

SOUTH AFRICA / JUDGMENT

Netshithuthuni v MEC: Co-Operative Governance and Traditional Affairs (COGHSTA) and Others (149/2015) [2016] ZALMPTHC 11 (15 March 2016)

[2016] ZALMPTHC 11

COURT

Limpopo High Court, Thohoyandou

BEFORE

AML Phatudi

CASE / FILE NUMBER

149/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOUA

CASE

NO: 149/2015

DATE:

15 MARCH 2016

In

the matter between:

NTSHAVHENI

ALBERT

NETSHITHUTHUNI.....APPLICANT

AND

MEC: CO-OPERATIVE
GOVERNANCE.....FIRST
RESPONDENT
AND
TRADITIONAL AFFAIRS (COGHSTA)
PREMIER
OF LIMPOPO
PROVINCE.....SECOND
RESPONDENT
TSHIVHASE
TRADITIONAL
COUNCIL.....THIRD
RESPONDENT

JUDGMENT

1. That it be and is hereby declared that the applicant (Ntshavheni Albert Netshithuthuni) is the Headman of Tshithuthuni ward.
 2. That upon his (applicant) discharge from the employ of Department of Public Works Limpopo Province, with effect from the 01st April 2010, the applicant became entitled to remuneration from the first and second respondent as a public office bearer as defined in the Remuneration of Public Office Bearer Act 20 of 1998.
 3. That the first respondent pays the applicant arrear salary from the 01st April 2010 to 28th February 2015 in the amount of R311 298.22 within thirty (30) days of making of this order.
 4. That the first respondent re-instate applicant's salary within thirty (30) days of making of this order and to effect payment to the applicant on monthly basis until lawfully excused.
 5. That first respondent pay the costs of this application on attorney and own client scale.
- [2] It is only the first and the second respondents who opposed the application. The third respondent neither opposed nor filed a notice to abide.

Factual

Background

- [3] The applicant alleged in his founding affidavit that he had since 1964 been appointed and installed as Headman of Tshithuthuni ward,

Tshivhase Territorial Council, Vhufuli, [Limpopo Province]. The former Venda Government[1], before and after obtaining its independence, recognised him as such. On the 14 April 1994, for whatever reason, the office of the Chairman: Council for National Unity, Republic of Venda, caused issue of a document headed: 'Civil and Criminal Jurisdiction

Conferred upon Headman Netshithuthuni N.A of Tshithuthuni ward.’ The chairman empowered the applicant in terms of Venda Traditional Leaders Administration Proclamation 29 of 1991 to, among others... hear and determine civil claims arising out of Venda Law and Custom brought before [the applicant] by residents of [his] area of

jurisdiction...[2]

[4] Over and above the applicant’s appointment and recognition as headman, he became an employee at the then Department of Public Works, Republic of Venda. When South Africa attained its democracy during 1994, the Republic of South Africa re-incorporated the Republic of Venda. Venda fell under Limpopo Province (formerly Northern Province). All employees in all departments of Venda remained so employed under the democratic Republic of South Africa.

[5] The applicant enjoyed earning a salary as Department of Public Works employee and from Northern Province Department of Local Government

and Traditional Affairs as headmen of Tshithuthuni. This is evident from the Department of Local Government salary advice[3]. On the 09 March 2001, the Northern Province Local Government and Housing wrote a letter to the applicant headed: Termination of salary as Traditional Leader*. The letter stipulated:

‘Following our 9/1 letter dated 12 October 2000, you are hereby informed that your salary as headman will be terminated with effect from 01 April 2001’.

[6] The applicant continued dispensing services as Public Works employee and headman but only earning a salary from the former. He, on 01 April 2010, retired as a Public Works employee. He then wrote a letter on the 04th March 2010 requesting the relevant department to reinstate his salary as the headman. This led to a meeting that ended up with a meeting arranged and facilitated by the third respondent between the applicant and GOGHSTA on the 12th March 2014. The first respondent indicated to the applicant that nothing can be done and his salary cannot be reinstated. He was told to go to court. That led to this application.

[7] Save the in limine points raised, the first and second respondents seem not to be opposing the merits. Respondents’ counsel conceded that the respondents are opposing the application solely on the in limine points raised. He further conceded that if this court is not with the respondents on in limine points, there is nothing on merits to controvert the application.

The Law

[8] The development of the law in this regard was settled in *Madzhadzhi v President of the RSA* (160/2009) [2010] ZASCA 57 (1 April 2010) as follows[4]:

[15] Before South Africa's democratic transition in 1994 the responsibility for regulating the affairs of traditional leaders lay with various 'self-governing territories'. In the Venda territory, which is now part of the Limpopo Province, chiefs and headmen were appointed under legislation administered by the former Venda Government. Their remuneration was determined under s 19 of the Venda Traditional Leaders Proclamation 29 of 1991 (the Venda Proclamation). According to Proclamation 109 of 19 June 1994, under the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution), the determination of traditional leaders' salaries fell within the province's competence in terms of s 126 read with schedule 6. The

administration of the Venda Proclamation was assigned to the province, which was then known as the Northern Province. Following the assignment of the Venda Proclamation to the Northern Province, its Executive Council, the Council for National Unity, on 8 April 1994 and by resolution 10/94, determined a uniform salary to be paid to chiefs at R46 311 per annum and to headmen at R30 000 per annum.

[16] The following year the national government was also given the power to determine the remuneration of traditional leaders in terms of s 2 of the Remuneration of Traditional Leaders Act 29 of 1995 - though this law did not remove the provinces' power over remuneration. Remuneration paid by the national government was to be additional to any salaries traditional leaders received from a province. So, while the national government was given authority to determine salaries for traditional leaders, the province's authority to pay the salaries of chiefs and headmen under the Venda Proclamation continued. A dual system of remuneration existed. The preamble to Act 29 of 1995 specifically acknowledged this duality by stating:

'... AND WHEREAS the subjects and followers of particular tribal hierarchies do not necessarily all reside in a single province and the constituencies of traditional hierarchies transcend provincial boundaries;

AND WHEREAS the need for members of traditional hierarchies to be supported, maintained and remunerated in respect of their tribal

roles from national governmental level and from national funds as opposed to the provincially administered statutory functions they may fulfil and in respect of which they may be remunerated by provincial or local governments is recognised.'

[17] The final Constitution (the Constitution) came into force on 4 February

1997. Traditional leadership is included in Schedule 4 and is subject to Chapter 12. It is thus a function over which national and provincial governments have concurrent legislative and executive competence. However, in the Certification, the Constitutional Court stated that even though the provinces retained most of their powers and functions over traditional leaders in the Constitution, a significant diminution in their authority occurred when the framework for their remuneration was transferred from provincial to national legislation by s 219(1)(a). But this did not mean that there was any constitutional impediment to

national legislation retaining the existing dual system of remuneration, which followed the introduction of Act 29 of 1995 referred to above. Nor did it prevent provinces from implementing national legislation. This much is clear from s 219(4) of the Constitution.

[18] REPOB was the national framework legislation passed to comply with s 219(1) (a) of the Constitution. It commenced operation on 23 September

1998. Section 5 deals with the remuneration of traditional leaders. It provides:

‘5 Salaries, allowances and benefits of traditional leaders, members of local Houses of Traditional Leaders, members of provincial Houses of Traditional Leaders and members of National House of Traditional Leaders. -

- (1) Traditional leaders, members of any local House of Traditional Leaders, members of any provincial House of Traditional Leaders and members of the National House of Traditional Leaders shall, despite anything to the contrary in any other law contained, be entitled to such salaries and allowances as may from time to time be determined by the President after consultation with the Premier concerned by proclamation in the Gazette, after taking into consideration -
 - (a) any recommendations of the Commission;
 - (2) Despite the provisions of subsection (1), a traditional leader, a member of a local House of Traditional Leaders, a member of a provincial House of Traditional Leaders or a member of the National House of Traditional Leaders who holds different public offices simultaneously, is only entitled to the salary, allowances and benefits of the public office for which he or she earns the highest income, but -
 - (a) this subsection shall not preclude the payment of out of pocket expenses for the performance of functions other than those for which such office bearer receives such highest income; and
 - (b) where only an allowance has been determined in terms of subsection
 - (1) in respect of a traditional leader’s membership of a local House of Traditional Leaders, a provincial House of Traditional Leaders or the National House of Traditional Leaders, such a traditional leader shall be entitled to such an allowance in addition to his or her salary, allowances and benefits as a traditional leader
- (4) The amount payable in respect of salaries, allowances and benefits to traditional leaders, members of local Houses of Traditional Leaders, members of provincial Houses of Traditional Leaders and members of the National House of Traditional Leaders shall be paid from monies appropriated for that purpose by Parliament in respect of the National House of Traditional Leaders and by a provincial legislature in respect of traditional leaders, members of local Houses of Traditional Leaders and members of provincial Houses of Traditional Leaders, as the case may be.’

- [19] REPOB'S effect is that the authority for deciding the salaries for traditional leaders now vests in the President, who must consult the Premier concerned and consider any recommendations of the Independent Commission for the Remuneration of Office Bearers, envisaged in s 219(2) of the Constitution, before making a decision. REPOB repealed Act 29 of 1995, but not the Venda Proclamation. So while REPOB contemplates that the President will determine the salaries of traditional leaders, the province retained the authority over the remuneration of chiefs and headmen - notwithstanding s 5(1) of REPOB. There is no constitutional challenge to the Venda Proclamation. So we must accept that the province's determination of salaries for headmen in 2002 was valid. This is because s 2(1) of Schedule 6 of the Constitution, which deals with transitional arrangements, provides that all law that was in force when the Constitution took effect continues to remain in force subject to amendment or repeal and consistency with the Constitution.
- [20] In 2005 the provincial legislature promulgated the Limpopo Traditional Leadership and Institutions Act 6 of 2005. In terms of s 34 read with Schedule 1 of that Act, the Venda Proclamation was repealed with effect from 1 April 2006. Section 21(1) provides that the salaries of traditional leaders would

thereafter be dealt with under REPOB - in other words, by the President. This brought the dual system of remuneration of traditional leaders in the province to an end.

- [21] Since then it appears that the President has from time to time determined salaries for kings, chiefs and also chairpersons and deputy chairpersons of the National House of Traditional Leaders, who are all senior leaders in the traditional leader hierarchy, but has not done so for headmen, who are not. Headmen continued to receive the same salary that the province determined on 1 October 2002".

- [9] It is further worth noting that Limpopo Traditional Leadership and Institutions Act 6 of 2005 made provision for transitional arrangements. Section 33 (2) provides:

- (2) Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act is deemed to have been recognised as such in terms of the relevant provisions of this Act.

Misjoinder

- [10] Having set out the law as I did, I now deal with the respondents' in limine points. Misjoinder was the first point raised. The first and second respondent contend that the applicant failed to join the President of the Republic of South Africa, National Minister of Co-operative Governance, Human settlement and Traditional Affairs; the Independent

Commission for Remuneration of Public Office Bearers; Minister of Finance and the Provincial Legislature of Limpopo. This point is, in my view, without merit in that the applicant had always been on the payroll of the Northern Province Department of Local Government and Traditional Affairs. The applicant's salary was, as indicated above[5], terminated by Northern Province Local

Government and Housing on the premise of the provisions of section 5 of REPOB. Northern Province Local Government and Housing was succeeded by the Department of Co-operative Governance, Human Settlement and Traditional Affairs (COGHSTA)

[11] I indicated that ‘the President [had] from time to time determined salaries for kings, chiefs and also chairpersons and deputy chairpersons of the National House of Traditional Leaders... but not... for headman[6]. Headman continued to receive their salaries from the province. It is common cause if not seriously denied that the applicant’s salary was paid by the first respondent predecessor with effect from 01 August

1997. The said payment was terminated on 01 April 2001 with a view to bring an end to the “dual system of remuneration of traditional leaders in the province.[7]” All what the applicant seek is the reinstatement of the salary he earned as a headman that was terminated by the first responded. The applicant sought such reinstatement on the bases that he no longer received payment in the form of salary from any other “public office”[8]. There is therefore, in my view, no misjoinder as contended.

Jurisdiction

[12] Section 21 (1) of the Superior Court Act 10 of 2013 provides that ‘[a] Division has jurisdiction over all persons residing or being in, and in relation to all causes arising... within its area of jurisdiction and all other matters of which it may according to law take cognisance....’

[13] The first and second respondents’ counsel reliance on this court lacking jurisdiction was based solely on the fact that the first and second respondents’ offices are situated in Polokwane. He submitted that the applicant ought to have followed the respondents by instituting the application in Limpopo Provincial Division and not this Court. I referred counsel to the provisions of section 21 (1) of Superior Court Act 10 of 2013. I indicated to him that it was common cause that the applicant resided within the area of this Court’s jurisdiction. I further indicated to him that this was one point that ought not to have been raised in that this Court had jurisdiction to hear this matter. He remained mum.

Prescription

[14] The respondents contended that the applicant’s claim partially prescribed in relation to the amount and totally in relation to the cause of action. They further contended that the salary payments that were due “[with effect from] 01 April 2010 to 28 February 2012” had prescribed. The respondents counsel submitted that the applicant did nothing after he had written a letter in 2010 up to the time of issue of summons in

2015. This is not true.

[15] On 04 March 2010, the applicant wrote a letter to the relevant Department for reinstatement of his salary as the headman of Tshithuthuni. The first respondent responded thereto. The third respondent intervened by arranging and facilitating the meeting by and between the applicant and COGHSTA. The meeting was held on 12 March 2014. This factual occurrence was never controverted by the respondents.

[16] It is trite law that prescription is governed by Prescription Act 68 of

1969. The Act provides that a person has three years from the date on which the debt becomes due to institute legal proceedings to claim

the debt. Prescription is triggered when the creditor become aware or is informed that the debtor is unable or unwilling to pay the amount claimed[9]. The applicant was only informed on 12 March 2014 that the first respondent is unable if not unwilling to reinstate his salary without the Court order. The respondents' counsel was at all material times in the know that the first respondent's unwillingness to reinstate the applicant's salary was communicated to the applicant during March

2014. His submission that "the debt" became due on 01 April 2010 is baseless and without merit. Prescription of the applicant's claim was only triggered and started running from the 12 March 2014 when he was informed of the Department's unwillingness to reinstate his salary.

Did the applicant's headman ship lapsed

[17] The other in limine point raised was that the applicant's headmanship lapsed on 01 April 2006 when Venda Proclamation was repealed. The respondents'

counsel submitted that the applicant was never legally appointed and recognised by the second respondent as the headman nor did he seek his reinstatement as headman. In my view, this point too has no merit.

[18] It was common cause or not seriously contested that the applicant had since 1964 been appointed and recognised by the third respondent as the headman of Tshithuthuni. The applicant's appointment was recognised by the then Republic of Venda and the Northern Province,

Republic of South Africa when Venda was incorporated in the Northern Province (now Limpopo). The then Limpopo Provincial Government recognised his headmanship. This was demonstrated by payment of his salaries by the Department of Local Government and Traditional Affairs (Northern Province) from at least August 1997 until terminated on 01 April 2001[10]. It is correct that Venda Proclamation was repealed by Limpopo Traditional Leadership and Institutions Act 6 of 2005. The Act made

provisions of transitional arrangements as stipulated in section 33

(2) . For convenience, the section provides that:

‘any traditional leader who was appointed as such in terms of applicable provincial legislature and was still recognised as a traditional

leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of the relevant provisions of this Act’ (emphasis added).

[19] It was not only the Act that made transitional arrangements. Section 2

(1) of Schedule 6 of the Constitution of the Republic of South Africa Act (Constitution) made provision for transitional arrangements[11]. As indicated earlier, it was common cause that the applicant was appointed and recognised as a headman by law that was in force[12] and remained recognised as such before the Venda Proclamation was repealed by the Act. The applicant is thus deemed to have been

recognised as a headman of Tshithuthuni in terms of the relevant provisions of Limpopo Traditional Leadership and Institutions Act 6 of 2005[13]. If indeed the headman ship of the applicant had lapsed, the third respondent would have indicated so. The third respondent would not have arranged, coordinated and or facilitated a meeting between the applicant and the first and second respondents for the benefit of the applicant. This in limine point as well stands to be dismissed. Seeing that the merits were not opposed, the application must succeed.

[20] It is trite law that costs follow the event. The applicant succeeded and is entitled to costs.

[21] The following order is thus made.

Order

21.1 The first and second respondents’ in limine points are dismissed with costs

21.2 The applicant (Ntshavheni Albert Netshithuthuni) is hereby declared the Headman of Tshithuthuni ward.

21.3 The applicant became entitled to reinstatement of his remuneration by the first and second respondents as a public office bearer as defined in the Remuneration of Public Office Bearer Act 20 of 1998 with effect from 01 April 2010,

21.4 The first respondent is ordered to pay the applicant arrear salary that became due from 01 April 2010 to 29 February 2016 within sixty (60) days of making of this order.

21.5 The first respondent is ordered to re-instate the applicant’s salary within thirty (30) days of making of this order and to effect payment to the applicant on monthly basis until lawfully excused.

21.6 The first and or second respondents are ordered to pay the costs of this application jointly or severally the one paying the other to be absolved.

Judge of the High Court

Heard on: 09 February 2016

For the Applicant: Mathivha Attorneys

For the Respondent: Simon Mokone Attorneys

Date of Judgment: 09 March 2016

AML PHATUDI J:

- [1] The applicant brought an application against the respondents for an order set out as follows in the notice of motion.
- [2] See: Applicant's Annexure "FA1" to his Founding Affidavit page 26
- [3] See applicant's Annexure "FA2" to his Founding Affidavit page 31.
- [4] Regrettably I found it inevitable to quote the insert verbatim
- ' See paragraph [5] above
- [6] Madzhadzhi v President of RSA op cit Para [21]
- [7] See section 21 (1) of REPOB
- [8] Section 5 (2) of REPOB
- [9] ATB Chartered Accountants (SA) v Edna Bonfiglio (648/09) [2010] ZASCA 124 (30 September 2010) see as well section 12 of Prescription Act 68 of 1969.
- [10] Salary advice attached to the papers
- [11] See: Madzhadzhi v President of the RSA (op cit) Para [19]
- [12] Venda Proclamation.
- [13] See: section 33 (2) op cit
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