REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: HCAA15/2021
REPORTABLE: YES/NO
OF INTEREST TO THE JUDGES: YES/NO
REVISED.

In the matter between:

MAMAELE GEORGINA MATSAUNG	**FIRST APPELLANT**
MANTEBELE MABYANE	**SECOND APPELLANT**
THABO MABYANE	**THIRD APPELLANT**

And

MAMAHULE TRADITIONAL AUTHORITY	**RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] On 14th April 2021 the respondent (applicant in the main application) launched an urgent application against the second and third appellants (first and second respondents in the main application) for a spoliation, as well as relief ancillary thereto. The application was set down for 28th April 2021. In that application should the appellants wish to oppose the respondent's application, they were required to serve their notice of intention to oppose by no later than 16h00 on 16th April 2021, and thereafter deliver their answering affidavit by no later than 12h00 on 21st April 2021. The application was served by the sheriff on both the appellants' on 15th April 2021 by affixing on the principal doors of their respective residential addresses.

[2] On 16th April 2021 the respondent filed a joinder application in terms of Rule 10 of the Uniform Rules of Court (the Rules) seeking to join the first appellant as the third respondent in the main application. The first appellant in that notice was called upon to serve her notice of intention to oppose should she so wish by close on business of the 16th April 2021 and thereafter to deliver her answering affidavit no later than 21st April 2021. On 16th April 2021 the respondent also filed a notice in terms of Rule 28(10) on urgent basis seeking

to amend its notice of motion in order to include the first appellant as the third respondent.

[3] The appellants filed their notice of intention to oppose on 19th April 2021. The first appellant filed her answering affidavit on 23rd April 2021 with the second and third appellants attaching confirmatory affidavits to the first appellant's answering affidavit. On 28th April 2021 the matter came before AML Phatudi J who struck out the first appellant's notice of intention to oppose and the answering affidavit with costs on the ground that it was filed out of the periods fixed by the respondent without making an application for condonation for late filing of their opposing papers. Immediately after the first appellant's opposing papers were struck out, counsel of the appellants' raised a point *in limine* of the respondent's non-compliance with Rule 41A of the Rules. The point *in limine* was upheld and the application was struck off the roll with no order as to costs.

[4] On 30th April 2021 the respondent filed their Rule 41A notice and also set the matter down on the urgent roll of the 4th May 2021. On 3rd May 2021 the appellants' filed their Rule 30 notice together with the second appellant's answering affidavit. The second appellant in her answering affidavit had included a condonation application for late filing of his opposing papers. On 4th May 2021 the matter came before Muller J. The appellants' counsel argued three points *in limine*, but no ruling was made on those points *in limine*. The presiding Judge adjourned matter to Thursday the 6th May 2021 to allow the respondent to file its replying affidavit to the appellants' answering affidavit. The points *in limine* raised by the appellants were that of lack of urgency, *locus standi* of the respondent and that of contravention of the practice directive by re-enrolling the urgent application in flagrant disregard of the rules of court and the practice directive.

[5] On 6th May 2021 when the hearing resumes, counsel for appellants handed in a substantive application for condonation for late filing of the answering affidavit by the appellants. The condonation application was by way of notice of motion which was a stand-alone application. After engagement with court, counsel for the appellants abandoned the stand-alone application, and proceeded to argue the condonation application as it appears in the appellants answering affidavit.

[6] The Muller J dismissed the appellants' condonation application on the basis that it was a belated attempt by the second appellant to reverse her earlier decision of filing a confirmatory affidavit to the first appellant's answering affidavit which was disallowed. Further that when the second appellant realised that the first appellant's answering affidavit has been disallowed, she needed to do something about the situation. After the dismissal of the appellant's condonation application, the court *a quo* dealt with the matter on unopposed basis and granted the orders as prayed for by the respondent. The default order granted included the first appellant. From the transcribed records, it does not appear that the first appellant was at any stage formally joined to be a party to the proceedings. Since the first appellant's opposing papers were struck out, it does not appear that the first appellant took part in further proceedings that continued. It is therefore not clear on what basis the default order was also against the first appellant despite she not been a party to the proceedings.

[7] The appellants are appealing against the whole of the judgment and order of Muller J handed down on 6th May 2021. The appeal is with the leave of the Supreme Court of Appeal. The appellants are seeking that the orders of the court *a quo* be set aside, and be substituted with an order dismissing the respondent's application, alternatively that the application be struck from the roll with costs.

[8] The issue which this court is required to determine is whether the court *a quo* was correct in refusing to grant the appellants condonation for late filing of their opposing papers. Should this court find that the court *a quo* erred in refusing the appellants' condonation application, the other issue to be determined is whether the respondent's application should have been dismissed.

[9] The factors which a court must consider when exercising its discretion whether to grant condonation includes the degree of lateness, the explanation for the delay, the prospects of success, degree of non-compliance with the rules, the importance of the case, the respondent's interest in finality of the judgment of the court below, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. (See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*[1]).

[1] [2013] 2 All SA 251 (SCA) at para 11

[10] In *Van Wyk v Unitas Hospital*[2] the Court said:

"This court has held that the standard for considering an application for condonation is the interest of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[11] When the application was first heard before AML Phatudi J on 28th April 2021, the first appellant had filed an answering affidavit, whilst the second and third appellants have filed confirmatory affidavits to the first appellant's answering affidavit. The first appellant's answering affidavit was disallowed by AML Phatudi J, and that resulted in the second and third appellants without any answering affidavit before court.

[12] The court *a quo* found that the second appellant had belatedly realized that in order to oppose the respondent's application she now had to depose an affidavit which she had elected not to depose, but rather to confirm the answering affidavit of the first appellant. The court *a quo* further found that to be a belated attempt to reverse a decision that the second appellant had made, and just wanted to do something about the situation since the first appellant's answering affidavit had been disallowed. The court *a quo* was therefore not convinced that condonation should granted especially where a litigant who with the aid of an attorney, and a counsel has decided to disregard with impunity the time limits set in the notice of motion.

[13] The court *a quo* in refusing the appellant's application for condonation had considered only one factor, and that is the explanation for the delay and disregarded the other factors that I have mentioned in paragraph 9 and 10 above. It is trite that in urgent applications, it is the applicant who determines the time frames within which the respondent had to comply with in case the respondent wishes to oppose the application, and the respondent had to comply with those time frames. The appellants were not extremely late in filing their answering affidavit, and the respondent had failed to show what

[2] 2008 (2) SA 472 (CC) at para 20

prejudice it would have suffered as a result of the late filing of the appellants' opposing papers which could not have been cured by a costs order.

[14] The appellants are challenging the *locus standi* of the respondent in that it is alleged that it is not a duly established traditional authority in accordance with the laws of the Republic of South Africa as stated by the respondent in its founding affidavit. According to the appellants, the Premier has refused to recognise the respondent as a traditional authority, which decision they successfully took on review. The appeal court has ordered the Premier to go and reconsider his decision to refuse to recognize the respondent as a community, and that reconsideration is still pending. The appellant has raised that as a point *in limine* which was argued on 4th May 2021 before Muller J and he had not made any ruling on that point *in limine*. If that point *in limine* is to be upheld, it will dispose of the whole matter.

[15] Even if the point *in limine* of *locus standi* is not upheld, this dispute has the potential to divide the whole community. It will create two factions for those who support the appellants and those who support the respondent. It will also create confusion as to where to go in case a community member needs assistance. This matter was therefore raising an issue of importance to the members of the community. It was therefore in the interest of justice for the court *a quo* to have granted condonation for the late filing of the respondents opposing papers so that there is finality in the litigation and certainty in the community, and avoid ever pending disputes.

[16] The court *a quo* did not adequately consider the factors which are to be taken into consideration when exercising its discretion whether to grant or refuse condonation. The court *a quo* has therefore erred in refusing to grant the appellants condonation for late filing of their opposing papers.

[17] Turning to the issue whether the respondent's application should be dismissed, the parties before the court *a quo* have already argued several points *in limine* that had been raised by the appellants. However, the court *a quo* did not make rulings on those points *in limine*. One of the points *in limine* raised by the appellants was that the respondent did not have *locus standi* to institute legal proceedings against them. In the court *a quo* the appellants have argued that the respondent is not recognized in law as an established traditional authority. The appellants further submitted that the laws that regulate recognition of traditional authority are the Framework Act and Limpopo Act. It

is the appellants' contention that the respondent had applied to the Premier's office for recognition which application was refused. Thereafter the respondent successfully reviewed the decision of the Premier, and the matter was referred back to the Premier for reconsideration of his decision. The Premier has not yet made a decision on that.

[18] The respondent before this court has argued that the community of Mamahule is a clearly *universitas personarum* of natural persons who identify themselves as a tribal community and under the late chief Ezekiel Matsaung. That the respondent had existed in fact and has been in this court and the constitutional court in many instances and could not have gone to the constitutional court or even this court if it is incapable of instituting or defending legal proceedings. That the respondent exists *de facto* and had litigated up to the constitutional court and had an interest in getting the assets listed in the spoliation proceedings.

[19] It is trite that in litigation proceedings, the first thing to establish is the *locus standi in iudicio* of the litigant. In *Four Wheel Drive Accessory Distributors v Rattan NO*[3] Schippers JA said:

"The logical starting point is *locus standi* – whether in the circumstances the plaintiff had an interest in the relief claimed, which entitled it to bring the action. Generally, the requirements for *locus standi* are these. The plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and it must be a current interest and not a hypothetical one. The duty to allege and prove *locus standi* rests on the party instituting the proceedings"

[20] Section 38 of the Constitution has introduced a departure from common law in relation to standing. It provides as follows:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are-
(a)anyone acting in their own interest;
(b)anyone acting on behalf of a person who cannot act in their own name;

[3] [2018] ZASCA 124; 2019 (3) SA 451 (SCA) (26 September 2018) at para 7

(c)anyone acting as a member of, or in the interest of, a group or class of persons;

(d)anyone acting in the public interest; and

(e)an association acting in the interest of its members."

[21] On plain reading of section 38 of the Constitution, it is applicable where a party is alleging that a right in a Bill of Rights has been infringed or threatened. In other words, ordinarily section 38 may be invoked where a challenge is based on a right in chapter 2 of the Constitution. The respondent in its application did not invoke section 38, and is therefore not applicable to it.

[22] The respondent does not dispute that the Premier of Limpopo has not yet recognized it as a traditional authority. In Limpopo the establishment of traditional authority/council is been regulated by the *Traditional Leadership and Governance Framework Act*[4] (The Framework) *and Limpopo Traditional Leadership and Institutions Act*[5] (Limpopo Traditional Leadership Act). In terms of section 4 of the Limpopo Traditional Act, it is the Premier of the Province who is empowered to recognise a traditional community. The traditional community must within 30 days after recognition establish a traditional council/authority.

[23] The appellants' counsel has argued that the Framework Act and the Limpopo Traditional Leadership Act has not been complied with for the respondent to be recognized as a traditional authority. The respondent's counter argument was that the community of Mamahule is a *universitas personanum* of natural persons who identified themselves as a tribal community and under the leadership of the late Ezekiel Matsaung, and therefore the respondent had existed in fact.

[24] In *Bakgaka – Ba – Mothapo Traditional Council v Tshepho Mathule Mothapo & Others*[6] Dlodlo JA said:

"[12]The provisions regulating the composition and recognition of traditional councils are clear, unambiguous and consistent with the stated purpose of the legislation. The purpose is the recognition of the institution of traditional leadership. These provisions must be complied with.

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[4] 41 of 2003
[5] 6 of 2005
[6] [2019] ZASCA 130 (30 September 2019) at para 13

[13]The Traditional Council indeed had no *locus standi* to institute and prosecute the action against the respondents in that it did not comply with the provisions of both the Framework Act and the Limpopo Traditional Leadership Act…Compliance with relevant legislation also seeks to eliminate such confusion. It must be known who are the members of the Traditional Council recognised and Gazetted by the Premier."

[25] Before this court counsel for the respondent has correctly conceded that the Premier has not yet recognized the respondent as a traditional authority. The respondent has not yet complied with the provisions of both the Framework Act and the Limpopo Traditional Leadership Act, and therefore, it lacks *locus standi* to institute and prosecute the action against the appellants. It follows that the appeal stands to be upheld.

[26] In the result I make the following order:

26.1 The appeal is upheld with costs.

26.2 The order of the court *a quo* is set aside and substituted with the following:

"(a)Condonation of the respondents' late filing of their notice of intention to oppose and answering affidavit is granted.

(b) The respondents' point in limine of locus standi is upheld and the application is dismissed with costs."

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MF KGANYAGO
JUDGE OF THE HIGH COURT OF SA
LIMPOPO DIVISION, POLOKWANE

I AGREE

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EM MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT OF SA, LIMPOPO DIVISION

I AGREE

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M NAUDE
JUDGE OF THE HIGH COURT OF SA
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the appellant	**: Adv M Mpshe SC**
	Adv Mzilikazi
Instructed by	**: Malose Matsaung Attorneys**
Counsel for the respondent	**: Adv M R Maphuta**
	Adv A Seshoka
Instructed by	**: GM Tjiane Attorneys**
Date heard	**: 10th June 2022**
Electronically circulated on	**: 15th June 2022**