"SN1"

IN THE NORTH WEST HIGH COURT
MAFIKENG

CASE NO.: 263/2010

In the matter between:

NYALALA JOHN MOLEFE PILANE	1ST APPLICANT
THE TRADTIONAL COUNCIL OF THE BAKGATLA BA KGAFELE TRADITIONAL COMMUNITY	2ND APPLICANT

and

M K PILANE	1ST RESPONDENT
R DINTWE	2ND RESPONDENT

DATE OF HEARING	:	2 JUNE 2011
DATE OF JUDGMENT	:	30 JUNE 2011
FOR THE 1ST AND 2ND APPLICANTS	:	ADV J H F PISTOR SC with him ADV O K CHWARO
FOR THE RESPONDENTS	:	ADV S COWEN

JUDGMENT

LANDMAN J:

[1] This is the extended return date of a rule nisi issued on 5 December 2010.

[2] The Bakgatla-Ba-Kgafela Traditional Community or tribe straddles the border of South Africa and Botswana. The paramount chief lives in Mochudi; a place made famous by Sol Plaatjie in a novel of that name. His deputy, who is recognised as a chief by the North West Provincial Government, attends to the affairs of the tribe in Moruleng which is located in the North West Province of South Africa.

[3] Traditional or customary law operates in terms of and under the Constitution of the Republic of South Africa of 1996 (the Constitution). See section 211 of the Constitution which reads:

"(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law."

[4] An undetermined number of members of the Bakgatla-Ba-Kgafela Traditional Community wish to secede and to establish or to be recognised as a separate traditional community or tribe. The history of the origin of the tribe and that of the secessionists is set out in great detail in the papers. I need not reproduce that history, as interesting as it is, here because of the limited relief which is sought by the applicant.

[5] It is sufficient to state that in as from July 2009 the secessionists decided:

(a) to unilaterally declare themselves independent of the tribe;

(b) to be called the Bakgatla-Ba- Kautlwale Pilane; and

(c) to unilaterally establish a traditional authority which they call the Motlhabe Tribal Authority.

[6] On 31 January 2011the secessionists issued an invitation to residents of the Motlhabe Village and, it transpires, other villagers to attend a meeting on 6 February 2010. Importantly the invitation was typed or printed on a letterhead of the Motlhabe Tribal Authority. The document, in translation reads:

> "The Residents of the Motlhabe Village"
>
> You are invited to a meeting on the 06 February 2010, at 09:00 in the morning at Motlhabe Community Hall.
>
> Agenda
>
> 1. The reply from the Government in connection with the [cessation and] independence of Motlhabe (from Moruleng Bakgatla).
> 2. [Decision] and Resolution of the Traditional Community in general in connection with the independence (from Moruleng Bakgatla)."

The words between square brackets are disputed. I rely only on the remaining part of the translation.

[7] The applicants communicated with the secessionists through their attorneys and informed them that litigation would ensue unless they abandoned their intention to hold the meeting. An attorney acting for the secessionists replied that the meeting would proceed.

The result was that an urgent interdict was launched and the respondents were interdicted from holding the meeting.

[8] The applicants wish the rule nisi to be confirmed in the following terms:

"1.1.1 Interdicting the Respondents and all persons acting through them or in collaborating with them, from:

1. Proceeding with the meeting of the members of the **MOTLHABE TRIBAL AUTHORITY (BAKGATLA-BA-KAUTLWALE PILANE)**, planned for the 6th February 2010 at 09:00 by M K Pilane (Mothl) and R Dintwe (the Respondents herein) referred to in an invitation/notice annexed as "A" and "A1" to the founding affidavit and/or anyone on their behalf or whom they may represent, which meeting is planned to be held at the Motlhabe Community Hall, Saulspoort, Pilansberg, district Rustenburg, North West Province; } interdicted

2. Organising or proceeding with any meeting purporting to be a meeting of the Traditional Community or of the Bakgatla-Ba-Kautlwale Pilane or Motlhabe Tribal Authority without proper authorisation by either of the Applicants or order of this Honourable Court.

3. Taking any steps or conducting themselves in any manner, which is contrary to the provisions of the North West Traditional Leadership and Governance Act 2 of 2005 (the North West Act), the Framework Act of the customs of the traditional community in Moruleng and the customary law, which steps or conduct is prejudicial to the Applicants, or disruptive to, or has any distracting or reducing or belittling effect on the status, role and function of the 1st and 2nd Applicants.

4. Acting for or on behalf of the legitimate Kgosikgolo or Kgosi of the Bakgatla-Ba-Kgafela.

5. Pretending to be authorised by the legitimate Kgosikgolo or Kgosi of the Bakgatla-Ba-Kgafela Traditional Community.

6. Representing to any person that they are authorised either by the legitimate Kgosikgolo or Kgosi of the Bakgatla-Ba-Kgafela Traditional Community or by virtue of any other reason to declare an independence or cessation of the Motlhabe Village from the Bakgatla-Ba-Kgafela Traditional Community in Moruleng.

7. Pretending or holding themselves out as a traditional community or a traditional authority under the name or names Bakgatla-Ba-

Kautlwale or Bakgatla-Ba-Motlhabe or the traditional authority of Motlhabe or any similar name or title of whatever kind.

1.1.2 A costs order on an attorney and client scale."

Paragraphs 4 and 5 of the Rule

[9] At the outset I intend to dispose of some of the relief sought. I do so on the basis that there are no allegation made in the founding papers which support these prayers.

[10] The applicants do not allege that the respondents are acting for or on behalf of the legitimate Kgosikgolo or Kgosi of the Bakgatla-Ba-Kgafela. Nor do the applicants allege that the respondents are pretending to be authorised by the legitimate Kgosikgolo or Kgosi of the Bakgatla-Ba-Kgafela Traditional Community. It follows that paragraphs 4 and 5 should be dismissed.

[11] It is convenient to deal with Ms Cowen's submission that the applicants were only authorised to pursue the relief sought in the first two prayers of the interim order. The remaining relief which is cast in very far-reaching and broad language was not authorised and accordingly should not be entertained. The prayers in the interim interdict are not dealt with in turn. In summary, in each case, the applicants have failed to demonstrate either a clear right or any threat or irreparable harm. Notably, there is no evidence on record to suggest that the meetings threaten to be anything other than lawful and disciplined.

[12] The relief which the applicants seek falls within their general mandate. The relevant resolution need not set out the exact relief which the delegates are empowered to seek.

Paragraphs 1 and 2 of the Rule

[13] The meeting which was to be held with the members of the **MOTLHABE TRIBAL AUTHORITY (BAKGATLA-BA-KAUTLWALE PILANE)**, planned for 6 February 2010 by the respondents at the Motlhabe Community Hall was interdicted. There is no purpose in confirming it. Paragraph 2 of the Rule makes provisions for the future. Nevertheless I need to consider whether this meeting should have been interdicted as it goes to costs.

Meeting called off

[14] The respondents say that on 2 February 2010, the first respondent was contacted by a member of the SAPS who advised him that he would be arrested if the meeting proceeded. In the circumstances the first and second respondents who signed the invitation to the meeting decided the meeting should be cancelled. The respondents proceeded to inform the members of the community that the meeting was cancelled. But, say the respondents it transpired that contrary to the first respondent's understanding, a previous attorney representing the respondents did not inform the applicants' attorney that the meeting had been cancelled but advised rather that it would proceed.

[15] The respondents set out the steps taken to advise the community that the meeting had been called off. I accept that this was done. But it does not assist the respondents for their attorney advised the applicants, in writing that the meeting would go ahead. The applicants were entitled to act upon this advice. The respondents say that they instructed their attorney that they would cancel the meeting. They aver that their attorney disregarded their instructions. This does not sound at all probable but assuming it was the case, it does not assist them. They are bound by the communication sent to the applicants by their appointed legal representative.

[16] The respondents point out that had the papers been served upon them they would have been able to put the true position before the court. Ms Cowen submitted that, viewed in this context, these proceedings were unnecessarily pursued from the outset.

Continuation of the UDI

[17] The nub of the respondents' defence is that the unilateral declaration of independence had been abandoned. The individuals who called the meeting for 6 February are the clan leaders in the Motlhabe community including the leaders of the Kgosing. They have called the meeting as a Kgotha Kgothe of the local community. They are entitled to do so under custom. It was intended to discuss the matter of their future in the light of the communications received from the Premier's office.

[18] Although the respondents say they have abandoned their attempt at obtaining independence unilaterally they are still bent on securing their independence. Ms Cowen submitted that in the wake of may falled attempts to resolve their disputes and grievances within the traditional community, using customary law dispute resolution systems, and despite various pleas made to government to assist them, they now wish to consider obtaining independence from the Bakgatla-Ba-Kgafela traditional community to establish a separate community. They have been advised by government representatives that to do so requires a formal application to the Premier in terms of applicable legislation and they wish to convene a meeting to discuss course.

[19] I do not find it necessary to examine the traditional law and customs in order to determine the nature of the traditional community meetings which may be held at the level suggested in their papers by the respondents. The reason for this is that the proposed meeting could not have been a traditional meeting. The invitations were sent out under the

auspices of the Molthabe Tribal Authority. The respondents cannot escape this fact. Ms Cowen did her best to convince me that the use of the name was merely incidental and that the respondents had been informed of its history. This does not assist the respondents at this time. Ms Cowen also sought to convince that the unilateral declaration of independence had been abandoned.

[20] Even if the unilateral declaration of independence had been abandoned, it does not detract from the fact that the respondent, as secessionists, were continuing to advance their case using the trappings and symbols of legitimacy and importantly the same trappings and symbols that had been used to advertise the proposed breakaway in 2009. See the letter attached to the founding affidavit as annexure "B".

[21] It is abundantly clear that in a constitutional dispensation no person or body of persons may create or reproduce structures otherwise than in terms of and in accordance with the constitutional processes contained within the Constitution which is the supreme law. This has been elegantly expressed in para 4.3 of the replying affidavit. I adopt and express it thus:
Any action by a parallel but unsanctioned structure that is neither recognised by the law or custom, seeking to perform and assume functions which are clearly the exclusive preserve of such recognised authorities, ought to incur the wrath of the law.

[22] Secession from a traditional community or a tribe was known in days gone by. See T W Bennet **Customary Law in South Africa** (2004) 105. Secession is an eventuality which is contemplated by both the National Framework Act 41 of 2003 (the NFA) and the North West Traditional Leadership and Governance Act 2 of 2005 (the NW Act). See section 7of the former Act and section 4 of the latter Act. The secessionists must comply with the law of the land. They may not flout the law. This is not to say that there is no space for a secessionist movement merely that such a movement may not trespass on the terrain and power of constitutionally recognised structures.

[23] Although the first and second applicants do not approve of secession they are unable to prohibit discussion on secession. They are statutorily obliged to administer the affairs of the tribe in accordance with traditional law and custom and in accordance with the applicable national and provincial legislation. It follows that they are also empowered and obliged to prevent others from usurping these powers.

[24] I have mentioned that when the secessionists declared or purported to declare their independence in July 2009 they purported to create the Motlhabe Tribal Authority. The concept of a Tribal Authority was replaced by that of a Traditional Authority. The latter has been superseded by a Traditional Council. A Tribal Authority was a statutory body established for a specific traditional community or tribe. Neither secessionists nor anyone else can create such a body. The purported creation of such a body and the use of its name is done to demonstrate and bolster the legitimacy of the cause. A non-goverment body may not hold themselves out to be part of the organs of state. Nor may they appropriate to themselves any symbols of state to proclaim a legitimacy which they lack.

[25] May discussion be instituted by secessionist or anyone else for that matter outside the traditional structures. It is unnecessary to decide this issue because of the facts; particularly in view of the vehicle which was used to call a meeting. The Constitution protects freedom of speech. See section [][][]. I may merely observe that interested community members have a right to gather and discuss matters of mutual interest unless specifically forbidden by a customary law which passes constitutional scrutiny.

[26] But the respondent did not choose this course of action and the applicants are not entitled to this part of paragraph 2 which interdicts the respondents from organising a meeting held for or by the Bagkatla-Ba-Kautlwale? For the reasons set out below a group of persons may not be interdicted from identifying themselves by reference to some present or historical person, feature or event.

[27] Paragraph 2 of the rule, as amended by the applicant to deal with an objection by the respondents, cannot be granted in this form. This court has no authority to grant or refuse the authorization of meetings. Any order which this court makes is predicated on an entitlement to such an order. As the order is framed it creates such a wrong impression. The affected words should be deleted. It follows that the order in paragraph 2 as amended should be confirmed. I have already indicated that there is no need, at this stage, to confirm paragraph 1 of the rule.

Paragraph 3 of the Rule

[28] The way in which the respondents and the secessionists in general have advanced or attempted to advance their cause has had the effects complained of. Interdicts have been granted against other or co-secessionists in the past and have, in at least one case, been ignored or defied. The applicant are entitled to have the substance of paragraph 3 of the Rule confirmed.

[29] However, I do not think any useful purpose will be served by linking the contravention of the legislation and customary law to conduct which is prejudicial, disruptive, distracting or has a belittling effect on the first and second applicants. To do so would provide the ground for further and unprofitable litigation.

Paragraph 6

[30] The applicants have not provided any evidence to show that the respondent have made any representations of the kind which they seek to interdict. The applicants are correct that such conduct is wrongful. But without proof of a reasonable apprehension that the respondents intend to do make these representations, the applicants are not entitled to this relief.

Paragraph 7

[31] The applicants are, in my view, for the reasons expressed concerning paragraph 1 and 2 of the Rule entitled to part of the order. The respondents may be interdicted from using such forms as Traditional Authority and, I may add, Tribal Authority or any similar name i.e. Traditional Council.

[32] The applicants are not entitled, at least on these papers, to an order that the respondents (and others) be interdicted from holding themselves out as a traditional community under the names mentioned. The respondents belong to a group which has a distinct identity. To an extent identity is what a group of people call themselves. It is their cultural right to do so even if others identify the group differently or decline to recognise their identity.

[33] The applicants seek an interdict prohibiting the respondents from pretending or holding themselves out as a traditional community or a traditional authority under the name Bakgatla-Ba-Kaitwale. I have dealt with the issue from the perspective of a traditional authority. The use of the names to describe their identity or to affirm their historical antecedents as described in the papers is an entirely different issue. The respondents have a historical foundation. The one are not required to their back on their culture and their inheritance. It is their belief that they are (to a degree which may be disputed) a distinct people. There is nothing on the papers which goes to show that this is a pretence or a sham which requires that to be interdicted.

Alternative remedy

[34] Ms Cowen suggested that the applicants have alternative remedies. Should the applicants wish to attend they are welcome to do so and to voice their concerns. This

submission does not any cognizance of the right of legitimate structures to resist unconstitutional structures and to insist that, for example, as in this case, secessionist work in terms of and under the law.

Costs

[35] This brings me to the question of costs. The applicants have been substantially successful and I would award them their costs. I do not think that there is any good reason to award punitive costs against the respondents. The papers were not served upon the respondents before the rule was sought.

[36] The result is that the rule nisi is confirmed in the following terms:

1. The Respondents and all persons acting through them or in collaborating with them, are interdicted from:

    1.1. Organising or proceeding with any meeting purporting to be a meeting of the Traditional Community or Motlhabe Tribal Authority without proper authorisation by either of the Applicants.

    1.2. Taking any steps or conducting themselves in any manner, which is contrary to the provisions of the North West Traditional Leadership and Governance Act 2 of 2005 (the North West Act), the Framework Act of the customs of the traditional community in Moruleng and the customary law.

    1.3. Pretending or holding themselves out as a traditional authority under the name or names Bakgatla-Ba-Kautlwale or Bakgatla-Ba-Motlhabe or the traditional authority of Motlhabe or any similar name or title of whatever kind.

2. The respondents are to pay the costs of the application jointly and severally, the one paying the other to be absolved.

A A LANDMAN

Judge of the High Court

Attorneys for applicants: Mothuloe Attorneys /S M Mookeletsi Attorneys

Attorneys for respondents: Legal Resources Centre/Minchin and Kelley Inc.