred to oral evidence, Counsel for the Applicants argued that the aim of this Court should be to resolve the disputes of the Mamadi Chieftaincy. That if this matter is referred to oral evidence or trial the Applicants will be in a better position to discover in terms of the Rules, a number of documents extracted from the Archive File 54/1074/4 which became available to the Applicants when this matter was already set down for hearing. Counsel pointed out that the said documents will give clarity to the following disputed issues:

49.1. That the documents will provide clarity that Masetha Frank Mamadi ruled until his death in 1981.

49.2. The documents will also prove that Molatelo Warrick Mamadi ruled between 1981 to 1985.

49.3. The documents will also prove that the First Applicant was the secretary of the Mamadi Community from 1966 until 1985

[50] What the Applicants are asking for is that the matter be referred to oral evidence so as to enable them to fortify their otherwise floundering application. This cannot be allowed.

In *Dodo v Dodo*[16] the following was said:

"The Respondent's case stands or falls on his own averment. I think the Respondent's request for oral evidence fails in this regard. The Respondent may not seek to lead evidence to make out a defence for the first time, by way of such oral evidence, where his defence is not already made out by him on papers "

Similarly, in *Carr v Uzent*[17] the Court held that:

"[The Applicant] has failed, in my opinion, in his affidavits, read as a whole, to make out this case, and Rule 9 was never designed to enable an applicant to amplify affidavits by additional evidence where the affidavits themselves, even if accepted, do not make out a clear case, but leave the case ambiguous, uncertain, or fail to make out a cause of action at all."

[51] I am of the view that absent that request from the onset of the application, should a dispute arise on the papers, as it did in the present matter, the Court is bound by the *Plascon-Evans* rule and must decide the matter in favour of the Respondents. Referring the matter for oral evidence will not, in the circumstances of this case, help the Applicants. Authorities referred to above and coupled with the discretionary powers of the Court, do not allow the Applicants to fortify their weak case through oral evidence.

[52] The genealogy annexed as "NN4" to the Respondents' answering affidavit as well as the findings of the Kgatla Commission show that the descendants of Matshopa from whence the First Applicant descends, are not entitled to the chieftaincy of the Mamadi Traditional Community. A decision to hear oral evidence is premised on the question whether there exists prospects of success for the applicant seeking such hearing. In *Kalil v Decotex (Pty) Ltd and Another*[18] the court held as follows:

"The applicant may, however apply for an order referring the matter for the hearing of oral evidence in order to try to establish a balance of probabilities in his favour. It seems to me that in these circumstances the Court should have a discretion to allow the hearing of oral evidence in an appropriate case. ... Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of viva voce evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent"

[53] On the conspectus of the evidence on affidavits in this matter, the Applicant have shown no prospects of success. The parties have appeared and testified (together with their witnesses) before the Kgatla Commission where they were subjected to questioning or cross examination. The First Applicant came out second best in the evidence before the Commission. His credibility was questioned and his evidence was labeled unreliable. I do not foresee the First Applicant improving from his poor performance before the Commission lest he perjures himself in his oral evidence before this Court.

[54] The Applicants' remedy lies in an action procedure and their election to proceed on motion was fatally misconceived from inception. A referral to oral evidence will not serve to cure the deficiencies of this matter in an expeditious and just manner. Accordingly, the request to refer the matter to oral evidence is refused.

[55] On the merits of the application, I am of the view that the Applicants have not made out a case for the relief that they seek in this application. The dispute of facts is such that the matter should be decided in favour of the Respondents.

[56] In the result, the application is dismissed with costs, such costs to include the costs of two Counsel where so employed.

EM MAKGOBA

JUDGE PRESIDENT OF THE HIGH

COURT, LIMPOPO DIVISION,

POLOKWANE

APPEARANCES

Heard on

: 15 October 2020

Judgment

delivered on

: 26 November 2020

For the Applicants

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[1] See Commission Report : at Page 374-375 para [7.9]; Record Vol 4

[2] 1984 (3) SA 623 (A)

[3] 2020 (5) SA Ill (SCA) at para (33)

[4] 1956 (3) SA 345 (A) at Page 349 -350

[5] 2008 (2) SA 184 (SCA)

[6] 1957 (4) SA 234 (C)

[7] 1949 (3) SA 1155 (T) at 11 62

[8] 2010 (5) SA 1 (SCA)at para [31]

[9] See Erasmus Superior Court Practice Vol 2 Part 01

[10] 2019 (3) SA 559 (ECP)

[11] At Page 5684

[12] See Fifth Respondent's Answering Affidavit, at para 5, Bundle 2, paginated page 126

[13] Room Hire Co (Pty) Ltd v Jeppe Mansions (Pty) Ltd 19 49 (3) SA 1155 (T) at 1162

[14] See De Reszeke v Maras and Others 2006 (1) SA 401 (C)

[15] 2010 (1) SA 1 86 (SCA) at 195 C- D

[16] 1990 (2) SA 77 (W) at 91 H-I

[17] 1948 (4) SA 383 (W) at 390

[18] 1988 (1) SA 943 (A) at 979 F-I

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