

ORIGINAL



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case no: 4504/2018

MOROKA MOIPONE

Applicant

and

THE PREMIER OF THE FREE STATE PROVINCE

1st Respondent

**THE COMMISSION ON TRADITIONAL LEADERSHIP
DISPUTES AND CLAIMS**

2nd Respondent

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

3rd Respondent

**THE MINISTER OF CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

4th Respondent

FREE STATE HOUSE OF TRADITIONAL LEADERS

5th Respondent

MOROKA SEHUNELO KINGSLEY

6th Respondent

MOROKA LEBOHANG HILARY

7th Respondent

HEARD ON: **29 JULY 2019**

CORAM: **JORDAAN, J et MURRAY AJ**

JUDGMENT BY: **MURRAY AJ**

DELIVERED ON: **19 SEPTEMBER 2019**

[1] The Applicant, Ms Moipone Moroka, a female State Prosecutor in the Free State Office of the Director of Public Prosecutions instituted this review application to set aside a decision by the Premier of the Free State Province ("the Premier"). The said decision declared the Sixth Respondent, one Kingsley Sehunelo Moroka, to be the rightful Senior Traditional Leader of the Barolong boo Seleka community. The Applicant denies that he is entitled to be so declared.

[2] The Applicant avers that the Premier's decision, which was communicated to the Barolong boo Seleka Royal Household on 10 November 2017, was based upon a report by the Commission on Traditional Leadership Disputes and Claims ("the Commission") published on 29 February 2016 and which, according to the Applicant, was procedurally flawed and factually incorrect and

therefore also stands to be reviewed and set aside. The reasons for the decision were provided on 8 March 2018. This Court granted condonation for the late filing of this review application.

- [3] Only the First Respondent opposed the application. In its answering affidavit, the First Respondent indicated that the only areas of dispute were matters for legal argument and that all specific factual allegations were denied.

- [4] Adv AP Berry and with him Adv D Grewar appeared for the Applicant, and Adv SM Lebala SC and with him Adv L Manye represented the First Respondent.

- [5] Mr Berry submitted that the issues to be determined were whether the decisions of the 1st and 2nd Respondents were in compliance with *The Traditional Leadership and Governance Framework Act 41 of 2003* ("the Act"). Mr Lebala denied non-compliance with the Act and averred that there was a material factual dispute, that the Applicant lacked *locus standi* to bring the application and that the application was really an appeal 'dressed as a review' since the Applicant attacked the contents of the Premier's decision.

- [6] Mr Berry argued that the Commission's recommendations and the Premier's decision contravened the provisions of s 21(2)(a) and (b) of the Act¹ which

¹ "S 21 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.

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

provide that disputes pertaining to Senior Traditional Leaders must first be referred to the relevant Provincial House of Traditional Leaders. The House must then, in accordance with its internal rules and procedures, seek to resolve the dispute and only if it is unable to do so, must the dispute be referred to the Premier.

- [7] He conceded that the Commission did report that the Provincial House indeed attempted to resolve the dispute but that it was unable to do so because one of the parties involved in the dispute was serving as its Deputy Chairperson. According to Mr Berry, the report indicated that the House therefore requested the Premier to handle the matter through the MEC in order to ensure the fair adjudication of the dispute.
- [8] The Applicant stated that the Deputy Chairperson concerned was her mother, Gaongalelwe Audrey Moroka, who deposed to a confirmatory affidavit, and who allegedly averred that the House never considered the dispute in terms of s 21(2) of the Act. The said affidavit, however, was merely a general confirmation of the contents of the Founding Affidavit.

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- (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 its 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;
 - (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.

[9] According to Mr Berry the Deputy Director General in the Premier's Office, Mr Kopung Ralikontsane, met with the Royal Household on 10 November 2017 to communicate the Premier's decision, and only after that, on 14 November 2017, met with the FS House of Traditional leaders.

[10] Based on the above, the Applicant averred that, contrary to the provisions of s 21(2)(b) of the Act, the Premier's decision had been made prior to the meeting with the House instead of only after the House had already attempted to resolve the dispute and failed to do so.

[11] Mr Berry accordingly submitted that the House had not been afforded an opportunity to resolve the dispute before its referral to the Premier, which contravenes s 21(2)(a) and 21(2)(b) of the Act. According to him that constituted an irregularity reviewable in terms of s 6(2)(b) and 6(2)(c) of PAJA in that, respectively:

"a mandatory and material procedure or condition prescribed by an empowering provision was not complied with", and "the action was unfair".

[12] With reference to the minutes of the 14 November 2018 meeting annexed to the Founding Affidavit, Mr Berry averred that the House was simply informed of the report and the Premier's decision without any meaningful consultation taking place. He based this averment on the following extracts from the Minutes:

"The Government is giving the report to the house for the purpose of noting. The report is official and nothing can be done."

"Government has resolved not to involve the House because BAROLONG BOO SELEKA has always been riddled with disputes."

"The house was invited to the commission. So they were represented."

- [13] He argued that the Applicant's mother in her capacity as Deputy Chairperson of the House, could simply have been excused from the meeting to allow the House to perform its functions in terms of s 21(2)(a).
- [14] On behalf of the Applicant it was averred, also, that the Premier's decision was arbitrary and failed to take cognisance of all the relevant facts. The first point of criticism was that he allegedly failed to pay attention to the Royal Household's non-acceptance of the report on 10 November 2017, and also failed to take into account the Applicant's representations on 16 November 2017 regarding substantive and procedural issues, and failed, furthermore to provide adequate reasons for his decision. According to the Applicant he merely said why he accepted the Commission's recommendations, not why he dismissed the views of the Barolong boo Seleka Royal Household.
- [15] It was submitted, moreover, that the Commission's recommendation was irrational. It was averred that it was based on the decision of one Kgosi Maroka II, sometime after 1833, to appoint one Tshipinare, whom he loved as his 'own blood son' to succeed him. This decision, according to the Commission's report was the "shifting of chieftancy from the Seleka lineage ... to the Tshidi lineage of Barolong". The report further stated that the chieftancy of Barolong Boo Seleka had been in the Tshipinare lineage since 1880. According to the Applicant the report deals with the succession to the point where she 'became the Senior Traditional Leader of BAROLONG BOO SELEKA'.
- [16] The Applicant alleges that the Commission's recommendation and the Premier's decision to declare Sehunelo Kingsley Moroka the rightful Senior

Traditional Leader of the Barolong boo Seleka resulted in the history, consistency and chieftancy of some 137 years being undone, without the Premier's having provided reasons why he would undo 180 years of history or reject the views of the BAROLONG BOO SELEKA Royal Household.

- [17] On that basis it was submitted that the Premier's 'decision to bypass the requirements of the Act' was reviewable and stood to be set aside. According to the Applicant the Premier not only erred in failing to refer the matter to the House of Traditional Leaders before he appointed the Commission to render a report and make recommendations, but also, before making his final decision, failed to comply with the provisions of s 21(2)(b)(i) and (ii) which provide that he may only resolve the dispute after consultation with *"(i) the parties to the dispute; and (ii) the provincial house of traditional leaders concerned."*
- [18] The Applicant has to make out her case in her Founding Affidavit. Her contention that the Premier circumvented the prescribed statutory procedure in s 21(2) of the Act by making his decision before the House had attempted to resolve the dispute, fails however. It is clear that the leadership dispute between the Barolong Boo Seleka Royal Family and the Barolong Boo Seleka Royal Khduthamaga has a lengthy history, spanning several decades, and that what happened since the death of Kgosi G Moroka in 2013 is material to the current dispute and pertinent to this application, not only the events of 2017 and 2018 on which the Applicant relies. The Premier's decision and the contents of the Minutes of the meeting in which the decision was communicated, have to be viewed in its proper context.

[19] This is evident from the letter which Mr Morena LS Moloi, Chairperson: Free State House of Traditional Leaders wrote to the HOD: Cooperative Governance and Traditional Affairs, on 3 February 2014 and which was provided by the First Respondent in its Notice of Compliance in terms of Rule 53 of the Uniform Rules of Court.

[20] The letter is titled: "Barolong Boo Seleka Succession Dispute Resolution: Request for Establishment of the Commission of Enquiry or Referral of the Dispute to the Commission on Traditional Leadership Disputes and Claims". It states, first of all, that the Barolong Boo Seleka Royal Family and the Barolong Boo Seleka Royal Khduthamaga have for years been engaged in a leadership succession dispute.

[21] As appears from paragraph 4 of the letter, after the death of Kgosi G Moroka in 2013 the same conflict regarding Barolong Boo Seleka resurfaced

"prompting the department of Cooperative Government and Traditional Affairs, representatives of the Free State House of Traditional Leaders, State Law advisors in August 2013 to meet the clashing Barolong boo Seleka Royal Family and Barolong boo Seleka Royal Khduthamaga to discuss amicable ways to resolve the dispute. The meeting resolved that matter should be referred to the Premier to either (letters confirming resolutions attached):

- 4.1 Establish the commission of enquiry in terms of section 127(e) of Constitution of the Republic of South Africa or
- 4.2 Refer the matter to the Commission on Traditional Leadership Disputes and Claims in terms of section 21 of Traditional Leadership Framework Act 41 of 2003 as amended to investigate and make recommendations."

[22] Mr Moloi stated in paragraph 5 that the executive committee of the Free State House of Traditional leaders during its sitting on 21 January 2014 acknowledged that the Barolong boo Seleka succession dispute had been ongoing for a number of years and had been addressed on various platforms; **“while numerous attempts by the House and the Department of Cogta to resolve it proved unsuccessful”** [my emphasis]. He indicated that the meeting unanimously decided that the institution of traditional leadership and service delivery was being negatively affected by the situation in Thaba Nchu and that the situation needed urgent resolution.

[23] He stated that, in order to effect an urgent solution to the leadership dispute, the executive committee of the House then resolved to:

- Refer the dispute to the Premier for intervention in line with the resolution that was taken on 27 August 2013 between the House representatives, Head of department of Cogta, Barolong boo Seleka Royal Family and Barolong boo Seleka Royal Khduthamaga; and
- To include the item in the order paper of the full sitting of the House for further discussion.

[24] He reported, furthermore, that on 30 – 31 January 2014 the full sitting of the House argued that the involvement of the House in this dispute resolution might have created doubts of biasness because some of the family members who are involved in the succession dispute are members of the House and ***“considering that a number of interventions did not yield success”*** [my

emphasis] the sitting ***“concurred with the resolution that the matter must be resolved by the neutral body”***.

- [25] Paragraph 7 clearly stated that ***“Taking into account that the available provincial avenues to resolve the dispute have been exhausted, the Free State House of Traditional Leaders humbly requests the Premier to consider one of the options referred to in paragraphs 4.1 and 4.2 above to resolve [the] Barolong boo Seleka succession dispute.”***

- [26] Clearly, therefore, there is no merit in the Applicant’s contention that the Premier circumvented the provisions of s 21(2) of the Act by making his decision before the House has had the opportunity to attempt to resolve the dispute and has failed to do so. As appears from the Chairperson’s letter, the House has indeed on numerous occasions unsuccessfully attempted to resolve the matter.

- [27] That is confirmed, also, in a letter dated 18 March 2104 in which Mr Mokete Duma, the HOD: Cooperative Governance and Traditional Affairs, stated that ‘all the endeavours of the department and the Free State House of Traditional Leaders to resolve the matter amicably weren’t fruitful. There is therefore a void in the functioning of that traditional council and thereby necessitating an urgent intervention to break the stalemate in that traditional community.’ He explained that it was therefore necessary to request the Commission on Traditional Leadership Disputes and Claims to investigate the matter and advise the Premier.

- [28] Mr Duma indicated that COGTA in accordance with the provisions of s 28 of the *Free State Traditional Leadership and Governance Act, 2005* consulted with Barolong boo Seleka to appoint and recognise the successor to Kgosi Gaopalelwe Moroka, and that “on 19 July 2013, two names of Ms Moipone Maria Moroka and Mr Kinsley Sehunelo Moroka were forwarded to Premier from both opposing groups of which the matter constituted a dispute.”
- [29] There is therefore no merit in the submission that s 21(b)(i) and (ii) was contravened by the decision having been made without due consultation with the relevant parties, either. Mr Moloi’s letter also confirms that in 2013, after the death of Kgosi G Moroka, COGTA, representatives of the FS House of Traditional Leaders and State Law Advisors met with both the Barolong boo Seleka Royal Family and the Barolong boo Seleka Royal Khduthamaga to discuss ways to resolve the dispute and that that meeting, which therefore included both the ‘clashing parties’, resolved to refer the matter to the Premier to either appoint a Commission of Enquiry or to refer it to the Commission on Traditional Leadership Disputes and Claims to investigate and make recommendations.
- [30] Both parties to the leadership dispute were therefore part of that decision, and, furthermore, responsible for the selection of potential candidates from which to declare the rightful Senior Traditional Leader of the Barolong boo Seleka. It is clear, furthermore, that all available avenues to resolve the dispute were indeed exhausted and that the request to the Premier was the last resort.

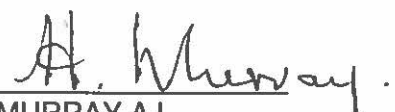
[31] Evidently, then, the allegation that no proper consultation took place before the Premier's decision was made, has no merit. Furthermore, it is clear that the Premier's decision was neither irrational nor taken without good reason: on the contrary he acted upon the direct request from the House of Traditional Leaders itself to intervene and to make the decision as a 'neutral body' to ensure the fair adjudication of the dispute.

[32] The Premier therefore did not fail to comply with s 21 of the *The Traditional Leadership and Governance Framework Act 41 of 2003* ("the Act") as alleged and the application cannot succeed.

[33] In view of our finding, there is no need to deal with the arguments and the point *in limine* raised on behalf of the First Respondent. There is no reason, either, to deviate from the normal order that costs follow the outcome.

WHEREFORE I make the following order:

1. The application is dismissed with costs.


MURRAY AJ

I concur and it is so ordered.


JORDAAN J

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