

SOUTH AFRICA / JUDGMENT

Sekhukhune and Another v Piet (4571/2017) [2017] ZALMPPHC 44 (14 December 2017)

[2017] ZALMPPHC 44

COURT

Limpopo High Court, Polokwane

BEFORE

Sikhwari

CASE / FILE NUMBER

4571/2017

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REPUBLIC
OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO
DIVISION, POLOKWANE)
CASE
NO: 4571 / 2017

Reportable: Yes
Of
interest to other judges: Yes
Revised.
14/12/2017
In

the matter between: KGOSHI
KENNETH KGAGUDI
SEKHUKHUNE 1ST
APPLICANT
SEKHUKHUNE
TRIBAL
COUNCIL 2ND
APPLICANT
and
SENONG
MMATANYANE
PIET RESPONDENT

JUDGMENT

SIKHWARI AJ

[1] The applicants obtained an interim order and rule nisi in this honourable court on 23 June 2017 in the following terms:

1. Interdicting and prohibiting the respondent, or any other person on his behalf, from holding any meeting, gathering or any other form of communal get-together, within the area of jurisdiction of the 2nd applicant, of which the 1st applicant is the reigning Kgoshi, for purposes of promoting, instigating, causing or facilitating disharmony within the community

falling under the 1st and 2nd applicants on 25 June 2017, or any other day;

2. Interdicting the respondent, or any other person on his behalf, from influencing the members of the community falling under the 1st and 2nd applicants against each other, or against the 1st applicant in any manner whatsoever, including by alleging that members are bewitched and have fallen under evil spirits;
3. Interdicting and prohibiting the respondent, or any person on his behalf, from in any manner interfering in, or instructing any person to interfere in the executive structures of the 2nd applicant;
4. The Sheriff is ordered to serve this application on the respondent personally;
5. Directing the respondent, or any person on his behalf, to pay costs of this application, jointly and severally;
6. The respondent is called upon to show cause on 20 July 2017 why this order should not be made final.

[2] The matter appeared before me on the return date on 15 November 2017. I discharged the above-stated rule nisi and also dismissed the interdict with costs against the applicants on party and party scale, jointly and severally with the one paying the other to be absolved. The applicants then filed application for leave to appeal.

[3] Application for leave to appeal is regulated in terms of section 17 of the Superior Courts Act 10 of 2013, which states that:

“17.(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that–

(a) (i) the appeal would have a reasonable prospect of
success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

- (b) the decision sought on appeal does not fall within the ambit of section 156(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”
- [4] The present application is based on Section 17(1)(a)(i) of the Superior Courts Act of 2013 which states that leave to appeal would be granted if the appeal would have a reasonable prospect of success.
- [5] At the hearing of the main matter the respondent abandoned his points in limine and preferred to argue the merits of the application. One of the abandoned point in limine was lack of locus standi on the part of the applicants.
- [6] On merits, the applicants’ application was one of a final interdict. It is trite law that applicants have to satisfy three

requirements of a final interdict; being: firstly, the existence of a clear right; secondly, the infringement of the said right and / or reasonable apprehension of irreparable harm to the said right; thirdly, the absence of adequate remedy to protect the said right (See Prest CB: “The Law & Practice of Interdicts”, Juta, 1993, pages 50-51).

- [7] It is trite law that whether applicants have a clear right or not is a matter of substantive law; and whether that right is clearly established is a matter of evidence. The phrase ‘clear right’ refers to ‘a right clearly established’. It refers to the degree of proof required to establish the right and should strictly not be used to qualify the right at all (See: *Beukes v Crous* 1975 (4) SA 215 (NC) at page 219).
- [8] The applicants’ application was based on the founding affidavit of the first applicant who stated that he is approaching the court in his capacity as the Acting Kgoshi of Marota Mohlaletsi traditional authority and Acting Paramount Kgoshi of Sekhukhuneland. In support thereof, the first applicant attached a certificate of appointment dated 26 October 2000. The first applicant stated that his clear right is emanating from this traditional leadership positions which he holds.
- [9] Appointment of acting Kgoshi is regulated in terms of Section 15(1) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 which provides that:
“15 Recognition of acting traditional leaders
 - (1) A royal family may, in accordance with the customary law of the traditional community concerned, identify a suitable person who must be a member of the royal family to act as a king, queen, senior traditional leader, headman or headwoman, as the case may be, where—
 - (a) a successor to the position of a king, queen, senior traditional leader, headman or headwoman has not been identified by the royal family concerned in terms of this Act;

- (b) the identification of a successor to the position of a king, queen, senior traditional leader, headman or headwoman is being considered and resolved in terms of this Act; or
- (c) a king, queen, senior traditional leader, headman or headwoman, as the case may be, would be absent from his or her area of jurisdiction under circumstances other than those provided for in section 16(1) and for a period of more than six months for–
 - (i) the treatment of illness;
 - (ii) study purposes; or
 - (iii) any other lawful purpose.
- (2) The premier must, upon appointment of an acting leader in terms of subsection (1)–
 - (a) issue a certificate of appointment; and
 - (b) inform the provincial house of traditional leaders and the relevant local house of traditional leaders.
- (3) The Premier must review the appointment of the acting traditional leader every 12 months.
- (4) The Premier must upon request by the royal family remove any person appointed in an acting capacity.”

[10] Although the first applicant was appointed an Acting Kgoshi in terms of section 2(8) of the now repealed Black Administration Act 38 of 1927, his appointment is regulated in terms of Limpopo

Traditional Leadership and Institutions Act 6 of 2005 as from 1 April 2006 in terms of section 33(3) of the latter Act which reads that “any person who, immediately before the commencement of this Act, had been appointed and was still recognised as a regent, or had been appointed in an acting capacity or as a deputy, is deemed to have been recognized or appointed as such in terms of the relevant provision of this Act.”

[11] Section 28(2) of the Traditional Leadership and Governance Framework Act 41 of 2003 which came into operation on 24 September 2004 also provides that “a person who, immediately before the commencement of this Act, had been appointed and was still recognised as a regent, or had been appointed in an acting capacity or as a deputy, is deemed to have been recognized or appointed as such in terms of section 13, 14 or 15, as the case may be.”

[12] In this case, there was no affidavit of the second applicant. There was no resolution or any document showing that the second applicant has authorised the proceedings on its behalf or has mandated the first applicant to act on its behalf or to sign affidavits on its behalf. Effectively, there was no evidence of the second applicant before the court. The second applicant was effectively not before the court.

[13] In the case of *Mulaudzi v Head Office: Vuwani Magistrate Office and Others* (291 / 2015) [2017] ZALMPHHC 3 (21 February 2017) at paragraph 22, Phatudi J stated that “a regent is recognised to hold office only for a period of 12 months (see section 14(1)(c)). The applicant failed to produce a certificate

of recognition issued by the Premier of Limpopo either as at 2015 or 2016”.

[14] The position of a regent is similar to that of an Acting Kgoshi or acting Paramount Kgoshi when it comes to review of the said appointment after every 12 months. Section 14(1)(c) of Act 6 of 2005 is which regulates appointment of regents states that “the Premier must review the recognition of a regent every 12 months.”

[15] Section 14(2)(b) of the Traditional Leadership and Governance Framework Act 41 of 2003 states that:

“14(2) An acting appointment in terms of subsection (1) must be made in accordance with provincial legislation, which legislation must at least provide for–

(a) ...

(b) a review of the acting appointment on a regular basis;”

[16] The applicants in this case have missed the point that the fact that the respondent has abandoned a point in limine for lack of locus standi does not absolve the applicants from the duty to prove the existence of a clear right as a first requirement for a final relief of an interdict. The court did not decide the case on the basis of applicants’ alleged lack of locus standi as stated in the grounds for the application for leave to appeal.

[17] Applicants in this application for leave to appeal do not deny that the certificate of recognition of the first applicant was never reviewed by the Premier since the coming into operation of Act 6 of 2005 on 1 April 2006. The first review should have taken place in April 2007; and thereafter every subsequent year.

[18] In my view, the first applicant should have caused the premier to review his appointment as envisaged in Act 6 of 2005.

Therefore, all the prayers of the applicants’ notice of motion cannot be granted. The first applicant has no clear right relating to the protection or otherwise of his purported subjects. For the purposes of a clear right, first applicant has no subjects; and cannot approach court on alleged clear right which is legally non-existent. The court cannot protect an illegitimate authority or right.

[19] Applicants are shifting the blame to the Premier for failure to conduct the review of the appointment of first applicant after every 12 months. This is a point which is raised for the first time in the application for leave to appeal. It was not part of the applicants’ case. On this ground alone, it will fall because it cannot stand as a point of appeal.

- [20] Nevertheless, I disagree with the aforesaid submission of the applicants for shifting the blame to the Premier. Applicants have a duty to initiate the process. If the Premier is dragging his feet, applicants may even approach court for relief to enforce compliance with the enabling legislation. If the appointment is not reviewed after the expiry of the 12 months' period, then the appointment will automatically lapse by operation of the law.
- [21] The court has discharged the rule nisi and dismissed the interdict on the basis that the first applicant has no clear right worth of protection by way of a final interdict. The duty to prove the existence of a clear right, and all other requirements for interdict, does not depend on the concession made by the other party or the failure of the other party to plead adequately. It is a requirement of law which the court must be satisfied that the said requirement has been fulfilled before granting an order for final interdict.
- [22] In his answering affidavit(s), the respondent admitted the locus standi of the applicants. However, such a concession does not extend to constitute a proof of the existence of a clear right on a balance of probabilities. As far as the second applicant is concerned, it has put no version before the court and has authorised no one to litigate on its behalf.
- [23] The test for establishing locus standi in iudicio is lower when it is compared with the applicable test for establishing a clear right for the purposes of a final interdict. Locus standi could be established with the minimum form of evidence. In this case, the court was not concerned with locus standi but the court was concerned with the existence of a clear right.
- [24] In the case of *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at page 352A, Watermeyer J stated that "each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the

conclusion

that it is the applicant which is litigating and not some unauthorized person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the Court, then I consider that a minimum of evidence will be required from applicant (cf. *Parson v. Barkly Est Municipality*, supra; *Thelma Court Flats (Pty) Ltd v. McSwigin*, 1954 (3) SA 457 (C))."

- [25] On the other hand, the test for establishing a clear right was stated in the case of *Lipschitz v Watrus* NO 1980 (1) SA 662 (TPD) at page 673D where Myburgh J stated that "a mandatory order such as that sought in prayer (2) is a form of interdict and can only be granted if all the requisites for an

interdict have been established. One of this is a clear right. Which means that the alleged facts, if accepted, must establish "a clear legal right" vesting in the applicant."

- [26] This places a duty and or burden and or onus on the part of the applicants to establish a clear right to justify the granting of the relief sought in their notice of motion. This onus is not dependant on the concessions, if any, made by the respondent. An application for a final interdict which does not establish a clear right will still be dismissed even if it is unopposed.
- [27] During argument of the application for leave to appeal, applicants' counsel referred the court to the case of *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes & Claims and Others* 2015 (3) BCLR 268 (CC) in an attempt to establish the clear right of the applicants. First applicant herein was the fifth respondent in the said case. Counsel of the applicants herein submitted that the Constitutional Court has ruled in the said Constitutional Court case that the first applicant is the Kgoshi of the Bapedi and as such there is no more need for the certificate of appointment or for subsequent review of his acting capacity by the Premier in accordance with Act 6 of 2005.
- [28] I had an opportunity of reading the said judgment and I disagree with the above submissions of applicants' counsel. In my view, the said case had to do with the dispute relating to the hose in which the kingship of the Bapedi should rest between the house of descendants of Sekhukhune I and the house of descendants of Mampuru II. The two houses have originated from the two rival sons of Kgoshi Sekwati I. the first applicant in this application for leave to appeal is the descendant of Sekhukhune I.
- [29] In that case of *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes & Claims and Others*, supra, it was stated in paragraph 31 of the minority judgment by Jafta J (with Nkabinde J concurring) that:
- "the Commission determined that kingship of Bapedi could then also be acquired by violent means. It defined this as the might and bloodshed rule. It held that Sekhukhune I had become king in terms of this rule. It was for this reason that the Commission concluded that the kingship of Bapedi "resorts under the lineage of Sekhukhune". This decision led to the present litigation"*
- [30] In the aforesaid case of *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others*, supra, in paragraph 74, Khampepe J (with Moseneke DCJ, Cameron J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring) stated in the majority judgment that:
- "... The Commission thus found that Kgosi Mampuru II "did not ascend the throne" and, for that reason, conclude that Kgosi Mampuru II could not have retaken the kingship, which remained with Kgosi Sekhukhune I' lineage."*
- [31] In conclusion, the Constitutional Court dismissed the appeal and upheld the decision of the Commission. Khampepe J stated in paragraph 109 of the aforesaid judgment that "the above considered, I find no reason to set aside the Commission's decision. The decision was neither irrational, nor did it ignore relevant facts. The appeal must be dismissed." There is no where it was stated by the Constitutional Court in the aforesaid judgment or the Commission or the Supreme Court of Appeal that the first applicant as a person is the Kgoshi

of the area.

- [32] The second applicant cannot rely on the affidavit of the first applicant without a resolution to do so. Even if the second applicant may rely on the said affidavit, the facts stated thereon are not sufficient to sustain the relief sought in the notice of motion on behalf of the second applicant. The respondent has never threatened nor violated any right of the second applicant.
- [33] In the case of *Mulaudzi v Head Office: Vuwani Magistrate Office and Others* (291 / 2015) [2017] ZALMPHHC 3 (21 February 2017), *supra*, at paragraph 22, Phatudi J stated further that “the applicant contended in his replying affidavit that he acts in his capacity as a leader of the traditional leadership / royal house of the Royal Family which is ruling at Muungamunwe village. There is no power of authority or a resolution by either the “traditional leadership” or the “Royal Family” authorising him to either depose to or institute the action before this court. I thus find that the applicant lacks the required *locus standi in iudicio*”. The same principle as stated by Phatudi J in *Mulaudzi* matter is applicable in so far as the requirement for a clear right is concerned on the part of the second applicant.
- [34] The court has further found that there are disputes of fact which are not capable of resolution on papers. The case of both applicants cannot survive the disputes of fact arising from the papers. In the case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at pages 1162 and 1168, it was held that the court will dismiss an application if the applicant should have realized when launching his application that a serious dispute of fact, incapable of resolution on the papers, was bound to develop.
- [35] The respondent’s version was that he is not a prophet but a traditional healer; the intended ceremony was organised by respondent’s graduates as part of their graduation ceremony where he accompanies them to their respective homes; he is not the organizer of the ceremony but was invited by people who needed his services; no confirmatory affidavit of Ntoampe Philemon Sekhukhune to support the hearsay allegations attributed to him; applicants’ case is based on allegations of witchcraft which, in my view, borders on criminal conduct and possible contravention of the Suppression of Witchcraft Act 3 of 1957; first applicant has never attended any of the respondent’s ceremonies and is therefore acting on hearsay; the interdict will affect the rights of other trainee graduates who could not resume trade prior to the graduation in the form of the ceremony, etc. The above facts constitute genuine disputes of fact between the parties.
- [36] In my view, the applicants have failed to prove the existence of a clear right. The attached certificate of appointment as an Acting Kgoshi or Acting Paramount Kgoshi issued in 2000; and not reviewed since April 2007 does not bestow “a legal right vesting in the applicant”. The disputes of fact do not justify the granting of the interdict or confirmation of the rule nisi. Without evidence proving existence of a clear right, the remaining requirements become moot. The application has to fail (*See Setlogelo v Setlogelo* 1914 AD 221 at page 227).

- [37] In the absence of a clear right, there will be no talk of an injury committed against the applicants or reasonable apprehension of harm. Be that as it may, it is trite law that the word ‘injury’ in the law of interdict must be understood in the wider sense to include any prejudice suffered by the applicants as a result of the infringement of their rights by the respondents. The injury does not have to be capable of pecuniary evaluation. The applicants were required to show that they are reasonable to apprehend that injury will result. The test for apprehension is an objective one (See Cilliers AC, Loots C & Nel HC: “Herbstein & Van Winsen on the Civil Practice of the High Courts and the Supreme Court of Appeal”, Juta Co, Vol. 2, 5th Ed, 2009, at page 1464).
- [38] In my view, the applicants’ application must fail. The applicants have no reasonable prospects of success on appeal. There are no bases why costs should not follow the event.
- [39] I accordingly make the following order:
1. The application for leave to appeal is dismissed with costs.

MS SIKHWARI AJ

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, LIMPOPO

DIVISION, POLOKWANE

APPEARANCES

For Applicant : Adv M Bresler

Instructed by : Espag Magwai Attorneys

For Respondent : Adv N Phatudi

Instructed by : Mankoe Attorneys

Date of Hearing : 12 December 2017

Date of Judgment : 14 December 2017

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Prepared on 13 October 2026 · Esheria