"SN 2"

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 : 03 FEBRUARY 2012
DATE OF JUDGMENT : 01 MARCH 2012

FOR THE 1ST & 2ND APPLICANTS: ADV H LEVER SC with him ADV O K CHWARO

FOR THE RESPONDENTS: ADV G M BUDLENDER SC with him ADV S COWEN

JUDGMENT ON LEAVE TO APPEAL

LANDMAN J:

[1] The respondents (in the main application) seek leave to appeal against the whole of my judgment delivered in this matter on 30 June 2011.

[2] I may mention, as some time elapsed between the filing of the application for leave and the date of hearing, that in this Court applications for leave to appeal are set down by the Registrar acting under the instructions of the Judge President and not the judge concerned.

[3] The respondent relies on 24 grounds of appeal which are set out, in its notice of application for leave to appeal, dated 20 July 2011.

[4] Mr Budlender SC, with him Ms Cowen, for the respondents, argued the matter with reference to the events as they were at the time that the judgment was delivered. However, as the order was intended to deal with existing and future conduct, the conduct of the secessionists, as reflected in a subsequent judgment by Hendricks J, dated 30 September 2011, has some relevance.

[5] I deal with the grounds in the order set out in the application for leave to appeal.

1.1 The respondents were restricted from passing themselves off as something that they were not ie a tribal authority, which, although stemming from legislation which has been repealed, is intended to confer some undue legitimacy on the association in question. Although a person or group of persons may constitute and identify themselves under a name of their choice there are limitations.

1.2 The respondents were not prohibited from proceeding with a meeting except to the extent that it infringes on the customary law and statutory rights and nomenclature pertaining to the second applicant.

1.3 Here too, the respondents were not prohibited from proceeding with a meeting except to the extent that it infringes on the statutory rights and nomenclature pertaining to the second applicant.

1.4 The judgment did not find that there was a statutory prohibition on the respondents organising a meeting.

1.5 This has been dealt with in para 1.1.

1.6 The respondents may not call a meeting of the traditional community i.e. the second applicant without permission of the first and second applicants.

1.7 The averments constituting this ground are in conflict with the reason for the application namely the invitation found on page 41 (translation on page 42) of the papers.

1.8 The history of the secessionist movement and the conduct of the respondents set out in the founding affidavit indicate an intention to unlawfully appropriate the symbols and trappings of power which belonged to the applicants. The subsequent conduct of the secessionist is relevant.

2.1 The basis for the breadth of the order stems from the history and the pattern of the conduct of the secessionist movement.

2.2 The order is wide but not vague as it prohibits the respondents from doing that which is the preserve of the applicants.

2.3 This is dealt with in para 2.2.

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3.1 Although the terms a traditional authority or tribal authority is no longer used by statute (although referred to in statute) it has connotations of legitimacy for the people of the tribe in question.

3.2 It is correct that there is no statutory or customary law impediment to using the nomenclature but, in the context, it is used to confer legitimacy where it is not warranted.

3.3 It is correct that a traditional community may hold themselves out as such but not where they are lawfully part of an existing grouping recognised by the State.

3.4 The facts support the order which has been made.

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4. The facts support the order which has been made.
5. The intention to secede and to create, wrongfully, a cloak of legitimacy to do so, was found to be established.
6. The facts support the order which has been made.
7. The respondents did not intend to convene a ward or village meeting of the second applicant.
8. The order does not prohibit freedom of expression, freedom of assembly and freedom of association.
9. There would be merit in this ground were it not for the past conduct of the secessionists.
10. The case of the applicants (in the main application) is set out in the founding affidavit. The order made was not the main relief sought. But alternative and lesser relief which was sought to cater for the occasion. The relief was foreshadowed in the founding affidavit.

[6] The respondents would have had a good case as regards costs, as Mr Budlender SC submitted, were it not for the context where a succession of different litigants pursue the same goals using illegitimate means.

[7] In the result I am not persuaded that another court may reasonably come to another conclusion.

[8] Therefore the application is dismissed with costs, the costs to include the costs of two counsel.

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.