IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 582/11

In the matter between:-

NYALALA MOLEFE JOHN PILANE	First Applicant
THE TRADITIONAL COUNCIL OF THE BAKGATLA-BA-KGAFELA TRADITIONAL COMMUNITY	Second Applicant

and

MPULE DAVID PHETO	First Respondent
THARI ERNEST PILANE	Second Respondent
SEGALE PILANE	Third Respondent
OUPA PILANE	Fourth Respondent
TINY MOTSHEGWA	Fifth Respondent

APPLICATION FOR LEAVE TO APPEAL

DATE OF HEARING	:	19 MARCH 2012
DATE OF JUDGMENT	:	19 APRIL 2012
COUNSEL FOR THE APPLICANTS	:	ADV N ARENDSE SC with ADV O K MATSEGO
COUNSEL FOR THE RESPONDENTS	:	ADV J PISTOR SC with ADV K CHWARO

JUDGMENT

HENDRICKS J

[A] **<u>Introduction</u>**:-

[1] In this matter, counsel chose to refer to the parties as in the main application. In order to avoid any confusion, in terms of this judgment on leave to appeal to, the parties will be referred to as in the main application.

[2] This is an application for leave to appeal to the Supreme Court of Appeal by the Respondents against the whole of a judgment delivered by this Court on 30th September 2011, in which a final interdict was granted in favour of the Applicants. Together with this application for leave to appeal is also an application for condonation for the late filing of the heads of argument on behalf of the Respondents. I will deal firstly with the application for condonation and thereafter with the application for leave to appeal.

[B] **<u>Ad condonation</u>**:-

[3] Notice of allocation of a trial date for the hearing of the application for leave to appeal was issued by the Registrar of this Court on the 28th February 2012, indicating that the matter has been allocated the dates of the 19th and 20th March 2012, as dates for the hearing of the application for leave to appeal. The Respondents were also made aware of their obligation as contained in Practice Direction no 21 of this Court.

[4] By way of a notice dated 7th March 2012, the Respondents served a supplementary notice to the application for leave to appeal. The

Respondents' heads of argument in support of the application for leave to appeal were only served on the Applicant's attorneys of record on Monday, the 12th March 2012 at 12h31, being four court days before the hearing of the application itself.

[5] It is common cause that in terms of paragraph 1 (a), (b) and (c) of Practice Direction no 14 read with Practice Direction no 28, the heads of argument of the Respondents herein should have been delivered at least 15 calendar days before the date of the hearing and those of the Applicants at least 10 calendar days before.

[6] It is self-evidently clear that there has been non-compliance with the above stated Practice Directions by the Respondents and consequently condonation should have been sought by means of a proper application. This was not done. Instead, condonation is being sought in the heads of argument filed on behalf of the Respondents. The latter *"application"* does not explain in detail the reasons for the late filing of the heads of argument. In particular the delay between the date on which the Registrar has communicated the allocated date for hearing (28 February 2012) until 12 March 2012, when the Respondents heads of argument were filed, has not been explained.

[7] In their heads of heads of argument, the Respondents contended that:-

> *"According to the Practice Directives of this Court, it may be that these heads are filed slightly late. We apologize for this, and we trust that little or no inconvenience will be caused to our*

colleagues representing the Applicants. The lateness of these heads of argument is not intention, willful or deliberate. It is some weeks ago that senior counsel for the Respondents and the Applicants had agreed to jointly approach the learned Judge in this matter for a date to argue the leave to appeal. Several dates were given. Only recently did our attorney of record indicate to us that indeed the learned Judge had indicated through his Registrar that 19 and 20 March 2012 would be available to argue the matter. At the time, senior counsel for the Respondents has been involved in several weighty matters over two (2) consecutive weeks, and was therefore unable to comply with this Honourable Court's directive. In the circumstances, we respectfully submit that the delay is slight, and that little or no prejudice will be caused to our colleagues for the Applicants."

At the hearing of this matter I granted the requisite condonation but intimated that this Court will demonstrate its disquiet with an appropriate order as to costs.

[8] The Rules of Court and the Practice Directives of this Court should as far as possible be adhered to by practitioners and should not willy-nilly be disregarded. It is trite that the unavailability of counsel because of his/her involvement in *"several [other] weighty matter[s]"*, can never be reason enough not to comply with the Rules of Court and Practice Directives. This should be discouraged at all costs. It should never be construed that this Court is there for the convenience of counsel. A punitive costs order will therefore be justified under these circumstances.

[C] **<u>Ad Merits of this application</u>**:-

[9] It is trite law that in an application for leave to appeal, it is incumbent upon an Applicant to show the existence of reasonable prospects of success on appeal. Put differently, an Applicant must show that a reasonable possibility exist that another court on appeal may come to a different decision on the facts than what the Court of first instance had arrived at. Furthermore, in an appeal to the Supreme Court of Appeal, an Applicant must also show that the case is of substantial importance that warrants it to be referred to the Supreme Court of Appeal.

See:-

- **Zweni v Minister of Law and Order and Another** 1993 (1) SA 523 (AD);
- **Westinghouse Brake and Equipment v Bilger Engineering** 1996 (2) SA 555 (AD);
- **Goodwin Stable Trust v Duohex (Pty) Ltd and Another** 1999 (3) SA 353 (C);
- **Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others** 2003 (5) SA 354 (SCA);
- **Kiwi Bay Village Association v Nelson Mandela Metropolitan Municipality and Others** 2009 (2) SA 166 (SCA).

[D] First and Second Applicants' *locus standi*:-

[10] In paragraph 2 of their heads of argument, Respondents contended that *"… the Court erred in holding that the central issue was whether the Respondents are or were members of the Royal Family of the Bakgatla-Ba-Kgafela tribe and whether they were entitled to call a meeting of the Royal Family, and that the outcome*

*of this enquiry determined the **locus standi** of the Applicants in this matter"*.

[11] This was stated ***in lieu*** of what **is** contained in paragraph [3] of the judgment of this Court. For ease of reference, I will repeat the relevant paragraph:-

> *"[3] Central to this case are the issues to be determined:- whether the Respondents are members of the Royal Family of the Bakgathla-Ba-Kgafela tribe and as such, whether they are entitled to call a meeting of the Royal Family. Incidental thereto is to be determined the **locus standi** of the Applicants in this matter."*

[12] It is clear from the contents of this paragraph that I stated that the central issue to be determined is whether the Respondents are members of the Royal Family and that ***incidental thereto*** is to be determined the ***locus standi*** of the Applicants, quite separately and independently. It is definitely not that the outcome of the enquiry as to whether or not the Applicants are members of the Royal Family that will determine, the ***locus standi*** of the Applicants.

[13] The ***locus standi*** of the First and Second Respondents respectively were distinctly dealt with separately, each under its own heading, in the judgment in the main application. The contention therefore that the outcome of the enquiry whether the Respondents are or were members of the Royal Family determined the ***locus standi*** of the Applicants is patently incorrect.

[14] In the judgment in the main application this Court comprehensively dealt with the ***locus standi*** of the First and Second Applicants and it need not be repeated in much detail in this judgment. Suffice to state that the First Applicant is the reigning Kgosi of the Bakgatla-Ba-Kgafela in South Africa. First Applicant's recognition as Kgosi is permanent and is acknowledged by the present legislation.

[15] On page 462 of the paginated record appears a Letter of Designation, which reads as follows:-

"REPABOLIKI YA AFRIKA BORWA
REPUBLIC OF SOUTH AFRICA

POROFENSE YA BOKONE BOPHIRIMA
NORTH WEST PROVINCE

LEKWALO LA INAKEMO
LETTER OF DESIGNATION

Go-tlhomamisiwa fano gore, go ya ka dithata tse ke di abetsweng ka karolo 36 ya Motao wa Dipuso 1978 (Molao 23 wa 1978), ke kgatlhegile go amogela mme ke supa fano motho yo o umakiwang fa tlase jaaka kgosi ya morafe go tloga ka letlha le le supilweng fa flase.
This is to certify that, by virtue of the powers vested in me in terms of section 36 of the Traditional Authorities Act, 1978 (Act 23 of 1978), I have been pleased to recognize and I hereby designate the person referred to below as the kgosi of the tribe and with effect from the date as depicted below.

1. MAINA KA BOTLALO / FULL NAMES: MOLEFE JOHN PILANE

2. MORATE / TRIBE: BAKGATLA BA KGAFELA
3. LETLHA LA TLHOPO / DATE OF EFFECT: 1 JANUARY 1996

Le neetswe ka seatla sa me / Given under my hand 18th JANUARY 1996

……..
Premier

Mosupiwa o tshwaleletse mo boemong jwa ga / Designee to act on behalf of

PERMANENT"

The word *"permanent"*, typed at the bottom, appears to be inserted purposefully and not that it was inserted for no apparent reason.

[16] When asking Adv Arendse SC, acting on behalf of the Respondents, why the word *"permanently"* appears at the bottom of the Letter of Designation he submitted that it is indicative of the fact that the First Applicant is holding office for and on behalf of Kgosikgolo Kgafela who resides in Motshudi, Botswana. This must be the position, he added, if regard is had to the contents of the founding and replying affidavit.

[17] Adv Pistor SC, on behalf of the Applicants, contended that the Traditional Authorities Act, 23 of 1978 [Bophuthatswana] ("the Bophuthatswana Act") clearly refers to a *"Kgosi"* or *"acting Kgosi"*. It must be that the words *"acting Kgosi"* is deleted and typed over. What remains is *"Kgosi"* and clearly the appointment of a Kgosi

can either be temporary in which instance the words *"designee to act on behalf of"* would make perfect sense because (s)he as *"acting Kgosi"* would hold office as designee on behalf of the person whose names would be typed in or if (s)he is permanently appointed, the word *"permanent"* would be typed in, as in this instance. The Letter of Designation indicates that the First Applicant is appointed as Kgosi and not acting Kgosi meaning that he does not hold the position for or on behalf of somebody else.

[18] On page 267 of the record appears a Certificate of Recognition which has almost ***verbatim*** the same contents of the Letter of Designation in terms of the Bophuthatswana Act. In terms of Chapter 3 of the applicable North West Traditional Leadership and Governance Act 2 of 2005, provision is made for *"Kgosi / acting Kgosi / regent Kgosi / deputy Kgosi"* which titles are encapsulated in the said Act. Even on this Certificate of Recognition provision is made at the bottom to stipulate on whose behalf the designee would act. To me, it makes perfectly sense that the word *"permanent"* on the letter of designation being accorded its usual and ordinary meaning, can only mean that the First Applicant is permanently appointed to the position of Kgosi and nothing else.

[19] This is also in line with what is stated by Kgosikgolo Kgafela when he said:-

> *"10.1 ….. In terms of the laws of the Republic of South Africa, the first respondent's appointment as representative of the Kgosi-Kgolo has been recognized and he has been given the powers of a chief for purposes of the traditional laws of the*

Republic of South Africa in regard to that portion of the Bakgatla nation resident in the North West."

[20] Having found that the First Applicant is permanently appointed and recognized as Kgosi, he has the necessary ***locus standi*** to bring this application.

[21] The Second Applicant is the traditional council of the tribe which is constituted by almost 60% of its members who are nominated by the First Applicant. To reiterate what is contained in the judgment in the main application – there can never be a ***lacuna*** in that no Traditional Council exists to run the affairs of the traditional community. Although their term of office expired on 24 September 2010, the members of the Traditional Council must remain in office until the process of re-composition of Traditional Council's is finalized. For the sake of good governance, a council whose term of office has expired should continue to be in existence until it is replaced by a newly elected council. In my view therefore, the contention by the Respondents that the Second Applicant lacks the necessary ***locus standi*** to bring this application, does not hold water. I find that the Second Applicant does have the necessary ***locus standi*** to bring this application.

[22] Adv Pistor SC submitted that even if it were to be found that the Second Applicant does not have ***locus standi*** through the operation of law (a fact which he does not concede to be the position), then it still remains that the First Applicant as permanently appointed Kgosi, is cloth with the necessary ***locus standi*** to institute these proceedings. I am in full agreement with

this contention by Adv Pistor SC but reiterate that I am satisfied that the Second Applicant also has the necessary ***locus standi*** to bring this application.

[23] I am of the view that there is no reasonable possibility that another court on appeal may conclude differently from what this Court found on the facts of this matter with regard to the ***locus standi*** of the First and Second Applicant. There are therefore no prospects of success on this point or ground of appeal.

[E] Membership of the Royal Family:-

[24] It was contended by the Respondents that there is a material dispute of fact on the papers as to whether or not they are members of the Royal Family. It was further submitted that this Court erred by taking a robust approach to the matter and took into account a number of factors, which include:-

[i] the fact that the Respondents, on their own version, stated that they were not from the first house of Kgosi Kgamanyane;

[ii] the undisputed version of Kgosikgolo Kgafela Kgafela II in an affidavit filed in a previous case, which affidavit was also filed in this case and to which the Respondents did not react; and

[iii] the undisputed version of the First Applicant in his affidavit.

[25] In my view, the mere denial by the Respondents of the

uncontested averments by the First Applicant and Kgosikgolo Kgafela Kgafela II does not amount to a real or genuine dispute of fact. There is no material or actual dispute of fact.

See:-

- **Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T);
- **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1994 (3) SAS 623 (A) at 634.

[26] In paragraph 9 of their heads of argument the Respondents contended that this *"… Court erred in finding that it is indeed the First Applicant who may simply determine by decree who members of the Royal Family is or are or should be"*. This is not what is contained in the judgment in the main application and this contention is therefore patently incorrect.

[27] Both the National Act, section 11 of Act no 41 of 2003 and the Provincial Act, section 13 of North West Act no 2 of 2005, require that the recognition/designation of a Kgosi shall be *"in accordance with the customary law …"* of that community. The customary law of the relevant community ***in casu*** clearly requires that designation be made by ***inter alia*** a member of the community in Botswana. However, that does not affect the validity of the designation as long as the person designated is a South African citizen.

[28] As far as this Court's finding with regard to the Respondents' membership of the Royal Family is concerned, I am convinced that no other court on appeal will come to a different decision than what this Court had arrived at on the facts of this matter. On this ground

for leave to appeal too, there is no reasonable prospect of success on appeal.

[F] <u>Pilane v Linchwe judgment</u>:-

[29] Much have been made about how this Court apparently misinterpreted the judgment by <u>Hendler J</u> in the matter of **<u>Pilane v Linchwe and Another</u>** 1995 (4) SA 686 B. In paragraph 11 of their heads of argument Respondents contended:-

> *"11. We will during the course of argument demonstrate to this Honourable Court that the Court's interpretation of the matter of Pilane v Linchwe and Ano 1995 (4) SA 686 (B), was incorrect, and gives rise to a reasonable prospect that an Appeal Court may find differently,* ***first****, the case was decided on an in limine point, and not on a fully opposed application on the principles decided in Plascon-Evans Paints Ltd v Riebeeck Paints (Pty) Ltd;* ***second****, the Court failed to take into account that Act 23 of 1978 was repealed in its entirety by the Provincial Act with effect from* ***20 March 2007****, and that since that date the first applicant had neither been appointed nor been recognized by the Premier of the Province in terms of s 13 of the Provincial Act; and,* ***third****, Hendler J accepted that there was a conflict of fact on the papers, and accordingly referred the matter to oral evidence "to resolve the factual conflict and to determine what in fact are the laws and customs of the tribe".*
>
> *In this regard, we submit that the matter is clearly of substantial importance not only to the respondents in the main application, but also to the applicants and to the entire Bakgatla-Ba-Kgafela traditional community, and that on this leg alone, the Court should grant leave to appeal."*

[30] During the course of argument an attempt was made to demonstrated to this Court that this Court's interpretation of **Pilane v Linchwe and Another** 1995 (4) SA 686 (B), was incorrect, and gives rise to a reasonable prospect that an appeal court may find differently, namely:-

[i] the case was decided on an ***in limine*** point, and not on a fully opposed application on the principles decided in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1994 (3) SAS 623 (A) at 634;

[ii] the court failed to take into account that Act 23 of 1978 was repealed in its entirety by the Provincial Act with effect from 20 March 2007, and that since that date the First Applicant had neither been appointed nor been recognized by the Premier of the Province in terms of section 13 of the Provincial Act; and

[iii] Hendler J accepted that there was a conflict of fact on the papers, and accordingly referred the matter to oral evidence *"to resolve the factual conflict and to determine what in fact are the laws and customs of the tribe"*.

[31] Although the above case was decided on a point ***in limine***, the said point was relevant to the present application and this Court provided comprehensive reasons for its finding and especially those related to the nomination and enthronement of the First Applicant as Kgosi under various legislative regimes.

[32] Its relevance is to the fact that the court recognized that once a Kgosi has been nominated or designated in terms of a prevailing legislation which later becomes obsolete, such an eventuality does not necessarily lead to the nomination or designation to become a nullity. By parity of reasoning this Court referred to that matter in order to deal with the allegation made by the Respondents, that the appointment of the First Applicant under the old Bophuthatswana Act should be regarded as a nullity under the new legislative regime.

[33] As far as the third point is concerned, it is true that that matter was referred for oral evidence by Hendler J, but the matter was never taken further. As to why that was the case, Adv Arendese SC could not provide any answer. To date, which is approximately seventeen (17) years later no cogent reason can be advanced why oral evidence was not presented in that matter. Be that as it may, I reiterate my findings in the judgment on the main application.

[G] Landman J's judgment:-

[34] The Respondents contended that the judgment of Landman J in case number 263/2010 supports their argument and by necessary implication, the contention is that the said judgment of Landman J is in their favour. This contention is incorrect.

[35] In his judgment on leave to appeal in the very same matter, Landman J dismissed the Respondents' (Applicants in that matter) application and handed down his reasons for so doing on 01

March 2012. A careful analysis of the two judgments by Landman J (the main application and the application for leave to appeal) clearly shows that the Respondents in those matters were debarred from convening meetings under the guise of an entity which they were in law not its members or which did not exist in law.

[36] To the contrary, the Landman J judgment confirmed that the Applicants herein are the only lawful entities of the Traditional Leadership of Bakgatla Ba Kgafela and went on to note, in a ***dictum***, the existence of the single tribe which straddles the two countries, an aspect which the Respondents seem to eschew. Reliance on the Botswana case of **Kgafela Kgafela & Others v The State**, case no CLHLB-000148-10 / CMMVL-000098-10, a copy of which is attached from page 214 of the paginated record is with respect misguided.

[H] The counter application:-

[37] On behalf of the Respondents, it was contended that this Court erred in refusing the counter application in circumstances where just cause existed for it to be granted. It is stated in paragraph 15 of the Respondents' heads of argument:-

> *"First, the respondents are interested parties and are entitled to enquire into the affairs of the Royal Family, and to hold a meeting to discuss the affairs of the Royal Family. Moreover, the Provincial Act requires the books of account of all traditional communities to be audited by the Auditor-General. In this case, the second applicant claims to be recognized by the Premier,*

and accordingly, must be subject to the audit by the Auditor-General. It is common cause that the Royal Family has not had their financial statements audited for more than six (6) years. This is unacceptable, and there cannot be any reasonable or just excuse why their books could not be open to scrutiny. The reason that there is no institutional framework providing for reporting, cannot be a just excuse. In any event, the relief being sought from this Honourable Court is for the Premier to instruct the Auditor-General to audit the books of the Royal Family. In this regard, this is a matter of the rule of law, and has little or nothing to do with the fact that no institutional framework is in place. At the very least, an order should have been granted with costs indicating the entitlement to have the books audited by the Auditor-General even though this may not have been done because there was no institutional framework in place."

[38] In the judgment in the main application I have comprehensively dealt with the counter application and advanced cogent reasons why this Court could not accede to the Respondents' request as embodied in the counter application. I need not repeat same in this judgment.

[39] Initially, during argument, it was contended by Adv Arendse SC that there is merit in the counter application raised by the Respondents. Later on he conceded however that this Court could not grant the relief sought in the counter application based on the fact that the parties that would be effected by the said order was not given an opportunity to be heard seeing that they were not cited as parties in the main application. The concession by Adv Arendse SC that this Court was correct in dismissing the counter application with costs was indeed a concession that was well

made.

[40] Based on the principle of ***audi alteram partem*** this Court would have erred in granting an order against a party or parties who is/are not party to the proceedings before it. As far as the counter application is concerned, there are no prospects of success on appeal.

[I] Constitutional Issues:-

[41] It was contended by Adv Arendse SC that the Respondents' right to freedom of association and freedom of speech under the Constitution [Act 108 of 1996] are violated by the extent of the order granted, which is a final interdict.

[42] In reference to the advertisement placed in the Sowetan newspaper, he submitted that this Court should have excised from the advertisement reference to the Royal Family. That being the case, so it was contended, then the advertisement would have been harmless. It would have meant that it was an advertisement published to call a meeting in order to discuss matters of the tribe which the Applicants were inapt to do.

[43] With the greatest of respect, this argument does not keep track with the fact that this advertisement must be directed at somebody. If the words Royal Family to whom it was initially intended to extent the invitation is deleted, then to whom would it be directed?

[44] The concession made by Adv Arendse SC that it was not

appropriate to state in the advertisement that the meeting is called in terms of the provisions of section 25 of the Act, because they lack authority or ***locus standi*** to do so, is indeed a concession well made. By the same token, the Respondents did not have the necessary authority in my view, to call a meeting for or on behalf of the members of the Royal Family. Not only are they not members of the inner circle or core of the Royal Family but they lack the necessary authority to call such a meeting.

[45] In my view, Adv Pistor SC was quite correct in his submission that the advertisement should be read in its totality to get the gist of what it actually convey. It is not for this Court to excise or cut out certain portions of the wording of the advertisement in order to give it a different meaning. Adv Pistor SC submitted that there is no constitutional point that was raised in the grounds of appeal or even referred to during the hearing of the main application. This is indeed the correct position. Furthermore, upon careful analysis of the argument presented, I am not persuaded that there is any constitutional point that can be raised.

[J] Conclusion:-

[46] Having dealt with the submissions and contentions of the Respondents in so far as the application for leave to appeal to the Supreme Court of Appeal is concerned, I am of the view that there are no prospects of success on appeal and this application should

therefore be dismissed.

[K] <u>Costs</u>:-

[47] There is no plausible reason why costs should not follow the result. However, the matter does not end there. As stated earlier on in this judgment, this Court should demonstrate its displeasure or disquiet about the fact that the heads of argument on behalf of the Respondents were filed late and not *"slightly late"* as contended in the heads.

[48] Coupled with this is also the fact that a proper application for condonation setting out the facts and circumstances that caused the delay is not embodied in an affidavit but merely mentioned in the heads of argument – a practice which is unheard of and which should be discouraged. In my view, this is sufficient reason to burden the Respondents with a punitive costs order. The complexity of the matter is beyond question and definitely justify the employment of two counsel (senior and junior).

[L] <u>Order</u>:-

[49] Consequently, the following order is made:-

[i] The application for leave to appeal to the Supreme Court of Appeal is dismissed.

[ii] The Respondents are ordered to pay the costs of this application on a scale as between attorney and own client, jointly and severally, the one paying the other to be absolved.

[iii] Such costs to include the costs consequent upon the employment of two counsel.

R D HENDRICKS
JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPLICANT: KGOMO MOKHETLE & TLOU ATTORNEYS