

SOUTH AFRICA / JUDGMENT

Thato Kholofelo Matsaung N.O and Another v Premier of Limpopo Province and Others (7879/2019) [2023] ZALMPPHC 70 (11 August 2023) [2023] ZALMPPHC 70

COURT

Limpopo High Court, Polokwane

BEFORE

M V Semenya

CASE / FILE NUMBER

7879/2019

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IN THE HIGH COURT OF

SOUTH AFRICA;

LIMPOPO DIVISION;

POLOKWANE

CASE NO: 7879/2019

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

DATE:

11 AUGUST 2023

AJP

SEMENYA M.V

In

the matter between:

THATO
KHOLOFELO MATSAUNG N. O
FIRST
APPLICANT
MAMAHULE
TRADITIONAL AUTHORITY
SECOND
APPLICANT
And
PREMIER
OF LIMPOPO PROVINCE
FIRST
RESPONDENT
LIMPOPO
PROVINCIAL COMMITTEE OF THE
SECOND
RESPONDENT
COMMISSION
ON TRADITIONAL LEADERSHIP
COMMISSION
ON TRADITIONAL LEADERSHIP
DISPUTE
AND CLAIMS
LIMPOPO
PROVINCE MEC FOR CORPORATIVE
THIRD
RESPONDENT
GOVERNANCE
AND HUMAN SETTLEMENT
MINISTER
OF CORPORATIVE GOVERNANCE
FOURTH
RESPONDENT
AND
TRADITIONAL AFFAIRS

JUDGMENT

Heard on 25 MAY 2023

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.

The date for the hand-down is deemed to be 11 August 2023.

SEMENYA AJP:

[1] In 2019, Lesiba Ezekiel Matsaung and the second applicant launched a review application, under the same case number, before Kganyago J seeking an order in terms of which the second respondent's recommendation to the Premier of the Limpopo Province (first respondent) to decline the applicant's claim for the restoration and recognition of the Bakone- Ba- Mamahule Ga-Matsaung's traditional status as chiefs and/or traditional leaders is judicially reviewed and set aside. The applicants further sought the judicial review and the setting aside of the Premier's decision, communicated in a letter dated the 17 March 2017, in which he informed the applicants that he has acted upon the report of the second respondent and declined to restore the status sought by the applicants. The setting aside of the Premier's refusal to give reasons for his decision was also part of the order sought by the applicants.

[2] In the court order dated the 19 November 2020, Kganyago J granted the following

orders:

"1. The Commission's report in making recommendations to decline the first applicant's claim for the restoration and recognition of the Bakone-Ba-Mamahule Ga-Matsaung traditional status as chiefs and/or senior traditional leaders of Mamahule Traditional Community is reviewed and set aside;

2. The Premier's decision communicated in a letter dated 19 March 2017 declining the first applicant's claim for the restoration and recognition of Bakone-Ba-Mamahule Ga-Matsaung's traditional

status as chiefs and/or senior traditional leaders of Mamahule Traditional Community is reviewed and set aside

3. The Premier's decision communicated in a letter dated 30 April 2019 refusing to give reasons for declining the first applicant's claim for the restoration and recognition of the Bakone-Ba-Mamahule Ga-Matsaung's traditional status as chiefs and/or senior traditional leaders of the Mamahule Traditional Community is reviewed and set aside.

4. The Premier's decisions in paragraph 2 and 3 above are substituted with an order remitting the Premier's decision for fresh determination within 3 months of this order."

[3] The first applicant in the application before Kganyago J has passed away and has been substituted by the first applicant in this application in terms of Rule 15(3) of the Uniform Rules of Court.

[4] As at the date of the hearing of the present application the Premier had not yet complied with the court order. Faced with the Premier's adverse conduct, the applicants approached this court with the present application under the same case number.

The following declaratory order is sought in this application:

“1. Declaring judicial review of the First Respondent’s failure and/or unreasonable delay in taking a decision to formally recognise the First Applicant’s traditional status as leader of the Bakone-Ba-Mamahule, Ga-Matsaung, and the Second Applicant as Mamahule Traditional Authority Community in terms of the Traditional Leadership and Governance Framework Act 41 of 2003.

2. Declaring that the First Applicant (Thato Kholofelo Matsaung), in terms of section 8 (1)
- (c) (ii) (aa) of the Promotion of Administrative Justice Act 2000 is hereby recognised as the kgoshi (chief) and Chairperson of the Bakone-Ba-Mamahule Ga-Matsaung Traditional Authority Community in terms of the Traditional Leadership and Governance Framework Act, 41 of 2003(the Framework Act) and the Traditional and Koi-San Leadership Act, 3 of 2019.
3. Declaring that within 7 (seven) days of the issue of this order, the First Respondent is directed to inform the Provincial House of the Limpopo Traditional Leaders (the house of traditional leaders) of the terms of this order.
4. The First Respondent (Premier) must within 14 (fourteen) days having informed the house as required in (3) above publish or cause to be published and gazetted the recognition of the First Applicant as the Senior Traditional Leader (chief) of the Mamahule Traditional Authority Community.
5. The First Respondent must within a period of thirty days (30) after the date of publication and gazetting as per (4) above, issue or cause to be issued a recognition certificate recognizing the First Applicant in terms of section 11(2)(a)(ii) of the Traditional Leadership and Governance Framework Act 41 of 2003.
6. Costs in the event of a party opposing the application.”
- [5] The application is opposed by the first and third respondents only who raised the following points in limine:
 - i. Non-compliance with Rule 41A; and
 - ii. first applicant’s lack of locus standi in iudicio.

The respondents did not address the merits of the application.

- [6] I agree with the applicants that the peculiar circumstances of this case render the point in limine to be without any merit. Firstly, a period of two years went by since the order of Kganyago J. The Premier did nothing to comply with it. Secondly, the Premier ignored a number of letters addressed to him by the applicants in which he was reminded to comply with the order. It is evident from the conduct of the Premier that he will not voluntarily avail himself to mediation. He would have otherwise suggested it to the applicants before the institution of these proceedings. Rule 41A is in any event, not limited to the applicants alone. This point in limine is dismissed on that basis.

- [7] The respondents further oppose the application on the basis that the applicants lack the necessary locus standi to institute the proceedings. The respondents contend that the relief sought in the case before Kganyago J was for the recognition of the first applicant as the chief of the Ba-Mamahule Traditional Authority, Ga-Matsaung and in addition, the recognition of the Mamahule Traditional Community. The respondents argue that, based on the decision of this court in appeal case no. 15/2021, a case that dealt with a different issue involving the applicants and other parties, and in which it was decided that the applicants have no locus standi in view of the fact that the Premier has not yet recognised the applicants, the latter has no locus standi to institute the present proceedings as well.
- [8] The respondents have not appealed the judgment and order of Kganyago J. The order therefore remains valid. The Premier has not yet complied with it. Despite this fact, the applicants do not seek an order in terms of which the Premier is held to be in contempt of court. As it appears from the prayers in the notice of motion, the applicants seek an order as contemplated in section 8(1)(c)(ii) (aa) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).
- [9] On the issue of locus standi, the respondents are further relying on the case of Bakgaga-Ba-Mothapo Traditional Council v Mothapo and Others[1] (Mothapo). In that case the Supreme Court of Appeal ruled that a community which has not yet been recognised as a traditional community by a Premier of a province as contemplated in section 2 of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act) read with section 3 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 (the Limpopo Act) has no locus standi. The respondents argue that the second applicant could not give the first applicant authority to act on its behalf when it is not yet recognised by the Premier in accordance with the provisions of the Limpopo Act.
- [10] This Court (the Limpopo Division of the High Court) has found on two occasions namely, in *Mamaele Georgina Matsaung and 2 others v Mamahule Traditional Authority*[2] (Georgina Matsaung) and in *Thato Kholofelo Matsaung and Another v Rebecca and Others*[3] that the two applicants in this matter have no locus standi. The decision was arrived at on the basis of the Mothapo case. The two judgments were written by Kganyago J after he had penned the 19 November 2020 order. It is not clear whether the issue was raised in the 2020 case.
- [11] The doctrine of precedent dictates that this court, as a single judge court, is absolutely bound by the decisions of the Supreme Court of Appeal and those of the full court of this Division. Ordinarily, this court would have to follow the decisions of these courts and to find that the applicants do not have the necessary locus standi to launch this application. However, in response to the respondents' submission that this court should follow the decisions of the Supreme Court of Appeal in Mothapo, counsel for the applicants contends that the facts of this present case are distinguishable from those of Mothapo. A submission is made that the present case concerns the judicial review of the Premier's failure to take administrative action which would have, if taken in favour of the applicants, given the applicants the recognition they are seeking in this application.

- [12] The undisputed facts of the case are that that the erstwhile kgoshi Lesiba Ezekiel Matsaung passed away on the 1 January 2021. He was succeeded by his kgoshi Sebetja who died a month after the burial of kgoshi Ezekiel Matsaung. Due to the tender age of Sebetja's eldest son, who was seven years old at the time of his father's death, the Mamahule Royal Family, in accordance with the dictates of custom, identified him (first applicant) as the successor in title as contemplated in section 11(1)(1)(a)(i) of the Limpopo Act. He was subsequently coronated as a traditional chief on the 25 September 2021.
- [13] The applicants are clearly parties with direct and substantial interest in the outcome of the proceedings. As enunciated in *Jacobs v Waks*[4] the applicants have locus standi on this fact alone. Furthermore, the Premier's inaction has adverse effect on the first applicant and the Royal Family that identified him as the next in the line of succession to the chieftaincy.
- [14] The applicants aver that the Premier has failed to carry out his statutory obligations in terms of section 3(4) of the Limpopo Act after the application was made in terms of section 3(4). They further allege that such failure amounts to a reviewable administrative action in terms of the provisions of section 1 of PAJA. It is further alleged that the Premier's failure to make a decision adversely affects the rights and legitimate expectation of the applicants and the community of Ga-Mamahule.
- [15] In terms of section 6(2)(g) of PAJA, this court has the power to judicially review an administrative action where the action concerned consist of failure to take an action. In this case, the applicants allege that they have complied with the prerequisites laid down in section 6(3) of PAJA. Firstly, it is common cause that the Premier has a legal duty to take a decision in that there is an existing court order to that effect. There is no pending appeal against the order. The duty also arises from the Limpopo and the Framework Acts-section 6(3)(b)(i). Secondly, the order has a specific date within which compliance is required. The Limpopo Act requires him to act within a period of three months -section 6(3)(b)(ii). That period has long lapsed. The evidence in this case proves that the Premier failed to take a decision for a period of 24 months as at the date of the launching of this application- section 6(3)(b)(iii).
- [16] A decision to be made in terms of section 8(1)(c)(ii) (aa) sought by the applicants can only be taken in exceptional circumstances.

Counsel for the applicants argues that the respondents did not address the substantive merits of the applicants' case. Counsel

submitted that this failure must be seen in an extremely serious light. Counsel for the applicants referred this court to the case of *Department of Transport and Others v Tasima (Pty) Ltd*[5] in which the following was said:

"The obligation to obey court orders has at its heart the very effectiveness and the legitimacy of the legal system...and is

the stanchion around which a State founded on the supremacy of the Constitution and the Rule of Law is built.”

It follows that based on this principle, the respondents cannot simply ignore the court order dated the 19 November 2020 on the basis of their own interpretation of the order. In any event, the facts of the application before Kganyago J, as stated above, was distinguishable to the appeal case and the Mothapo case.

[17] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*[6] the court said the following:

“To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in a good position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable.”

[18] I agree with counsel for the applicants that exceptional circumstances as contemplated in section 8(1)(c) (ii)(aa) exists:

- (a) The Premier has failed to respect the Rule of Law by ignoring the court order dated the 19 November 2020;
- b) a period of 24 months has lapsed without complying with the said order;
- c) there is continued litigation involving the same community based on the uncertainty created by the Premier’s failure to take action-the cases referred to in paragraph 10 above;
- c) to this day, the applicants and this court is in the dark with regard to the Premier’s reasons for the inaction. The merits of the case were not addressed in the answering affidavit;
- d) the respondents are constitutionally obligated to respect the institution of traditional leadership which is part of our Constitution
- e) the applicants and the community of Mamahule have been waiting for justice for far to long. The principle of justice delayed is justice denied finds application in this matter; and
- f) there are no prospects that the parties will find an amicable solution to the challenges they both face in this case. Therefore, remitting the matter to the Premier, as it was done before, will constitute further delay in reaching finality.

[19] I am satisfied that the applicants made out a case for substitution and that such substitution will be just and equitable. The respondent failed to come up with evidence to the contrary. I fail to find any valid reason why the respondent is unable to provide the applicants with reasons for declining their claim. One can be justified to say the decision was arbitrarily taken.

[20] On the issue of costs, the applicants seek punitive costs due to the prejudice suffered by the applicants and the community of Mamahule which is occasioned by the respondent's undue delay in taking a decision. Further that the Premier has acted in a contemptuous manner by ignoring a court order. It is further argued that the opposition of the application was baseless. I find that the punitive costs sought will not have an impact on the coffers of the respondents as they are going to be borne by the tax payer. In the exercise of the discretion bestowed on me, I am of the view that costs on a normal scale will be appropriate in the circumstances of this case.

[21] I do not deem it necessary to consider the application for condonation filed by both parties. I accept the reasons proffered from both sides.

[22] In the result I make the following order:

1. It is declared that the judicial review of the First Respondent's failure and/or unreasonable delay in taking a decision to formally recognise the First Applicant's traditional status as leader of the Bakone-Ba-Mamahule, Ga-Matsaung, and the Second Applicant as Mamahule Traditional Authority Community in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 is unlawful and set aside.

2. It is declared that the First Applicant (Thato Kholofelo Matsaung), in terms of section 8

(1) (c) (ii) (aa) of the Promotion of Administrative Justice Act 2000 is hereby recognised as the kgoshi (traditional leader) and Chairperson of the Bakone-Ba-Mamahule Ga-Matsaung Traditional Authority Community in terms of the Traditional Leadership and Governance Framework Act, 41 of 2003 (the Framework Act) and the Traditional and Koi-San Leadership Act, 3 of 2019.

3. the first respondent is ordered to, within 7 (seven) days of the issue of this order, inform the Provincial House of the Limpopo Traditional Leaders (the house of traditional leaders) of the terms of this order.

4. The First Respondent (Premier) must within 14 (fourteen) days having informed the house as required in (3) above publish or cause to be published and gazetted the recognition of the First Applicant as the Senior Traditional Leader (chief) of the Mamahule Traditional Authority Community.

5. The First Respondent must within a period of thirty days (30) after the date of publication and gazetting as per (4) above, issue or cause to be issued a recognition certificate recognizing the First Applicant in terms of section 11(2)(a)(ii) of the Traditional Leadership and Governance Framework Act 41 of 2003.

6 The first and second respondents are ordered to pay the costs of the application.

M V Semenya

Acting Judge President

Limpopo Division.

APPEARANCES: Counsel for the Applicants : Adv. G Marcus SC & R Richards Instructed by :
Malose Matsaung Attorneys Counsel for the Respondents : Adv.BF. Gededger Instructed by : State
Attorneys Date of Hearing : 25 MAY 2023 Date of Judgment : 11 August 2023

[1] (926/2018)

[2019] ZASCA 130 (30 September 2019)

[2] Unreported case No. HCAA15/2021 ZALMPPHC 15 June 2022

[3] Unreported case no. 2506/2022 ZALMPPHC 30 June 2022

[4] 1992(1) SA 521 (A)

[5] 2017(2) SA 622 (CC)

[6] 2015

(5) SA 245 (CC)

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