



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

CASE NO: 2654/2016

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| (1) | REPORTABLE: <u>YES/NO</u> |
| (2) | OF INTEREST TO THE JUDGES: <u>YES/NO</u> |
| (3) | REVISED. |
| <p>DATE: <u>24/10/2016</u> SIGNATURE: <u>[Signature]</u></p> | |

In the matter between:

MASHILE MAXMAN PHASHA

FIRST APPLICANT

BAROKA BA NKWANA ROYAL FAMILY

SECOND APPLICANT

and

THE PREMIER: LIMPOPO PROVINCE

FIRST RESPONDENT

TLAKALE MAVIS PHASHA

SECOND RESPONDENT

MANYAKU ELIZABETH MAIMELA

THIRD RESPONDENT

POTLAKE NKWANA STEVEN PHASHA

FOURTH RESPONDENT

JUDGMENT

MAKGOBA JP

[1]. The Applicants brought an application against the Respondents for an order in the following terms:

1.1. That the decision of the Royal Family dated 8 September 2014 appointing the First Applicant as the acting Kgoshi of the Baroka-Ba-Nkwana Traditional Community is hereby declared as valid and binding.

1.2. That the First Respondent is directed to act in terms of Section 15(2) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005:-

1.2.1. by issuing a certificate of appointment for the First Applicant and

1.2.2. by informing the Provincial House of Traditional Leaders and the relevant Local House of Traditional Leaders.

1.3. That the First Respondent should comply with the above within 10 days of service of this order upon him.

1.4. That the Second, Third and Fourth Respondents be and are interdicted from:-

1.4.1. arranging and/or holding meetings with the members of the Baroka Ba Nkwana Community;

1.4.2. approaching the Community or any third party in an attempt to solicit donations or funding;

1.4.3. entering into agreements in the name of the Second Applicant;

1.4.4. using the stamp of Baroka –Ba-Nkwana Royal Council.

1.5. Costs in the event of opposition.

[2]. The Applicants essentially approach this Court primarily for a declaratory relief and a *mandamus*. The declaratory relief relates

to the recognition and enforcement of a decision of the Royal Family to appoint the First Applicant as acting Kgoshi. The Applicants contend that this decision is valid by reason of it having been taken by the Royal Family in terms of Section 15(1) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 ("the Limpopo Act"). Section 15(1) in its relevant form, reads:

" 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."*

- [3]. The relief of a *mandamus* is directed at the First Respondent ("the Premier") that he be ordered to act in terms of section 15(2) of the Limpopo Act to issue the First Applicant with a recognition certificate. Section 15(2) provides:-

“The Premier must, upon appointment of an acting traditional leader in terms of subsection (1) –

(a) issue a certificate of appointment; and

(b) inform the provincial house of traditional leaders and the relevant local house of traditional leaders.”

- [4]. The application is opposed by the Second, Third and Fourth Respondents. The First Respondent abides the decision of the Court. The Second, Third and Fourth Respondents dispute that the First Applicant is entitled to the relief sought and/or that the appointment of the First Applicant as an acting Kgoshi is, under the prevailing circumstances, warranted and justified.

Dramatis Personae

- [5]. There is a relatively long and controversial history of litigation in the Baroka –Ba-Nkwana Community involving the parties in the present matter and others, all dating back to the period shortly after the death of Kgoshi Nkwane Aubrey Phasha (“Kgoshi Aubrey”).

- [6]. Kgoshi Aubrey was the first born of the late Kgoshi Potlake Steven Phasha ("Kgoshi Steven"), the father of both the First Applicant ("Maxman") and Kgoshi Aubrey. The latter succeeded Kgoshi Steven to the position of Chieftancy. He died in April 2003 in a car accident.
- [7]. The Second Respondent ("Tlakale") is the wife of the late Kgoshi Aubrey, with whom she had no male child. However, by virtue of marriage Tlakale is the candle wife of Kgoshi Aubrey.
- [8]. The Third Respondent had a son with Kgoshi Aubrey. There is a dispute as to whether they were married to each other. Their son, born out of wedlock, is the Fourth Respondent herein. The Third and Fourth Respondents were parties in previous litigation seeking the appointment of the Fourth Respondent as a successor to Kgoshi Aubrey.
- [9]. The Second Respondent previously acted as a regent and was previously issued with a recognition certificate to that effect on 26 January 2011. However, the certificate fell away on 12 December

2012 when it was withdrawn and replaced by a certificate of her appointment as an acting Kgoshigadi. Her appointment as acting Kgoshigadi is a subject of a pending litigation in the North Gauteng High Court, Pretoria.

Factual Background

[10]. Since the passing away of Kgoshi Aubrey, the Baroka-Ba-Nkwana Community has been embroiled in conflicts which have resulted in a proliferation of litigation in regard to numerous issues. Various Court applications were instituted as summarised below.

Application under case number: 13846/2003

("the 2003 application")

[11]. The 2003 application was brought by the Second Respondent in the present application (Tlakale) and concerned the issue as to who is the candle wife of the late Kgoshi Aubrey.

The issue emanated from the dispute as to who was entitled to bury Kgoshi Aubrey. In that application Mojapelo DJP gave an order, dated 28 May 2003, declaring the Second Respondent (Tlakale) as the candle wife of Kgoshi Aubrey and therefore

entitled to bury him. That order was never challenged and/or rescinded.

In the present application the First Applicant (Maxman) concedes that Tlakale is the candle wife and that this issue was in fact resolved by Mojapelo DJP in the 2003 application. However, the Third and Fourth Respondents seem to dispute this issue in another pending litigation in the North Gauteng High Court, Pretoria.

Application under case number 4438/2008

(the 2008 application)

[12]. The 2008 application was brought by one of the Bakgoma (Inner Circle member) Lipson Ngaku Phasha, and concerned, *inter-alia*, the question as to who constitutes members of the inner circle (Royal Family) of the Community.

Rabie J gave an order, dated 26 July 2010, declaring specific persons as members of the inner circle (Bakgoma). By then they were 24 in number.

Application under case number 18879/2011

(the 2011 application)

[13]. The 2011 application was launched by Maxman (the First Applicant herein) essentially seeking the setting aside of the Second Respondent's recognition as a regent and to have the question as to who should succeed Kgoshi Aubrey referred back to the Royal Family for decision making. This application also dealt with the issue of paternity of the Second Respondent's son.

Claassen J ordered for the paternity test to be performed. He also made an order that the dispute regarding who is the candle wife should be referred to trial. He furthermore ordered that pending the finalisation of the dispute the *status quo* as is existed before the launch of that application shall be preserved. The order is dated 6 June 2011. It is common cause that the trial envisaged by Claassen J has not yet been held. The matter is thus still pending.

Application under case number 4243/2013

(the 2013 application)

[14]. The 2013 application was brought by the Third and Fourth Respondents (in the present application) as well as the late mother

of both Kgoshi Aubrey and Maxman. The application was brought mainly to set aside the decision of the Premier to recognise the Second Respondent (Tlakale) as an acting Kgoshigadi. By order dated 26 July 2013, Baqwa J declared the appointment of Tlakale as an acting Kgoshigadi to be of no force and effect pending final determination and outcome of the 2011 application.

[15]. It is appropriate to quote the relevant order which is as follows:

" 2. Pending the final determination and outcome of the matter in this Honourable Court under case number 18879/2011 and the relief sought in PART B of this application, the recognition of the fourth respondent by the first respondent as acting Kgoshigadi in terms of section 15(2) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005, is hereby suspended and declared to be of no force and effect".

[16]. The Court also confirmed that the result of the paternity test was that the Second Respondent's son is not the biological son of the late Kgoshi Aubrey.

[17]. It is common cause that the matter as per Court order of Baqwa J is still pending in as much as Part B of that application has not yet been heard and finalised and the trial as envisaged in the Court order of Claassen J is still to be held.

The Present Application

[18]. Before launching this application a letter regarding the appointment of Maxman as the acting Kgoshi was addressed to the Premier requesting him to issue Maxman with the appointment certificate in the light of the resolution of the Royal Family dated 8 September 2014 and as envisaged in Section 15(2) of the Limpopo Act.

[19]. A response was received from the Acting Head of the Department of Corporative Governance, Human Settlements and Traditional Affairs, Limpopo, in which the acting Head of Department advised as follows:

“ Kindly note that according to our records you are party to a litigation that is pending in Court under Case No.18879/2011. The department’s position is that the pending dispute must first be disposed

of or finalised and then a fresh application be made following a prescribed procedures."

The issue of *lis pendens*

[20]. The Second Respondent raised a point of *lis pendens* in relation to case number 18879/2011 (the 2011 application) and case number 42437/2013 (the 2013 application).

It is common cause that the 2011 application is still pending. The matter has been referred to trial and has reached a stage where the Applicants in the case have filed their declaration to which the Respondents therein have filed their plea. It would appear that the matter is indeed heading for trial as ordered by Claassen J.

[21]. Regarding the 2013 application, it is common cause that same has not yet been finalised. Part B of the said application which concerned the issue of who is to be an acting Kgoshi is still pending. Needless to say that the present application has to do

with the same issue of acting Kgoshi as in the pending case under the 2013 application.

[22]. It should also be mentioned that in the 2011 application the Second Applicant (Baroka-Ba-Nkwana Royal Family) has launched an application for intervention to be joined as the Fifth Respondent . Interestingly, the First Applicant herein (Maxman) opposes such application for intervention. The latter application is also still pending.

[23]. In my view the whole dispute pertaining to the leadership of Baroka-Ba-Nkwana Community is pending in two cases before the North Gauteng High Court, Pretoria. The present application amounts to a duplication or attempts on the part of the First Applicant to overtake the proceedings before another Court.

Conclusion

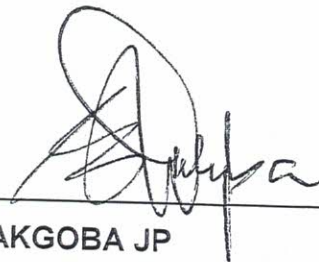
[24]. I find it undesirable that the present application be entertained until the matters under case number 18879/2011 and case number 42437/2013 which remain pending before the High Court in Pretoria are finalised.

[25]. During the hearing of this matter on the 17 October 2016 I made the following proposal to the parties and their legal representatives:

That the two pending cases before the High Court in Pretoria be consolidated and transferred to the Limpopo Division of the High Court, Polokwane where the matters will be heard on trial with the interested parties giving oral evidence so that this long outstanding issue of the leadership of Baroka-Ba-Nkwana can be resolved once and for all. Should the matters be transferred to this Court the Judge President shall give the parties a preferential date of trial as soon as possible during the next term.

[26]. I got the impression that the parties are agreeable to my proposal. However, it is not for me to make such an order but I trust that the parties will oblige in an effort to reach finality in this ongoing feud.

[27]. The application is accordingly dismissed with costs.



E M MAKGOBA JP

JUDGE PRESIDENT OF THE HIGH
COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on : 17 October 2016

For the Applicants : P.G Seleka SC

Instructed by : Sefalafala Attorneys

For Second Respondent : Mr. K K Kekana

Instructed by : Maesela Incorporated Attorneys

For Third & Fourth

Respondents : In Person