

REPUBLIC OF SOUTH AFRICA


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

CASE NO: 92/2025

- (1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED: YES/NO

Makoti A.J.

 A black rectangular box covering the signature of Makoti A.J.

SIGNATURE

DATE

In the matter between:

MOTHAPO ROYAL COUNCIL

First Applicant

MATHULE TSHEPO MOTHAPO

Second Applicant

AFFECTED SPAZA SHOP OPERATOR/OWNERS

Third Applicant

And

POLOKWANE LOCAL MUNICIPALITY

First Respondent

BAKGAGA BA MOTHAPO TRADITIONAL COUNCIL

Second Respondent

**THE HEAD OF DEPARTMENT, LIMPOPO DEPARTMENT
 OF COOPERATIVE GOVERNANCE, HUMAN SETTLEMENT
 AND TRADITIONAL AFFAIRS**

Third Respondent

KGOSHIGADI MADIPOANE REFILWE MOREMADI MOTHAPO

Intervening Party

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **14 February 2025**.

JUDGMENT

Makoti AJ

Introduction

- [1] To call it a community in perpetual tumult in the context of leadership is to understate their reality. Years have gone by without an answer of permanency as to who, both *de facto* and *de jure*, is the leader of the traditional community of Mothapo. This justifies the use of the vernacular expression '*tau tša hloka thobela ke mojano*'. I loosely translate this to mean, in pith, that troubled is a society or community that is without an identified leader. It will become clear below as to why this expression rings true in the prevailing situation at Ga-Mothapo.
- [2] After hearing the application there was an attempt to introduce new evidence, which was not on affidavit. I am precluded, for obvious legal reasons, to consider such evidence in this judgment. It is well established that affidavits which are filed in motion proceedings constitute both pleadings and evidence.¹ It would be inappropriate for me to have regard to evidence which is not on affidavit.

¹ Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D.

- [3] The applicants seek to interdict the Polokwane Local Municipality (the Municipality), which is the first respondent, from accepting or entertaining applications for purposes of issuing business permits based on letters that are issued by the Traditional Council of Bakgaga Ba Mothapo (Council). They also want the court to direct the Municipality to accept and to issue spaza shop permits which are based on letters that have been issued by Mothapo Royal Council (MRC).
- [4] The Council, which is cited as the second respondent, has not filed any papers to oppose the application. Instead, Kgoshigadi Madipoane Refilwe Moremadi Mothapo (Moremadi), ostensibly as a senior traditional leader, has filed an application to intervene as a party and to enter issue with the applicants. Thus, the issues for consideration are: whether the application deserves to be heard on urgent basis, the question of intervention, and whether interdictory relief ought to be granted.

Whether intervention ought to be allowed

- [5] The parties are accusing each other of not having the right to participate in these proceedings. More so, the applicants are asking the court to deny the application by Moremadi to intervene in these proceedings. They argue that she is not an acting senior traditional leader of the community as she has averred in the intervention application. There is a dispute whether she is a senior traditional leader, and I have nothing to confirm or disprove the allegation. Also, the applicants contend that the traditional community does not presently have a recognised council and, therefore, Moremadi cannot use the Council to perform any official functions associated with that office. I am not called to resolve her legitimacy as an acting senior traditional leader.

- [6] The law regarding applications to intervene is settled. Such applications are regulated in terms of Rule 12 of the Uniform Rules of Court. It provides that:

“Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all the parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to further procedure as the action as to it seem meet.”

- [7] The test for intervention was explained in *SA Riding for the Disabled Association v Regional Land Claims Commissioner*² the Constitutional Court held that:

“[9] It is now settled that an applicant for intervention must meet the direct and substantial interest test in order to succeed. What constitutes a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court. This means that the applicant must show that it has a right adversely affected or likely to be affected by the order sought. But the applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to relief.

[10] If the applicant shows that it has some right which is affected by the order issued, permission to intervene must be granted. For it is a basic principle of our law that no order should be granted against a party without affording such party a pre decision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation.”

- [8] The principle is that once an intervening party shows that it has a direct and substantial interest in the subject-matter of the case, the court ought to grant leave to intervene. What stands out from the above quoted text is that an order ought not to be granted which has implications over a person who has not been afforded a chance to participate in the court proceedings. This *audi*

² [2017] ZACC 4, paragraphs [9]-[11].

alteram partem principle is in accordance with what was enunciated in *Nelson Mandela Metropolitan Municipality v Greyvenouw CC*³ in these terms:

“[9] In addition, when, as in this matter, the applicants base their claim to intervene on a direct and substantial interest in the subject-matter of the dispute, the Court has no discretion: it must allow them to intervene because it should not proceed in the absence of parties having such legally recognised interests.”

[9] Further, the court in *Special Investigating Units v Van Kampen and Another*⁴ held that:

“[19] Intervention regulated by the provisions of Rule 12 relates to the manner a party joins the proceedings. It does not deal with the question of whether the party is entitled to be part of the proceedings. The Rule must be interpreted permissively. If the applicant could have instituted or defended the pending civil proceedings, it is fallacious to deny that party intervention on the basis that there is no specific provision authorising that party to intervene in the proceedings. The essence is being entitled to take part in the pending proceedings. The Rule is to be interpreted in a way that promotes the participation in the pending proceedings by those entitled to participate in it. In my view, Rule 12 in referring to plaintiff includes a plaintiff in reconvention.”

[10] The case for the Intervening Party is that, in addition to being an acting senior traditional leader of the community, she is the *de jure* head of Council, which has issued the letters which form the subject matter of this application. These are the letters which the applicants say the Municipality should be interdicted from receiving or accepting. Surely, under these circumstances, the originator of the impugned letters must have standing to defend their validity, as well as the authority with which she issued them.

[11] I note that Moremadi somewhat conflates her statutory functions with those of Council - as if her name is synonymous with the institution. That, however, is

³ Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004 (2) SA 81 (SE).

⁴ Special Investigating Unit v Van Kampen and Another (5790/2020P) [2023] ZAKZPHC 49 (3 May 2023).

a sideshow that should not detain us. On the facts I find that to deny her a chance to defend her actions will not fit in with what is espoused in the authorities mentioned above. But then there is a problem in that the Intervening Party has not filed an application asking the court for leave to intervene. The filed Notice of Intention to Intervene is not in compliance with regular procedure. Happily, that is not an insurmountable problem as the court is entitled to raise the issue of intervention *mero motu* where it is of the opinion that a party that is likely to be affected by the outcome of the case is not cited nor served with the application.

- [12] Based on the reason of authorship of the letters, even though she purported to be doing so on behalf of Council, and due to the fact that I am of the view that the Intervening Party stands to be affected by the Court's decision, the intervention is accordingly allowed.

Whether the application is urgent

- [13] Urgency is both a factual and legal question. Our jurisprudence is replete with legal authorities on what a party asking to be heard on urgent basis must do. First, such a party must present facts which he avers renders the case urgent. Once that hurdle is surmounted, the party must indicate why a hearing in due course will not afford it substantial redress.⁵

- [14] The upshot of the applicant's case on urgency is that:

[14.1] they began to experience problems with the Municipality on 19 December 2024, when it began to reject the letters issued by the Royal

⁵ Cekeshe And Others v Premier, Eastern Cape & Others 1998 (4) SA 935 (Tk) at 948E; Mangala v Mangala 1967 (3) SA 415 (E).

Council as sufficient for purposes of issuing spaza shop licenses or permits. The Municipality appears not to recognise such letters and that the Royal Council is authorised to issue them.

[14.2] the position adopted by the Municipality raised consternation amongst spaza shop owners who could not be helped with the letters issued by the MRC. Efforts by the second applicant, Mathule Tshepo Mothapo, to resolve the issue with the Municipality drew blanks. He visited the Municipality on 23 December 2024 and again on 02 January 2025 without success.

[15] If they do not get a hearing and a ruling prior to the closing date for registration of spaza shops, the applicants argue, they stand to suffer harm with no prospects of attaining substantial redress in the future. They contend that they will lose the right to continue their spaza shop businesses, which will condemn their families to be without income. This rings true at least in respect of the third applicant, which is a collective of people running spaza shops within the Mothapo traditional community.

[16] The Intervening Party contends that the application is not urgent. If urgent, she argued, and latching onto the history of the problems as reflected in the founding affidavit, the urgency that the applicants rely on is self-created or contrived. She contended that the applicants should blame themselves as they knew of the problems already on 19 December 2024. This argument misses important aspects of this application. First, the applicants have indicated that they have attempted in vain to resolve the matter with the Municipality. Second, it is a fact that the deadline for registration of spaza shops is 28 February 2025.

[17] The erudite words of Moseneke ACJ, as he was then, say to us that it is not so much that the applicants have caused delays in bringing the application that will deny them entrance into the court, rather it is the harm they may have to endure as well as whether there exists substantial redress in due course which are deciding factors. In *South African Informal Traders Forum and Others v City of Johannesburg and Others*⁶ the Court said the following:

“[37] Another of the City’s contentions was that the urgency the applicants relied on was self-created and ought not to be entertained. Even if it is accepted that urgency arose as early as October 2013, it was only prudent and salutary that the applicants first sought to engage the City before they rushed off to Court. That engagement, as mentioned above, produced the agreement of 2 November 2013.

[38] I find nothing dilatory in the efforts of the applicants to engage the City and persuade it to restore them to their trading positions in the inner city. Their return to their trading stalls remained urgent throughout the engagements or negotiations attempted before an urgent application was launched. Even by the time they approached this Court, their claims were self-evidently urgent ...”

[18] In any case, the interdictory orders that the applicants are asking for are intended to operate against the. They have tried to resolve the issue with the Municipality before approaching this court, which attempts were rebuffed. I am satisfied and accept that the matter is urgent and warrants to be heard on that basis.

The merits

[19] There are two fundamental issues here. Atop these is the question of the customary role of the first and second applicants. Do they have the right to administer traditional community affairs? If so, where do they derive such

⁶ South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others (CCT 173/13 ; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014).

authority? Then, there is the important issue of the legitimacy of Moremadi's position as senior traditional leader of Bakgaga Ba Mothapo, which has been contested by the applicants. The applicants contend that her appointment as acting senior traditional leader has lapsed as it has not been reviewed and extended by the Premier in terms of applicable statute.

[20] The issues raised above feed directly into the question of the requested interdicts - that is whether they ought to be granted. Statutorily, the administrative affairs of a traditional community are within the province of the Council.⁷ As for the Royal Council, it purports to act as a functionary of the Royal Family which is empowered to take and perform administrative functions. But this body is not established in terms of statute, nor is it endowed with legislative powers and functions. When I engaged counsel for the applicants on these issues, it was readily conceded that there are no known legislative powers or functions adhering to the Royal Council.

[21] With that out of the way, it does not seem to me that the Royal Council can ask for the kind of interdictory orders that it seeks against the Municipality, more so in relation to the part where it wants the latter to accept and process the letters that it has issued. To allow that would be to abdicate the rule of law, a fundamental constitutional principle which requires that people should perform only powers and functions which are lawfully conferred upon them.⁸ *Jowell*⁹ points out that:

"... The rule of law requires open, clear, stable, general rules that must be applied without preference by independent courts. These principles have several practical legal implications. They require, in the first instance, exercise of public power within

⁷ Section 19 and 20 of the Traditional and Khoi-san Leadership Act No. 3 of 2019.

⁸ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC); 1999 1 SA 374(CC).

⁹ *Jowell* "The rule of law today" 19.

the framework of the law. In a case in which power is exercised *ultra vires*, the official exercising of that power is in breach of the rule of law. However, the rule of law as legality may mean more than merely acting within the scope of allocated power.”

- [22] With regard to the spaza shop owners I am afraid they have chosen to be part of a battle that is wages without and far from them. They have no business in selecting who, in this case, is legally entitled to send or receive letters, and they are in no position to tell the Municipality that it must accept and rely on only the letters that were issued by the first and second applicants.
- [23] The applicants are asking for final interdict orders, and they must satisfy the court that they have a clear right to them. Our authorities have held that to determine whether an applicant has a clear right is a question of substantive law.¹⁰ Whether a right is clear is a matter of evidence. Therefore in order to establish a clear right, the applicants have to prove on a balance of probability, facts which in terms of substantive law establish the right relied on.
- [24] In attempting to prove that they have a clear right the applicants rely on the corporate existence of the first applicant. What they say about it is essentially that the first applicant is an administrative body that is endowed with administrative functions attaching to the Mothapo Royal Family. That is not correct. They are not an administrative body at all. They have no authority to issue administrative letters. The result is that they cannot demonstrate this for purposes of the orders that they have prayed for. It is futile of them to try to assert a right that they do not in law possess. In the circumstances, I am not satisfied that the applicants have proven that they have a clear right for purposes of the orders that they are requesting this court to make.

¹⁰ Minister of Law & Order, Bophuthatswana v Committee of the Church Summit of Bophuthatswana 1994 3 SA 89 (BG) at 97–98.

- [25] The above should not be seen as an endorsement of the Council's authority to issue the letters. As it was argued by counsel for the applicants - in line with the authority in *Bakgaga-Ba-Mothapo Traditional Council v Mothapo and Others*,¹¹ there is currently no recognised council having the powers to administer the affairs of the traditional community. That means that the second body which has allegedly issued the letters which the applicants are aggrieved by is itself not entitled to be in office.
- [26] Back to the statement that I made earlier, all of these things mean that community members, including in this case the affected spaza shop owners, are faced with a predicament in that they do not have a legitimate body (i.e. a lawfully constituted traditional authority) to represent them and look after their interests. Tragically, leaderless, rudderless and desperate is the only way to describe the position that community members find themselves in.
- [27] The leadership challenges faced by this traditional community are historical. On 27 October 1995 Le Roux J of the then Transvaal Provincial Division directed a way forward which he had hoped would assist the dispute of leadership to be put to rest. He ordered the Premier of Limpopo to *inter alia*:
- "2. ... appoint a chairman of act as facilitator of a meeting to be held at a time and venue to be determined by such appointed on or before which the said facilitator shall be appointed on or before 30 November 1995.
 4. That the meeting establish according to customs, laws and traditions of the said tribe, who the true and legitimate Balgomana are and that a list of names of those persons be compiled."

¹¹ *Bakgaga-Ba-Mothapo Traditional Council v Mothapo and Others* (926/2018) [2019] ZASCA 130 (30 September 2019).

- [28] I was minded to follow a similar approach, but the Premier is not a party before me. It will therefore not be prudent to make a court order against the Premier without their participation. What I remain with is a material factual dispute as to the legitimacy of the parties before me, that is, whether they are who they purport to be as leaders of the traditional community. The issue of leadership of the traditional community remains and it is the root of the current dispute. Though they should know each other within the context of their leadership structures and positions, they reject each other's positions and roles, especially as members of the Royal Family.
- [29] As I see it, the dispute as to the legitimate existence of the Council starts with the question whether the traditional community has a duly recognised senior traditional leader. An argument that suggests that the Council in law exists is not only wrong, but it also undermines what Shikhwari AJ (confirmed by the Supreme Court of Appeal) has held in the Bakgaga-Ba-Mothapo authority mentioned above. Unless the Council was composed in terms of applicable legislative prescripts, it cannot be said to be lawfully in existence. By arrogating for itself status and powers that it does have it is acting in a manner that is repugnant to the rule of law.
- [30] Moremadi contends that she is entitled to be a senior traditional leader by virtue of being a candle wife. That does not seem correct, but it is a question that can be properly answered by a court having considered the customs and traditions of the traditional community. I am mindful that she was previously identified and recognised as senior traditional leader. However, I have no facts as to when her position was either confirmed or last reviewed nor when her tenure was extended by the Premier. It may very well be that her hold on the senior traditional leadership position has fully run its course, but I make no

finding about it. My view is that the issue should be resolved because it is only if she is a senior traditional leader that she can lead the Council.

[31] I do not lose sight of the fact that I am called upon to consider interdict orders which would see the Municipality being directed to not accept the letters which were issued by a non-existent council. Were I to so direct, the Municipality would be compelled to accept letters issued by another body exercising powers that it does not in law possess. The Royal Council can't be helped to contravene the law. Its hands are not clean. In *Maughan and Another v Zuma*¹² the Court held that:

"[95] Our courts have also found an abuse of process to exist where a litigant comes to court with 'unclean hands', and have dismissed a litigant's claim. Such power is sparingly exercised, as it prevents a litigant from having their day in court, which right is constitutionally entrenched in s 34 of the Constitution. The Constitutional Court has endorsed the approach of dismissing a claim on the grounds of abuse 'because the litigant who would bring it is disqualified from doing so by reason of their abuse'."

[32] I see only one outcome in this case - its dismissal.

[33] Though I would dismiss the application, none of the parties is entitled to the costs of this litigation.

Order

[34] I make the following order:

[a] The application is dismissed.

¹² 2023 (5) SA 467 (KZP).

[b] The is no order as to costs.



MOKGERWA MAKOTI

ACTING JUDGE OF THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE

APPEARANCES:

HEARD ON: 28 JANUARY 2025

JUDGMENT DELIVERED ON: 14 FEBRUARY 2025

FOR THE APPLICANT: ADV MH MASILO

MANABELE S ATTORNEYS

POLOKWANE

FOR THE RESPONDENT: ADV KK KEKANA

MAKGOBA KGOMO MAKGALENG ATTORNEYS

POLOKWANE