

SOUTH AFRICA / JUDGMENT

Mogale and Another v Premier, North West Province and Another (M485/20) [2024] ZANWHC 169 (3 July 2024)

[2024] ZANWHC 169**COURT**

North West High Court, Mafikeng

BEFORE

Petersen

CASE / FILE NUMBER

M485/20

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**IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION -
MAHIKENG
CASE NO.: M485/20**

Reportable:

YES / NO
Circulate
to Judges: YES / NO
Circulate
to Magistrates: YES / NO
Circulate
to Regional Magistrates: YES / NO

In the matter between:

GEORGE
RANGENNA MOGALE
First
Applicant
MATUMA
CLAN
Second Applicant
and
PREMIER,
NORTH WEST PROVINCE
First Respondent
ANDREW
NKWANE MOGALE
Second
Respondent

CORAM: PETERSEN J
DATE
OF HEARING
:
14 JUNE 2024
DATE

OF WRITTEN SUBMISSIONS: 21 JUNE 2024
DATE

JUDGMENT RESERVED : 21 JUNE 2024
The judgment was handed
down electronically by circulation to the parties'
representatives via email. The date and time for
hand-down is deemed
to be 03 July 2024 at 12h00.
ORDER
The applicants, joint and
severally, the one paying the other to be absolved, are ordered to
pay the costs of the application which
costs shall include the costs
attendant upon the employment of Counsel, where so employed, on Scale
B of the scale of costs.

JUDGMENT

PETERSEN ADJP

- [1] In 2016, the then Premier of the North West Province established the Maluleke/Baloyi Commission of Inquiry ('the Commission') through publication in Provincial Government Gazette Extraordinaire 7656 of 15 June 2016. The mandate of the Commission was to investigate various traditional succession disputes which existed for decades, regarding the rightful Bogosi ('the position held by a Kgosi') of various tribal communities.
- [2] The dispute in this application concerned a challenge to the rightful heir to the Bogosi of the Bapo ba Mogale. The question being who the rightful and direct descendants were of Mogale Mogale, the first Kgosi of the Bapo community in the Bapong Village, who ruled in the 1800's.
- [3] This review application whilst implicating the Bapo ba Mogale I and II traditional disputes, is related specifically to the findings and recommendations of the Commission in respect of Bapo 1 on 12 August 2020. In terms of these findings the Premier consequently recognized the second respondent as the Kgosi of the Bapo ba Mogale traditional authority on 20 August 2020.

- [4] The applicants shortly after the recognition of the second respondent as the Kgosi of Bapo Ba Mogale launched the review application. The application was enrolled on the Unopposed Motion Roll of 17 December 2020, but removed when notice of opposition was delivered by both respondents.
- [5] The application was referred for Judicial Case Management by Deputy Judge President Djaje, once removed from the Unopposed Motion Roll. The matter was subsequently case managed with appearances either in person or on a virtual platform during or on April 2021, 21 October 2021, 25 November 2021, 5 May 2022, 3 November 2022, 20 January 2023, 3 March 2023, 14 April 2023, 21 July 2023 and 18 August 2023. By 18 August 2023, Deputy Judge President Djaje perturbed by the lack of co-operation from the first respondent removed the matter from the roll. At this stage, both respondents had already delivered their answering affidavits. To date no replying affidavit has been delivered by the applicants. As a result, the second respondent set down the application for hearing on 14 June 2024.
- [6] The applicants filed a notice of withdrawal of the application on 23 November 2023 without tendering costs, purportedly acting in terms of Uniform Rule 41(1). This triggered the present application predicated solely on the issue of costs.
- [7] A part-heard criminal trial brought me to the Mogwase Circuit Court away from the main seat in Mahikeng for hearing on 13 and 14 June 2024. A hearing was arranged on the MS Teams virtual platform to entertain oral arguments regarding costs by Counsel for the parties. Despite the aforesaid arrangement, connectivity challenges at the Mogwase Circuit Court rendered the hearing impossible. This Court proposed hearing the parties on an alternative date or alternatively proposed the filing of written submissions within seven (7) days from 14 June 2024. Counsel acquiesced in the latter proposal and filed written submissions for which this Court extends its appreciation.
- [8] Adv Nkwai Ramasehla for the applicants in his written submissions “begs” the leave of this Court to withdraw the proceedings with no order as to costs or otherwise to order that each party bears its own costs. The reasons advanced for the withdrawal of the application, in brief, are as follows. The erstwhile attorneys of record for the applicants, withdrew on 19 July 2023. The present attorney of record was instructed and on 23 November 2023 took instruction from the applicants. The applicants claim to be unaware if the application was heard on 8 December 2020. Reference is made to a Notice of Set Down served on 9 October 2023 on the erstwhile attorneys of the applicants for 14 June 2024. At that stage, the present attorneys of record were not on record yet.
- [9] According to Adv Ramasehla the papers he received “were not in good order.” By this is meant that the applicants’ understanding of their case was not reflected in the papers. It is said that they regrettably appended their signatures to the papers in circumstances where the papers did not accord with their instructions. On this basis the contention is that the matter would not have been properly and adequately placed before Court if the application proceeded on the papers filed by the applicants to the prejudice of the applicants.

[10] Adv Ramasehla, on the prescripts of Rule 41(1) accepts that it was not competent for applicants who have instituted these proceedings to withdraw the proceedings without consent of the respondents or with leave of the Court. An indication that the applicants may renew the application on supplemented facts, if they so wish, is of no moment for purposes of the consideration of this application.

[11] The nub of the argument of the issue of costs by the applicants' is that no order should be made regrading costs of the "withdrawn

application". The reason being that the application was set down for hearing on 14 June 2024 before the present attorney of record was instructed; and the Notice of Set down was served on the erstwhile attorneys of record who had already withdrawn at the time. In the alternative, the submission is made that this Court considers an order that each party should bear its own costs which it is said will be consistent with the principles enunciated in *Biowatch Trust v Registrar Genetic Resources and Others* ZACC 14; 2009 (6) SA 232 (CC); 2009 (1) BCLR 1014 (CC) at paragraphs 21 - 25.

[12] Nyakala Attorneys for the second respondent advances similar arguments to the first respondent on the issue of costs.

[13] Rule 41(1)(a) provides that:

"A person instituting any proceedings may at any time before a matter has been set down and thereafter by consent of the parties or leave of the court withdraw such proceedings, in any of which events he shall deliver a notice of withdrawal and may embody in such notice a consent to pay costs."

[14] The default position is that a party withdrawing proceedings will ordinarily be liable for the costs of the withdrawn application. A court in considering whether a party who has withdrawn the application should be liable for the costs of the withdrawn application, must consider all the circumstances attendant to the withdrawal of the application.

[15] The authorities are clear that the party withdrawing an application or action must pay the costs except in exceptional circumstances. The law in this regard is trite. See: *Net v O.V.S Staatkonstruksie en Algemene Sweiswerke* 1977

(3) SA 933 (O); *Wildlife and Environmental Society v MEG for Economic Affairs* 2005 (6) SA 123 (ECD); *Waste Products Utilisation v Wilkes (Biccari Interested party)* 2003 (2) SA 590 (W); and *ABSA Bank v Robb* 2013

(3) SA 619 (GSJ).

[16] In *Germishuys v Douglas Besproeiingsraad* 1973 (3) SA 299 (NC) at 300D-E, Van Rhyn J held that:

“Where a litigant withdraws an action or in effect withdraws it, very sound reasons (baie gegronde redes) must exist why a defendant or respondent should not be entitled to costs. The plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because, after all, his claim or application is futile and the defendant, or respondent, is entitled to all costs associated with the withdrawing plaintiffs or applicant's institution of proceedings.”

[17] It was further held in *Hammond and Hammond Transactional Law Clinic v Bitou Municipality and Others* (8526/21) [2021] ZAWCHC 150 (11 August 2021);

[2021] JOL 50959 (WCC) at paragraph 16 that:

“Ordinarily, the withdrawal of a matter is viewed as a concession on the merits, a recognition that the merits have become academic or that the relief sought is for whatever reason futile. Whatever the reason for the withdrawal of a matter, the court retains a discretion to award costs (Wildlife and Environmental Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape and Others 2005

(6) SA 123 (E) at 129-30) with the general rule being that the respondent is entitled to all costs caused by the institution of the proceedings, a rule which is not to be departed from without good grounds (AC Cilliers Law of Costs at 2-8 and 2-10.) The court exercises a wide but not unlimited discretion in determining costs, with it required to consider the facts and circumstances of the matter. Importantly, the exercise of this discretion must lead to a result which is one to which a reasonable person could have come.”

See too: *Master Blaster (Pty) Ltd v Sasol Dyno Nobel (Pty) Ltd* [2020] ZAGPPHC 376 at paragraph 15.

[18] The main reason for the withdrawal of the application is predicated on an assertion by the applicants that the application does not accord with the instructions to their erstwhile attorney. The applicants, however, do not provide a satisfactory explanation, why they signed the affidavits in support of the application, when it did not accord with their instructions. What the applicants seem to conveniently avoid is that a deponent to an affidavit is seized with the onerous duty of primarily disclosing facts that are within their personal knowledge, which are to be true and correct. To my mind the applicants' contention is simply disingenuous. In *Mpembe and Another v Minister of Police and Another* (2226/2022) [2024] ZANWHC 131 (23 May 2024), Reddy AJ (as he then was) emphasizes the importance of the personal knowledge prerequisite of an affidavit as follows:

“[28] Afore an exposition of the personal knowledge prerequisite of an affidavit, it is peremptory to define what an affidavit comprises. An affidavit is a sworn statement in writing. In using an affidavit as an evidential instrument, the facts that form the body of the affidavit must be within the personal knowledge of the deponent.

[29] The significance of the personal knowledge qualification in the deposing of an affidavit goes to the heart of affidavit evidence. In application proceedings, the affidavits take the place not only of the pleadings in action proceedings, but also of the essential evidence which could be led at trial. To this end, it axiomatically follows that generally relief may only be granted in motion proceedings if it is supported by primary admissible evidence that is set out in the body of the affidavits. The admissibility of a deponent's evidence depends on whether he/she has personal knowledge of the primary facts. Intertwined with a deponent's knowledge of primary facts is the hearsay rule of evidence. The hearsay rule of evidence applies to all proceedings, including applications. According to Section 3(4) of the Law of Evidence Amendment Act 45 of 1988, hearsay evidence is "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence."

[30] In *Maharaj v Barclays National Bank Ltd* 1976

- (1) SA 418 (A) at 423D-E. the court held that the mere assertion by a deponent that he can swear positively to the facts is not regarded as being sufficient, unless there are good grounds for believing that the deponent fully appreciated the meaning of these words.

[31] In *President of the Republic of South Africa and Others v M & G Media Ltd* 2011

- (2) SA 1 (SCA) at paragraph [38], the Supreme Court of Appeal remarked as follows on the meaning of personal knowledge:

"A court is not bound to accept the ipse dixit of a witness that his or her evidence is admissible... Merely to allege that that information is within the 'personal knowledge' of a deponent is of little value without some indication, at least from the context, of how that knowledge was acquired, so as to establish that the information is admissible, and if it is hearsay, to enable its weight to be evaluated. In this case there is no indication that the facts to which Mr Chikane purports to attest came to his knowledge directly, and no other basis for its admission has been laid. Indeed, the statement of Mr Chikane that I have referred to is not evidence at all: it is no more than bald assertion."

[32] There is no undervaluing the importance of the personal knowledge aspect of the deponent to the material facts that are being deposed to in the founding affidavit. The absence of personal knowledge diminishes the evidential weight of the affidavit evidence. In motion proceedings, affidavits are the procedural mechanism which permits the introduction of evidence.

[33] It is against this backdrop that Letsoalo's affidavits must be critically evaluated to determine if the personal knowledge prerequisite has been met. Letsoalo contends that he is the Senior Assistant State Attorney attached to the Office of the State Attorney, Mahikeng. He is also the attorney of record of the defendants. As a result, the facts contained in his affidavit are, save where the contrary appears from the contents thereof, within his own personal knowledge and belief are both true and correct."

- [19] Further, and by way of analogy to the law of contract, a person who signs a contractual document thereby signifies his assent to contents of the document. He is bound by the ordinary meaning and effect of the words which appear above his signature.
- [20] The fact that the applicants after settling the founding papers now seek to retract the contents of the founding papers does not avail the applicants. It is after all the applicants who have invited the respondents to this Court to answer to the case set out in the founding papers. The withdrawal of the application following acceptance of the invitation, and the filing of opposing papers has come at a cost to the respondents who have instructed attorneys and Counsel, cannot simply be overlooked on the explanation put forward by the applicants. The so called Biowatch principle also does not avail the applicants in these circumstances.
- [21] The applicants therefore remain liable for the costs in relation to the application, which costs include the costs attendant on the employment of Counsel where so employed.

Order

[22] In the result the following order is made:

A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

FOR THE APPLICANTS: ADV. N RAMASEHLA Instructed by Mphahlele Thelma Mathakgo Attorneys c/o Ntsamai Attorneys Inc 17 Clarendon Street GOLFPVIEW MAHIKENG FOR THE FIRST RESPONDENT : ADV. M RASEKGALA Instructed by: The State Attorney 1st Floor East Gallery, Mega City cnr Sekame and Dr J Moroka Drive MMABATHO FOR THE SECOND RESPONDENT : MR. S T NYAKALE Instructed by: Nyakale Attorneys c/o Molefakgatlo Attorneys Office 3 Shasons Centre Shippard Street MAHIKENG

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