

SOUTH AFRICA / JUDGMENT

Sepadi and Another v Premier of Limpopo Provincial Government and Others (1863, 1864/2014) [2015] ZAGPPHC 1097 (13 October 2015)

[2015] ZAGPPHC 1097

COURT

North Gauteng High Court, Pretoria

BEFORE

M G Phatudi

CASE / FILE NUMBER

1863 & 1864/2014

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REPUBLIC
OF SOUTH AFRICA
OFFICE
OF THE CHIEF JUSTICE
IN
THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
DIVISION, PRETORIA)
Case
No. 1863 & 1864/2014

Date: 13/10/2015
Reportable
Of
interest to other judges
In

the matter between:

CASE
NO. 1863 & 1864 /2014
SEPADI
LESEILA E
JOSEPH
1st Applicant
SERAKI
NKAHLOLENG FRANS
2nd
Applicant
and
THE
PREMIER OF LIMPOPO PROVINCIAL
GOVERNMENT
First Respondent
MEC
OF L IMPOPO PROVINCIAL
DEPARTMENT
OF CO-OPERATIVE
GOVERNANCE,
HUMAN SETTLEMENTS &
TRADITIONAL
AFFAIRS Second
Respondent
MAROTA"A-BOGWASHA
TRADITIONAL
COUNCIL
AUTHORITY Third
Respondent

Headnotes:

Traditional
law: whether applicants qualify as Headmen
within the purview of Section 12(
l)(b)(ii) of Limpopo
Act 6 of 2005 and therefore entitled to
remuneration m public office bearers in terms of Section 5(3) of Act
20 of 1998, as amended.

Evidence:

a certificate of recognition as a Traditional Leader a
prerequisite for entitlement to payment of stipend and associated
benefits
of public office bearers recognised
as Traditional Leaders - in casu, held,
that, not every Traditional Leader holding a traditional leadership
position qualifies, in the absence of a certificate
of recognition,
as a Traditional Leader. Held further that, no such evidence of
recognition adduced by applicants. In consequence,
application
dismissed with costs.

JUDGMENT

PHATUDI AJ:

[1]

INTRODUCTION:

1.1 This matter conflates two applications which were brought under case numbers 1863 and 1864 I 2014, respectively. The applications, in essence, involve the same subject-matter in form and substance, and so is the relief sought by the applicants against the respondents. The applications are opposed by the First and Second Respondents only.

1.2 At the inception of the proceedings it was agreed and recorded by both Counsel that the two applications be heard in tandem, and that the outcome of the matter under Case No. 1863/2014, shall invariably lead to the disposal of and the outcome in the other, as the case may be. The applications shall, therefore, be referred to as "the application" throughout herein.

It was also agreed and recorded that the points in limine as raised by attorney for the respondents, be first heard and disposed of and, if successful, the matter would then rest at that point if, of course, the outcome thereof has the effect of finally disposing the issues in dispute. Reference to "the applicant" shall also include "the applicants" herein.

[2] In this application, the Applicants seek relief as follows[1]:

2.1 "an Order declaring the termination of my salary and related benefits by the second respondent as a result of implementing Circular No. 154 of 2010, to be both unlawful and a nullity;

2.2 Directing the Second Respondent to re-instate my salary and related benefits within 30(thirty) days of granting this order.

2.3 Directing the Second Respondent to pay my salary arrears and benefits with retrospective effect from October 2013 up to the date of granting this Order, and be paid strictly within 30(thirty) days of awarding same order into the trust account of my attorneys of record("Mashao Attorneys") .

2.4 That the Second Respondent be ordered to unfreeze and pay the applicants' salary and related benefits within 30(thirty) days of granting the order;

2.5 Costs be paid by the Second Respondent on attorney and own client scale. However, in the event of opposition by all the First and Third Respondent, however the costs be paid by all the respondents in so far as they may elect to oppose this application;

2.6 Granting the applicant further and/or alternative relief".

- [3] Resisting the relief claimed, attorney for the First and Second respondents(hereinafter called "the respondents") raised some special preliminary points of law ranging from non-joinder and/or misjoinder of certain crucial Organs of State which should and/or should not have been cited as co- respondents, lack of locus standi, non-compliance with certain provisions of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002[2], the Promotion of Administrative Justice Act, 2000[3], otherwise known as "PAJA", to the Prescription Act, 1969[4] .
- [4] I shall, for the sake of brevity and avoidance of prolixity, deal only with the relevant points raised in limine, and attempt simultaneously to link each one of them to the submissions advanced on behalf of the Applicants and the Respondents, respectively.
- [5] First, Attorney for the Respondent contended that the Applicant failed to establish by way of cogent evidence, that he is a recognised Headman as alleged in his Founding Affidavit[5] ("FA"). Applicant alleged that he was "properly recognised" by the Honourable Premier of Limpopo as a Headman of the village known as Ga-Motodi under the traditional authority of the Third Respondent. According to him the recognition was effected on 01 May 2011 and as a result, he become a public office bearer clothed in that capacity.

It was this recognition of his status as a Headman, and, therefore, an office bearer, that entitled him to earn remuneration and associated benefits payable by the Second Respondent.

- [6] It is these two separate but distinct notions that perhaps require a closer scrutiny in this context.
- [7] Regard being had to the definitions of a "Headman" within the parameters of existing legal framework, one will then begin to appreciate whether or not the applicant has a legal standing to have launched the present proceedings.
- [8] Section 1 of the Traditional Leadership and Governance Framework Act[6], read with the Limpopo Traditional Leadership Institutions Act[7]("Limpopo Act") in particular, define "Headman or headwoman", as:

"a traditional leader who -

(a) -----

--

(b) Is recognised as such in terms of the Act.

- [9] I shall confine myself to Chapter 4 of the Limpopo Act as it is the legislative enactment from which the Applicants claim their alleged recognition.

Section 12(1) (b) provides:-

"The Premier must subject to subsection(2)-

- (i) by notice in the Gazette recognise the person so identified by the royal family in accordance with paragraph(a) as senior traditional

leader, headman or headwoman, as the case may be".

- (ii) "issue a certificate of recognition to the person so recognised";

- (iii)

[10] Upon proper construction of the language contained in the relevant subsection above, it follows that for one to assert his or her status as a Headman or Headwoman, the Premier would be enjoined to have proclaimed in a provincial Gazette in which a particular incumbent is recognised after having been identified by the royal family concerned. In the same breath, the person so recognised is required to be issued with a certificate of recognition, depending on his or her status. In so doing, the Premier performs an administrative action or function which is peremptory.

[11] In the present case however the applicants allege to have been "properly recognised" by the Premier on 01 May 2011 as Headmen without attaching even a shred of documentary evidence to their application in the form of a certificate of recognition to corroborate their allegations. It is inconceivable to ever imagine whether in the absence of such crucial evidence is there any other avenue to escape attack from the respondents.

[12] In order to consolidate their claim, the Applicants contended that by virtue of their alleged recognition, they were, therefore, entitled to receive their monthly stipend and related benefits as public office bearers.

[13] This contention brings me to yet another intriguing question, namely, whether in the absence of a certificate of recognition referred to in Section 12(1)(b)(ii) of the Limpopo Act, is it competent for Applicants to assert their right to be qualified as public office-bearers within the meaning of such other legal instruments as the Remuneration of Public Office Bearers Act, 1998[8], as amended ("the RePOB Act") .

In terms of Section 1 (viii) of the "RePOB" Act, the term "office bearer" means o "Deputy President, a Minister, a Deputy Minister-----a Premier, a Member of the Executive Council (MEC) ----a traditional leader-----." Meanwhile, Section 1 (xii) of the same Act defines a "traditional leader" as "any person identified in terms of section 5(4) ".

Section 5(4) of the said Act provides:

"A traditional leader is a person identified by the Minister after consultation with the Premier concerned by notice in the Gazette for the purpose of this Act".

[14] Casting the net even wider to appreciate the notion, Section 1 of the Limpopo Act defines a "traditional leader" as a "any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of this Act". (my own underlining) .

[15] In consequence, not every person who is a "traditional leader" and who holds a "traditional leadership

position" ipso facto qualifies to be issued with a certificate of recognition referred to in Section 12(1)(b)(ii) of the Limpopo Act.

For an incumbent to qualify either as a Headman, Headwoman or some form of other traditional leadership position, a certificate of recognition is in my view, an indispensable prerequisite not only to be recognised as such, but also to be able to assert any entitlement to the benefits associated with the office of a public office bearer within the broader purview of section 5(3) of the "Repob" Act 1998.

From the reading of the broader definitions found in the enactments referred to, it seems to me plain that, the applicants in this

instance, had to establish their standing first before they could assert the right to remuneration benefits referred to in terms of section 5(3) of the Repob Act.

[16] The cardinal issue that calls for determination in this instance, is therefore whether any tangible evidence to

corroborate the applicants' status either as Headmen, public office bearers, invariably entitling them to the relief sought, was established.

[17] The legal principles governing the requirements for recognition of a "traditional leader" in its wider sense, were succinctly dealt with by this Court in *Gilbert Maleboho and Others v The Premier of Limpopo Province and Others*[9] .

Makgoba J, (as he then was) in Paragraph 31 made the following remarks:

"The institution of Traditional Leadership in Limpopo Province is governed by the provisions of the Traditional Leadership and Governance Framework Act No. 41 of 2003 as amended by Act No. 23 of 2009 read with the Limpopo Traditional Leadership Institutions Act No. 6 of 2005 as amended by Act No. 4 of 2011 ("the Limpopo Traditional Leadership Act") .

In adding flesh to the skeleton formulating the enunciated principle, the learned Judge proceeded in paragraph 32 to cite verbatim the provisions of Section 12(1) ; 12(2) and 12(3) of the said Act, and held at paragraph 33 that:-

"It needs to be pointed out that as a matter of law the Premier does not have a discretionary power in regard to recognition of a kgoshi and that once the relevant jurisdictional conditions are present, he is in fact compelled by law to formally recognise one as kgoshi and to formally issue him with a certificate of recognition". (own underlining)

[18] Applying the foregoing dictum to the facts at issue in this matter, the question is whether the Applicants satisfied these imperatives. I am not persuaded that they did. In the premises, I am satisfied that in the absence of the requisite certificate of recognition referred to, the Applicants cannot be heard to argue that they are legible to continue to receive remuneration as public "office bearers" as they did under the "Repob" Act, 1998.

To do so would be a clear violation not only of the provisions of the Public Finance Management Act[10] ("PMFA") ---, but also offend against the spirit of Section 5(3) of the "Repob" Act, 1998.

The relevant subsection of section 5 of the said Act provides:- Section 5 (3) of the Act:

"The amount payable in respect of salaries and allowances to traditional leaders, members of provincial Houses of Traditional leaders and members of the Council of Traditional Leaders shall be paid from monies appropriated for that purpose by Parliament in respect of the Council of Traditional Leaders and Provincial legislative in respect of traditional leaders and members of provincial Houses of Traditional Leaders, as the case may be".(underlining for own emphasis) .

[19] Based on these considerations and bearing in mind the status the Applicants claim, it would be a grave injustice going to the root of an act of maladministration, to hold otherwise that applicants are entitled by virtue of their alleged status as "traditional

leaders" or "public office bearers" to continue to benefit from the "monies appropriated" for that purpose by the Limpopo Provincial legislature within which they are ordinarily resident and/or domiciled.

[20] That having been said, this brings me to the second leg of the point raised in limine , namely, that of mis-joinder and/or non-joinder of certain Organs of state, in casu, the Limpopo Provincial Legislature.

[21] I consider it unnecessary to arrest myself in detail on this submission, save to mention that once it has been found that the

Applicants ' status as Headmen was not established, it follows logically, therefore, that they ore disqualified from the definition

of "office bearer/s" or "traditional leaders" within the meaning of the "Repob" Act, in general, and section 5(3) of the said Act, specifically to qualify for payment of stipends.

[22] Employing the ordinary canons of construction, it is not hard to conceive that the provisions of Section 5(3) of the Act, exclude the Applicants from the benefits set out therein, which are, in fact "monies appropriated" for that

purpose by the Limpopo Provincial Legislature. To that extent, it is axiomatic that the First and Second Respondents were, as their Attorney correctly submitted, mis-joined as co-respondents in these proceedings. This proposition flows naturally, from the plain language used in Section 5(3) of the relevant Act.

[23] It was not, in my view, the intention of the law giver to have charged either the Premier's office or even that of the Second

Respondent for that matter, with the responsibility of having to remunerate such "public office bearers" and "traditional

leaders" as the Applicants. To do so, the respondents would have arrogated to themselves administrative functions normally performed by public servants as employees of the State.

[24] In view of these factors, I find that the respondents should not have been drawn into dust of conflict in the circumstances. Accordingly, the objection in this regard succeeds and, ought therefore, be upheld. The two points in limine as sustained are crucial, and go to the aorta of the applicants' claim, so to speak.

[25] I have already intimated elsewhere herein that I shall for avoidance of prolixity not delve much in other subsidiary points in limine referred to in paragraph 4 of this judgment.

Although I have had occasion to consider, evaluate and applied my mind to the submissions made by counsel during argument, I had thought to my mind. that such issues were not only irrelevant to the real dispute between the parties, but would serve no useful purpose in having to deal with them extensively in determining the real dispute. To do so would be a cumbersome and otherwise a worthless exercise, let alone to consider even the merits, which at any rate, I was not asked to entertain, except where the Preliminary points of law were found to be a damp squib.

[26] Against this background, I opine therefore that once it is found that the Applicants' locus standi in these proceedings was absent, then all issues in the periphery naturally, fall away. In the circumstances the relief sought ought to fail. In consequence I make the following order;

COURT ORDER:

[1] The application is dismissed with costs.

M G PHATUDI

ACTING JUDGE OF THE HIGH

COURT, GAUTENG DIVISION, PRETORIA

HEARD ON:

06 August 2015

DELIVER ED ON:

13 October 2015

APPEARANCES:

1. For Applicants:

Adv. Tibeila

Instructed by:

Mashao Attorneys

Polokwane

2. For First and Second

Respondents:

Mr S. Mokone

Simon Mokane Attorneys

3. For Third Respondent:

No appearance

[1] Prayers 1to 6 of the Notice of Motion, Par PS

[2] Act 40 of 2002

[3] Act 03 of 2000

[4] Act 68 of 1969, as amended

[5] Para: 2.1 at P9 and Pa ra: 8.1, P16 "FA",

[6] Act 41of 2003, as a mended

[7] Act 6 of 2005, as amended

[8] Act 20 of 1998, as a mended, into Act 21 of 2000

[9] (Case No: 57191/2011) delivered on 15.04.2014(marked "reportable")

[10] Section 1of Act 011999("PMFA")

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