

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 3494/2020

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
Signature <i>[Handwritten Signature]</i>	
Date... 03/07/2020	

In the matter between:

THULARE VICTOR THULARE**APPLICANT****(in his personal capacity as KGOSHIKGOLO (KING)
OF THE BAPEDI NATION)**

AND

KGAGUDI KENNETH SEKHUKHUNE**FIRST RESPONDENT****SEKWATI KHUTJO SEKHUKHUNE****SECOND RESPONDENT**

JUDGMENT

MAKGOBA JP

- [1] This is an application for an interdict brought on urgent basis by the Applicant against the Respondents to protect the position of the Applicant as the duly appointed Kgoshikgolo (King) of the Bapedi nation against the alleged illegal claims that the Second Respondent is to be inaugurated as the new King of the Bapedi.
- [2] In the Notice of Motion the Applicant sought an order in the following terms:
- 2.1. That the First Respondent be ordered to:
- (a) step down as Acting Kgoshikgolo (Acting King) of the Bapedi in so far as he has until now has claimed still to occupy that position;
 - (b) stop claiming that his son, the Second Respondent is the rightful King-to-be of the Bapedi Nation;
 - (c) stop to claim or associate himself with claims that the Second Respondent will be enthroned as Kgoshikgolo of the Bapedi Nation on 15 August 2020, or whenever or whatsoever;
 - (d) stop encouraging anyone to collect money from members of the Bapedi Nation for any function to enthrone his son as Kgoshikgolo;
 - (e) do all things and to sign all documents required by law and the custom of the Bapedi people to publicly step down as Acting

Kgoshikgolo of the Bapedi and to hand over the kingship to the Applicant;

- 2.2. The First Respondent is interdicted from referring to himself as the King or acting King of the Bapedi;
- 2.3. The First Respondent is ordered to hand over to the Applicant control of all the regalia, documentation, furnishings, furniture and buildings that were held by him in his capacity as the acting Kgoshi within 7 days from the date of this order;
- 2.4. The Second Respondent is ordered to stop claiming that he is the rightful King-to-be of the Bapedi nation and to allow or encourage anyone to arrange for ceremonies to be arranged for him to be enthroned as the King on 15 August 2020 or whenever or to allow that money be collected for this purpose from members of the Bapedi nation.
- 2.5. The costs of this application is to be paid by the Respondents jointly and severally.

[3] In essence the relief sought can be summed up as follows:

- 3.1. That the First Respondent be ordered to publicly step down as Acting King of the Bapedi, to stop claiming that his son, the Second Respondent is to be inaugurated as the new King on 15 August 2020, to stop encouraging people to collect money for the said inauguration

and to hand over all and any regalia of the Kingship that may still be under his control to the Applicant.

3.2. That the Second Respondent is to be interdicted from referring to himself to be the King-to-be of the Bapedi and to allow anyone to arrange for him to be enthroned on 15 August 2020 as the King of the Bapedi or on any other date.

[4] The application is opposed by the Respondents. At the hearing of the matter the Applicant abandoned the larger portion of prayer 4 of the Notice of Motion where it concerns the handing over of furnishings, furniture and buildings that were held by the First Respondent in his capacity as the Acting Kgoshi.

Factual Background

[5] On the 29 July 2010 the Commission on Traditional Leadership Disputes and Claims announced, through the President of South Africa, its findings and recommendations regarding the Kingship of Bapedi. In particular it was announced that the Applicant is the rightful King of Bapedi.

The First Respondent challenged the findings and recommendations of the Commission. His application to review and set aside the findings and recommendations of the Commission was dismissed by the Gauteng Division of the High Court, Pretoria on 20 March 2018.

- [6] The Constitutional Court dismissed the First Respondent's application for leave to appeal on 4 March 2020, on the basis that there existed no reasonable prospects of success.

On 3 April 2020 the President of the Republic of South Africa issued his recognition of the Applicant as the King of the Bapedi by way of publication in the Government Gazette no. 43206.

- [7] On 6 April 2020 a press statement was issued under the banner of the "**Office of the Kgoshikgolo of Bapedi His Majesty King KK Sekhukhune**". The press statement, inter alia, rejects the Applicant as the King of the Bapedi as well as the High Court and the Constitutional Court's finding and the President's recognition of the Applicant's Kingship. The press statement also confirms the intended inauguration of the Second Respondent as the King of the Bapedi on 15 August 2020.

- [8] [8] It is appropriate to quote verbatim the relevant portions of the press statement. They are as follows:

8.1 "2. The Office of the Kgošikgolo of Bapedi Nation has the honour to inform South Africans and the Media that Sekhukhune Royal Family has been dramatically imposed with a new King called Victor Thulare by President Ramaphosa as per Government Gazette, 3 April 2020 No. 43206 notice of Department of Traditional Affairs of **03 April 2020**

signed on **25 March 2020** which is said to be in terms of **section 9(2a) and (b) of Traditional Leadership & Governance Framework Act No. 41 of 2003 (Act 41 of 2003)**. This was done against the decision by the Royal Family to appoint HRH Prince Sekwati Khutjo Sekhukhune as the next king of Bapedi Nation”

8.2 “3.1. Bakgoma and Bakgomana met on **8 March 2020** and

deliberated on the issue of appointment of a person as King of Bapedi. It was resolved that – Prince Sekwati II Sekhukhune (Phaahl’a Bauba) is identified in terms of section **9(1)(a)(i) and (ii) of the Framework Act** as a person in terms of the customary law of Bapedi to assume the position of a king of the Bapedi Kingship;”

8.3 “3.2. Meeting with the Traditional Leaders few Chiefs and Headmen and Headwomen took place at the royal palace on **17 March 2020**. The meeting was convened to inform them about the Constitutional Court’s decision on **04 March 2020**, but most importantly to inform them about the process that is being undertaken to identify HRH Prince Sekwati II Sekhukhune (Phaahl’a Bauba) in terms of **section 9(1) of the Framework Act** to assume the position of a king in terms of the customary law as he is the firstborn-son of the Candle Wife, Khudu Sekhukhune (Matladi’a Maswi). – Bapedi tradition, customary law and

cultural practices are locked and the only people with the key to appoint a king are Bakgoma and Bakgomana;"

- 8.4 *"5. Bakgoma and Bakgomana have the honour to inform the people of South Africa including the Honourable President Matamela Cyril Ramaphosa and his Cabinet that the appointment of Sekwati II Sekhukhune was blessed by the Aunts and Uncles of the Sekhukhune Royal Family and it should be recognised as such."*
- 8.5 *"7. Notwithstanding the President's consideration of the recognition of Victor Thulare as the King of Bapedi Kingship as indicated on the Government that he signed on 25 March 2020 and issued on 03 April 2020 just a day before HRH Prince Sekwati II Khutjo Sekhukhune (Phaahl'a Bauba) could be announced as the next King of Bapedi Nation; Bakgoma and Bakgomana of the Bapedi Kingship have come to terms with the discrimination and pursuance of our Kingdom by government and judiciary alike. In this regard, the Office of the Kgošikgolo of Bapedi Nation acting in good faith on behalf of the Royal Family and the Nation at large is informing the President that our Traditional Leaders and their Communities have already committed to support and subject themselves to King Sekwati II Khutjo Sekhukhune (Phaahl'a Bauba) even if the government has chosen not to recognise him in favour of Victor Thulare."*

8.6 *“11. Furthermore we want to inform the nation that Bakgoma, Bakgomana, and Aunts were supposed to have a small traditional function to install Prince Sekwati II Khutjo Sekhukhune (Phaahl’a Bauba) as the traditional Leader of Bapedi Kingship on 04 April 2020 at Maroteng Royal Palace but due to National Lockdown as a result of Coronavirus the event has been postponed until further notice as and when government will allow gathering to take place; however Phaahl’a Bauba has assumed his official duties as from 01 April 2020. The bigger official ceremony to inaugurate him will take place on 15 August 2020 during the celebratory event to commemorate the life and times of the legendary King Sekhukhune I.”*

[9] The press statement concludes with the following:

“NB: As we said before, His Majesty King Sekwati II (Phaahl’a Bauba) will be the King of Bapedi Kingship even if he is not recognised by the State and not receiving benefits from the government. In any case government recognition is all about benefits including the salary. However, the position of the royalty is all about blood and customary law of succession it is not dependent on recognition.”

The press statement is attached as annexure "T5" to the founding affidavit. It professes to be issued by the office of the Kgošikgolo of Bapedi His Majesty King KK Sekhukhune. It bears a stamp with both a handwritten date (06-04-2020) and with a logo.

- [10] On or about 16 May 2020 a social media campaign was launched in terms of which arrangements are confirmed to ensure that the inauguration referred to above takes place during August 2020. This social media campaign is in the form of a WhatsApp message that is circulating in the community. It provides a bank account number with First National Bank into which members of the public would deposit the funds required for the inauguration ceremony in respect of the Second Respondent.
- [11] On 18 May 2020 the Applicant's attorneys of record wrote a letter to the First Respondent, to stop stating that the Second Respondent will be inaugurated in August 2020 as King of the Bapedi and to stop raising funds for such an inauguration. As there was no positive response forthcoming from the Respondents, the Applicant launched the present application on 12 June 2020.

Issues

[12] The following issues are to be adjudicated in this matter:

- 12.1. Whether the matter is urgent.
- 12.2. Whether other parties need to be joined.
- 12.3. Whether First and/or Second Respondents took part in or associated themselves with the campaign to reject the Applicant as King and to enthrone the Second Respondent on 15 August 2020
- 12.4. Whether the Applicant is entitled to the interdictory relief sought in terms of the notice of motion to the extent set out above.

Facts not in Dispute

[13] The following are the material facts that are common cause or not in dispute;

- 13.1. In terms of the findings of the Commission on Traditional Leadership Disputes and Claims and the decisions of the High Court and the Constitutional Court, the Applicant is the duly appointed King of the Bapedi.
- 13.2. There exists a campaign to reject the Kingship of the Applicant and enthrone the Second Respondent, though there is a dispute whether the Respondents associated themselves with the campaign

13.3. When the First Respondent applied to the Constitutional Court for leave to appeal, his son, the Second Respondent also applied to take part in that application, claiming that he was the rightful heir to the throne. These applications were unsuccessful.

13.4. The First Respondent does not in his opposing affidavit claim any entitlement for himself or his son to the Kingship.

13.5. The campaign to inaugurate the Second Respondent is also not in dispute, but the Respondents deny their association with the campaign.

Urgency

- [14] The Respondents contend that this application lacks urgency and as a result the application must be struck from the roll. They argue that the application was issued on 12 June 2020 for hearing on 30 June 2020 as opposed to the Practice Directives of this Court which in the circumstances the application should have been set down for hearing on 23 June 2020. Furthermore the Respondents argue that the Applicant failed to explain why this application was only brought on 12 June 2020 without an explanation of what happened between the 19 May 2020 and 11 June 2020.

The argument goes further to state that the Applicant failed to give adequate account of events which made this application to be so urgent that everything must stop for this Court to hear the application.

- [15] There is no merit in the issue of urgency raised by the Respondents. The delay on its own is not a good ground to prevent the granting of an urgent relief. The Court still bears the obligation to decide whether after taking account all the circumstances of the matter, urgent relief is warranted. The test is whether the circumstances of the case are such that the applicant will or will not be afforded substantial redress at a hearing in due course.

In **Mogalakwena Municipality v Provincial Executive, Limpopo and Others**¹ Tuchten J said:

“It seems to me that when urgency is in issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent”.

- [16] The circumstances in the present case have already been outlined or described in the factual matrix of this case in paragraphs [5] to [11] above.

Regarding the notion of delays, it was held as follows in **East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd and Others (11/33767) [2011] ZAGPJHC 196 pages 3-4**²:

¹ (35248/14) [2014] ZAGPPHC 400; [2014] 4 All SA 67 (GP) at para 64

² (11/33767) [2011] ZAGPJHC 196 PP 3-4

"[8] In my view the delay in instituting proceedings is not, on its own a ground for refusing to regard the matter as urgent. A court is obliged to consider the circumstances of the case and the explanation given. The important issue is whether, despite the delay, the applicant can or cannot be afforded substantial redress at a hearing in due course. A delay might be an indication that the matter is not as urgent as the applicant would want the Court to believe. On the other hand a delay may have been caused by the fact that the Applicant was attempting to settle the matter or collect more facts with regard thereto.

"[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application".

[17] The present case has to do with interdicting the Respondents from their continuing conduct in defying the Court orders confirming the Kingship of the Applicant, and planning the inauguration of the Second Respondent as a King on 15 August 2020. Surely such remedy should be granted to the Applicant as a matter of urgency because the Applicant will not be afforded any substantial redress at a hearing in due course; particularly after the 15 August 2020 when the proverbial horse shall have bolted.

This matter is therefore urgent.

Joinder of other Parties

[18] The Respondent raised the points of non-joinder in respect of the following persons or institutions:

18.1. Non-joinder of the President of the Republic of South Africa.

18.2. Non-joinder of the First Respondent's family.

18.3. Non-joinder of the Royal Family / Bakgoma and Bakgomana.

18.4. Non-joinder of Marota-Mohlaetsi Traditional Authority.

18.5. Non-joinder of Lerumo La Setshaba Movement.

- [19] The point of non-joinder in respect of all the above-mentioned persons and institutions as raised by the Respondents is ill-conceived. None of the above has any direct or substantial interest in the present case.

The Applicant's case is aimed at curbing the unlawful conduct of the Respondents in their refusal or reluctance to accept the Applicant as the rightful and duly appointed King. The case has nothing to do with the recognition of the Applicant by the State President as a King. In any event the Respondents do not dispute the appointment and / or recognition of the Applicant as a King. It is just that they do not like it or that they deliberately want to defy the authority of the Courts and that of the State President.

- [20] It cannot be heard to be said that all the above-mentioned persons or institutions sought to be joined in this case have an interest in the defiant attitude and conduct of the Respondents.

In my view any person who does wrong things does so in his own right.

Furthermore, this case has nothing to do with a dispute over traditional leadership or kingship so as to call for the involvement of other traditional leadership structures like bakgoma, bakgomana and the traditional authority.

The case is simply to deal with those individuals like the Respondents who have resorted to rebel against the authority of the newly appointed King of the Bapedi and in fact also against the Court orders.

[21] I accordingly dismiss all the points of non-joinder raised by the Respondents.

Merits

[22] Regarding the merits of this case it has to be established whether the First and / or the Second Respondents took part in or associated themselves with the campaign to reject the Applicant as King and enthrone the Second Respondent on the 15 August 2020.

As a corollary to that is whether the Applicant is entitled to the interdictory relief sought in the notice of motion.

[23] As already indicated above, the Respondents do not dispute the fact that the Applicant is the rightful and duly appointed King. They do not dispute that there is a campaign to reject the Applicant's Kingship and enthrone the Second Respondent as it appears in the press statement, the contents of which have been outlined in paragraph [8] above.

Furthermore, they do not dispute the existence of a social media campaign in the form of a WhatsApp message calling upon members of the public to contribute funds for the inauguration ceremony on 15 August 2020.

- [24] The First and Second Respondents' defence is that they are not responsible for the issue of the press statement and the WhatsApp message and that they disassociate themselves therewith. This was in essence the argument put forward by their Counsel, Mr Tebeila.

In this matter only the First Respondent filed an opposing affidavit to deal with the allegations in the founding affidavit. The Second Respondent did not file an opposing affidavit to deny what is alleged against him by the Applicant. Consequently, the allegations against the Second Respondent remain unchallenged.

- [25] The press statement bears a stamp with the words: **Office of the Kgoshikgolo of Bapedi His Majesty K K Sekhukhune**. In the face of this, the First Respondent's answer is a bare denial that he is associated with the contents of the press statement. His actual answer is: *"The applicant is put to proof that the first respondent issued the press statement"*.

In my view, the failure by the Respondents to act to correct the press statement and to make it clear that the First Respondent is no longer "**His Majesty the King**" and that the Second Respondent will not take part in the inauguration, under the circumstances, at the very least amount to tacit participation by the Respondents in the campaign.

The First Respondent does not explain how it comes that the press release goes out in the name of the Office of the King referring to him as His Majesty the King, bearing the stamp of the Office of the King.

A bare denial is not sufficient in these circumstances.

[26] Save for denying material allegations in his opposing affidavit, the First Respondent failed to give any explanation why his name featured so prominently in the press statement. The First Respondent presented no countervailing evidence, but rather availed himself to a bald denial of his involvement in the press statement and the campaign to enthrone the Second Respondent.

[27] The First Respondent's bare denial does not raise real, genuine and *bona fide* disputes of fact in the circumstances of this case.

In **Wightman t/a JW Construction v Headfour (Pty) Ltd**³ it was held that:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the

³ 2008 (3) 371 (SCA) at 375 para [13]

fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment”.

- [28] It is trite that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the Court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

See **Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd**⁴.

In the present case the version set up by the First Respondent is clearly untenable that this Court is justified in rejecting same merely on the papers.

I accordingly make a finding that the First and Second Respondents participated in or associated themselves with the campaign to reject the Applicant's Kingship and are involved in the arrangements to enthrone the Second Respondent on

15 August 2020.

- [29] The Respondents' conduct is in defiance of Court orders. Despite litigation having come to a final end the Respondents in defiance of the Court judgments continued to present themselves as the Acting King and the

⁴1984 (3) SA 623 (A) at 634E – 635C

King-to-be that is going to be enthroned on 15 August 2020. This is done with intent to undermine the position of the Applicant and to hamper him in the exercise of his powers and complying with his duties to govern and serve the Bapedi nation as a King. They attempt to sow division and serious risk of violence and loss of life may result.

In the result the Applicant seeks an order to the effect that the First Respondent be interdicted from referring to himself as King or acting King and to stop all actions that are associated with the Kingship, including announcing that his son will be installed as the King of the Bapedi nation.

Conclusion

[30] It is clear that the First Respondent has not done anything to publicly hand over the power to the Applicant and by his conduct supports the defiance and the presentation of the Second Respondent as the person that has already taken over as the King and will be publicly inaugurated on 15 August 2020. The actions of the First and Second Respondents amount to undermining authority and amount to illegal resistance to the lawful government structures and they are acting contrary to the rule of law.

[31] The conduct of the two Respondents has not been as could be expected in a democratic society where the rule of law is respected. Their conduct makes it necessary for the Applicant to obtain the order prayed for in order to prevent

harm not only to the Applicant, but also to the Bapedi people and law and order.

[32] In the result I grant the following order:

1. The First Respondent is ordered to:
 - (a) step down as Acting Kgoshikgolo (Acting King) of the Bapedi in so far as he has until now has claimed still to occupy that position.
 - (b) stop claiming that his son, the Second Respondent is the rightful King-to-be of the Bapedi Nation.
 - (c) stop to claim or associate himself with claims that the Second Respondent will be enthroned as Kgoshikgolo of the Bapedi Nation on 15 August 2020, or whenever or whatsoever.
 - (d) stop encouraging anyone to collect money from members of the Bapedi Nation for any function to enthrone his son as Kgoshikgolo.
 - (e) do all things and to sign all documents required by law and the custom of the Bapedi people to publicly step down as Acting Kgoshikgolo of the Bapedi and to hand over the kingship to the Applicant.
2. The First Respondent is interdicted from referring to himself as the King or acting King of the Bapedi.

3. The First Respondent is ordered to ensure that any regalia associated with Kingship is made available to the Applicant within 10 (ten) days of this order, and in so far as not under control to make known to the Applicant where it can be found and still in the possession of the First Respondent not be used in any way or manner for any purpose whatsoever.
4. The Second Respondent is ordered to stop claiming that he is the rightful King-to-be of the Bapedi nation and to allow or encourage anyone to arrange for ceremonies to be arranged for him to be enthroned as the King on 15 August 2020 or whenever or to allow that money be collected for this purpose from members of the Bapedi nation.
5. The cost of this application, including the cost of two Counsel shall be paid by the Respondents jointly and severally, the one to pay the other to be absolved.

A handwritten signature in black ink, appearing to read 'E M Makgoba', is written over a horizontal line.

E M MAKGOBA

**JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

Heard on : 30 June 2020

Judgment delivered on : 03 July 2020

For the Applicants : Adv. JL Van der Merwe SC
Adv. L K Van der Merwe
Adv. M Malatji

Instructed by : Phosa Loots Inc
c/o Pratt Luyt & De Lange Attorneys

For the Respondents : Adv. S S Tebeila

Instructed by : Mampa & Machete Inc
c/o M S Moloto inc