

SOUTH AFRICA / JUDGMENT

Royal Bafokeng Nation v Khunou and Others (M420/16) [2017] ZANWHC 64 (31 August 2017)

[2017] ZANWHC 64

COURT

North West High Court, Mafikeng

BEFORE

M M Leeuw

CASE / FILE NUMBER

M420/16

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IN

**THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION,
MAHIKENG**

Reportable:	YES / NO Circulate to Regional Magistrates: YES / NO Circulate
to Judges:	YES / NO Circulate
to Magistrates:	YES / NO CASE NO: M420/16 In

the matter between:

ROYAL
BAFOKENG NATION
APPLICANTS
and
LUCKY
ELIAS KHUNOU
1st RESPONDENT
MPHO
RAKGOMO
2ND RESPONDENT
DAVID
MPIPI
3RD RESPONDENT
J
S
MODUMO
4TH RESPONDENT
RAMOLEBOGA
MOSHUWE
5TH RESPONDENT
BEN
MODISE
6TH RESPONDENT
ALL
OTHER UNKNOWN PERSONS WHO HAVE
ILLEGAL
ERRECTED OR INTEND ILLEGALLY
ERECTINGFENCES
OR STRUCTURES ON PORTIONS
OF
LAND DESCRIBED AS BIERKRAAL NO. 120 JQ 7TH
RESPONDENTS
DATE
OF HEARING
:
29 JUNE 2017
DATE
OF JUDGMENT
:
31 AUGUST 2017
COUNSEL
FOR APPELLANT
:
Adv.Wesley & Adv.Monnahela
COUNSEL
FOR THE RESPONDENT
:
Adv. Jansen SC

JUDGMENT

LEEuw JP

Introduction

- [1] The applicant is seeking an order confirming the following rule nisi issued by Gutta J on 26 August 2016:

“1. The Applicant’s non-compliance with rules of this Court relating to time and manner of service is condoned and the manner dealt with as one of urgency on an ex parte basis in terms of rule 6(12) of the Uniform Rules of Court.

2. A rule nisi calling upon the Respondents to show cause on 29 SEPTEMBER 2016 at 10:00 or soon thereafter as counsel may be heard why a final order should not be made in the following terms:

2.1 The Respondents are interdicted from erecting fences or structures or from occupying the structures already erected but not occupied on the Applicant’s property known as Bierkraal No.120, Registration Division JQ, situate in the district of Rustenburg.

2.2 In the event any of the Respondents erecting fences and/or structures on the property contrary to the provisions of paragraphs 2.1 above, the Sheriff of the High Court, Bafokeng, with the assistance of the members of the South African Police Service in Tsitsing or any relevant police station, is authorized and directed to remove or demolish the fences and/or structures, provided the Respondents are not occupying the structures.

3. The provisions of paragraphs 2.1 and 2.2 above shall operate with immediate effect pending the return date.

4. The Sheriff of the High Court, Bafokeng is directed to effect service of this order in the following manner:

4.1 by serving the order personally on each of the Respondents;

4.2 by displaying a copy of the order at each on the notice boards at the entrance of the Applicant’s administrative offices at Phokeng, Rustenburg; and

4.3 by displaying a copy of the order at each of the illegal structures already erected or property fenced off by the Respondents.

5. The Respondents may anticipate the return date on 48 hours’ notice to the Applicant’s attorneys in terms of the Uniform Rules of Court.

6. Costs, only in the event any of Respondents oppose(s) the application.

7. Further and/or alternative relief.”

- [2] The interim order was extended per agreement between the parties to 26th October 2016 to enable the respondents to file their opposing papers. A notice of intention to oppose was filed by Mfenyana Attorneys Inc. who placed their names on record as representatives of the first to the seventh respondents. The opposing affidavit was filed by the first respondent together with the confirmatory affidavits of the second to the sixth respondents. There is no answering affidavit filed in respect of the seventh respondent.
- [3] On the 29 September 2016, the rule nisi was extended to the 26 November 2016 and thereafter several times until the 29 June 2017 when the matter was heard.

The Parties

- [4] The applicant is the Royal Bafokeng Nation, a traditional council as defined in the Traditional Leadership and Governance Framework Act No. 41 of 2003 (Framework Act) read with the North West Traditional Leadership and Governance Act No.2 of 2005 (Governance Act). Modisaotsile Kenneth Mokate (Mr.Mokate) deposed to the founding affidavit in his capacity as head of the Land Use Management Unit, of the Royal Bafokeng Administration.
- [5] The first respondent Lucky Elias Khunou (Khunou) is a member of the Tsitsing Village Community and purports to be duly authorized to depose to the answering affidavit on his behalf and on behalf of the second to the sixth respondents, as well as the unnamed 7th respondents. All the respondents are members of the Tsitsing Village a tribal community within the jurisdiction of the Royal Bafokeng

Nation.

- [6] The identity of the seventh respondents is unknown. The deputy sheriff, Claudia Mathapelo Mokua (Ms Mokua) together with her

assistant, effected service of the interim Court order, by affixing a copy thereof at the entrance of “more than 20 demarcated area (sic),” at Bierkraal no. 120 JQ. Ms Mokua further states that she effected service on a “number of respondents” who were identified by the applicant’s officials. She does not disclose their identity. The first to the sixth respondents will cumulatively be referred to as the respondents.

Background

Facts

- [7] It is common cause that the Royal Bafokeng Nation owns the land where Tsitsing Village is established together with many other portions of land within its area of jurisdiction. However there is a dispute relating to the ownership of the land at issue, which matter is pending in this court under case number 999/2008.

- [8] It is not in dispute that during August 2016 at Tsitsing village the respondents allocated stands to the unnamed persons cited as the 7th respondents in these proceedings. Kedibone Kgaladi (Ms Kgaladi) who is a land monitoring inspector in the employ of the Royal Bafokeng

Administration and, whilst on patrol duty, discovered that the respondents had allocated stands to the seventh respondents. Some of the persons had already erected fences on the allocated stands. The respondents were in the process of allocating more stands.

- [9] Ms Kgaladi issued a “notice of compliance” to the respondents, wherein she informed them that they did not have the right and authority to allocate stands on the Royal Bafokeng Nation land. The respondents were further informed that their conduct was illegal, and that they were restrained from distributing or allocating stands. They were consequently ordered to remove the parameter fence and structures from the allocated stands. They were also informed about their right to make representations to the Royal Bafokeng Administration before the 7 September 2016. These notices did not deter the respondents from allocating stands in that when Ms Kgaladi again came for an inspection on 23 August 2016, there were more stands allocated and structures built, some of which were ready for occupation.

Submissions

- [10] Mr Mokate submits that the Royal Bafokeng Nation owns all land within its jurisdiction and that a standing policy and procedure was established for the purpose of regulating allocation of stands. This Policy is contained in a document known as the Royal Bafokeng Nation Master Plan (the Master Plan) whose vision is to establish a physical, social and economic plan through which the Royal Bafokeng Nation land will be used to the maximum. The Plan is published at various places in the villages within the Royal Bafokeng Nation area and was adopted after consultation with the various Traditional Councils. He further asserts that the approval and allocation of residential stands lies with the Royal Bafokeng Nation in accordance with the Master Plan. However, the allocation of residential stands was suspended from 2013 to date.
- [11] Mr Khunou submits that the land at Tsitsing Village does not belong to the Royal Bafokeng Nation and confirms that there is a case pending in that regard. He submits that the Master Plan is not a legitimate document adopted by the members of Tsitsing Village. According to him, the Royal Bafokeng Nation used the Master Plan as a tool for “exerting their authoritarian behavior” on the members of villages who claimed ownership of their land within its jurisdiction. He argues that the Rustenburg Local Municipality and the Bojanala District Municipality are the only competent entities empowered to implement a plan relating to the allocation of stands at the Tsitsing Village or Bierkraal 120 JQ.
- [12] He further submits that the communities and sub-communities within the larger Royal Bafokeng Nation had previously functioned well and co-operated with the Royal Bafokeng Administration in all planning and allocation of stands for residential purposes. He agrees

with Mr Mokate that there was a moratorium on land allocation, albeit for different reasons. He intimates that the moratorium was occasioned by the pending case 999/2008, and that it is a malicious action taken by Kgosi Molotlegi against those communities that opposed the aforesaid case. He further submits that because of the moratorium, plans for development at the Tsitsing Village and the erection of a shopping centre, were delayed and put on hold.

- [13] Mr Khunou further submits that he and the 2nd to the 6th respondents are members of the Tsitsing Traditional Council and consequently that the Traditional Council should have been joined as a party to these proceedings, together with the local municipality because the matter relates to land allocation.
- [14] It is further argued that the 7th Respondents were allocated land or stands by the Tsitsing Traditional Council and thus wish to occupy the land as their right to access adequate housing is entrenched in Section 26 (1) of the Constitution.

Issues

[15] The issues to be determined are:

- a) whether the respondents are members of a Traditional Council as defined in the relevant statutes;
- b) whether the respondents had the right to allocate land or stands to the 7th respondents.

Analysis

- [16] I have already alluded to the fact that the ownership of the land on which the Tsitsing Village is established, is an issue pending in this Court. It is therefore not necessary for this Court to make a finding in that regard.
- [17] Mr Khunou asserts that he acts on behalf of the traditional council of the Tsitsing Village, which is a traditional leadership structure of which the 2nd to 6th respondents are also members.
- [18] The Royal Bafokeng Nation does not recognize the respondents as members of a local tribal authority and Mr Mokate denies the

existence of the Tsitsing traditional council. He submits that there are only 3 Kgotlas in Tsitsing Village with their own Kgosana namely, Kgosana Motepe, Kgosana Rakhua and Kgosana Makgaka. Counsel for Royal Bafokeng Nation, Mr Wesley, argued that the Tsitsing traditional council is not a traditional community as defined in the Framework Act and Governance Act;

- [19] Section 1 of the Framework Act, defines a “traditional council” as “a council established in terms of Section 3 and includes a traditional sub-council established in terms of Section 4B”. Furthermore,

Section 3(1) of the Framework Act provides that:

“3. Establishment and recognition of traditional councils

- (1) Once the Premier has recognised a traditional community, that traditional community must establish a traditional council in line with principles set out in provincial legislation.
- (2)
 - (a) A traditional council consists of the number of members determined by the Premier by formula published in the Provincial Gazette, after consultation with the provincial house, in accordance with the guidelines issued by the Minister by notice in the Gazette.

[Para. (a) substituted by s. 4 of Act 23/2009]

- (b) At least a third of the members of a traditional, council must be women.
- (c) The members of a traditional council must comprise -
 - (i) traditional leaders and members of the traditional community selected by the senior traditional leader concerned who is an ex officio member and chairperson of the traditional council, for a term of five years aligned with the term of office of the National House of Traditional Leaders, in terms of that community's customs, taking

into account the need for overall compliance with paragraph (b); and

- (ii) other members of the traditional community who are democratically elected for a term of five years aligned with the term of office of the National House of Traditional Leaders and who must constitute 40% of the members of the traditional council.

[Para. (c) substituted by s. 4 of Act 23/2009]

- (3) The Premier concerned must, by notice in the Provincial Gazette and in accordance with the relevant provincial legislation, recognise a traditional council for that traditional community within a defined area of jurisdiction.”

[20] Section 1 of the Governance Act defines a traditional council as “the council, which is constituted in accordance with the laws and customs of a particular traditional community”

Furthermore, Section 6 of the Governance Act provides that:

“6. Constitution of a Traditional Council.-

- (1) A traditional community recognised in terms of section 3 shall have a traditional council constituted in accordance with this Act as read with the Framework Act.
- (2)
 - (a) The Premier must determine, in accordance with a prescribed formular, the number of members of a traditional council, taking into consideration the population of the traditional community;
 - (d) A Senior Traditional Leader shall be the chairperson of the traditional council concerned.

(3) The Premier must publish, by notice in the Gazette, the composition of any traditional council referred to in subsection (1) reflecting the names of the members and the area of jurisdiction of such traditional council.”

[21] The respondents argue that they were entitled to allocate stands to the 7th respondents, which right is afforded to them by virtue of their status as a local traditional council and that the allocation of

stands is done in accordance with customary law which empowers local communities to allocate the stands “in terms of their own rules and laws and would then notify the administration of the Bafokeng Nation”, because they control the funds of the Bafokeng Nation.

[22] It is important to note that the recognition of either a traditional community or traditional council must be published by notice in the Government Gazette. [See Section 3 (4) and Section 6(3) of the Governance Act and Section 3 (5) and Section 2 (2)(a)(b) of the Framework Act]. The respondents did not place any facts on record which suggest that they fall within the purview of the definition of traditional council or traditional community. Mr. Khunou is not a senior traditional leader. He does not assert that the purported Tsitsing traditional council was established in accordance with the abovementioned statutory provisions. I am of the view that the respondents are not constituted as a traditional council or community.

Do the respondents have the authority to allocate stands?

[23] The applicant submits that the application for allocation of stands is made to a kgosana, who after assessment of the application and making a recommendation in favour of the allocation, would then submit the application to the Royal Bafokeng Administration for consideration and possible allocation. The respondents admit that the allocation of stands was done in collaboration with the Royal Bafokeng Administration albeit they challenge the legitimacy of the Master Plan.

[24] The procedure for allocating residential stands is not regulated by any statutory provision. However, both parties are ad idem that, customary law principles are applicable in that regard. They both agree that the allocation of stands is done in collaboration with each other. Although there is a dispute of fact in relation to whether or not there is a moratorium on the allocation of stands, it is nonetheless evident that the respondents did not have the authority to independently allocate stands without the knowledge

and in collaboration with the Royal Bafokeng Administration. The fact that the respondents are not satisfied with the services of the Royal Bafokeng Nation and its administration, does not entitle the respondents to allocate stands on land which is still a subject contention pending in this court.

[25] It is important to note that, on the basis of the respondents' version, the Royal Bafokeng Nation is responsible for providing services and infra-structural development on the allocated stands, which therefore means that the Royal Bafokeng Administration must be involved in the allocation of stands until the resolution of their dispute regarding ownership of land at Tsitsing Village. I hold the view that the respondents do not have the authority to allocate the stands within the Tsitsing Village.

Should the seventh respondents be evicted?

[26] I have already alluded to the fact that the identity of the seventh respondents is not known. They did not file any answering affidavits and the service of the interim order was inadequate. Stands have already been allocated to the seventh respondents, some of whom have demarcated their allocated areas and others have erected structures which are ready for occupation. Their situation and plight cannot be ignored.

[27] It is trite law that the Courts are enjoined to consider the provisions of Section 26(3) of the Constitution of the Republic of South Africa (Constitution), before an eviction order can be granted. Section 26(3) provides that:

"26. ...

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant

circumstances. No legislation may permit arbitrary evictions."

[28] The Prevention of Illegal Eviction from Unlawful Occupation of Land Act No. 19 of 1998 (PIE) was enacted to give effect to section 26(3) of the Constitution. The purpose of the Act amongst others, is to "provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and ..." This Act applies in respect of all land throughout the Republic. (See Section 2 thereof).

[29] The seventh respondents are unlawful occupiers of the allocated land at Tsitsing Village. Section 1 of PIE, defines "unlawful

occupier" as "a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of security of Tenure Act, 1997, and excluding a person whose informal right to land, but for the provisions of this Act, would be protected by the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).

[30] Furthermore, Section 4(1) of the PIE provides that:

"Eviction of unlawful occupiers

4. (1) Notwithstanding anything to the contrary contained in any law or the common law, the provisions of this section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.”

[31] In *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005

- (1) SA 217 (CC) at para [23], the Court held the view that: “The Constitution and PIE require that, in addition to considering the lawfulness of the occupation the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other Constitutional values, so as to produce a just and equitable result”.

[32] The duty of the court in situations where an unlawful occupier is being evicted is adumbrated by the Constitutional Court in *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* (CCT108/16)

[2017] ZACC 18 (8 June 2017): I restate same extensively as follows:

“[47] It deserves to be emphasised that the duty that rests on the court under section 26(3) of the Constitution and section 4 of PIE goes beyond the consideration of the lawfulness of the occupation. It is a consideration of justice and equity in which the court is required and expected to take an active role. In order to perform its duty properly the court needs to have all the necessary information. The obligation to provide the relevant information is first and foremost on the parties to the proceedings. As officers of the court, attorneys and advocates must furnish the court with all relevant information that is in their possession in order for the court to properly interrogate the justice and equity of ordering an eviction. This may be difficult, as in the present matter, where the unlawful occupiers do not have legal representation at the eviction proceedings. In this regard, emphasis must be placed on the notice provisions of PIE, which require that notice of the eviction proceedings must be served on the unlawful occupiers and “must state that the unlawful occupier . . . has the right to apply for legal aid”.

[48] The court will grant an eviction order only where: (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable; and (b) the court is satisfied that the eviction is just and equitable having regard to the information in (a). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. I reiterate that the enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful.

[49] Where occupiers are not represented, the Supreme Court of Appeal in *Changing Tides* has provided some additional guidance:

“Where [unlawful occupiers] are not represented, courts may consider issuing a rule nisi and causing it to be served on the occupiers (and if it is not present, the local authority), together with a suitably worded notice explaining the right to temporary emergency accommodation, how they can access such accommodation, and inviting them to come to court to express their views on that issue at least.”

[50] To this I would add that the court should explain to the unlawful occupiers their right to apply for legal aid and where appropriate

direct them to approach a named legal aid clinic with a given address.

[51] In brief, where no information is available, or where only inadequate information is available, the court must decline to make an eviction order. The absence of information is an irrefutable confirmation of the fact that the court is not in a position to exercise this important jurisdiction.

How the High Court approached its duties

(Footnotes excluded).”

[33] Mr Khunou correctly in my view, raised the issue of the non-joinder of the Local Municipality in these proceedings. The Local

Municipality should have been joined as a party to the proceedings in order to give effect to Section 4 (7) of PIE which provides that:

“(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”

See also: City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012

(2) SA 104 (CC) at para [96].

[34] I have already alluded in paragraph [6] above that the service of rule nisi on the seventh respondents was inadequate, An order that seeks to confirm the eviction order against them, without affording them an opportunity to state their case, will be unjust and unlawful in the circumstances.

[35] I accordingly find that the respondents were not entitled to allocate stands to the seventh respondents, and further that in as far as the eviction of the seventh respondents is concerned, they are unlawful occupiers who should be granted an opportunity to state their case so as to enable the Court to consider relevant circumstances and determine whether eviction would be just and equitable.

Costs

[36] The respondents were afforded an opportunity by the Royal Bafokeng Administration officers to make representations regarding their purported right to allocate the residential stands. They did not exercise that right but instead defiantly continued with the allocation of stands. These proceedings could have been avoided. I am of the view that costs should follow the result.

Order

[37] I accordingly make the following order:

1. The rule nisi issued by this Court on 26 August 2016 is discharged.
2. Pending the determination of the right to title or ownership of the Farm Bierkraal 120 JQ, the respondents are restrained from allocating any residential sites on the farm Bierkraal 120 JQ, without consulting the relevant structures of the applicant, the Royal Bafokeng Nation, and reaching agreement with the applicant on the allocation of such sites.
3. In the event that the parties cannot reach an agreement on the allocation of residential sites, any of the parties, or any affected

person may approach the court, for any relevant relief.

4. Should the applicant still wish to proceed with the eviction of the seventh respondents, it should do so in accordance with the relevant laws or statutory laws in that regard.
5. The first to the 6th respondents are ordered to pay costs jointly and severally, the one paying the other to be absolved. The costs shall include costs of two counsel.

M M LEEUW

JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

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