REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 11377/2023

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

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DATE 10-07-2024 SIGNATURE [redacted]

In the matter between:

HEADMAN MATOME ENOS KOBE	**FIRST APPLICANT**
MOLOKOMME M.D.	**SECOND APPLICANT**
MONEPYA M.R.	**THIRD APPLICANT**
MONYEBODI D.E.	**FOURTH APPLICANT**
MORUKHU M.A.	**FIFTH APPLICANT**
PHALA ANDRIES	**SIXTH APPLICANT**
KGATLA PHILIP	**SEVENTH APPLICANT**

KUBU N.A.	**EIGHTH APPLICANT**
MOLOKO LEBOGO	**NINTH APPLICANT**
LEKGWARA M.A.	**TENTH APPLICANT**
MADIBANA S.A.	**11TH APPLICANT**
MADIOPE N.A.	**12TH APPLICANT**
BARNARD MAILULA	**13TH APPLICANT**
MANAKA CAIPHUS	**14TH APPLICANT**
MABOYA ELROS	**15TH APPLICANT**
MALEKA N.D.	**16TH APPLICANT**
STEPHINA PHOLOBA	**17TH APPLICANT**
MANTASE THELEDI	**18TH APPLICANT**

-and-

THE PREMIER OF THE LIMPOPO PROVINCE	**FIRST RESPONDENT**
THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE LIMPOPO PROVINCE DEPARTMENT OF CO-OPERATIVE GOVERNANCE, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS	**SECOND RESPONDENT**
THE CAPRICORN DISTRICT MANAGER, TRADITIONAL AFFAIRS	**THIRD RESPONDENT**
BAHANANWA TRADITIONAL COUNCIL	**FOURTH RESPONDENT**
BETHUEL MABOYA	**FIFTH RESPONDENT**

MATOME SILAS MOTLAPEMA	**SIXTH RESPONDENT**
MPHATENG JOHANNES MOLEBO	**SEVENTH RESPONDENT**
NTOME FRANS MAELA	**EIGHTH RESPONDENT**

JUDGMENT

BRESLER AJ:

Introduction:

[1] The Applicants apply for the following relief:

1.1 Pending implementation of the Full Court order per case number HCAA 14/2021 granted on the 28th of June 2021:

1.1.1 That the First, Second and Third Respondents are interdicted from appointing and recognizing the 5th, 6th, 7th and 8th Respondents as Headman of the Bahananwa Traditional Community.

1.1.2 That the First, Second and Third Respondents are interdicted from processing any appointment of a headman or headwoman of the Bahananwa Traditional Community.

1.2 That the First, Second and Third Respondents are ordered to pay the costs of this application on Attorney and Client scale.

1.3 That the remaining Respondents be ordered to pay the costs on attorney and client scale in the event of opposition.

[2] The application is opposed by the Fourth Respondent only.

[3] The common cause facts relevant to these proceedings are the following:

3.1 On the 11th of February 2019, *inter alia* the First Applicant and several other individuals instituted a review application in the above Honourable Court in terms whereof they sought an order reviewing and setting aside the decision to remove them as headman / headwomen and ancillary relief.

3.2 The review application was dismissed with costs on the 6th of February 2020.

3.3 Thereafter *inter alia* the First Applicant launched an appeal to the Full Court against the whole judgment and order. The Full Court upheld the appeal with costs on the 28th of June 2021 (the 'Full Court order').

3.4 The Fourth Respondent and Kgoshi Ngoako Isaac Lebogo then obtained special leave to appeal from the Supreme Court of Appeal.

3.5 The First to Third Respondents also applied for special leave to appeal to the Supreme Court of Appeal which application was dismissed on the 18th of September 2023.

[4] This court is now called upon to determine if an interdict *pendente lite* should be granted in terms whereof the appointment of alternative headman and headwoman are suspended pending the finalisation of the aforesaid Appeal.

[5] The matter initially came before court as an urgent application on the 12th of December 2023. On this day, this Court granted a provisional order by agreement between the parties, and after having been urged by this court to consider an amicable settlement of this matter, *inter alia* to the effect that:

5.1 Pending finalisation of the appeal before the SCA under case number 1204/2021, the Respondents are interdicted from appointing and recognising any third party as headman or headwoman of the following Bahananwa Villages:

5.1.1 Lesfontein Village.

5.1.2 Inveraan Village.

5.1.3 Eldorado Village.

5.1.4 Milbank Village.

5.1.5 Normandy Village.

5.1.6 Slaaphoek Village.

5.1.7 Addney Village.

5.1.8 Varedig Village.

5.1.9 Diepsloot Village.

5.1.10 Balckhill Village.

5.1.11 Leipzig Village.

5.1.12 Glenfirnis Village.

5.1.13 Lemonside Village.

5.1.14 Naairn Village.

5.1.15 Bergendal Village.

5.1.16 Miltonduff Village.

5.1.17 Papegaai Village.

5.1.18 Bulbul Village.

5.1.19 Lousenthal Village.

5.1.20 Sweethome Village.

5.1.21 The Glen Village.

5.1.22 Escourringa Village.

5.1.23 Ziest Village.

5.1.24 Springfield Village.

5.2 There is nothing effecting the appointment of headman / headwoman of other villages.

5.3 Costs are reserved.

[6] On the return date, the matter was argued at length by the representatives of respectively the Applicant and the Fourth Respondent. It stands to be noted that this matter was argued simultaneously with case number: 10954/2023, being a related matter between the same parties raising similar issues to be determined. Judgment in matter 10954/2023 will be delivered separately but simultaneously herewith.

[7] From the onset, this Court raised the question if it would not serve the purposes of justice if the *rule nisi* is made final – especially considering the uncertainty prevailing in the community pending finalisation of the appeal in the Supreme Court of Appeal. Counsel for the Applicant, Adv Monyemoratho agreed with the contention and moved for the order to be made final with costs.

[8] Counsel for the Fourth Respondent, Adv. Gaisa however submitted that they will abide by the said order if same is made final. He furthermore submitted that this Court is not bound to confirm the *interim* order and same can be dismissed. The

Court must ultimately have regard to the grounds of opposition in determining if a case has been made out for the relief prayed for in the Notice of motion.

Application of law to the facts:

[9] Both counsels addressed the court extensively on the question if the appeal is still pending in the Supreme Court of Appeal having regard to the fact that the said appeal was merely removed from the roll.

[10] Counsel for the Applicants furthermore submitted that the Full Court sat as a court of first instance and Leave to Appeal in respect of the merits should therefore have been granted by the Full Court and not the Supreme Court of Appeal. In the Applicants' view, the pending appeal therefore only lies against the condonation aspect and not the remaining order.

[11] The difficulty that this court has with the reasoning is the fact that it does not appear from the order granting Leave to Appeal that such leave was granted in respect of selective issues. This court is not privy to the full extent of the documents and arguments delivered in the Supreme Court of Appeal. Having regard to the order granting Leave to Appeal, this court must assume that leave was granted against the whole judgment and order.

[12] The Applicants submit that, since leave to appeal was not requested or obtained from the Full Court, the Supreme Court of Appeal has no jurisdiction to entertain an

appeal on the merits. During argument, this Court raised the concern that the Appeal served before the Supreme Court of Appeal in the past and it does not appear that either the parties or the court raised the issue of jurisdiction. Does this court therefore have the required jurisdiction to make a finding in respect of the jurisdiction of the Supreme Court of Appeal in the absence of any objection raised by the parties or the court during the hearing of the Appeal? I think not.

[13] A very similar question was raised in the matter of ***National Credit Regulator v Lewis Stores (Pty) Ltd and Another***[1]. At paragraphs [56] the court found that the correct procedure is the following:

> *'For those reasons I conclude that an appeal from the decision of a High Court ... whether constituted of a single judge, or two judges, or as a full court, lies with leave of that court sitting as a court of first instance. Such leave should be sought in terms of s16(1)(a) of the SC Act and not by way of an application for special leave to appeal from this court.'*

[14] The Supreme Court of Appeal however found that special circumstances existed for the court to exercise its inherent jurisdiction to regulate its own procedure and to condone the irregular manner in which the appeal is brought. It is thus apparent from this decision that the Supreme Court of Appeal has an inherent jurisdiction to condone irregular proceedings of such a nature. Especially in instances where

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[1] 2020 (2) SA 390 (SCA)

correcting the irregularity will result in a duplication of proceedings and unnecessary costs being incurred.

[15] It is again reiterated that it is not for this Court to consider if such an irregularity has transpired. It would not be appropriate for this court to question the jurisdiction of the Supreme Court of Appeal having regard to the fact that such jurisdiction was not questioned by the Supreme Court of Appeal itself.

[16] For purposes of these proceedings, the Court will assume that there are pending proceedings in the Supreme Court of Appeal. It must therefore be determined if the Applicants are entitled to the relief prayed for *pendente lite.*

[17] The Fourth Respondent raised numerous technical objections, the first being the lack of urgency of the application. This court is of the view that the issue of urgency was rendered moot when the *interim* order was granted by consent. A finding that the matter was not sufficiently urgent would in any event only resulted in the matter being struck from the urgent roll with the appropriate cost order, and not a dismissal of the case on the merits.

[18] The Fourth Respondent has also raised the non-joinder of the 'Bahananwa Royal Family'. The Fourth Respondent consequently refers to the matter of ***Absa Bank Ltd v Naude NO***[2] in its Answering affidavit. The Court has carefully considered the contents of this case and could find no reference to the recognition of headman as

[2] 2016 (6) SA 450 (SCA)

contemplated in paragraph 36 of the said Answering affidavit. The case deals with business rescue and not traditional leadership.

[19] It is indeed correct that Section 12 of the **Limpopo Leadership and Institutions Act,** Act 6 of 2005 provides for the Royal Family's involvement in identifying the candidate to assume the position in question. Section 12(1)(b) and Section 12(2) however makes it clear that the prerogative to formally recognise the candidate lies with the Premier and not the Royal Family.

[20] In this court's view, one must have regard to the nature of the relief prayed for. The Applicant's to a certain extent wants to preserve the *status quo* pending the finalisation of the Fourth Respondent's appeal pending in the Supreme Court of Appeal. They are not asking for new Headman to be recognised pursuant to such individual being identified by the Royal Family, nor are they asking for the reconsideration and resolution consequential upon the Premier's refusal to issue a certificate of recognition. In the aforesaid instances, the involvement of the Royal Family is apposite.

[21] The Royal Family has a direct and substantial interest in as far as they have the right to identify a possible candidate for recognition. What renders the issue problematic is the dispute as to the relevant Royal Family that should be involved. The Applicants submit that no such Royal Family as the 'Bahananwa Royal Family' exists. In the Applicants view, the Royal Family concerned must be the Lebogo Royal Family.

[22] The Fourth Respondent does not submit any proof or corroborating evidence of the existence of the 'Bahananwa Royal Family'. In this court's view, the Fourth Respondent has therefore failed to show, on a balance of probabilities, that this entity indeed exists and should be joined.

[23] It must again be highlighted that the order granted in this matter, does not in any way prejudice the rights of the applicable Royal Family to identify potential candidates for the remaining villages. No prejudice is therefore suffered if this court does not embark on an investigation into the correct identity of the applicable Royal Family.

[24] It must furthermore be noted that the Bahananwa Royal Family was not joined, nor did they intervene as a party to the main case or the proceedings in the Supreme Court of Appeal. As such, and in lieu of the prevailing circumstances *in casu,* the point *in limine* pertaining to the joinder of the Bahananwa Royal Family is dismissed.

[25] As to the misjoinder of the Fifth, Sixth, Seventh and Eight Respondents, this Court disagrees with the Fourth Respondent's submissions. Parties may be joined to proceedings in as far as they may hold a vested interest in the outcome of the proceedings. The Applicants presumably heard that the Fifth to Eight Respondents will be recognised as Headman. The purpose of the proceedings is to stay the recognition process. In this Court's view the interest that these Respondents have in the outcome of these proceedings are sufficient to warrant their joinder. This point *in limine* can therefore also not succeed.

[26] As to the merits of the matter, the Fourth Respondent reiterated that the pending appeal has suspended the order of the Full Court. The Fourth Respondent repeatedly states that the pending appeal restores the *status quo ante.* In paragraph 50.3 of the Answering affidavit, the Fourth Respondent specifically records:

> *With the status quo restored, the royal family of the senior traditional leader of the Bahananwa traditional community is at liberty to identify headman and continue to bring governance to its territory.*

[27] In paragraph 53.3 the Fourth Respondent furthermore declares that:

> *Consequently, the applicants have no right (whether clear or prima facie) to call themselves headman or to claim the relief that they seek.*

[28] Having considered the general gist conveyed by the Fourth Respondents, it is apparent that the appointment of Headman in respect of the Villages forming the subject of the dispute in the pending Appeal, will not be voluntarily suspended pending a determination of the said Appeal.

[29] The requirements for *interlocutory* or *interim* relief have been stated and restated in numerous cases, the standard formulation of the requirements being the following:[3]

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[3] As per the decision in ***LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*** 1969 (2) SA 256 (C) at 267A – F

'Briefly these requisites are that the applicant for such temporary relief must show –

(a) That the rights which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;

(b) That, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) That the balance of convenience favours the granting of the interim relief; and

(d) That the applicant has no other satisfactory remedy.'

[30] In as far as the Appeal is pending, the right of the Applicants to the relief prayed for, is *prima facie* established. It is also reasonable to apprehend that injury will result should the relief not be granted.[4] The appointment of alternative Headman to the Villages that forms the subject of the pending appeal, will cause considerable confusion, uncertainty and ultimately pandemonium in the community. It follows

[4] See ***Free State Gold Areas Limited v Merriespruit (Orange Free State) GM CO Ltd*** 1961 (2) SA 505 (W) at 518

that the balance of convenience favours the granting of the relief. The potential prejudice to be suffered by the Applicants should the *interlocutory* relief not be granted, far outweighs any inconvenience suffered by the Fourth Respondent should the relief be granted.

[31] As to the existence of an alternative remedy, the Fourth Respondent raised the issue that the Applicants should have applied in terms of Section 18(3) for the execution of the order pending appeal. This Court does not agree with the reasoning. The Applicants are not applying for the recognition process to be finalised in their favour, nor are they applying for any relief akin to benefitting from their potential appointments as Headman. They merely want to suspend the recognition process *in toto* pending finalisation of the appeal. There is therefore no other remedy available to them that would yield the same, or a similar result than the current remedy before court.

[32] This court appreciates that revised relief has been prayed for during the hearing to the extent that the applicable villages that should be excluded from any identification and recognition process, was specified in the *interim* order. This was not the position in the Notice of Motion. The Applicants conceded that the appointment of headman / headwoman should not be suspended *in toto* as contemplated in prayer 2.2 of the Notice of Motion.

[33] At the inception of this judgment, this court recorded that the Applicants moved for the *interim* order to be made final. The Fourth Respondent essentially conceded that they will abide by the order should it be made final.

[34] What is of particular importance in this matter is the fact that the uncertainty surrounding the appointment of headman / headwoman has been the prevalent *status quo* since their removal in 2013. I can only fathom the extent of the legal costs that has accrued in this matter to date hereof.

[35] As stated during the hearing, the people in the community are the ones that suffer. Justice demands that there is finality to litigation. Should the Court exercise its discretion and refuse the interdictory relief, this may result in further extensive and costly litigation. It is trite law that the court has an overriding discretion whether to grant or refuse an interdict and to regulate the further proceedings of any application before it.[5] In the exercise of the discretionary power, the court may impose such terms as it may think fit upon the granting of the said interdict.[6]

[36] Having regard to all the circumstances of this matter, this court finds that the *interim* order stands to be confirmed to the extent set out herein after.

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[5] See ***Knox D'Arcy Ltd & others v Jamieson & others*** 1995 (2) SA 579 (W) at 693 G – H
[6] See ***Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd & others*** 1994 (2) SA 172 (C) at 184H – 185D

Costs:

[37] The Applicants are substantially successful in the relief prayed for. The Fourth Respondent's opposition was not entirely unwarranted in as far as the relief claimed in the Notice of Motion was couched in extremely wide terms and therefore potentially detrimental to them.

[38] The Court retains a discretion to award costs that is fair to all parties concerned. Despite the fact that the *interim* order is made final to certain extent, I am of the view that the normal rule that costs should follow the result, will not bring about a fair result. Under the circumstances, each party is ordered to pay its own costs.

Order:

[39] In the result the following order is made:

40.1 The *interim* order granted on the 12th day of December is made final to the following extent:

40.1.1 The First to Fourth Respondents are interdicted from appointing and recognising any third party as headman / headwoman in respect of the following Bahananwa Villages:

a. Lesfontein Village.

b. Inveraan Village.

c. Eldorado Village.

d. Milbank Village.

e. Normandy Village.

f. Slaaphoek Village.

g. Addney Village.

h. Varedig Village.

i. Diepsloot Village.

j. Balckhill Village.

k. Leipzig Village.

l. Glenfirnis Village.

m. Lemonside Village.

n. Naairn Village.

o. Bergendal Village.

p. Miltonduff Village.

q. Papegaai Village.

r. Bulbul Village.

s. Lousenthal Village.

t. Sweethome Village.

u. The Glen Village.

v. Escourringa Village.

w. Ziest Village.

x. Springfield Village.

40.1.2 The aforesaid order does not affect the appointment and recognition of headman / headwoman of other villages falling under the Bahananwa Traditional Council.

40.2 Each party is ordered to pay its own costs.

[redacted]

M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE APPLICANTS	:	**Adv MB Monyemoratho**
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DATE OF HEARING	:	**10 April 2024**
DATE OF JUDGMENT	:	**10 July 2024**