REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

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

Signature .....

Date... 22/11/2018

CASE NO: 2422/2018

In the matter between:

MANEE MARGARET DIKGALE	**1ST APPLICANT**
SEHLOMOLA EDWARD DIKGALE	**2ND APPLICANT**
and	
PREMIER, LIMPOPO PROVINCE	**1ST RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPEARATIVE GOVERNANCE, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS	**2ND RESPONDENT**
SOLOMON MALESELA DIKGALE	**3RD RESPONDENT**
DIKGALE TRADITIONAL COUNCIL	**4TH RESPONDENT**
LIMPOPO HOUSE OF TRADITIONAL LEADERSHIP	**5TH RESPONDENT**
CAPRICORN HOUSE OF TRADITIONAL LEADERSHIP	**6TH RESPONDENT**

JUDGMENT

MAKGOBA JP

[1] The First and Second Applicants herein are mother and son respectively. On the 17 April 2018 the Applicants instituted proceedings in which they sought the following order:

First, the review and setting aside of the appointment of the Third Respondent as a Senior traditional leader of the Dikgale Traditional Community and an order declaring the certificates which appoint the Third Respondent as Kgoshi of Dikgale Community null and void.

Second, an order directing the First Respondent to appoint the Second Applicant as Senior traditional leader of the Dikgale Community, **alternatively**,

an order directing the Third Respondent as the Senior Mokgomana to convene a meeting of the royal house for the purpose of identification and appointment of the Senior traditional leader and the report to this Court.

[2] In essence the Applicants impugn the historical appointment of the Third Respondent, SOLOMON MALESELA DIKGALE, as Kgoshi of the Dikgale

Traditional Community. They seek order in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") to:

2.1. review and set aside the appointment;

2.2. remove the Third Respondent as Kgoshi;

2.3. appoint the Second Applicant as Kgoshi of the Traditional Community.

[3] The application is opposed by the First, Second, Third and Fourth Respondents who, over and above opposing the merits of the application, have raised the following points of law relating to:

3.1. non-joinder of the Royal Family;

3.2. the applicability of PAJA and the Provincial Legislation and

3.3. unreasonably delay in seeking the review.

[4] The application concerns a dispute of leadership within the Traditional Community of Ga – Dikgale. The Applicants contend that the position belongs to the Second Applicant in terms of the applicable customs and cultural practices of the Community. On the other hand the Respondents contend that the appointment of the incumbent leader (Third Respondent) was decided and announced by the Royal Family in July 1995, which decision culminated in the Premier of the Limpopo Province issuing a certificate of recognition / appointment later that year.

The Respondents contend further that the communication by the Royal Family of the appointment of the Third Respondent as Kgoshi is within the knowledge of the Applicants, or they ought reasonably to have become aware of it during 1995. Thus, under PAJA and / or the common law they are non-suited to bring this application.

FACTUAL BACKROUND

[5] The Third Respondent is the son of the late RANTI EDWARD DIKGALE who was the Kgoshi of the Dikgale Traditional Community from 1960 until 1982 when he died. He is the eldest male issue of the ten children of the late Kgoshi Ranti Edward Dikgale. At the time of the death of his father, the Third Respondent was still young and at school to take over the chieftainship. As a result one WILLIAM LEKOTA DIKGALE, the First Applicant's late husband and father to the Second Applicant, was approached by the Royal Family as a regent in the Third Respondent's place and stead until the latter comes of age.

[6] The Third Respondent states that the appointment of William Dikgale to act as Regent was not done in terms of the customary laws and custom of the Dikgale Traditional Community. It was more motivated by the fact that some members of the community feared him and they did not want to be seen to be opposing him. When William Dikgale took over the regency of the Dikgale

traditional leadership he started doing things his own way, he was disrespectful to Bakgoma and Bakgomana and flouted every customary law and custom that was applicable to the Dikgale Traditional Community.

[7] Specifically, when William Dikgale had to take a wife, being the First Applicant, he collected money from the traditional community under the pretext that he was going to marry a woman from Lekota family which family is recognised by the Dikgale Royal Family for purpose of marrying a candle wife (mmasechaba) but instead of going to the Lekota family he decided to go and marry the First Applicant who was unknown to the community. The First Applicant was married from Makgaleng family of the Nchabeleng Community in Apel, Sekhukhune during September 1984.

[8] After his marriage William Dikgale was approached and confronted by members of the Lekota family, in particular one Manyoro Lekota and upon so approached he decided to organize people to kill Lekota after which he was charged for murder. That was the beginning of his problems with the community which culminated in him being chased out of the community. In 1995 he was then removed from his acting position as Kgoshi by the Bakgoma and Bakgomana. His removal was approved by Cabinet of the then Northern Province Provincial Government. Such letter of approval of his

removal was addressed to him and attached to the Third Respondent's answering affidavit and marked Annexure "MSD2".

[9] On or about 31 July 1995 in a meeting of the Dikgale Royal Family held at Moshate, Dikgale, the Royal Family identified the Third Respondent as the Kgoshi to take over the traditional leadership of the Dikgale Traditional Community. The Third Respondent states in his answering affidavit that during this meeting the First Applicant was present at Moshate as she resides there. The First Applicant was aware of the decision and was informed of same by the Bakgoma and Bakgomana as a member of the family.

On 29 September 1995 the Office of the Premier, Northern Province issued a certificate of recognition and appointment of the Third Respondent as Kgoshi of the Dikgale traditional community. A copy of the certificate of recognition is attached to the answering affidavit and marked Annexure "MSD4". A certificate of appointment dated 16 August 1995 duly signed by the then Premier of Limpopo, N A Ramatlhodi is attached as Annexure "MSD5" to the Third Respondent's answering affidavit. The First Applicant was present at Moshate and never raised any objrctions to the appointment and recognition of the Third Respondent. The Second Applicant, who was born in 1987 was still a child of 8 years at that time.

[10] Pursuant to the Third Respondent's appointment and recognition as Kgoshi he was introduced to the community as its Kgoshi and a ceremony was then arranged for his inauguration as a Kgoshi of the Dikgale traditional community. The ceremony took place on the 6 June 1996. The ceremony took place at Moshate and everyone within the traditional community of Dikgale was invited. The First Applicant was once more present at Moshate during the ceremony. There were officials from the government including the Premier of the then Northern Province, now Limpopo, and other dignitaries.

[11] During September 2017 the Third Respondent started receiving letters from the First Applicant's attorneys in which they advised that their client has written to the Premier for the Premier to review the Third Respondent's appointment. They alleged that the Third Respondent is an acting Kgoshi and as such his position should be reviewed in terms of section 15(3) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005. The Third Respondent responded to the attorneys' letter and advised them that his appointment is not an acting appointment but that of a Kgoshi.

[12] It is significant and also appropriate to put it on record that the Applicants did not file any replying affidavit to the Respondents' answering affidavits. The factual background of this case as outlined above is set out in the Third Respondent's answering affidavit. There is nothing to gainsay the version of

the Third Respondent as outlined above. The version of the Third Respondent is undisputed. The case will therefore be decided factually on the version of the Third Respondent. Suffice to say that the version of the Applicants has been denied by the Third Respondent in so far as their facts are not common cause.

POINTS OF LAW *IN LIMINE*

Non-joinder of the Royal Family

[13] A decision to identify a Senior Traditional Leader (Kgoshi) rests with, in terms of section 12 of the Limpopo Traditional Leadership and Institutions Act, 2005, the Royal Family of a particular traditional community. Likewise, when a person who is holding a position of traditional leader is replaced the Royal Family must, as a matter of law and established culture and traditions within the Province of Limpopo, be involved. The Premier cannot act to impose an appointment of a traditional leader on any Royal Family. In the circumstances, the Royal Family of Dikgale Traditional Community has a direct and substantial interest in the final decision to be made by this Court. It is therefore imperative that the Royal Family be cited as a party in these proceedings.

[14] Joinder of a party may be demanded where the other party(s) has a direct and substantial interest in the issues involved and the order which the Court might make (**See United Watch & Diamond Co v Disa Hotels 1972 (4) SA 409 (CPD) at 415E – F; Burger v Rand Water Board 2007 (1) SA 30 (SCA) para 7).** The Applicants cited the Traditional Council in these proceedings. This is unnecessary. By failing to join the Royal Family, the Applicants have committed a non-joinder of a party having substantial interest in the outcome of this matter.

The applicability of the Provincial and National Legislation

[15] The provisions of section 12 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 ("the Provincial Act") which provides for the appointment of traditional leaders, are anchored on the applicable provisions of the Traditional Leadership and Governance Framework Act 41 of 2003 ("the Framework Act"). Section 21 of the Framework Act provides for the dispute and claim resolution mechanism relating to traditional leadership and the applicable customary law. The section established a specialised forum for resolution of disputes relating to traditional leadership, namely the Commission on Traditional Leadership Disputes and Claims.

[16] Where there is a dispute as to the chieftainship the Framework Act provides for a mechanism for raising such disputes. It embraces the provisions of section 25 and 26 of the Framework Act. In **Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others 2015 (3) BCLR 268 (CC)** the Constitutional Court dealt with and defined the role of the Commission and stated that:

"[68] The Commission on Traditional Leadership Disputes and Claims was established by section 22(1) of the Traditional Leadership and Governance Framework Act. It was a specially constituted body which had authority to decide on any traditional leadership dispute and claim contemplated in section 25(2) of the Framework Act. This included cases where there is doubt as to whether a kingship…was established in accordance with customary law and customs. The Commission could institute investigations on request from interested parties or of its own accord."

The Applicants in this case should have taken their dispute of chieftainship to the Commission. There is no explanation why the dispute was not raised as soon as the Second Applicant attained the age of majority. The Applicants have not, before embarking on this application, taken advantage of the provisions of the Framework Act to challenge the appointment of the Third Respondent as the traditional leader of the Dikgale Traditional Community.

The Applicability of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)

[17] This application is premised on the provisions of PAJA. PAJA came into effect in 2000. It is a trite principle of law that legislation does not apply retrospectively unless the legislature has clearly expressed a contrary intention. PAJA has no express provisions that it operates retrospectively. The impugned decision in the present case was taken in 1995, long before the coming into effect of PAJA. In **Associated Institutions Pension Fund & Others v Van Zyl & Others 2005 (2) SA 302 (SCA) para 46**, it was held that since PAJA only came into operation on 30 November 2000, after the impugned decision in that case was taken, the validity of the defence of unreasonable delay had to be considered with reference to common law principles.

[18] I accordingly make a finding that the provisions of PAJA are not applicable to the present dispute. The review application was brought on a wrong basis.

Unreasonable delay in seeking the Review

[19] It is desirable and in the public interest that finality be reached within a reasonable time, in respect of judicial and administrative decisions and litigation in general. It was a longstanding rule that Courts have the power, as part of their inherent jurisdiction to regulate their own proceedings, to refuse a

review application if the aggrieved party has been guilty of unreasonable delay in initiating the proceedings. The rationale for the long-standing rule is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the Respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.

See **Associated Institutions Pension Fund & Others v Van Zyl & Others, supra at para 46 – 47.**

[20] In **Van Zyl** para 48, it was stated that the reasonableness or unreasonableness of a delay is dependent on the facts and circumstances of each case. It is a matter of factual enquiry upon which a value judgment is called for in the light of all the relevant circumstances, including any explanation that is offered for the delay. It is an investigation into the facts of the matter in order to determine whether, in all the circumstances of the case, the delay was reasonable.

[21] In the present case the Applicants have not put forward any explanation for bringing this application only recently during April 2018 when the impugned decision was taken in July 1995 when the Bakgoma and Bakgomana identified the Third Respondent as Kgoshi or when he was inaugurated as Kgoshi at a ceremony held at Moshate in June 1996.

[22] There is a long-standing rule of our common law that proceedings for judicial review of the decisions of public bodies must be instituted without undue delay. If there has been an unreasonable delay, a Court may in the exercise of its inherent power to regulate its own proceedings, refuse to determine the matter. In this manner an invalid decision may, in a sense, be validated. The reasons for the rule are said to be twofold. First, it is desirable and important that finality should be reached within reasonable time in relation to judicial and administrative decisions or acts. It can be contrary to the administration of justice and the public interest to allow such decisions or acts to be set aside after an unreasonable long time has elapsed. The second reason is the inherent potential for prejudice involved in failure to bring a review within a reasonable time, not only to a party affected by the decision but also to the effective functioning of the public body in question and to third parties who may have arranged their affairs in accordance with the decision. For this reason proof of actual prejudice to the Respondent is not a precondition for refusing to entertain review proceedings by reason of undue delay. The extent of the prejudice is, however, a relevant consideration and may be decisive when the delay has been relatively slight. The application of the rule requires answering of two questions, namely:

(a) was there an unreasonable delay?

(b) if so, should the unreasonable delay be condoned?

[23] Although the first question implies a value judgment, it entails a factual enquiry. The Second question involves the exercise of judicial discretion. Both questions must of course be answered in light of the facts and circumstances of the particular case. (See **Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 38H – 42D; Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nationale Vervoerkommissie, en 'n Ander 1986 (2) SA 57 (A) at 86A – G; Associated Institutions Pension Fund & Others v Van Zyl & Others 2005 (2) SA 302 (SCA) at paras 46 – 48; Gqwetha v Transkei Development Corporation Limited 2006 (3) All SA (245) paras 22 – 24**).

[24] Whether there has been an unreasonable delay depends largely on the extent of the delay and the acceptability of the explanation tendered, if any. In this regard it may sometimes not be sufficient to simply claim ignorance of the decision. In **Associated Institutions Pension Fund** Brand JA said the following at para [51]:

"In my view there is indeed a duty on applicants not to take an indifferent attitude but rather to take all reasonable steps available to them to investigate the reviewability of administrative decisions adversely affecting them as soon as they are aware of the decision. These considerations are, in my view, also reflected in both s 7(1) of PAJA and in the provisions of s 12(3) of the Prescription Act 68 of 1969. Whether the applicants in a particular case have

taken all reasonable steps available to them in compliance with this duty, will depend on the facts and circumstances of each case. (Compare ***Drennan Maud & Partners v Pennington Town Board 1998 (3) SA 200 (SCA)****).*"

In my view the same considerations are applicable to the question of knowledge of the decision. It should be legally insufficient for a litigant to rely on ignorance of a decision in circumstances where the existence of the decision would have become known by the taking of reasonable steps in the circumstances. The Court should therefore determine whether the existence of a decision would have been uncovered by the taking of reasonable steps in the particular circumstances and the period of delay should be reckoned from that date, event or period.

[25] The factors relevant to the exercise of the discretion to nevertheless overlook an unreasonable delay, include the extent of the delay, the explanation therefor, any prejudice to the Respondent and / or third parties and the nature of the impugned decision.

[26] In **Wolgroeiers**, supra the Court found that the Appellant had unreasonably delayed the institution of the review. The Court also refused to exercise its discretion to overlook the unreasonable delay, even though it found that the review would have succeeded. **Wolgroeiers** therefore provides clear authority

that the prospect of anything meaningful being achieved by the Applicant in the event of the review application succeeding is a relevant consideration in the exercise of the discretion to condone the unreasonable delay of review proceedings.

[27] In **Gqwetha** there was a divergence of opinion on the question whether, apart from the consideration mentioned in **Wolgroeiers,** the prospect of success in the review application itself was a relevant consideration. Mpati DP, with whom Farlam JA concurred, held at paras [18] and [19] that it clearly was. Nugent JA, with whom Navsa JA and Van Heerden JA concurred, was of the opinion at paras [34] and [35] that the prospect of the challenged decision being set aside is not a material consideration in the absence of an evaluation of what the consequences of setting the decision aside are likely to be. However, the issue has since been settled by the Constitutional Court. In **Khumalo and Another v MEC for Education, KwaZulu-Natal 2014 (5) SA 579 CC** the following was said on behalf of the majority at para [57]:

"An additional consideration in overlooking an unreasonable delay lies in the nature of the impugned decision. In my view this requires analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge."

(See also **Beweging vir Christelik-Volkseie Onderwys and Others v Minister of Education and Others 2012 (2) All SA 462 (SCA) at para [47]**)

[28] Applying the legal principles outlined in the authorities referred to above to the facts of the present case, I come to a conclusion that the Applicants' delay in bringing this application is inordinate and thus unreasonable. Same cannot be condoned. In the circumstances the Applicants are non-suited to bring the review application.

THE MERITS

[29] On the undisputed facts that have been canvassed above and as set out in the Third Respondent's answering affidavit, it has been established that the Third Respondent is the rightful Kgoshi of the Dikgale Traditional Community. In their founding affidavits the Applicants failed to show that the First Applicant is the candle wife (mmasechaba) and that the Second Applicant, as the son to the late acting Kgoshi William Dikgale is the rightful heir to the chieftainship.

[30] As already stated above, the Applicants failed to file any replying affidavit to gainsay crucial facts contained in the Third Respondent's answering affidavit. The following facts are contained in the Third Respondent's answering affidavit and are undisputed:

"24.1. The contents of this paragraph are denied. The First Applicant was married by the then Acting Chief of Dikgale Community Mr **William Dikgale**, who married her from Makgaleng family. The First Applicant's

marriage did not comply with our customs for her to can be a Mmasechaba. As such the First Applicant was never recognised by the Dikgale community and her marriage was never celebrated in terms of the customs of Dikgale community.

24.2. The First Applicant is not a Mmasechaba and this is proven by the fact that she never participated in any activity and let alone in the meetings of the Royal Family. It is custom that a Mmasechaba must participate in the decision making of the Royal Family, but this has never been the case with the First Applicant.

24.3. The First Applicant is alleging to be a Mmasechaba but yet she is not even aware of the activities taking place in the Royal Family. She mentioned elsewhere in her supplementary founding affidavit that she only became aware of my appointment as Kgoshi of Dikgale Community on the 15th of June 2018. If indeed the First Applicant was the Mmasechaba she could have known of my appointment as Kgoshi of Dikgale Community a long time ago.

25.2. Her marriage with the former Acting Kgoshi William Dikgale was never nullified for a simple reason that it never had any effect on the Chieftainship of Dikgale Community. The First Applicant was never married to be a Kgoshi bearer. In terms of our custom a Mmasechaba may only be married from the Lekota family and the First Applicant is from Makgaleng Family."

CONCLUSION

[31] In the light of the conclusive evidence before me, I make the following findings:

31.1. The Third Respondent, Malesela Solomon Dikgale is the only son amongst the ten children of the late Kgoshi Ranti Edward Dikgale. Upon the death of his father the Third Respondent was identified by the Royal Family as the successor to the traditional leadership. However, due to the fact that he was still young, the late William Dikgale was nominated to act as Kgoshi of the Dikgale Traditional Community until the Third Respondent comes of age.

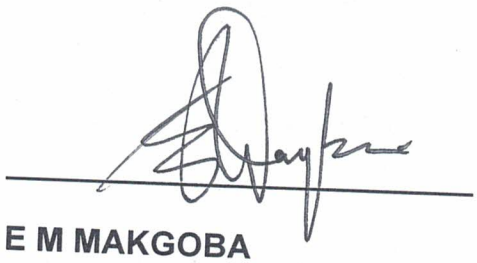
31.2. In terms of the customary law and customs and statutorily in terms of section 12 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 it is the prerogative of the Bakgoma and Bakgomana (the Royal Family) to decide what must happen to the traditional leadership position of a traditional community.

31.3. During 1995 and due to his acts of misconduct the late William Dikgale was chased out of the traditional community and removed from his traditional leadership and from his acting position. The Second Applicant, being the son of William Dikgale never had any entitlement to the traditional leadership and was never earmarked as such.

31.4. The Third Respondent, is the eldest son of the late Kgoshi Ranti Edward Dikgale and as such, was duly and correctly identified by the

Royal Family as a successor to the chieftainship of the Dikgale Traditional Community.

[32] The Applicants have not made out a case for the relief they seek. In the premises the application is dismissed with costs including costs of Senior Counsel where employed.



E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on	**: 14 November 2018**
Judgment delivered on	**: 22 November 2018**
For the Applicants	**: Mr M E Phooko**
	Moloko Phooko Attorneys
For the 1st & 2nd Respondents	**: Adv. M Makoti**
	Adv. Moshoeu
Instructed by	**: State Attorney**
For the 3rd Respondent	**: Adv. Z Z Matebese SC**
Instructed by	**: Maboku Mangena Attorneys**