



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 926/2018

In the matter between:

BAKGAKA - BA - MOTHAPO TRADITIONAL COUNCIL

APPELLANT

and

TSHEPO MATHULE MOTHAPO & OTHERS

RESPONDENTS

Neutral citation: *Bakgaka – Ba – Mothapo Traditional Council v Tshepo Mathule Mothapo & others* (926/2018 [2019] ZASCA 130 (30 September 2019))

Coram: Cachalia, Tshiqi, Dlodlo, Mbatha JJA and Tsoka AJA

Heard: 4 September 2019

Delivered: 30 September 2019

Summary: Customary law – locus standi – whether a Traditional Council established in terms of customary law had locus standi to institute action on behalf of the Bakgaka – Ba – Mothapo Traditional Community – whether the submission of insufficient number of men or women appointed as councillors to the Premier’s office justified the Court a quo ordering that the appellant had no locus standi – whether Kgoshigadi had the locus standi even though she derived authority to institute action from a resolution passed by Traditional Council.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Sikhwari AJ sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Dlodlo JA (Cachalia, Tshiqi, Mbatha JJA and Tsoka AJA concurring):

[1] The issue in this appeal is whether a Traditional Council established in terms of customary law has locus standi to institute an action on behalf of Bakgaka – Ba – Mothapo Traditional Community. Kgoshigadi Madipoane Refiloe Maremadi Mothapo ('Kgoshigadi'), an adult female described in the pleadings as Kgoshigadi of Bakgaka – Ba – Mothapo tribe in Thabamooopo district, Ga – Mothapo village (Limpopo Province) and the Tribal Council (Traditional Council) instituted an action against the seven respondents in the High Court. The first, thirty first, thirty fourth, thirty sixth, thirty eighth, forty second and forty third are the seventh respondents referred to above. The second to the thirtieth and thirty second to the thirty fourth respondents are alleged to be working in collaboration with the first respondent in unlawfully allocating residential and business sites to various people including outsiders on the properties known as Syferkuil 921 LS. It is alleged that the unlawful sale and allocation of business and residential sites by the respondents continues notwithstanding court process initiated before the Magistrate Court. They pleaded that the Traditional Council performs functions in terms of s 4(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (The Framework Act) to:

(a) administer the traditional community in accordance with customs and tradition;

(b) assist, support and guide traditional leaders in the performance of their functions.

[2] The cause of action alleged in the particulars of claim is that portions of Syferkuil 921 LS and Majeebaskraal 1005 LS are properties allocated to Bakgaka – Ba – Mothapo tribe and are thus under the jurisdiction and/or administration of Kgoshigadi and the Traditional Council. It is averred that the first respondent's conduct in receiving money for the purported sales of land and the issuing of purported permission to occupy was unlawful. The land in question is tribal land held in trust by Kgoshigadi and the Traditional Council on behalf of Bakgaka – Ba – Mothapo tribe. Such land, according to Kgoshigadi and the Traditional Council, may not be sold by an individual. Any monies received on behalf of Bakgaka – Ba – Mothapo should be deposited into the trust account opened by the Traditional Council on behalf of the tribe.

[3] The relief sought was to prohibit and restrain the respondents from allocating, selling or in any other way alienating parcels of tribal land under the jurisdiction or under the control and authority of Kgoshigadi and the Traditional Council. What Kgoshigadi and the Traditional Council sought before the High Court was also a declarator to the effect that:

(a) the respondents be ordered to account as to the whereabouts of monies received in the purported sale agreements and the purported permission to occupy the sold land; and
(b) such purported sale agreements or permission to occupy be declared null and void ab initio.

[4] The seven respondents raised a special plea against both Kgoshigadi and the Traditional Council. They pleaded that Kgoshigadi has not been duly identified and recognised as Kgoshigadi in terms of the process prescribed in terms of the Framework Act. Additionally, they pleaded that Kgoshigadi is disqualified from being capable of being recognised by virtue of the fact that she was not born of royal blood and that she is not related to the royal family. As to the Traditional Council, the respondents pleaded that it had no locus standi to institute and prosecute the action against them by virtue of the fact that the provisions of the Framework Act, with reference to the establishment and

recognition of Traditional Councils, had not being complied with. In particular, the respondents pleaded that the Premier has not, in terms of the provisions of s 3(3) of the Framework Act, by notice in the Provincial Gazette, recognised the Traditional Council for the traditional community concerned. In reply both Kgoshigadi and the Traditional Council averred that they have the necessary locus standi to institute the action. Kgoshigadi contended that she was identified and recognised in terms of the process described in the Framework Act read in conjunction with s 33(2) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 (the Limpopo Traditional Leadership Act). The issues were separated in terms of Rule 33(4) of the Uniform Rule of Court.

[5] What the high court was called upon to determine was the question of locus standi, that is, whether Kgoshigadi and the Traditional Council had standing to claim this relief. After having heard evidence the high court delivered a judgment. It found that Kgoshigadi had the requisite locus standi. It found, however, that the Traditional Council did not have the necessary locus standi to institute this action. The Traditional Council, aggrieved by these findings, applied for leave to appeal. The application was dismissed by the high court, but this court subsequently granted the necessary leave. The Traditional Council's stance before the high court was that it had complied with both the Framework Act and the Limpopo Traditional Leadership Act. But before this Court, the Traditional Council presented a different case. It contended that as the Traditional Council was established in terms of customary law, it had the requisite locus standi to institute the action, by virtue of its establishment under customary law.

[6] In promulgating the Framework Act, Parliament sought to set out a national framework, norms and standards defining the place and the role of traditional leadership within the new system of democratic governance. The aim was not only to recognise the institution of traditional leadership but also to transform these institutions in line with constitutional imperatives. It became necessary that provinces enact provincial legislation within the framework contained in the Framework Act in order to provide for matters peculiar to each province.

[7] Section 33(5) of the Limpopo Traditional Leadership Act under the heading 'Traditional arrangements' states as follows:

'A tribal authority or Tribal Council that, immediately before the commencement of this Act, existed under the provisions of any law, is deemed to be a Traditional Council established under this Act: provided that such Traditional Council must comply with the provisions of s 4 within one year of the commencement of this Act.'

[8] Section 4 of the Limpopo Traditional Leadership Act mentioned above determines the Constitution and composition of Traditional Councils. Section 4 of the Limpopo Traditional Leadership Act is substantially mirrored in ss 28(4) and 3(2) of the Framework Act. The key difference is that the latter Act provides for a 7-year period from the commencement (of the Framework Act) for the Tribal Council to comply with the relevant section. This period would have expired in September 2011. As at the date when the action in this matter was instituted (August 2014), the Traditional Council had still not complied with either the Limpopo Traditional Leadership Act or Framework Act. This was still the case when the matter came before the high court in December 2017.

[9] Section 4 of the Limpopo Traditional Leadership Act reads:

'Traditional Councils

(1) The Premier must, when recognising a traditional community in terms of s 3(4), and with due regard to the needs of the traditional community concerned, determined the number of councillors for its traditional council to be established in terms of subsection (2): Provided that the total number must not exceed 30.

(2) A traditional community recognised by the Premier in terms of this Act must within 30 days after the traditional community has been informed accordingly in terms of s 3(4) establish a traditional council for that community, consisting of men and women who in accordance with the customary law of the traditional community concerned are recognised as councillors as well as other members of the traditional community concerned elected democratically.

(3) The senior traditional leader of the traditional community referred to in subsection (2), must convene a meeting of all adult members of the traditional community for the purposes of election of members of the traditional council, by giving reasonable notice of such meeting in accordance with the custom of such traditional community. The senior traditional leader or his or her designated presides over such meeting.

(4) The elected members of the traditional council must as far as possible be sufficiently representative of the wards of the traditional community concerned.

60 percent of the traditional council must consist of traditional leaders and members of the traditional community selected by the senior traditional leader and other 40 percent must consist of elected members.

(5) (a) At least a third of the members of the traditional council must be women, unless the Premier-

(i) is satisfied upon certification by the senior traditional leader concerned that there is sufficient number of women; and

(ii) determines the lower threshold of women to be included in the particular traditional council.

(b) The senior traditional leader must, after the required number of men and the available number of women have been elected, if satisfied that there is insufficient number of women to fill the remainder of vacancies required to be filled by women, adjourned the elections and refer the matter to the Premier in writing for the Premier's directive in terms of paragraph (a).

(b) The senior traditional leader must, upon receipt of the Premier's directive referred to in paragraph (b) resume the elections within 14 days of such receipt in accordance with such directive.

(c) The Premier must review the threshold of women to be elected into the traditional council prior to the election of the new traditional council.

(6) Election of members of the traditional council must be done by way of voting in manner determined by the Premier or any person designated by the Premier to oversee the elections.

(7) Particulars of the establishment of the traditional council and the names of the members therefore must be submitted to the Premier in writing, within 60 days after the traditional council has been established in terms of subsection (2).

(8) The Premier must, upon receipt of the particulars referred to in subsection (8), if satisfied that the provisions of the Act have been complied with, within 30 days recognise the traditional council by notice in the *Gazette*.

[10] According to the evidence led before the high court, the Limpopo Traditional and Leadership Act was not complied with. Of the nine members of the Traditional Council there was only one traditional leader. There were no women in the list allegedly submitted to the Premier for approval. This despite the fact that s 4(4) and (5) of the Limpopo Traditional Leadership Act provides that elected members of the council must be

sufficiently representative of the wards of the Traditional Community concerned; 60 percent of the Traditional Council must consist of Traditional Leaders and members of the Traditional Community selected by the Senior Traditional Leader. The remaining 40 percent must consist of the elected members. At least a third of the members of the Council must be women. Both Kgoshigadi and Mr Ranson Mothapo, who testified on behalf of the Traditional Council, conceded that there was non-compliance with these requirements.

[11] The evidence led reveals that no response had been received from the Premier to the alleged submission of members of the Council. It also appears that no enquiry was ever made as to why the Premier had not responded. Be that as it may, it is common cause that the Traditional Council was not recognised and gazetted by the Premier.

[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 institutions of traditional leadership. These provisions must be complied with.

[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. That much was conceded by counsel for the appellant. The special resolution passed by the Traditional Council which authorised Kgoshigadi to institute the proceedings was attached to the petition that had to be considered by this court. In that special resolution 30 persons purporting to be members of the Traditional Council signed. Strangely, the record of proceedings in this appeal says, apart from Kgoshigadi, there are only 9. Compliance with relevant legislation also seeks to eliminate such confusion. It must be known who are members of the Traditional Council recognised and Gazetted by the Premier.

[14] During the hearing appellant's counsel, in support of his contention that it was not necessary for the Traditional Council to be recognised, referred this court to *Pilane and*

another v Pilane and another.¹ In *Pilane*, a clan which was part of the Bakgaka – Ba – Kgafela unsuccessfully tried to protect their local assets and hold an officially recognised Traditional Leader (Nyalala Pilane) to account. Their attempts to secure accountability through traditional structures and by approaching government had been a failure. These individuals took a decision to secede from the Bakgaka – Ba – Kgafela Tribe. They were successfully interdicted from holding meetings in order to discuss the secession. The traditional leader contended that it was only himself and the officially recognised Traditional Council that had the power to call meetings. The group of individuals approached the Constitutional Court challenging the North West High Court decision. In a majority judgment, the Constitutional Court set aside the interdicts holding that stopping people from meeting infringed many rights protected in the Constitution, including the right to freedom of expression, freedom of association and assembly. The Constitutional court found that allowing traditional communities to hold traditional leaders and councils accountable to ensure that they perform their functions appropriately. *Pilane*, therefore does not support the appellant in this matter. It is clearly distinguishable.

[15] In *Sigcau v Minister of Cooperative Governance and Traditional Affairs*,² an argument was advanced that the court must allow the dispute regarding the Kingship of the Amaphondo AseQaukeni to be resolved in the customary manner by referring it to the royal family. This argument was put forth despite the provisions in the Framework Act which created a commission whose mandate is to investigate the dispute and submit a report to the President recommending the rightful person to the throne. The Framework Act provided what the President needed to do upon receiving the report from the Commissioner. The Constitutional Court found that once the Commission has resolved a dispute or a claim applying customary law and has conveyed its decision to the President, the President must simply carry out the steps provided in s 9(2) (a) and (b); that is, the President must publish a notice in the Government Gazette recognising the person decided upon, and must issue a certificate of recognition to that person.³ The court further

¹ *Pilane and another v Pilane and another* [2013] ZACC 3; 2013(4) BCLR 431 (CC).

² *Sigcau v Minister of Cooperative Governance and Traditional Affairs* [2018] ZACC 28; 2018 (12) BCLR 1525 (CC).

³ *Sigcau* para 44.

held that where the Commission has identified and decided upon the person entitled to be king or queen, the royal family may not reopen the s 9(1) process to identify the person entitled to be king or queen. Similarly, in the matter before us, once two pieces of legislation provide how the Traditional Council is constituted, a party cannot rely on customary law outside the statutory requirements for the recognition of a Traditional Council.

[16] It is indeed perplexing that the high court found that Kgoshigadi had the requisite locus standi despite the fact that she derived her authority to institute the action from a resolution passed by the Traditional Council (which had no locus standi). In view of the fact that there is no cross-appeal, it is not necessary to deal with this aspect at all. The parties agreed that costs should follow the result.

[17] The appeal is dismissed with costs.

D V Dlodlo
Judge of Appeal

APPEARANCES:

For the Appellant: KK Kekana and TL Mahasha
Instructed by: Maesela Incorporated, Johannesburg
Phalatsi & Partners Inc, Bloemfontein

For the Respondents: JC Erasmus
Instructed by: Rheeder Attorneys, Polokwane
McIntyre Van der Post, Bloemfontein