

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case no: 1043/2007

Date heard: 2007-12-07

Date delivered: 2007-12-14

In the matter of:

**THE PREMIER: NORTHERN CAPE
KGOSI KS MOTSHWARAKGOLE**

**FIRST APPLICANT
SECOND APPLICANT**

versus

LA GASEEMELWE	FIRST RESPONDENT
MM GASEEMELWE	SECOND RESPONDENT
SH GABOREWE	THIRD RESPONDENT
G GABOREWE	FOURTH RESPONDENT
R GAOGATWE	FIFTH RESPONDENT
P GOREWANG	SIXTH RESPONDENT
S THIBOGANG	SEVENTH RESPONDENT
MS MOSALA	EIGHTH RESPONDENT
L BOIHANG	NINTH RESPONDENT
DG NTLHAILE	TENTH RESPONDENT

Coram: **MAJIEDT J**

JUDGEMENT

MAJIEDT J:

1. This is the return day of a *rule nisi* which was granted in this

Court on 24 August 2007. The applicants ask for confirmation of the interim interdict and the respondents are opposing the application for a final order. At issue is the disputed chieftainship of the Batlhaping Ba Ga Phuduhudu.

2. Prior to the commencement of the hearing, I had addressed a memorandum to the legal representatives of the parties requesting them to furnish supplementary heads of argument regarding the question whether this Court has the necessary jurisdiction to hear the matter. At the hearing, Counsel for the applicants, Mr Motloun (albeit initially with great reluctance) and Mr Van Niekerk SC, Counsel for the respondents, conceded that this Court does not have jurisdiction to hear the matter. This is so because of the anomalous position that, administratively and politically the areas where the second applicant and the respondents are resident and where the dispute had arisen, fall within the Northern Cape Province, but judicially these areas still fall in the North West Province under the jurisdiction of the Bophuthatswana General Division.
3. Mr Motloun initially contended that the respondents have consented to jurisdiction and that therefore this Court is clothed with the necessary jurisdiction. When pressed on this aspect, he conceded that the submission is bad in law. It has been decided in a long line of cases that, even where parties consent

to the jurisdiction of a Court, in the absence of any other ground of jurisdiction, it is not sufficient cause to clothe a Court with the necessary jurisdiction. See *inter alia*:

Ex Parte Kajee 2004(2) SA 534 (C) at 542 B-C.;

Daljosaphat Restorations Pty (Ltd) v Kasteelhof CC 2006(6) SA 91 (C) at 99 C-E (par 35).

It is settled law further that a Court which has doubts as to its jurisdiction may *mero motu* raise the point, even where the respondents had not objected to jurisdiction in their papers. See in this regard:

Runeli v Minister of Home Affairs and Others 2000(2) SA 314 (TKHC) at 317 B-C

4. Following on his concession with regard to the lack of jurisdiction of this Court, Mr Motlounq then applied for the matter to be transferred to the Bophuthatswana General Division in terms of the provisions contained in s3 of the Interim Rationalization of Jurisdiction of High Courts Act, 41 of 2001 ("*the Act*"). Mr Van Niekerk in response, has submitted that there has to be a substantive application on Notice of Motion with supporting affidavits before the Court in order to consider whether the matter should be transferred.

Section 3 of the Act reads as follows:

- “(1) If any civil proceedings have been instituted in any High Court, and it appears to the Court concerned that such proceedings-

- (a) should have been instituted in another High Court; or
- (b) would be more conveniently or more appropriately heard or determined in another High Court,

the Court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other High Court.

- (2) An order for removal under subsection (1) must be transmitted to the registrar of the High Court to which the removal is ordered, and upon receipt of such order that Court may hear and determine the proceedings in question.”

5. The only reported decision which I could find in which the aforementioned s3 had been considered is **Nongovu NO v Road Accident Fund 2007(1) SA 59 (T)**. In that matter Patel J observed with regard to this particular section:

“It is probable that this section has superseded, without expressly repealing, s 9 of the Supreme Court Act.”

at par 10 (64 B)

In the judgment Patel J also held as follows at par13 (64 H):

“A Court, in the instant matter the TPD, must itself have jurisdiction before it can transfer proceedings to another Court.”

If the learned judge meant that this was the position under s9 of the Supreme Court Act, 59 of 1959, that statement is correct. Section 3 of the Act, however, introduces a new ground for transfer namely, if it appears to a High Court that the proceedings should

have been instituted in another High Court. It is quite obvious that a court which does not have jurisdiction may effect such transfer in terms of the aforementioned s3(1)(a). The purpose of this legislation, as the name suggests, is to rationalise in the interim the areas of jurisdiction of the High Courts. It was quite clearly intended to deal with matters such as the present, where parties approach the wrong forum in the mistaken belief that, because the political and administrative boundaries had been redemarcated in terms of other legislation, the areas of jurisdiction of the High Court had been redemarcated accordingly. Authorities such as the one referred to by Patel J in the aforementioned **Nongovu** case, which hold that a case can be transferred to another Court only if the transferring Court itself has jurisdiction to hear the case in the first place, must therefore be read in the context that such transfer occurs under the provisions of s9 of the Supreme Court Act and on the grounds of convenience. See in this regard:

Welgemoed and Another NNO v The Master and Another 1976(1) SA 513 (T) at 523 C-D;
Ex parte Benjamin 1962(4) SA 32 (W);
Van der Sandt v Van der Sandt 1947(1) SA 259 (T).

6. Section 3 of the Act, quoted above, envisages that the Court may order transfer on application by a party. There is no authority, nor has any been relied upon, for the proposition advanced by Mr Van Niekerk on behalf of the Respondents, that

a substantive application is required in the circumstances. I do not, in any event, see the need for such an application in these circumstances. It is clear to all concerned that this Court does not have the necessary jurisdiction and that the matter should be transferred to the Bophuthatswana General Division. A substantive application will not elucidate matters any further; on the contrary, such a course of action would merely delay the matter unnecessarily. In the circumstances I am satisfied that the oral application brought by Mr Motlounq is sufficient. In addition thereto, I have given Mr Van Niekerk adequate opportunity to address the matter of transfer to another High Court in his oral argument. I am accordingly satisfied that I can order transfer of the matter in terms of s3 of the Act to the Bophuthatswana General Division.

7. The next question that arises is the effect of the lack of jurisdiction and the consequent transfer of the matter on the *rule nisi* which had been issued and also the matter of costs. With regard to the *rule nisi*, this Court's lack of jurisdiction obviously also prevailed at the time that the *rule nisi* had been issued. It is clear that this aspect was never considered by the parties or by my colleague who had issued the interim order. In the premises, therefore, the *rule nisi* should be discharged, in my view. With regard to costs, the applicants who are *dominii litis*

clearly erred in approaching the wrong forum. Mr Motlounq argued that this was a *bona fide* mistake, given the anomaly that exists and which I had alluded to earlier. While this is so, a litigant must choose his/her/its forum and must do so diligently and conscientiously. It surprises me that the State Attorney, who is the instructing attorney for the applicant in this matter, was not aware of this position regarding jurisdiction. In any event, I believe that in the exercise of my discretion with regard to costs it would not be equitable and fair towards the respondents if a costs order is not made in their favour. On the other hand, however, the respondents also failed to appreciate this fact, admitted the averments regarding to this Court's jurisdiction and opposed the matter fully, including the issuing of instructions to Counsel. My *prima facie* view was that costs should be ordered on an unopposed basis, given the fact that the respondents also failed to raise this point. I agree, however, with Mr Van Niekerk, that the applicants are supported by State machinery, whereas the respondents are ordinary citizens and that it would be inequitable to mulct them in costs. Consequently I am of the view that the applicants should be ordered to pay the costs on an opposed basis.

8. Disputes relating to chieftainships are, at best of times, highly emotive affairs. The present matter is no exception. I would

urge the parties, more particularly the second applicant and the respondents, to exercise restraint in the interim while the matter awaits a hearing date in the Mafikeng High Court.

9. The following order is issued:

1. **The *rule nisi* issued on 24 August 2007 is discharged.**
2. **In terms of the provisions contained in Section 3 of the Interim Rationalisation of Jurisdiction of High Courts Act, 41 of 2001, this matter is transferred to the Bophuthatswana General Division of the High Court.**
3. **The applicants are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs incurred by the respondents with regard to the proceedings in this Court up to and including the costs of the hearing on an opposed basis.**
4. **A copy of this order must be transmitted by the Registrar of this Court to the Registrar of the High Court, Bophuthatswana General Division.**

**SA MAJIEDT
JUDGE**

ADVOCATE FOR THE PLAINTIFF	:	ADV MOTLOUNG
ADVOCATE FOR THE DEFENDANT	:	ADV J VAN NIEKERK SC
ATTORNEY FOR THE PLAINTIFF	:	STATE ATTORNEY
ATTORNEY FOR THE DEFENDANT	:	HAARHOFFS
DATE OF HEARING	:	7 DECEMBER 2007
DATE OF JUDGEMENT	:	14 DECEMBER 2007