

SOUTH AFRICA / JUDGMENT

Mogoboya and Others v Mogoboya and Others (8797/2023) [2023] ZALMPPHC 99 (23 October 2023) [2023] ZALMPPHC 99

COURT

Limpopo High Court, Polokwane

BEFORE

Kganyago

CASE / FILE NUMBER

8797/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

DIVISION, POLOKWANE

CASE

NO: 8797/2023

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE:

23/10/2023

In

the matter between:

MALESELA
PATRICK MOGOBOYA
FIRST
APPLICANT
MOGOTLO
ALPHEUS MOGOBOYA
SECOND
APPLICANT
MAHLOLO
PETER MOGOBOYA
THIRD
APPLICANT
JACK
MATLHANE MOGOBOYA
FOURTH
APPLICANT
MAHLOLO
WILLIAM MOGOBOYA
FIFTH
APPLICANT
TAOLOJOSEPHLEMAO
SIXTH
APPLICANT
ROMEO
MOGALE
SEVENTH
APPLICANT
MMATLOU
SALOME MASHABELA
EIGHTH
APPLICANT
BATHABINE
TRADITIONAL COUNCIL
NINETH
APPLICANT
BATLHABINE
ROYAL FAMILY
TENTH
APPLICANT
And
MASIBELE
JACK MOGOBOYA
FIRST
RESPONDENT
SAMUEL
MPHAFUDI MALATJI
SECOND
RESPONDENT
MASHILE
FRANS PHALANE
THIRD

RESPONDENT
THABE
PHALANE
FOURTH
RESPONDENT
MEKIA
PHALANE
FIFTH
RESPONDENT
ISAAC
PHALANE
SIXTH
RESPONDENT
NORMAN
MOGOBOYA
SEVENTH
RESPONDENT
BETHUEL
MATSHITELA
EIGHTH
RESPONDENT
MAMAROBA
GODFREY MATSHITELA
NINTH
RESPONDENT
THABE
MATSHITELA
TENTH
RESPONDENT
SAMUEL
MOGOBOYA
ELEVENTH
RESPONDENT
RAMAPE
MOGOBOYA
TWELTH
RESPONDENT
JERIMIA
PHALANE
THIRTEENTH
RESPONDENT
MOGOBOYE
PHALANE
FOURTEENTH
RESPONDENT
SOLLY
MATSHITELA
FIFTEENTH
RESPONDENT
STANDARD
BANK LIMITED OF SA

SIXTEENTH
RESPONDENT
GREATER
TZANEEN LOCAL MUNICIPALITY
SEVENTEENTH
RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The first to the fifth applicants alleges that they are members of the traditional council for Batlhabine-Ba-Mogoboya traditional community and also blood members of Batlhabine-Ba-Mogoboya royal family. The sixth to eighth applicants alleges that they are members of the traditional council for Batlhabine-Ba-Mogoboya traditional community. The applicants avers that the first respondent is the acting senior traditional leader of Batlhabine-Ba-Mogoboya traditional community, whilst the second to fifteenth respondents are members of the community of Ga-Mogoboya.
- [2] The applicants alleges that during February 2019 the first respondent was appointed by the Premier of Limpopo Province as the regent senior traditional leader of Batlhabine-Ba-Mogoboya traditional council. Following the appointment of the first respondent as acting senior traditional leader, a meeting was held where the first, second, fifth and sixth applicants together with second, seventh, eighth and ninth respondents were elected as council members.
- [3] The person who was supposed to have been appointed the senior traditional leader was Ramoba Mogotlo Mogoboya, however he passed away whilst he still 8 years old. According to the custom of Ga-Mogoboya, a candle wife was supposed to be married in order to revive the house of the late Ramoba Mogotlo Mogoboya. It is the duty of the royal family to decide from which family must the candle wife be married. That resulted in a disagreement between the royal family and Phalane family. According to the view of the royal family, the candle wife was supposed to be married from the Ramodike family, whilst the view of the Phalane's was that she must be married from their family. There was then a rivalry among the council members relating to the issue of the candle wife to the extent that the Phalane's attempted to remove the acting senior traditional leader from office.
- [4] On 16th November 2020 the thirteenth, sixth and eighth respondents were removed as council members of Batlhabine Traditional Council. The third, fourth, seventh and eighth applicants were appointed as new council members whilst the first, second, fifth and sixth applicants retained their positions as council members. According to the applicants, they have been in undisturbed possession of their respective portfolios and the council offices since November

2020. On Monday the 7th August 2023 whilst the applicants have gathered at the offices of the royal family executing their normal duties of the traditional council, they were wrongfully and forcefully ejected from the royal offices by the first respondent in company of the other respondents. The first respondent demanded all the keys to the royal offices from the applicants. Whilst the first respondent was still talking to the applicants, the second respondent interjected and told the first respondent to tell the applicants that they are not there to negotiate but that they wanted the keys. Out of fear of being harmed, the applicants handed over the keys of the royal offices to the first respondent and left.
- [5] After the applicants have left the royal offices, the first respondent phoned the first applicant demanding that they should return the laptop and cellular phone that were still in their possession. On 9th August 2023 the first applicant received a letter of demand from the first respondent informing the first applicant that (i) he has been ejected from the tribal offices; (ii) Batlhabine traditional council of which the first applicant was a member has been dissolved; and (iii) that he was required to return both the tribal office laptop and cellular phone within 2 days of receipt of the letter, failing which a theft charge will be opened against him. The first applicant instructed his attorneys to write a letter to the first respondent notifying him that he (first applicant) was a member of Batlhabine tribal council, and that he was in possession of both the laptop and cellular phone by virtue of his position as a council member.
- [6] On 12th August 2023 the applicants notified the first respondent that they did not accept the wrongful deprivation and forceful ejection from Batlhabine council without the consent of the royal family. The applicants demanded that the first respondent reinstate them by the 14th August
2023. On 17th August 2023 the first respondent wrote a letter to the applicants notifying them that he had withdrawn the third applicant from Greater Tzaneen Municipality as representative of Batlhabine traditional council and replaced him with the third respondent as a new representative. The applicants notified the seventeenth respondent that they did not accept their replacement to the municipality without their consent, and that they regard that action as null and void. The applicants tried to resolve this matter amicably to no avail and that is when they decided to institute their urgent application, as the respondent has failed to follow due legal processes before they were forcefully removed.
- [7] The first to fifteenth respondents are opposing the applicant's application. In their answering affidavit the respondents have stated that the applicants are no longer council members as the council in which they were serving has been dissolved. Since the applicants have been removed as councillors, the relief they are seeking is incompetent. Further that there was no deprivation in that deprivation in law must be in respect of property or thing, and must not be of a position within an institution. The respondents submit that the removal from council does not amount to spoliation, since a position as a council member cannot be possessed. That regarding the cell phone and laptop, the applicants have never

returned them despite several demands for their return.

- [8] The first respondent denies that the second respondent had instructed him to tell the applicants that they were not there to negotiate, but that what he said was that they want the keys. The second respondent had uttered those words after the first respondent had recorded his demand. That the statement by the second respondent did not amount to a threat or intimidation. The applicants handed in the keys following the demand by the first respondent, and there were no grounds to fear

anything. The respondents denies that their conduct was unlawful.

- [9] The applicants have brought an urgent spoliation application against the respondents. This court has already dealt with the issue of urgency and found that the application was urgent and has enrolled it as such. It is trite that mandament van spolie is directed at restoring possession to a party which has been unlawfully dispossessed, irrespective of the possession. The spoiled person must allege and prove that he/she was in peaceful and undisturbed possession of the property or other real right. Its underlying

philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due processes.

(See *Ngqukumba v Minister of Safety and Security and Others*[1]).

- [10] The applicants were appointed as the members of the traditional council for Batlhabine-Ba-Mogoboya traditional community and their term of office expires at the end of the year 2024. On 7th August 2023 the applicants were removed from office by the first respondent with the assistance of the second respondent to fifteenth respondents. The applicants were instructed to handover the keys of the offices, laptop and cell-phone. However, the evidence shows that the applicants have refused to handover the laptop and cell-phone. The first respondent went on to inform the applicants that he had dissolved their council. The applicants were removed from office as council members before their term of office expires. There is no evidence that due processes of the law were followed by the first respondents with the assistance of other respondents in taking the council's keys from the applicants and also in dissolving the council. By taking the council's keys shows that the applicants were no longer permitted to have access to council's premises. The manner in which the keys were taken from the applicants shows that it was not a friendly request, but forcefully demanded through some intimidation and threats which resulted in the applicants acceding to their demands. The applicants have handed over keys to the respondents out of fear and not voluntarily. That was also followed by threats to open criminal charges of theft should the applicants fail to return the laptop and cell phone. This is a further indication that the removal was not friendly or by consent from the applicants, but was by force.

[11] This dispute is all about the applicants been removed as members of the traditional council of Batlhabine tribal authority. The question is whether mandament van spolie is available to them as a remedy for such type of disputes. To put it differently, can it be said in the real sense that the applicants

have been dispossessed of their positions and the council premises. The applicant's counsel has submitted that the applicants had

quasi-possession of the right to access to the council premises and also as council members, which right is protected and cannot be taken away without following due processes. Counsel for the respondent on the other hand had relied on the unreported case of *Dr Cyril Samuels v Dr Runganathan Reddy*[2] where Strydom J held that the applicant had to show actual possession, albeit quasi possession to ground spoliatory relief. Further that in order to succeed in obtaining spoliatory relief the applicant had to demonstrate possession for his own benefit. It is the respondents' contention that the applicants have failed to establish that and are therefore not entitled to the relief they are seeking.

[12] The holder of a servitude had quasi-possession of the right which mandament van spolie is available as a remedy for the restoration of the lost possession of a right of servitude. A servitude cannot be possessed in the ordinary sense of the word and possession is represented by the actual exercise of the right with the result that a refusal to allow a person to exercise the right will amount to a dispossession of such a right. In such legal proceedings it is unnecessary to prove the servitude, but it is the restoration that has to be restored by the mandament van spolie until it is determined whether the servitude indeed exists. (See *Bon Quelle (Edms) BPK v Munisipaliteit van Otavi*[3]).

[12] Even though the *Bon Quelle* relates to a servitude, it had some similarities with the case at hand as the exercise of the rights in question are all within the ambit of quassi-possessio. The applicants could only be able to possess the keys to the offices, but could not possess access to the council premises in the ordinary sense of the word. The applicants can only exercise the right to have access to the council premises which in my view, this right is similar to that of a servitude of which the refusal to allow the applicants to exercise that right will amount to dispossession of the right.

[14] The applicants were duly appointed as members of the council and their appointments are coming to an end at the end of 2024. Part of their responsibilities is be in possession of the keys to the council/royal offices. It had been like that since their appointment. What this court must determine is whether they were unlawfully removed from the offices and also as council members, and also whether the remedy of mandament van spo/ie is available to them. The applicant's term of office has not yet expired and they were still entitled to the use of the council/royal offices and also to be council members for the duration of their term of office without any disturbance.

- [15] Prior to the incidents of the 7th August 2023, the applicants were in possession of the keys to the council/royal offices. By being in possession of the keys to the council/royal offices, shows that the applicants were not only members of the council, but were in charge and control of the council premises, and have a right of access to the council premises. The applicants were also in possession of the council's laptop and cell phone. For one to be appointed as a member of the council, there is no application like applying for employment but one gets elected. The council members are not employees who are covered by the labour laws. The council members are in the council to serve their communities and are not there for their personal needs. The applicants were therefore not exercising personal rights arising from contract in the positions which they were appointed as council members, but were representing the community at large.
- [16] The use of the council premises, possession of the keys to the council premises and possession of the laptop and cell phone shows that they were in charge and control of the council/royal offices which in my view amount to possession the council/royal offices. The applicants have therefore established the rights capable of protection by the mandament van spolie. The Samuel's case which the respondents have relied on is distinguishable from the case at hand. The applicants did not voluntarily hand over the keys of the council's premises to the respondents, but were forced to do so. If the removal was amicable, the applicants would have also have handed over the cell phone and laptop which up to date the applicants have not yet handed them in. The respondents would also have not threatened to open a criminal case of theft against the appellants. There is no evidence by the respondents whether due processes were followed by the first respondent in dissolving the council. A council cannot just be dissolved without due processes been followed as its term of office has not yet expired. Even if the term of office had expired, due processes need to be followed in case of dissolution of the council.
- [17] The manner in which the applicants were removed, constituted interference with the applicants' possession of the council/royal offices as due processes of the law was not followed by the respondents. The applicants' term of office has not yet expired, and what is paramount at this stage is to restore the status quo, and it is unnecessary determine whether the first respondent had validly dissolved the council. The applicants have met the requirements for the relief of mandament van spolie.
- [18] In the result the following order is made:
- 18.1 The first to the fifteenth respondent are ordered to restore to the applicants:
- 18.1.1 The applicants' respective occupation as councillors of Batlhabine traditional council.
- 18.1.2 Full access to the Batlhabine royal offices, situated at Mosoroni village, Ga-Mogoboya, by handing over to the applicants at the applicants' attorneys of record keys to all of the doors at the said premises.

17.2 The first to the fifteenth respondents to pay the costs of the application on party and party costs jointly and severally the one paying the other to be absolved.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

APPEARANCES: Counsel for the applicants : Adv Booysen R Instructed by : Frank Setati attorneys
Counsel for the respondents : Chidi M Instructed by : Phetole Richard Mohale attorneys Date
heard : 10th October 2023 Electronically circulated on : 23rd October 2023

[1] [2014] ZACC14 (15 May 2014) at para 10

[2] Case no 1518/2022 Gauteng Division Johannesburg (3rd February 2022) at para 15

[3] 1989

(1) SA 508 (A)

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