



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: **1317/2019**
Heard: **12/03/2021**
Delivered on: **04/06/2021**

In the matter between:

MOTHEO JANTJIE	First Applicant
BATLHAPING BA PHUDUHUTSWANA (JANTJIE)	
ROYAL FAMILY	Second Applicant
TLAMELO MATTHEWS LEKWA	Third Applicant
GAOTIMANWE TIMOTHY LEKWA	Fourth Applicant
OLEHILE MICHAEL BODUMELE	Fifth Applicant
KGOISHO SETUNGWANE	Sixth Applicant
D MANNER	Seventh Applicant

and

KGOSIENEWANG EMMANUEL JANTJIE	First Respondent
BA-GA JANJIE TRADITIONAL COUNCIL MANYEDING	Second Respondent
PREMIER OF THE NORTHERN CAPE	Third Respondent
CHAIRPERSON: NC HOUSE OF TRADITIONAL LEADERS	Fourth Respondent
MEC: CO OPERATIVE GOVERNANCE, HUMAN	
SETTLEMENT AND TRADITIONAL AFFAIRS, NC PROVINCE	Fifth Respondent
THE COMMISSION ON TRADITIONAL LEADERSHIP	
DISPUTES AND CLAIMS	Sixth Respondent

JUDGMENT

Mamosebo J

[1] The application is for the enforcement of a court order granted by Kgomo JP on 25 October 2013 in the following terms:

“It is ordered that (by agreement)

1. *The applicants and respondents agree to lodge a dispute in terms of section 59 of the Northern Cape Traditional Leadership Governance and House of Traditional Leaders Act, 2 of 2007, within 90 days from date hereof.*
2. *Pending the finalisation of the above dispute, the respondents agree not to:*
 - 2.1 *Publicly state that the first applicant [Mr Motheo Jantjie] is not the legitimate son of the late Mr Pico Patrick Jantjie;*
 - 2.2 *Publicly state that [Mr Motheo Jantjie] is not the legitimate Chief of the Batlhaping Ba-Ga Jantjie Tribe;*
 - 2.3 *Do anything which obstructs, impedes, disrupts or interferes with the work activities and/or powers of the applicants;*
 - 2.4 *Threaten or intimidates or harass any person who carries [out] work on behalf of the applicants and/or Batlhaping Ba Ga Jantjie Tribe;*
 - 2.5 *Threaten or intimidate or harass any member of [Mr Motheo Jantjie's] family;*
 - 2.6 *Allocate sites to people within the jurisdiction of the applicants.*
3. *Each party pays its own costs.”*

[2] The applicants now seek the following relief in the Notice of Motion:

- 2.1 That the third to sixth respondents (Premier of the Northern Cape; Chairperson of the Northern Cape House of Traditional Leaders; MEC: Cooperative Governance, Human Settlement and Traditional Affairs (COGTA) and The Commission of Traditional Leadership Disputes and Claims) must take all reasonable steps to process the dispute that was lodged in terms of paragraph 1 of the court order under Case Number 1234/2013, and referred to the Premier of the Northern Cape Province for referral to the Commission on Traditional Leadership Disputes and Claims in terms of s 25(2)(a) of the Traditional Leadership and Governance Framework Amendment Act of 2003.
- 2.2 That the third to sixth respondents advise the applicants in writing, through their attorney of record, within 15 court days from the date of this order, of the steps they have taken to process the dispute.

2.3 To the extent necessary, that the first and second respondents be ordered to lodge a dispute in terms of the order within 10 court days from the date of this order.

2.4 That any respondent who opposes this application be ordered to pay the costs of the applicants on an attorney and client scale.

Only the first and second respondents oppose this application. The remainder filed Notices to abide the decision of the Court.

Background

[3] Mr Babuseng, for the applicants, informed Court that the enforcement of the current relief is sought only against the first respondent (Mr Kgosienewang Emmanuel Jantjie), and the second respondent (Ba-Ga Jantjie Traditional Council Manyeding). Counsel intimated that there has been non-compliance by the respondents with the order in that they failed to lodge a dispute and that this Court must now order them to lodge it within 10 days of this order.

[4] What seems incomprehensible is that if the applicants, through Mr Thato Joseph Jantjie (Thato), have already referred the dispute to the Premier why would the respondents also need to refer the same dispute again? It is unclear from the terms of the agreement whether the parties had to refer the dispute jointly or separately acting independently from each other.

[5] Section 59 falls under the head: **Commission or committee of inquiry into disputes and other matters relevant to Traditional Leadership of traditional communities and powers of the Premier following commission's report**. It stipulates:

“(1) *The Premier may appoint a commission or a committee, in terms of provincial legislation to inquire into and submit a report to him or her in regard to –*

- (a) any dispute in connection with the recognition of a senior traditional leader or the appointment of a headman or headwoman.
 - (b) the question as to whether any person recognised as senior traditional leader or confirmed as headman or headwoman-
 - (iii) is the rightful incumbent of the office of senior traditional leader or headman or headwoman as the case may be;
 - (c) any other matter which the Premier may deem necessary.
- (2) (a) At any inquiry by a commission referred to in subsection (1), representations may be made and evidence may be presented to the commission either personally or otherwise by a senior traditional leader or headman or headwoman in relation to whom the inquiry is held, and on behalf of any member of the traditional community in question and where applicable, by or on behalf of the person claiming to be entitled to traditional leadership as the case may be;
- (b) A failure or refusal on the part of any person referred to in paragraph (a) to attend an inquiry held by the commission or to make any representations or give evidence in the course of the proceedings before the commission, does not in any way invalidate the proceedings or the findings of the commission.
- (3) The commission must as soon as reasonably practicable, after the conclusion of its inquiry, submit to the Premier its report, containing its findings and recommendations.
- (4) The Premier may, after having considered the report, findings and recommendations of the commission –
- (a) settle or decide the dispute in such manner as he or she deems fair and equitable and for that purpose issue a directive as he or she deems fit;
 - (b) in the case of a senior traditional leader, headman or headwoman revoke his or her recognition as such; or
 - (c) in the circumstances contemplated in paragraph (b) of this subsection, depose the senior traditional leader, headman or headwoman concerned as the case may be, and, for the purposes of paragraph (b) of this subsection, recognise any other member of the particular traditional community qualified for that purpose as the senior traditional leader or headman or headwoman respectively.”

[6] Para 14 of the founding affidavit reads:

“I am advised that the merits of the application under Case Number 1234/2013 were not considered by the court and the parties agreed to the above order for the purpose of a proper investigation to be done to resolve the disputes relating to who is the rightful and legitimate Chief of the Batlhaping Ba-Ga Jantjie.”

[7] At the heart of this dispute and in substantiation to para 14 of the founding affidavit, the question raised by the first applicant is whether the first respondent, Kgosienewang Emmanuel Jantjie, is the son of Pico Patrick Jantjie, and if so, who, between the late Thato Jantjie, (the first applicant’s

father) and the first respondent, was the eldest son for purposes of chieftaincy?

[8] It is unclear why Mr Babuseng sought an enforcement order only against the first and second respondents, a deviation from what appears in the Notice of Motion, which seeks an order for the Premier, Chairperson of the House of Traditional Leaders, MEC, and the Commission, to furnish them with feedback on steps they have taken to resolve their dispute and to furnish such feedback within ten (10) days of this Court's order.

[9] It is imperative for parties to exhaust internal remedies before approaching the Court, unless exceptional circumstances exist. This we find in s 21 of the Traditional Leadership and Governance Framework Act, 41 of 2003, which stipulates:

“Dispute and claim resolution

(1)(a) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.

(b) If a dispute or claim cannot be resolved in terms of paragraph (a), subsection (2) applies.

(2)(a) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with the internal rules and procedures.

(b) If a provincial house of traditional leaders is unable to resolve a dispute or claim as provided for in paragraph (a), the dispute or claim must be referred to the Premier of the Province concerned, who must resolve the dispute or claim after having consulted –

(i) the parties to the dispute or claim; and

(ii) the provincial house of traditional leaders concerned.

- (c) *A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.*
- (3) *Where a dispute or claim contemplated in subsection (1) has not been resolved as provided for in this section, the dispute or claim must be referred to the Commission.”*

[10] The exhaustion of internal remedies has also been dealt with by the Constitutional Court in *Koyabe v Minister of Home Affairs* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) at 340 paras 34 - 40; and *Nichol v Registrar of Pension Funds* [2005] ZASCA 97; 2008 (1) SA 383 (SCA) at 389 para 15.

[11] Unquestionably, the following facts or factors seem to be common cause or acceptable or probable:

- 11.1 The dispute of who the rightful Chief of the Batlhaping Ba-Ga Phuduhutswana is dates back to 2009.
- 11.2 Various community meetings were held in an effort to have the dispute amicably resolved, an assertion admitted by the First Respondent (Kgosienewang) in his answering affidavit.
- 11.3 The dispute was brought to the attention of the Northern Cape House of Traditional Leaders and the Department of Cooperative Governance Human Settlement and Traditional Affairs in 2010 but remained unresolved.
- 11.4 On 24 January 2014, Mathibane Mere Attorneys, for the applicants, addressed a “without prejudice” letter marked “J4” to the Northern Cape Provincial House of Traditional Leaders in which a chronology of the attempts made to resolve the matter was outlined followed by a request to have the dispute resolved in terms of the Traditional Leadership and Governance Framework Act, 41 of 2003.

- 11.5 There were various correspondences addressed to the Department of Cooperative Governance Human Settlement and Traditional Affairs during 2010 pertaining to the delays in having the dispute amicably resolved;
- 11.6 On 23 March 2012 in a meeting with the former Premier of the Northern Cape Provincial Government, Ms Sylvia Lucas, as evinced on the “J7”, a resolution was taken that Mr Thato Joseph Jantjie, who is not cited as a party, must lodge a dispute with COGTA on behalf of the applicants.
- 11.7 In August 2012 Thato duly addressed the dispute to Mr Pholoholo, a Director in COGTA. The dispute stubbornly persisted.
- [12] On 02 February 2015 a letter marked “J14” was written under the auspices of the Office of the Premier and addressed to Mathibane Mere Attorneys, which reads:
- “RE: DISPUTE CHIEFTAINSHIP OF THE BATLHAPING BA GA JANTJIE: THATO JOSEPH JANTJIE/KGOSIENEWANG EMMANUEL JANTJIE***
Your letter dated 21 January 2015 refers.
The Provincial House will most probably deal with this matter on or before 15 February 2015.
In the interim kindly furnish us with the particulars of Mr TJ Jantjie’s substitute.
Yours sincerely
PN Mafungo
Chief State Law Adviser.”
- [13] Mathibane Mere Attorneys then responded to the Premier on 09 February 2015 in a letter marked “J13” as follows:

“RE: DISPUTE CHIEFTAINSHIP OF THE BATLHAPING BA GA JANTJIE: THATO JOSEPH JANTJIE/KGOSIENEWANG EMMANUEL JANTJIE
The above matter and your letter dated 02 February 2015 refers.
The writer notes the contents of your aforesaid letter with much of appreciation from my client as it indicates the commitment on your part to resolve this long outstanding dispute.

Please be informed that the substitute to Mr TJ Jantjie is his eldest son Motheo Jantjie identity no¹. residing at his parental home [at] Manyeding Village, Kuruman. Attached is the ID copy.

Further that you will advise us in time if there is any other requirement/ participation from our part that is required as you indicated that the house will commence with this matter on 15 February 2015.

Trust the above is in order.

Mathibane Mere Attorneys

Per R Mere”

- [14] On 14 July 2015, the Premier, Ms SE Lucas, addressed letter “J15” to Mathibane Mere Attorneys under the same head as follows:

“The above matter refers.

Kindly be advised that the Northern Cape Provincial House of Traditional Leaders has referred this matter back to me and advised that it be referred to the Commission in terms of Section 25(2)(a) of the Traditional Leadership and Governance Framework Amendment Act of 2003.

Based on the above, you are hereby requested to please advise your clients accordingly.

Yours sincerely.

Mrs SE Lucas

Premier: Northern Cape Province”

- [15] This culminated in the application before me whereby the applicants seek the enforcement of para 1 of the order by Kgomo JP.

- [16] Section 25 (1) and (2)(a)(iii) of the Framework Act provides:

“Functions of Commission

- (1) The Commission operates nationally in plenary and provincially in committees and has authority to investigate and make recommendations on any traditional leadership dispute and claim contemplated in subsection (2).*
- (2) (a) The Commission has authority to investigate and make recommendations on –*
 - (iii) a traditional leadership position where the title or right of the incumbent is contested.”*

¹ Identity number of Motheo Jantjie omitted to protect his privacy.

- [17] Whether the applicants followed s 59 of the Northern Cape Traditional Leadership Governance Act, 2007 or the Legal Framework Act, 2003, does not expunge the inaction displayed by the Office of the Premier. In *Sigcau v President of the Republic of South Africa* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC) at para 15 the Constitutional Court held:

“[15] ..[T]he institution of traditional leadership and the determination of who should hold positions of traditional leadership have important constitutional dimensions.”

- [18] Musi AJ, in the ConCourt, made the following poignant remarks in *Tshivulana Royal Family v Netshivhulana* [2016] ZACC 47 at para 27:

“[27] *It is in the interests of justice that disputes pertaining to traditional leadership be resolved with certainty and clarity in order to maintain stability.*”

- [19] The Framework Act has evidently created a framework within which provinces may regulate their own traditional affairs. It is inexplicable and inexcusable why the Premier did not on her own accord invoke the provisions of s 59(1)(b)(iii) of the Northern Cape Traditional Leadership Governance Act, 2007, by appointing a commission or a committee, in terms of the said provincial legislation to inquire into who the rightful kgosi has to be. The appointed body would have furnished her with a report from which subsections (3) and (4) of Act 2 of 2007 would have followed.

- [20] The Premier could, instead of writing to the applicants’ attorneys advising them to refer the matter to the commission, have taken the referral step herself. Section 25(2)(b) of the Framework Act allows that or does not debar the Premier from doing so. In fact, it was her offices’ responsibility to do so.

[21] On the other hand Mathibane Mere Attorneys also failed to invoke s 25(2)(b) of the Framework Act to lodge a dispute with supporting documentation setting out all the steps they have taken as well as the nature of the dispute in order to facilitate the expeditious finalisation of the dispute.

[22] Had the role-players meaningfully invoked the applicable provisions of the available legislation, the following course would have been open:

22.1 Referral to the Commission by the Premier in terms of s 59(3):

The Commission would have been required, as soon as reasonably practicable, to submit a report to the Premier with its findings and recommendations. The Premier would then dispose of the matter invoking s 59(4).

22.2 Referral to the Commission in terms of s 26 of the Framework Act which provides:

“26 Recommendations of Commission

- (1) *A recommendation of the Commission is taken with the support of at least two thirds of the members of the Commission.*
- (2) *A recommendation of the Commission must, within two weeks of the recommendation having been made, be conveyed to –*
 - (a) *The President and the Minister where the position of a king or queen is affected by such a recommendation; and*
 - (b) *The relevant provincial government and any other relevant functionary to which the recommendation of the Commission applies in accordance with applicable provincial legislation in so far as the consideration of the recommendation does not relate to the recognition or removal of a king or queen in terms of section 9, 9A or 10.*
- (3) *The President or other relevant functionary to whom the recommendations have been conveyed in terms of subsection (2) must, within a period of 60 days make a decision on the recommendation.*
- (4) *If the President or the relevant functionary takes the decision that differs with the recommendation conveyed in terms of subsection (2), the President or the relevant functionary as the case may be must provide written reasons for such decision.*
 - (a) *The Premiers must, on an annual basis and when requested by the Minister, provide the President and the Minister with a*

report on the implementation of their decisions on the recommendations of the Commission.

(c) A copy of the report referred to in paragraph (a) must be submitted to the relevant provincial house for noting.”

[23] The applicants have resorted to following the Provincial legislation. The envisaged dispute resolution as prescribed in s 59 culminates with the decision of the Premier. The Premier’s office is the one that refers the dispute to the Commission or committee for an inquiry and upon receipt of a report from them, and, as soon as reasonably practicable, may, settle or decide the dispute in such manner as he or she deems fair and equitable and for that purpose issue a directive as he or she deems fit. It therefore follows that the office of the Premier has not acted in a manner that is fair and equitable.

[24] Mr Motloun, for the respondents, argued that this Court should consider invoking Rule 42(1)(c) of the Uniform Rules of Court because there may have been a misapprehension on the part of both parties by invoking s 59 of the Provincial Act. According to him this section presupposes that there has to be a report furnished to the Premier. Counsel submitted that s 59 has been incompetently invoked because s 12 (1)(c) of the Framework Act is more appropriate in this case. It provides:

“12 Removal of senior traditional leaders, headmen or headwomen

(1) A senior traditional leader, headman or headwoman may be removed from office on the grounds of–

(c) wrongful appointment or recognition.”

[25] In countering this submission Mr Babuseng contended that the issue for determination does not require the removal of the incumbent headman but whether he is the rightful or legitimate traditional leader. I agree. Section 12 is inapplicable in the circumstances. It is also my view that on a proper construction of s 59, which is a provincial provision for resolving

traditional disputes, there was no error common to both parties in reaching a settlement to resolve their dispute. I therefore find that Mr Motlounge cannot be correct to urge me to implement Rule 42(1)(c) to vary or rescind the order granted by Kgomo JP on 25 October 2013.

- [26] The purpose of making a settlement agreement an order of court is to enable the party in whose favour it was granted to enforce it through execution or contempt proceedings in the event of non-compliance. See *PL v YL* 2013 (6) SA 28 (ECG) at paras 39 and 40. It must also be borne in mind that the applicants have not, sensibly, asked that the responsible Premier be held in contempt of the Court order because there is no suggestion that the Premier has wilfully or deliberately refused to carry out the order of Court or defied it. See in this regard the pronouncements by Cameron JA (then) in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 333 para 8 and 9 which need not be quoted.
- [27] I must mark my displeasure towards Mr Babuseng for his flagrant disregard for the “Rules Regulating the Proceedings of the Northern Cape Division of the Supreme Court of South Africa”. Whereas the applicants’ heads were served and filed on 08 December 2020, the Practice Note was filed out of time, only on 10 March 2021. Mr Babuseng also indicated that, in his opinion, all portions of the record are relevant for the adjudication of the application. Not to be outdone Mr Motlounge’s Practice Notice also claimed that the whole record was relevant whereas it was not². This application pertains to the enforcement of an order of

² Northern Cape Rule 3(6) stipulates that:

(6) In all opposed applications the heads of argument of all parties shall be accompanied by a notice (the practice notice) containing the following concise details:

- (a) The names of the legal representatives who appear on behalf of the respective parties (if known);
- (b) The nature of the application;
- (c) The relief which each of the parties seek;
- (d) The expected duration of argument;

Court and only documents and affidavits relevant thereto ought to have been highlighted. These derelictions are unacceptable and must be discontinued. See in this regard the admonishment by Harms JA in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) and Another* 1998 (3) SA (SCA) at 954 para 36 and 37 that finds relevance in this opposed application:

“[36] I wish to say something about the practice note. It is required of the practitioner who will argue the appeal to indicate which parts of the record in his opinion are not relevant for the determination of the appeal (1997 (3) SA 345 (SCA); ([1997] 2 B All SA between pp 594 and 595)). The object of the note is essentially twofold. First, it enables the Chief Justice in settling the roll to estimate how much reading matter is to be allocated to a particular Judge. Second, it assists Judges in preparing the appeal without wasting time and energy in reading irrelevant matter. Unless practitioners comply with the spirit of this requirement, the objects are frustrated and this in turn leads to a longer waiting time for other matters. Caterham’s note boldly claimed that the whole record was relevant while it had to be obvious that the whole record of 30 volumes and 2669 pages could not be, especially in view of the limitation of the issues on appeal. When called upon by the learned Judge presiding to reconsider, we were informed that 11 volumes were irrelevant. Even that was an understatement. Much more was, as is apparent from Birkin’s note which was filed out of time. This conduct is unacceptable.”

[31] **On the question of costs.** Regard being had to the dispute as it unfolded and the role played by all the relevant parties, I am of the view that the office of the Premier has caused this ship to sink whereas she was the person in authority well-placed to dispose of this dispute expeditiously. It is deduced from the Premier’s letter dated 15 July 2015 addressed to the applicants’ attorneys that her office ought to have referred the dispute to the Commission for a report but failed to do so. Notwithstanding that the Premier has not opposed the application but filed a Notice to Abide

(e) An indication of the portions of the record which, in the opinion of the legal representative, is not relevant for the adjudication of the application;

(f) The issues which require determination;

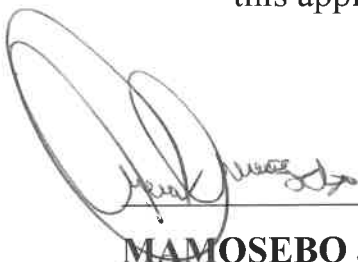
(g) A concise summary of the argument/submissions of each party to the issues;

(h) A list of authorities which will in particular be relied upon during argument.

this Court's decision, it will be in the interests of fairness and equity that the Premier's office pay 50 % of the costs of this application on the normal scale as already pointed out. Although the applicants have achieved substantial success in this application they have contributed in a large measure to the current situation.

[32] In the result, the following order is made:

1. The Premier of the Northern Cape Province is ordered to process the dispute lodged in terms of the Court Order under Case Number 1234/2013 granted on 25 October 2013 as contemplated in section 59(1)(a)(iii) and (4) of the Northern Cape Traditional Leadership Governance and House of Traditional Leaders Act, 2 of 2007 within 14 Court days of this order.
2. The Premier of the Northern Cape is ordered to pay 50 % of the costs of this application.



MAMOSEBO J

NORTHERN CAPE DIVISION

For the applicants:
Instructed by:

Adv. B Babuseng
Ntlha Matlala Inc
c/o Magoma Attorneys

For the 1st, 2nd, 4th & 5th respondents:
Instructed by:

Adv. S Motloun
The Office of the State Attorney