

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED
Signature <i>[Handwritten Signature]</i>	
Date 08/09/2020	

CASE NO: 6711/2018

In the matter between:

KGOSHI MOHUBE PHILEMON KOMANE
BAKONE BA MAANAKANE TRIBAL COUNCIL

FIRST APPLICANT
SECOND APPLICANT

and

PREMIER: LIMPOPO PROVINCE**FIRST RESPONDENT****GERONAH RESOURCES (PTY) LTD****SECOND RESPONDENT****NKWE PLATINUM SOUTH AFRICA (PTY) LTD****THIRD RESPONDENT****KGAGUDI KENNETH SEKHUKHUNE****FOURTH RESPONDENT****SEKHUKHUNE TRIBAL COUNCIL****FIFTH RESPONDENT****KGATLEDI LETTY KOMANE****SIXTH RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] The First and Second Applicants brought an urgent application against the Respondents for an in the following terms:

1. Dispensing with the forms and services provided for in the rules of this Court and directing that this application be heard on an urgent basis in terms of Rule 6(12);
2. That the Applicants' failure to comply with practice directives of the above Court, if any, regarding urgent applications and setting down thereof be and is hereby condoned;
3. That the decision of the First Respondent of 10 October 2018, to appoint Sixth Respondent as Headwoman of Komane community is declared unlawful and invalid and is hereby reviewed and set aside;
4. That the First Respondent is prohibited from finalizing and issuing to Sixth Respondent the certificate of Headwoman or traditional leader of Komane community;
5. That the Second and Third Respondents are prohibited from working with the Sixth Respondent in relation to community trusts created to administer funds generated from prospecting and mining activities at Dekom farm and other areas falling under Applicant's jurisdiction;

6. That the Fourth Respondent is prohibited from interfering with appointment of trustees and administration of community trust funds relating to Ga Komane community;
7. That orders in prayer 4,5,6 and 7 operate as interim relief with immediate effect pending the outcome of review application of the First Respondent's decision of 10 October 2018;
8. That the costs of this application in terms of Part A hereof to be costs in the application Part B below;
9. That the Applicant be granted such and / or alternative relief as the Court may deem fit.

[2] In Part B of the Notice of Motion the Applicants sought the following orders:

- 2.1. That the orders in prayers 4,5,6 and 7 in Part A be made final;
- 2.2. Declaring the decisions of the Premier of 10 October 2018 unlawful and invalid.
- 2.3. Reviewing and setting aside the decision of the Premier taken on 10 October 2018;
- 2.4. That the costs of the application be paid by Respondents who oppose the application, one paying others to be absolved.

[3] On the 13 November 2018 before Sikhwari AJ the following orders were granted by way of a draft order:

- 3.1. That the Second and the Third Respondents are prohibited from working with the Sixth Respondent in relation to trust fund generated from prospecting and mining operations at Dekom Farm, Ga-Komane and other areas falling within the jurisdiction of the Applicant;
- 3.2. That the Fourth Respondent is prohibited from interfering with the appointment of Trustees and administration of community trust funds of Ga-Komane community.
- 3.3. That the Second and the Third Respondents are prohibited from working with any person other than Bkone-Ba-Maakanane Development Trust in relation to community trusts funds.
- 3.4. That prayers 3 and 4 of the notice of motion against the First Respondent are abandoned.
- 3.5. That the First Respondent is granted leave to join the Second and the Third Respondents regarding the costs of the application.
- 3.6. That the matter be heard on 21 February 2019 for determination of Part B of the application.

[4] Prayers 3 and 4 of the Notice of Motion against the First Respondent (the Premier) were abandoned at the hearing of the urgent application when it was discovered that the Premier had not made the alleged decisions of the

10 October 2018.

In the present application the Applicants seek a final order in the form of an interdict against the rest of the Respondents. This application is opposed by the Fourth, Fifth and Sixth Respondents (“the Respondents”).

Issues for Determination

[5] The following issues are for determination by this Court:

- 5.1. Whether the First and Second Applicants have authority to bring this application against the Respondents, i.e their *locus standi*.
- 5.2. Whether the Applicants should be granted a final interdict against the Respondents herein. In other words, whether the Applicants have proven all the requirements of a final interdict against the Respondents.

Condonation

[6] The Respondents brought a substantive application for condonation of their late filing of their answering affidavit. The application is opposed by the Applicants. The Applicants brought an application for condonation of the late filing of their replying affidavit, which application is not opposed by the Respondents.

[7] Rule 27(1) of the Uniform Rules of this Court provides:

“In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or

abridging any time prescribed by these Rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet”.

Rule 27(3) provides as follows:

“The court may, on good cause shown, condone any non-compliance with these Rules. The sub-rule requires “good cause” to be shown and that gives the Court a wide discretion which must be exercised with regard also to the merits of the matter seen as a whole”.

[8] The principles governing an application for condonation can be summarised as follows:

1. Giving reasonable or acceptable explanation for the default or delay.
2. That there is a *bona fide* case which prima facie will succeed.
3. The applicant needs not illustrate a probability of success, but rather the existence of an issue fit for trial.
4. That there is no prejudice to the parties.

In **Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A)** it was stated that in deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion to be exercised judicially upon a consideration of all facts, and in essence is a matter of fairness to both sides. That among the facts

usually relevant are the degree of lateness, explanation therefor, the prospects of success and the importance of the case.

Ordinary, these factors are interrelated and they are not individually decisive. They must be weighed against each other.

- [9] It is trite that amongst the factors that the Court has regard to are: the degree of non-compliance, the explanation of the delay, the prospects of success, the importance of the case, the nature of the relief, the other party's interest in finality, prejudice to the other side, the convenience of the Court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for the non-compliance.

See : **Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae) 2008 (2)SA 472 (CC)**

and

Commissioner for the South Africa Revenue Service v Van der Merwe [2015]3 ALL SA (SCA)

- [10] The Respondents' notice of intention to oppose was filed on 14 November 2018 and the *dies* to file the answering affidavit expired on 5 December 2018. The Respondents served and file their answering affidavit on 21 February 2019, almost three months out of time. However considering the *dies non* in the

calendar of the High Court (15 December to 15 January) the period can be set at about two months.

Hereunder the Respondents give the explanation for the delay in filing their answering affidavit.

- [11] The Respondents' explanation for the delay in filing their answering affidavit within the prescribed time determined by the rules of this Court is contained in an affidavit of the Fourth Respondent.

The Fourth Respondent states that he is being sued herein in his capacity as the Acting King of the Sekhukhune area within which the area the First Applicant falls. Due to the magnitude of the matter and the fact that the dispute herein revolves around Traditional Leadership claims, he had to secure information orally from some elders within the Royal Family and the community with regard to the origin and history of Bakone Ba Komane traditional community of which the Applicant claims to be a leader.

- [12] After being served with papers in this matter the Respondents secured the services of their present attorney of record who duly filed a notice to oppose within the prescribed time. Before they could file their answering affidavit they had to secure information regarding the traditional leadership. Among other source the Fourth Respondent had to visit archives to look into the literature as well as literature written by historians and ethnologists.

- [13] The Respondent was bound to consult with the Fifth as well as the Sixth Respondent who resides at Dekom farm. The area has no proper communication network and transport infrastructure which made it difficult to communicate with the Sixth Respondent. Furthermore the Respondents also had to consult with the First, Second and Third Respondents in order to get their views and standpoint regarding this matter.
- [14] After consultation with their attorney of record and identification of counsel to assist in the consultation and preparation of the opposing papers, it was then that the answering affidavit was prepared, finalised and filed of record. All these efforts took more than two months to accomplish.
- [15] In opposing the application for condonation the First Applicant in his opposing affidavit was not able to gainsay the facts as set out in the Fourth Respondent's affidavit save to state that the aforesaid facts do not justify the late filing of the answering affidavit and that such facts do not constitute good cause for the Respondents' late filing of their answering affidavit.
- [16] The Applicants had an opportunity to file their reply to the Respondents' answering affidavit. Their replying affidavit was also file out of time and the Respondents acceded thereto. Nowhere in their replying affidavit or their affidavit opposing the condonation application of the Respondents, do the

Applicants state that they suffered any prejudice as a result of the Respondents' late filing of their answering affidavit.

- [17] In the light of cumulative facts stated by the Fourth Respondent in his affidavit coupled with the lack of prejudice to any party, this Court is inclined to grant condonation for the late filing of the Respondents' answering affidavit. On the papers filed of record I am of the view that the Applicants have a weak case in this application.

On the other hand the Respondents have prospects of success in their case as will appear later in this judgment.

Accordingly, the application for condonation is granted and the Respondents' late filing of their answering affidavit is condoned.

The Applicants' *Locus Standi*

- [13] The Respondents raised a point that the First and Second Applicants herein lack authority to bring the present proceedings before Court. The Respondents submitted that the Applicants have no authority and no *locus standi* to institute this application on behalf of the community they purport to act for and on behalf of Bakone-Ba-Maanakane Community Development Trust. The First Applicant claims his authority or *locus standi* by virtue of him being a Senior Traditional Leader (Kgoshi). For reasons that will follow later in this judgment, this is incorrect.

The First Applicant falls outside the provisions of section 12 of the Limpopo Traditional Leadership and Institutions Act No 6 of 2005.

The equivalent provision on national level is section 11 of the Traditional Leadership and Governance Framework Act No 41 of 2003.

[19] The Respondents submitted further that the Second Respondent, which is named Bakone Ba Maanakane Tribal Council does not exist as a traditional community and falls outside the purview of sections 3 and 4 of the Limpopo Traditional Leadership and Institutions Act. That the community has not been recognised as a traditional community in terms of section 3 of this act and further that the Second Applicant has not been recognised as a traditional council in terms of section 4 of the Act.

[20] The Applicants concede in their papers that Bakone Ba Maakane's status as the traditional community and the First Applicant as a Senior traditional leader (kgoshi) of Bakone Ba Maakane were not "created" by the Traditional Leadership and Governance Framework Act, 2003 and its provincial counterpart, the Limpopo Traditional Leadership and Institutions Act, 2005.

The Applicants contend that their status existed long before the enactment of the abovementioned statutes. The First Applicant states that he took over from his late father as the Kgoshi of Bakone Ba Maakane, in accordance with their

traditions and customs. The First Applicant concedes that he holds no Certificate of Appointment issued by the Premier of Limpopo.

It is not denied that the Second Applicant was never constituted and recognised by the Premier in terms of section 4 of the Limpopo Traditional Leadership and Institutions Act, 2005.

- [21] Section 3 of the Limpopo Traditional Leadership and Institutions Act, 2005 provides for the recognition of traditional communities. Such community may apply to the Premier in writing for recognition. The community so recognised by the Premier as such, shall establish a Traditional Council for that Traditional Community. In terms of section 4 of the Act, the Premier shall recognise the Traditional Council by notice in the Gazette. It is common cause that the Second Applicant, who is referred to as the “Tribal Council” was never recognised as a Traditional Council. For this reason the Second Applicant does not exist, and therefore cannot have the *locus standi* in the present proceedings.

See **Bakgakga-Ba-Mothapo Traditional Council v Tshepo Mathule Mothapo & Others (926/2018) [2019] ZASCA 130 (30 September 2019) at para 13.**

[22] The position of the First Applicant cannot be better.

The recognition of a senior traditional leader, headman or headwoman is regulated in terms of section 12 of the Limpopo Traditional Leadership and Institutions Act, 2005.

In terms of this section the traditional leader is identified by the royal family who submit the name to the Premier. The latter **must** then recognise such person so identified by the royal family by issuing a notice in the Gazette. A certificate of appointment is then issued by the Premier to such senior traditional leader, headman or headwoman, as the case may be.

It is common cause that the First Applicant never went through this process and was never issued with a Certificate of Appointment.

In the circumstance the First Applicant does not have the authority to act as Senior traditional leader (kgoshi) as he claims to be.

[23] At the hearing of this matter the Court requested Counsel for the Applicants to produce, if any, authorisation of the First Applicant to bring this application on behalf of the community he professes to lead. The Court was referred to a document marked as "Annexure BBK1" to the founding affidavit. The document purports to be a resolution of Komane Tribal Authority adopted on 1st November 2018. The document is reproduced and forms part of this judgment as shown hereunder:

KOMANE TRIBAL AUTHORITY

Bakone ba Komane

Chief Mchube Philemon Komana
Ga-komane village (Dekom
252KT) PO Box 9786
Sekhukhune
1124
Contact: 082 534 3625



RE: RESOLUTION TO CHALLENGE THE APPOINTMENT OF LETTY KGATLEDI KOMANE
AS HEADWOMAN OF KOMANE COMMUNITY

The council members have hereby to challenge the appointment of the above person as our
Headwoman by taking her to court.

Council member's names and signatures:

1. Matshehu Komane
2. Stephen Molepe
3. Douglas Maepa
4. Nomza Komane
5. Dintso Komane
6. LEOPE TAU
7. M TLOKE
8. Kaboo Komane

[Handwritten signatures of the council members, including a large signature that appears to be 'Molepe']

01 NOVEMBER 2018

- [24] The document is referred to as a Resolution to Challenge the Appointment of Letty Kgatledi Komane(Sixth Respondent) as Headwoman of Komane Community and nothing else. No authority is given to the First Applicant to bring the present interdict proceedings against the Fourth and Fifth Respondents. Furthermore the eight persons who signed the document purport to be Council members. Apparently they are Council members of the Second Applicant. I have already made a finding that the Second Applicant does not exist.
- [25] In the result, I make a finding that the First and Second Applicants have no authority or a *locus standi* to litigate in this application. On this ground alone, the application should be dismissed.

Whether the Applicants satisfied the requirements of a final interdict

- [26] For more than a century our law has authoritatively required an applicant seeking a final interdict to:
- (1) demonstrate a clear right;
 - (2) show an injury in the form of irreparable harm actually committed or reasonably apprehended and;
 - (3) the absence of an alternative remedy

See **Setlogelo v Setlogelo 1914 A 221 at 227**

Where an applicant seeks an interim interdict, two further qualifications are added:

(1) The right need not be clear provided it is *prima facie* established, even if open to some doubt; and

(2) The balance of convenience must favour the relief claimed.

See: **Webster v Mitchell 1948 (1) SA 1186 (W) at 1189 to 1190**

Gould v Minister of Justice and Another 1955 (2) SA 682 (C) at 688

[27] I have already made a finding that both the First and Second Applicants have no authority or the *locus standi* to bring the present matter before Court. It follows that they cannot demonstrate any clear right which is required for a final interdict to be granted against the Respondents. I need not even deal with the other remaining two requirements of a final interdict where the Applicants have failed to establish a clear right.

[28] In the result the application is dismissed with costs.

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 : 27 August 2020
Judgment delivered on : 08 September 2020
For the Applicant : Adv. J S Matsimela

Instructed by : Mathule Tjabane Attorneys
c/o F P Mugivhi Attorneys

For the 4th, 5th & 6th Respondents : Adv. K K Kekana

Instructed by : Lamola Attorneys
c/o Mphahlele Attorneys