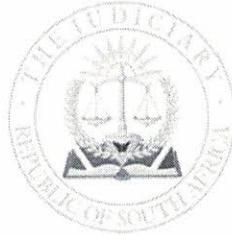


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 1247 / 2014

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED:
.....	
.....	
DATE: 13/12/2017	SIGNATURE:

In the matter between:

KGOSHIGADI MADIPOANE REFILOE MOREMADI MOTHAPO
BAKGAGA-BA-MOTHAPO TRADITIONAL COUNCIL

1ST PLAINTIFF
2ND PLAINTIFF

and

TSHEPO MATHULE MOTHAPO & 43 OTHERS

1ST-44TH DEFENDANTS

JUDGMENT

SIKHWARI AJ

[1] The first and second plaintiffs have brought an action against the first to forty-fourth defendants in terms of combined summons, with particulars of

was never issued with the certificate of appointment since the coming into operation of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 ("Act 6 of 2005"). She stated that she is familiar with Act 6 of 2005 as well as the Traditional Leadership and Governance Framework Act 41 of 2003.

[4] She conceded that her acting position was never subjected to review by the Premier at the end of every 12 months after the coming into operation of Act 6 of 2005. She testified further that in 2014 when the proceedings herein were launched she was the only women member of the second plaintiff. However, recently they have tried to comply with provisions of section 4 of Act 6 of 2005 by including some women in the traditional council. She testified that she is not aware if the Premier has given recognition to the second plaintiff by way of issuing a notice in the Gazette as envisaged in section 4(9) of Act 6 of 2005. All she knows is that names were submitted to the Premier. She further conceded that in the traditional council of the second plaintiff it is only herself and one Lesetja Herman Modiba who are senior traditional leader and traditional leader respectively; but the rest of the members are neither traditional leaders nor senior traditional leaders.

[5] The second witness to testify for the plaintiffs was Mabontshi Ramson Mothapo. Briefly, his evidence was that he is a chairman of the *bakgomana*

which is a council of close male royal family members. He is also a member of the second plaintiff. He testified that the second plaintiff started following the provisions of section 4 of Act 6 of 2005 during 2015. At the time of the instituting of this action, the said prescripts for composition of the traditional council were not followed.

[6] He confirmed the version of the first plaintiff regarding the review of the position of the first plaintiff by the Premier and the submission of names of elected councilors of the second plaintiff. He stated further under re-examination that the second plaintiff was created by custom of the Bakgaga-Ba-Mothapo community and is not created nor answerable to Act 6 of 2005.

[7] Matters of appointments of acting *kgoshigadi* (or acting senior traditional leader) are regulated in terms of Section 15(1) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 which provides that:

“15 Recognition of acting traditional leaders

(1) A royal family may, in accordance with the customary law of the traditional community concerned, identify a suitable person who must be

a member of the royal family to act as a king, queen, senior traditional leader, headman or headwoman, as the case may be, where—

- (a) a successor to the position of a king, queen, senior traditional leader, headman or headwoman has not been identified by the royal family concerned in terms of this Act;*
 - (b) the identification of a successor to the position of a king, queen, senior traditional leader, headman or headwoman is being considered and resolved in terms of this Act; or*
 - (c) a king, queen, senior traditional leader, headman or headwoman, as the case may be, would be absent from his or her area of jurisdiction under circumstances other than those provided for in section 16(1) and for a period of more than six months for—*
 - (i) the treatment of illness;*
 - (ii) study purposes; or*
 - (iii) any other lawful purpose.*
- (2) The premier must, upon appointment of an acting leader in terms of subsection (1)—*
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- (a) *issue a certificate of appointment; and*
 - (b) *inform the provincial house of traditional leaders and the relevant local house of traditional leaders.*
- (3) *The Premier must review the appointment of the acting traditional leader every 12 months.*
- (4) *The Premier must upon request by the royal family remove any person appointed in an acting capacity.”*

[8] Although the first applicant was appointed an Acting *Kgoshigadi* in terms of section 2(8) of the now repealed Black Administration Act 38 of 1927 on 16 November 1987, her appointment is regulated in terms of Limpopo Traditional Leadership and Institutions Act 6 of 2005 as from 1 April 2006 in terms of section 33(3) of the latter Act which reads that “*any person who, immediately before the commencement of this Act, had been appointed and was still recognised as a regent, or had been appointed in an acting capacity or as a deputy, is deemed to have been recognized or appointed as such in terms of the relevant provision of this Act.*”

[9] Section 28(2) of the Traditional Leadership and Governance Framework Act 41 of 2003 which came into operation on 24 September 2004 also provides that *“a person who, immediately before the commencement of this Act, had been appointed and was still recognised as a regent, or had been appointed in an acting capacity or as a deputy, is deemed to have been recognized or appointed as such in terms of section 13, 14 or 15, as the case may be.”*

[10] In the case of *Mulaudzi v Head Office: Vuwani Magistrate Office and Others* (291 / 2015) [2017] ZALMP THC 3 (21 February 2017) at paragraph 22, Phatudi J stated that *“a regent is recognised to hold office only for a period of 12 months (see section 14(1)(c)). The applicant failed to produce a certificate of recognition issued by the Premier of Limpopo either as at 2015 or 2016”*.

[11] The position of a regent is similar to that of an Acting *Kgoshigadi* or acting senior traditional leader when it comes to review of the said appointment after every 12 months. Section 14(1)(c) of Act 6 of 2005 which regulates appointment of regents states that *“the Premier must review the recognition of a regent every 12 months.”*

[12] Section 14(2)(b) of the Traditional Leadership and Governance Framework Act 41 of 2003 states that:

“14(2) An acting appointment in terms of subsection (1) must be made in accordance with provincial legislation, which legislation must at least provide for–

(a) ...

(b) a review of the acting appointment on a regular basis;”

[13] The first review of the first plaintiff's acting position should have taken place in April 2007; and thereafter, at the end of every subsequent 12 months' period. Plaintiffs do not deny that the first plaintiff's appointment was never reviewed since the coming into operation of Act 6 of 2005 on 1 April 2006. However, the plaintiffs tried to shift the blame to the Premier for not doing his duty of reviewing her appointment. The plaintiffs have a duty to cause the Premier to effect the review or process same; if need be, by way of compelling him through the court process in view of the fact that section 15(3) of Act 6 of 2005 is phrased in peremptory terms.

[14] The first plaintiff is relying on the letter dated 15 May 2013 as implied ratification of her acting appointment by the Premier. The said letter is from

the Limpopo Province's Department of Co-operative Governance, Human Settlement & Traditional Affairs ("COGHSTA") and is addressed to Bakgaga-Ba-Mothapo traditional community. The said letter is confirming that the first plaintiff is the *Kgoshigadi* of Bakgaga-Ba-Mothapo Traditional Council with effect from 11 August 1987. It is not uncommon for the Premier to communicate through COGHSTA in matters of traditional affairs.

[15] Act 6 of 2005 does not prescribe the manner in which the review must be done. It does not provide for the publication of the notice or review process in the government Gazette. I do not think that the Premier is expected to issue a new certificate of recognition of an acting appointment every 12 months if there is no change of the incumbent. In my view, it would suffice if the Premier may simply issue a document confirming that the incumbent's appointment was reviewed in terms of section 15(3) of Act 6 of 2005 and he or she will continue to act as a king, queen, senior traditional leader, traditional leader or regent or as the case may be.

[16] The trite test to determine *locus standi* is that where surrounding circumstances clearly confirm the existence of authority, the minimum of formal evidence is required to prove *locus standi* (See *Erasmus: "Superior Court Practice"*, Service 1 of 2016, at page D1-186). In this case, the

surrounding circumstances are that the first plaintiff was appointed an Acting *Kgoshigadi* in 1987, and she has been reigning as such. Both parties submitted that a challenge to her authority which was initiated by first defendant's father and later prosecuted further by the first defendant was finalized in August 2017 in favour of the first plaintiff. The existence of the COGHSTA letter has weakened the special plea as against the first plaintiff. Consequently, I will apply the minimum evidence test to determine *locus standi* of the first plaintiff.

[17] It is trite law that the onus is on the first plaintiff to allege and prove her *locus standi*. In the case of *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at page 575H-I, Nestadt J (as he then was) stated that "in accordance with the general rule that it is for the party instituting proceedings to allege and prove that he has *locus standi*, the *onus* of establishing that issue rests upon the applicant."

[18] In the case of *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Bpk* 1957 (2) SA 347 (C) at page 352A, Watermeyer J stated that "each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf. Where, as in the present case, the respondent has offered no evidence at all to suggest that the applicant is not properly before the Court, then I consider that a minimum of evidence will be required from applicant (cf. *Parson v.*

Barkly Est Municipality, supra; Thelma Court Flats (Pty) Ltd v. McSwigin, 1954 (3) SA 457 (C)).”

[19] The court should guard against the abuse of the special plea of lack of *locus standi* as a tactic was just a tactic to frustrate and delay the resolution of the real dispute between the parties, especially where there is no prejudice against the party raising the special plea. In the case of *Tattersall and Another v Nedcor Bank Ltd* 1995 (3) SA 222 (AD) at page 228I-J, where Nestadt JA stated that “it would seem that the denial was what may be called a tactical one. The tactic must fail. This is a case in which the approach adopted in *Mall’s* case (at 352B), namely that when the challenge to authority is a weak one, a minimum of evidence will suffice, applies.”

[20] In my view, the letter from COGHSTA is indicative that as on the 11 August 2013, the Premier still recognized the first plaintiff as the Acting *Kgoshigadi*. The COGHSTA letter, with its formal defects, constitute sufficient minimum evidence to establish *locus standi* on the part of the first plaintiff. Unlike in the *Mulaudzi* matter, in this case the letter is backed up by certificate issued in 1987.

[21] The second ground for challenging locus standi of the first plaintiff was that she is not a member of the Mothapo royal family. It was stated in the special plea that she is a commoner from Mphahlele family. She has no royal lineage to qualify her to act as a *Kgoshigadi* of the Bakgaga-Ba-Mothapo traditional community. No evidence was led to back this ground. I indicated to the parties from the onset that I am not sitting as a court of review in terms of rule 53 or PAJA to review the 1987 acting appointment of the appointment of the first plaintiff. I cannot take this ground any further as it was not substantiated. I take it as abandoned.

[22] In my view, the special plea relating to lack of *locus standi* against the first plaintiff has to fail. The main action may proceed to trial on merits with the first plaintiff standing as the only plaintiff.

[23] As regards the lack of *locus standi* of the second plaintiff, the court was referred to the provisions of section 4 of Act 6 of 2005 which states that:

"4. *Traditional Councils*

- (1) *The Premier must, when recognising traditional community in terms of section 3(4), and with due regard to the needs of the traditional*

community concerned, determine the number councillors for its traditional council to be established in terms of subsection (2): Provided that the total number must not exceed 30.

- (2) *A traditional community recognized by the Premier in terms of this Act must within 30 days after the traditional community has been informed accordingly in terms section 3(4) establish a traditional council for that traditional community, consisting of men and women who in accordance with the customary law of the traditional community concerned are recognised as councillors as well as other members of the traditional community concerned elected democratically.*
- (3) *The senior traditional leader of the traditional community referred to in subsection (2), must convene a meeting of all adult members of the traditional community for the purposes of election of members of the traditional council, by giving reasonable notice of such meeting in accordance with the custom of such traditional community. The senior traditional leader or his or her designate presides over such meeting.*
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- (4) *The elected members of the traditional council must as far as possible be sufficiently representative of the wards of the traditional community concerned.*
 - (5) *60 percent of the members of the traditional council must consist of traditional leaders and members of the traditional community selected by the senior traditional leader and the other 40 percent must consist of elected members.*
 - (6)
 - (a) *At least a third of the members of the traditional council must be women, unless the Premier*
 - (i) *is satisfied upon certification by the senior traditional leader concerned that there is a sufficient number of women; and*
 - (ii) *determines the lower threshold of women to be included in the particular traditional council.*
 - (b) *The senior traditional leader must, after the required number of men and the available number of women have been elected, if satisfied that there is insufficient number of women to fill the remainder of vacancies required to be filled by women, adjourn*
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the elections and refer the matter to the Premier in writing for the Premier's directive in terms of paragraph (a).

(c) The senior traditional leader must, upon receipt of the Premier's directive referred to in paragraph (b) resume the elections within 14 days of such receipt in accordance with such directive.

(d) The Premier must review the threshold of women to be elected into traditional council prior to the election of the new traditional council.

(7) Election of members of the traditional council must be done by way of voting in the manner determined by the Premier or any person designated by the Premier to oversee the elections.

(8) Particulars of members of the traditional council and the names of the members thereof must be submitted to the Premier in writing, within 60 days after the traditional council has been established in terms of section (2).

- (9) *The Premier must, upon receipt of the particulars referred to in subsection (8), if satisfied that the provisions of the Act have been complied with, within 30 days recognise the traditional council by notice in the Gazette."*

[24] On the evidence of the plaintiffs, it became glaringly clear that there have been several violations of the enabling Act 6 of 2005. Plaintiffs admitted that there is only one traditional leader (Lesetja Herman Modiba) out of 9 members of plaintiffs' traditional council. This was a violation of section 4(5) of Act 6 of 2005. There was a concession by both witnesses of the plaintiffs that the traditional council of the plaintiffs had no women members. This was a violation of section 4(6)(a) of Act 6 of 2005.

[25] There was no sound explanation from plaintiffs as to why they did not cause the Premier to comply with section 4(9) of Act 6 of 2005 regarding their recognition by way of a notice in the government Gazette. As it stands, the Premier has not yet satisfied himself that the composition of the second plaintiff complies with Act 6 of 2005. Secondly, and perhaps more importantly, the Premier has not yet given recognition to the plaintiffs' traditional council. Such a council does not exist in law.

[26] The peremptory duty on the Premier in terms of section 4(9) of Act 6 of 2005 is the most important one in that it constitutes the act of giving recognition to the traditional council. It is a certification that the Council is compliant with the legislation. It is an act of giving legal existence and or legal authority on the traditional council; without which there is no traditional council. The failure to comply with this requirement, irrespective of the reason thereof, is fatal against the purported traditional council, second plaintiff.

[27] The defence raised in evidence by the plaintiffs that their traditional council was created in terms of custom, and not necessarily Act 6 of 2005, is misplaced and lacks legal substance. Section 33(5) of Act 6 of 2005 provides that *“a tribal authority or tribal council that, immediately before the commencement of this Act, existed under the provisions of any law, is deemed to be a traditional council established under this Act: Provided that such traditional council must comply with the provisions of section 4 within one year of the commencement of this Act.”*

[28] As stated above, the said period of one year has expired on 1 April 2007. However, section 28(4) of the Traditional Leadership and Governance Framework Act 41 of 2003, as amended, has extended the above period of one year to seven years. In this case it means that the cut-off was the 23

September 2011. The plaintiffs had not yet complied as on 21 August 2014 when the combined summons commencing the main action was issued as well as at the hearing of the matter on 12 December 2017.

[29] In my view, the defendants' special plea for lack of *locus standi* against the second plaintiff must succeed. The second plaintiff is not a traditional council as envisaged in section 4 of Act 6 of 2005. There is no documentary proof that as of now when the matter was heard, the second plaintiff had duly complied with the above provisions of Act 6 of 2005.

[30] Costs are within the judicial discretion of the presiding Judge. In this case both parties are equally successful in that one special plea is dismissed and another is upheld. In the circumstances, costs for the special pleas will be costs in the main action.

[31] I accordingly make the following order:

1. That the special plea for first plaintiff's lack of *locus standi* is dismissed.
 2. That the special plea for second plaintiff's lack of *locus standi* is upheld.
 3. That costs are in the main action.
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MS SIKHWARI AJ
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE

APPEARANCES

For Plaintiffs	:	Adv JC Erasmus
Instructed by	:	Rheeder Attorneys
For Defendants	:	Mr RE Maesela
Instructed by	:	Maesela Incorporated
Date of Hearing	:	11-12 December 2017
Date of Judgment	:	13 December 2017