

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

CASE NO: 31565/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
12 June 2013	<i>EIM bushi</i>
DATE	SIGNATURE

12/6/2013

In the matter between:

PATRICK MOTLATSO MAETELETJA

APPLICANT

and

FRANS MADULA MAETELETJA

1ST RESPONDENT

CHIEF DAVID PHETO GO SELEKA

2ND RESPONDENT

PREMIER OF LIMPOPO PROVINCE

3RD RESPONDENT

MEC FOR LOCAL GOVERNANCE

4TH RESPONDENT

HOUSE OF TRADITIONAL LEADERS

5TH RESPONDENT

J U D G M E N T

KUBUSHI, J

- [1] The Maeteletja village is a small community which falls under the Seleka Tribal Office under the Chieftaincy of Chief David Phetogo Seleka. The 1st respondent has been appointed and inaugurated as the headman of this community. The applicant is resisting the appointment and has thus approached this court for an order declaring: the appointment of the 1st respondent as the headman of the Maeteletja Community as void *ab initio*; the applicant as the rightful heir and successor of the late Lucas Moloko Maeteletja as the headman (induna); and directing the 2nd to 5th respondents to inaugurate the applicant as the headman of the Maeteletja Community.
- [2] It is common cause that in terms of the long established customary laws of South Africa a headman or headwoman (induna) is appointed by the Chief in terms of the established customary laws of that particular community. The long established customary laws of the Maeteletja Community are that their headmen (indunas) are appointed in terms of the customary law of male primogeniture from the Maeteletja family. The aforesaid customs and practices of the Maeteletja Community are recognised and protected in terms of section 211 of the Constitution Act, 108 of 1996. The process of appointing headmen and headwomen is encapsulated in section 11 of the Traditional Leadership and Governance Framework Act 41 of 2003 (the national legislation) read with section 12 of the Limpopo Traditional Leadership and Institution Act 6 of 2005 (the provincial legislation).

- [3] The applicant's contention is that the 1st respondent's appointment does not comply with the customary laws of the Maeteletja Community or the provisions of section 11 of the national legislation read with section 12 of the provincial legislation. The applicant avers that the 1st respondent's father was not a headman, but a regent, and, that the 1st respondent was born out of wedlock. The 1st respondent was not known to the Maeteletja family until after the death of his father. He was also not using the Maeteletja surname. He changed to this surname after his father passed away.
- [4] The 1st respondent denies these allegations and contends that his parents were married by customary law. He was using his mother's maiden surname because at the time of his birth, his mother's identity document was not registered in his father's surname. He was able to change his surname to that of his father only after the passing away of his father.
- [5] The 2nd to 5th respondents are not opposing the matter.
- [6] The crisp issue to be determined is the validity of the appointment of the 1st respondent as the headman of the Maeteletja Community.
- [7] The institution, status and the role of traditional leadership is recognised in the Constitution Act 108 of 1996. Section 211 thereof provides that –

“(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable subject to the Constitution and any legislation that specifically deals with customary law.”

[8] The legislation applicable in regard to traditional leadership is the national legislation read with the provincial legislation as quoted in paragraph [2] of this judgment. The national legislation mirrors the provincial legislation. It is, thus, not necessary for purposes of this judgment to analyse both legislations. The provincial legislation specifically applies in the Limpopo Province where the Maeteletja Community is situated. I shall, therefore, in my analyses concentrate on the provincial legislation.

[9] The procedure for the appointment of a headman or headwoman is set out in section 12 of the provincial legislation. In terms of the section –

“(1) Whenever a position of a senior traditional leader, headman or head woman is to be filled-

(a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to the customary law of the traditional community concerned-

- (i) *identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and*
- (ii) *through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of the specific person.*

(b) the Premier must, subject to subsection (2)-

- (i) *by notice in the Gazette recognise the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, headman or headwoman, as the case may be;*
- (ii) *issue a certificate of recognition to the person so recognised; and*
- (iii) *inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional leader, headman or headwoman.*

(2) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the Premier-

- (a) may refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations; or*
- (b) may refuse to issue a certificate of recognition; and*
- (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.*

(3) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (2) has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration

and resolution by the royal family has been done in accordance with customary law."

[10] Subsection (1) (a) of the provincial legislation stipulates that in the appointment of a headman or headwoman the royal family must with due regard to the applicable customary law identify a person who qualifies in terms of customary law to assume the position in question. The provisions of this subsection are peremptory and must be followed to the letter. In this instance, the royal family in the Maeteletja Community were therefore compelled in terms of this subsection to identify a person who qualified in terms of customary law to assume the position of the headman.

[11] Customary law is a body of rules and norms that has developed over centuries. An enquiry into the position under customary law will therefore invariably involve a consideration of the past practices of a community. The content of customary law must be determined with reference to both the history and the usage of the community concerned. See SHILUBANA & OTHERS v NWAMITWA 2009 (2) SA 66 (CC) at paras [44] and [46].

[12] In this instance, the parties are agreed that the Maeteletja family have always followed the custom of male primogeniture in appointing a headman for the community. Primogeniture is the right, by law or custom, of the firstborn son to inherit the entire estate, to the exclusion of younger siblings. It is therefore common cause that the indunas in

the Maeteletja Community have always been appointed in terms of this system. This factor, according to the parties is well known in the community. A person who would qualify as a headman in terms of customary law practised in the Maeteletja Community must therefore be the first born son of the reigning headman.

- [13] It is also common cause that the first headman (induna) of the Maeteletja Community was Sebatana Frans Maetetetja (Sebatana). When Sebatana passed away he was succeeded as headman by his son Lucas Moloko Maeteletja (Moloko). Moloko passed away on 22 October 1992. At that time his eldest son, the applicant, was still young and could not take his late father's throne. The applicant's uncle, Joseph Pale Maeteletja (Pale), was appointed as a regent. Pale was the half-brother to the applicant's father. Subsequent to Pale's death, another applicant's uncle, Moses Thema Maeteletja (Thema), was appointed regent. Thema was the youngest brother in the family of the applicant's father. When Thema passed away, the applicant was permanently living and working in Gauteng. He was at this time ready to take over the throne. The family agreed that the 1st respondent, who is the son to Thema, be appointed as regent until the applicant came back from Gauteng. The applicant eventually came to settle permanently in the Maeteletja village. The respondents, however, refused to appoint him as the headman and instead appointed and inaugurated the 1st respondent.

- [14] The parties are agreed that, in terms of the applicable customary law the applicant was to succeed his father. The royal family instead identified the 1st respondent to assume the position of headman even though he was not in line as *per* the customary law of primogeniture. The 1st respondent's legal representative conceded in argument that by identifying the 1st respondent as such, the royal family deviated from the custom that had been followed for many years by the community. The deviation, according to the 1st respondent, had to be done because it was revealed at that time that the applicant's father, Moloko, was not the biological son of Sebatana, the applicant's paternal grandfather. These allegations are denied by the applicant.
- [15] This revelation, according to the 1st respondent, was done by Adelaide Moeteletji the daughter of Sebatana. The revealed information was confirmed by Mokgaetsi Letitia Maeteletja (Mokgaetsi) whose confirmatory affidavit to the 1st respondent's opposing affidavit forms part of the papers before me.
- [16] At the commencement of the hearing I requested the parties' legal representatives to address me on the question of the disputes of facts emanating from the papers, in particular the issue of the legitimacy of the applicant's father, Moloko. The 1st respondent's legal representative submitted that it will not be possible for the 1st respondent to provide any other evidence, except as already provided for in the papers, to prove that the applicant's father was not the biological son of Sebatana. The

1st respondent would also not be able to lead *viva voce* evidence in respect of this issue due to the fact that the two ladies, Adelaide and Mokgaetsi have since passed away.

[17] Affidavits in application proceedings constitute not only the evidence but also the pleadings, and therefore, while it is not necessary that the answering affidavit set out a formal plea, it must contain, in the evidence it sets out, all that would have been necessary in a trial. See SAUNDERS VALVE CO LTD v INSAMCOR (PTY) LTD 1985 (1) SA 144 (TPD) at 149C.

[18] There is no other evidence before me, in respect of this dispute, except the confirmatory affidavit of Mokgaetsi. The 1st respondent in his answering affidavit does not state the source of Adelaide's information. Mokgaetsi in her confirmatory affidavit does not state the source of her information as well.

[19] Adelaide and Mokgaetsi's revelations, in my view, are secondary facts and do not constitute evidential material capable of supporting the allegation raised. I therefore, find myself constrained to can accept their evidence as admissible for purposes of this hearing. Even if this allegation by Adelaide and Mokgaetsi was true, I would still be challenged to accept it at this stage when it was never raised at the time Moloko was inaugurated as the headman of the Maeteletja

Community. It is common cause that Moloko reigned as the headman between 1989 and 1992, it follows that his lineage must succeed him.

[20] The objective inference to be made in the circumstances of this case is that Moloko was the first born child of Sebatana. Moloko, correctly so, succeeded Sebatana and his lineage must succeed him as well. Following the custom of primogeniture the applicant as the eldest son of Moloko stood in line to succeed him.

[21] To my mind, the applicant is correct the 1st respondent's father was not in line to be a headman and as a result the 1st respondent could not have been in line to be a headman. By appointing, the 1st respondent as headman, the royal family, wrongly so, deviated from the customs and traditions of the Maeteletja Community when identifying a person as headman.

[22] In terms of section 2 of the provincial legislation where there is evidence or even a mere allegation that the identification of a person as a headman or headwoman was not done in accordance with customary law, customs or processes, of a particular community the Premier is open to two options:

- (i) to either refer the matter to the Provincial House of Traditional Leaders and the relevant Local House of Traditional Leaders for their recommendations; or

- (ii) to refer the matter back to the Royal Family.

The Premier has no discretionary power to resolve the dispute on his own, his power and/or function is expressly restricted by legislation to refer the matter to one of the two forums referred to above to obtain a recommendation or otherwise refer the matter to the Royal Family for a resolution. See the unreported judgment in **N I LEBOHO & OTHERS v THE PREMIER OF LIMPOPO & OTHERS** Case No. 37898/2007 delivered on 28 January 2011 at para [26].

[23] It is the applicant's contention that he raised the issue of the failure by the royal family to comply with the provincial legislation with Chief Seleka who it appears informed the premier. According to the applicant the grievance was dealt with by Mr Ramahasha, Ms Kutumela and Mr Shai who were representing the 3rd and 4th respondents. The three officials, aided by what is referred to as an anthropologist's report, took a unilateral decision and announced the 1st respondent as the successor to Moloko. The three officials representing the 3rd and 4th respondents failed to follow the grievance procedure set out in subsection 2 of the provincial legislation.

[24] Based on the two grounds, namely, failure to comply with the requisites of the customary law and the provisions of subsection 2 of the provincial legislation I am inclined to grant the applicant the relief sought in respect of prayer 1 of his notice of motion.

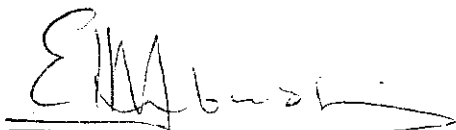
[25] Although it is so that I have considered prayer 2 and 3 of the notice of motion and have also expressed an opinion as to the non-compliance with the processes and procedures. I am, however, hesitant to grant the relief sought in respect of these prayers. I am in respectful agreement with my brother Raulinga J when he stated the following:

"Much as the court might have formed an opinion on this matter, it would be disingenuous of me to make an order in terms of prayer 1.3. This will be tantamount to installing or recognising Ngako Isaac Leboho as "Kgoshi" and thereby usurping the powers of the Premier and all the relevant structures. While it might be necessary to make an order in exceptional instances, I am not tempted to do that in this case. Even if one is of the view that the proper procedures and processes were not followed in the recognition of the 2nd Respondent, one is also mindful of the separation of powers and the respect that must be accorded to the executive and its administration. I am therefore inclined to making an order in terms of prayer 1.1 without any correction and 1.2. Prayer 1.3 is therefore considered but not granted. Proper procedures and processes must still be followed to identify and recognise the "Kgoshi"."

See the unreported judgment in **N I LEBHOHO & OTHERS v THE PREMIER OF LIMPOPO & OTHERS** above at para [44].

[26] As is trite costs follow the successful party. The applicant being the successful party is therefore entitled to his costs.

[27] In the premises prayers 1 and 4 of the Notice of Motion are granted.



E. M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearances:

HEARD ON THE	: 27 MAY 2013
DATE OF JUDGMENT	: 12 JUNE 2013
APPLICANT'S ATTORNEY	: MALOKA THULARE ATTORNEYS
RESPONDENT'S ATTORNEY	: OBI MATLAILA ATTORNEYS