



IN THE NORTH GAUTENG HIGH COURT, PRETORIA
[REPUBLIC OF SOUTH AFRICA]

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
17 JULY 2014	
DATE	SIGNATURE

CASE NUMBER: 63613/2011

17/7/2014

In the matter between:

MANKU SELINA PHASHA

1ST APPLICANT

THE ROYAL FAMILY FOR ROKA-MAKGALANOTO

2ND APPLICANT

TRADITIONAL COUNCIL

And

MARIA TLAKALE PHASHA

1ST RESPONDENT

THE PREMIER FOR LIMPOPO PROVINCIAL

2ND RESPONDENT

GOVERNMENT

JUDGMENT

MAVUNDLA J;

[1] This is one of the many applications dealing with disputes, either of chieftainship or the rightful bearer of the chief, or candle wife or Kgoshigadi. *In casu* the applicant seeks a declaratory order that:

- 1.1 she is a properly appointed senior traditional leader of Roka-Makgаланoto Traditional Community and Roka-Makgаланoto Traditional Council;
- 1.2 The appointment and recognition of the first respondent as the acting Kgoshigadi or Chief of Traditional Community and Roka-Makgаланoto Traditional Council be set aside; and
- 1.3 the recognition and certificate issued to the first respondent be declared null and void and be set aside;
- 1.4 the second respondent or any authorised person be ordered
 - (i) to issue a certificate of recognition as chief/ kgoshigadi to the the first applicant
 - (ii) to inform the Limpopo House of Traditional Leadership and the local house of traditional leaders about her appointment and
 - (iii) to proclaim the recognition of the first applicant as the senior traditional leader of the community and council.

[2] The preliminary issue to be disposed of before engaging with the merits of the dispute, is the application for condonation for the late filing of the notice of intention to oppose and the opposing affidavit of the first respondent.

[3] It is trite that the grant of condonation is a matter of the discretion of the court¹. In the exercise of my judicial discretion, I am inclined to and grant condonation for the filing of both the notice of intention to defend and the opposing affidavit for the following reasons:

3.1. The dispute is over who the rightful kgoshigadi is. This issue, in my mind, is of importance not only to both the applicant and the first respondent, but also to the general community regarded as the rightful subjects of the disputed throne. The speedy and final resolution to the dispute by the right forum is of equal importance to all and sundry;

3.2 The reason advanced for the delay can be attributed, in my view, to the bureaucracy on the part of the Limpopo Government and the slow process therein in taking important decisions regarding the funding of the legal costs for the

opposition by the first respondent. The first respondent stated that she first had to apply, through her first attorney, for Limpopo government funding for purposes of defending the matter; whereas the application for funding was submitted as early as during November 2011, immediately after having been served with the court papers, she was only notified of the approval of her application in January 2012; This contributed to the delay in engaging the services of new and current attorneys and counsel as well as the preparing of the opposing papers. I am of the view that the explanation proffered is reasonable.

3.3 The delay of about two months, under the circumstances was not inordinate because immediately after the grant was approved the first respondent approached this court for condonation.

AD MERITS OF THE MAIN APPLICATION.

[4] Having read the papers which served before me, and heard the submissions made on behalf of the applicant and the first respondent, I am of the view that this application should be

dismissed for the reasons set out herein below.

[5] The applicant contends that she is the first daughter of the late Chief Kgolanae Phasha and the late candle wife Lekgale Phasha (born Thobejane) of Roka-Makgаланoto traditional community, who both died respectively in 1961 and 1963 without leaving a male heir. She contends that she was supposed to succeed her father, but this was opposed by a section of the community as well as other descendants of Chief Makgаланoto Pasha and candle wife Mamothobedi Ngwanakutu Phasha (her grandparents) from the other wives of her Chief Makgаланoto Phasha.

[6] The family tree of the descendants of Chief Makgаланoto Pasha is as follows:

From Mamothibedi Ngwanakutu candle wife:	From Makgobole Phasha 2 nd wife:	From Mmankau Phasha (3 rd wife:	From Ramogohlo Phasha 4 th wife:
--	--	---	--

1 Manku Phasha (daughter))	1 Selatole Phasha (son)	1 Manapyane Phasha (son)	1 Ebago Phasha (daughter)
2 Kgolanae Phasha (son)	2 Mahloane Phasha (son)	2 Tjotjobane Phasha (son)	2 Liddah Phasha (daughter)
3 Khudu Phasha (daughter)	3 Poo Phasha (son)	3 Nkwane Phasha (son)	3 Magdeline Phasha (son)
4 Sepadi Phillemon Phasha (son)	4 Selebalo Phasha (son)	4 Unknown daughter	4 Mmalefago Phasha (daughter)
5 Phokoane Frans Phasha (son)	5 Kgoboko Phasha (son)		
	6 Tshelong Phasha (son)		

[7] In my view, the heir to the throne of Chief Makgalanoto Pasha would come from his male offspring born from the candle wife under column 1. When Chief Makgalanoto passed on, the chieftainship did not devolve to his first daughter, Manku Pasha, but his son, Kgolane Phasha. By same logic, in the absence of a male heir on the part of Kgolanae, the throne would have devolved to Sepadi Phillemon Phasha. From the applicant's own deposition, the latter was subsequently installed as the caretaker of the throne. But I am only expressing an opinion, which may not necessarily accord with the customs and tradition of the

Phasha community.

- [8] It would seem that the Phasha royal family, descendants of Chief Makgalanoto Pasha are now divided into two camps, namely those coming through the first column (descendants of the candle wife Mamothibedi Ngwanakutu, and those from the three other columns. The dispute as to who should wear the throne of Makgalanoto Pasha, regard being had to the fact that his son, the late Kgolanae Phasha, passed on without leaving a male, has been raging on as far back as in the eighties.
- [9] As indicated herein above, the dispute is also between the royal family, the descendants of the candle wife (first column above) and those of the three wives (columns 2,3 and 4 above), regarding which faction is entitled to elect a candle wife. It also relates to where the candle wife should be staying, and which place is recognised as "*moshate*" (the royal palace).
- [10] According to the applicant, in the 1980 the other faction of the royal family, without consulting the ruling family and the

community, married the first respondent as a candle wife of Roka-Makgalanoto traditional community from Nkadimeng family in Manganeng village Sekhukhune district, which marriage is contended to be illegitimate. On the 20th October 1988 the first respondent was recognised by the hitherto Prime Minister of the former Lebowa Government as the acting Kgoshigadi.²

[11] According to the applicant, the second respondent was recognised as the acting Kgoshigadi by former Premier Ngwako Ramatlhodi who is the predecessor of the 2nd respondent (sic).

[12] In essence, the applicant beseeches this court, without saying so, to review and set aside decisions taken well over twenty years, to say the least. She does not make a case for not having approached the court as far back as in the eighties. For this reason only, this court is at large to refuse to entertain the matter³.

[13] The first respondent contended, *inter alia*, that there are too many issues that are in dispute that cannot be resolved by way of

² Vide annexure "A" at paginated page 31 of the founding affidavit.

³ Chairperson, *STC v JFE Sapela Eelectronics* 2008 (2) SA 638 (SCA) at para [28].

affidavits. For instance, it was submitted on behalf of the first respondent, quite correctly so, that there was nothing which would inform this court what the actual custom regarding the choice of a candle wife is, without the assistance of expert evidence on this aspect.

[14] It is trite that where there is a dispute of facts which cannot be resolved on affidavits, the court in the exercise of its discretion, can either refer the matter to evidence or dismiss the application⁴. The disputes go too far back and well over twenty years. It is in my view, not desirable to have the court to interrogate matters of history that goes that far back. For this reason I decline to refer the matter to oral evidence.

[15] It was further submitted, quite correctly so, on behalf of the first respondent that the applicant has proved no cause of action. The first applicant was praying for the declaratory order contrary to the provisions of s12 (2) of the *Limpopo Traditional Leadership and Institutions Act*, 6 of 2005 (*The Limpopo Act*) which provides that in case of the refusal by the second respondent to issue the

⁴ *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (AD) at 430G-431A.

recognition certificate, he must refer the dispute either to the house of the traditional leadership or the royal family to restart the process of the appointment.

[16] Coupled with the above reasons, I further bear in mind that: The *Traditional Leadership and Governance Act* 41 of 2003 provides, *inter alia*, as follows:

“S25 Functions of Commission.—

- (1) The Commission operates nationally in plenary and provincially in communities and has authority to investigate and make recommendations on traditional leadership dispute and claim contemplated in subsection (2).
- (2) (a) The Commission has authority to investigate and make recommendations on—
 - (ii) a case where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headman was established in accordance with customary law and custom.
 - (iii) a traditional leadership position where the title or right of the incumbent is contested;
 - (viii) all traditional leadership claims and disputes dating from 1 September 1927 to the coming into operation of provincial legislation dealing with traditional leadership and governance matters; and...

[17] In as much as the *Nhlapo Commission*, which the dispute *in casu* had been reported to, is no longer in existence, s26A of Act 41 of

2003 in terms of which provincial commissions has been created, empowers, through its subsection (4), the relevant provincial commission to continue with the functions referred to in s25 (2) to (5) and (7) of Act 41 of 2003. In my view, the relevant dispute is still pending before the Commission. The first applicant contended that this dispute is pending before the *Kgatle Commission* which has been established to deal with the senior traditional leadership dispute.

[18] It is common cause that *in casu* the dispute was referred to the *Nhlapo Commission* and has not as yet been finalised. Section s7 of *PAJA* demands that internal remedies must first be exhausted before the court is approached, unless internal remedies are not provided for. *In casu*, there exists a structure that is empowered to deal with the relevant dispute⁵. The applicants have not set out cogent and exceptional reasons why this court should be seized with the matter while the dispute is still pending at the Commission; *vide Ulde v Minister of Home Affairs and Another*⁶. I am therefore of the view, that in the circumstances of this case, the relevant dispute must be ventilated exhaustively by the relevant

⁵ *Vide* para [26] *supra*.

⁶ 2008 (6) SA 483 (WLD) at p492 para [17].

commission.⁷ For this reason as well the application stands to be dismissed.

[19] It is trite that the costs follow the event and there is no reason to depart from this principle.

[20] In the premises, the application is dismissed with costs.



N. M. MAVUNDLA

JUDGE OF THE HIGH COURT

DATE OF HEARING : 24 APRIL 2014

DATE OF JUDGMENT : 17 JULY 2014

APPLICANT'S ATT : BOTHA MASSYN & THOBEJANE ATTORNEYS

APPLICANT'S ADV : ADV. R. S. WILLIS and ADV S RAWAT

1st RESPONDENTS' ATT : LEDWABA INC ATTORNEYS

1st RESPONDENTS' ADV : ADV. L.G.P. LEDWABA

⁷ *Dudumayo and others v Dalasile and others* (1842/10) ZAECMHC 8 (26 May 2011) (not yet reported); *Mngomezulu v Premier of the Province of KwaZulu-Natal* 2011 JDR 1561(KZNP) not as yet reported.