

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 6634/2024

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: NO</u>
(3)	<u>REVISED.</u>
DATE: 10 JUNE 2025	SIGNATURE..... 

In the matter between:

BAROKA BA NKWANA ROYAL FAMILY

FIRST APPLICANT

SAVIOUR LEGADIMANE PHASHA

SECOND APPLICANT

MACDONALD PHASHA

THIRD APPLICANT

AND

PREMIER, LIMPOPO N.O

FIRST RESPONDENT

MEC COGHSTA N.O LIMPOPO PROVINCE

SECOND RESPONDENT

PATRONELLA MAMASEGARE PHASHA

THIRD RESPONDENT

BAKONE PLATINUM MINE (PTY) LTD

FOURTH RESPONDENT

SAMANCO MINE (PTY) LTD

FIFTH RESPONDENT

JUDGMENT

MANGENA AJ

- [1] **Baroka Ba Nkwana Royal Family** is a family in turmoil. Nothing demonstrates this state of affairs than the number of years it has taken the family to agree on the name of the person to be appointed a **Senior Traditional Leader of Baroka Ba Nkwana Traditional Community**.
- [2] **Makgoba JP** chronicled "*the relatively long and controversial history of litigation in the Baroka Ba Nkwana Community*" in **case number 2654/2016** dating back to the period shortly after the death of **Kgoshi Nkwana Aubrey Phasha** who died in a car accident in **2003**. Twenty-two years later, the dispute is still crying for resolution in the hallowed chambers of the Limpopo High court.
- [3] The Applicant brought an application in two parts, praying for the following orders;

PART A

- (a) Suspending the operation and execution of the recognition certificate granted by the Honourable former **Premier of Limpopo Province Mr Chupu Stanley Mathabatha** on or about **04 June 2024** in terms of Rule 45A pending the determination by court of Part-B (**Review application**).
- (b) Interdicting and restraining the 1st and 2nd Respondents from coronating the 3rd Respondent as the Senior Traditional Leader of Baroka Ba Nkwana Traditional Authority.

PART B

- (a) Directing that the Recognition certificate issued by the **Premier of Limpopo Province Mr Chupu Stanley Mathabatha** on **04 June 2024** recognising **(Ms) Patronella Mamasegare Phasha** as **Senior Traditional Leader of Baroka Ba Nkwana Traditional Community** be reviewed and set aside.
- (b) Directing the Premier of Limpopo Province to withdraw the recognition certificate issued and recognising **(Ms) Patronella Mamasegare Phasha** as Senior Traditional Leader of Baroka Ba Nkwana Traditional Community.
- (c) Directing the Premier of Limpopo Province to issue the recognition certificate to **(Mr) Saviour Legadimane Phasha** recognising him as Acting Senior Traditional Leader of Baroka Ba Nkwana Traditional Community within 60 days from the date of this order.
- [4] There are other ancillary orders prayed for both in part A and B. This judgment relates only to part A which was initially launched as an urgent application for hearing on **09 July 2024**. It was struck off the roll with costs and came before on a normal opposed motion roll.
- [5] When the matter was called, counsel for the third Respondent raised issues relating to the service of set-down and urged me to remove the matter from the roll on the basis that his office was not properly served with a set-down. He fell short of imputing impropriety on the part of the applicant's attorneys of record to the effect that they have forged his office stamp. In support of his contention, he submitted that the practice in his office is that the person receiving the documents appends his/her signature on the document in addition to the date stamp. The set-down in the court file did not have a signature of the person who received it.
- [6] The applicant's counsel remain steadfast in his submission that the matter was properly enrolled and the set-down was served on the third Respondent's attorneys. He was ready to call the attorney into the witness box to testify on this aspect. I found this to be unnecessary as I was satisfied that there has been proper

notice of set-down and that it was in the interests of justice that the matter be heard. The matter was rolled over for argument on **16 May 2025** at **14h00** in order to afford the third Respondent's counsel an opportunity to prepare himself.

- [7] When the matter was called on the **16 May 2025**, Counsel who appeared on the **15th** did not come to court and instead sent **Adv Makosha** who sought to once again argue for the postponement of the matter on the basis that it was not properly enrolled. I declined the request for the postponement and re-affirmed the correctness of the decision I made the previous day.

BACKGROUND

- [8] As it appears from the prayers, the Premier of Limpopo recognised **Ms Patronella Mamasegare Phasha** as a Senior Traditional Leader of Baroka Ba Nkwana Traditional Community on the **04 June 2024**.
- [9] The Applicants are unhappy with this recognition and want to have it reviewed and set aside. Pending the review they would like to have the recognition suspended and have the second Applicant, **Mr Saviour Legadimane Phasha** appointed as an Acting Senior Traditional Leader.
- [10] The basis of the Applicants contention is that there is an existing court order issued by **Rabie J** on the **26 July 2010** declaring the persons listed on **pages 16 and 17** of the **Geneological report** of **Prof Sekgothe Mokgoatsana** dated **28 April 2010** the rightful Bakgoma of the Baroka-Ba Nkwana Tribe. The court order further declared the listed persons "to be the sole and exclusive decision making body with powers to run the tribal affairs of the Baroka-Ba Nkwana Tribe.
- [11] Acting in accordance with the court order, the listed persons convened on **19 June 2022** and identified **Mr Saviour Legadimane Phasha** to be the **Senior Traditional Leader** of the Bakgoma-Ba Nkwana and Baroka Ba Nkwana Traditional Community. The resolution was dispatched to the Limpopo Provincial Government through the Department of Co-operative Governance, Human Settlements and Traditional Affairs for processing.

- [12] The resolution was never processed despite numerous follow ups and agitation by the Applicants. This is so because there is no unanimity as to who constitute the Royal family, hence "parallel" structures. I interpose to indicate that I was informed during the hearing of this application that there is another group which has applied to intervene as the "real" royal family. This is despite the order of Rabie J which remains extant until reviewed and set aside.
- [13] The application is opposed by the third Respondent, **Ms Patronella Mamasegare Phasha** who vehemently denies that the persons whose names appear on **Rabie J's** order constitutes the royal family. She further states that whilst it is true that Bakgoma are empowered to identify the senior traditional leader, they are required by law to promote the principles enshrined in the Bill of Rights which requires equality of treatment, prevention of unfair discrimination as well as advancement of gender representation in the succession to traditional leadership positions.
- [14] She alludes to the fact that she is the only child of the **late Kgoshi Aubrey Phasha** and his candle wife **Ms Tlakale Mavis Phasha**. That she is a woman cannot be used as the basis to preclude her from ascending to his father's crown. She therefore defends the Premier's decision and prays for the dismissal of the Part A application.
- [15] The regulatory framework governing the appointment of traditional leadership in Limpopo involves two stages. The first stage is the identification stage where the royal family must, whenever a position is to be filled, identify a person for that leadership role in terms of customary law and custom. The second stage is the recognition stage where the royal family submits the particulars of the identified person to the premier of that province. See **Netshimbupfe and Another v Carthcart and Others**, [2018] 3 ALL SA 397 (SCA) at paragraph 8; **Chief Avhatendi Ratshibvumo Rambuda and Others vs Tshibvumo Royal Family and Others**, 2024 (1) BCLR 1376(CC) at paragraph 51.
- [16] The body with full authority to identify a person for recognition as a traditional leader is the royal family. The premier is obliged to act in accordance with the dictates of

the royal family unless such identification was not made in line with customary law and processes in which event he or she will be required in the exercise of his/her discretion to either refer the matter to the provincial and local houses of traditional leaders or to refuse recognition.

- [17] Upon receipt of the conflicting resolution from the royal family, the premier referred the matter to the provincial and local house of traditional leaders for investigation.
- [18] The committee conducted the investigation and compiled a report after consulting with all the affected parties. The committee also took into account the litigation history since the passing away of **Kgoshi Aubrey Phasha** including the 2010 court order of **Rabie J** which is still in force because it has not been set aside. The committee recommended that **Ms Patronella Mamasegare Phasha** be considered for the position of senior traditional leadership in line with the Baroka Ba Nkwana Customary Law of Succession and as well as the Constitution Act 108 of 1996 which mandates gender equality.
- [19] Acting on the recommendations of the investigative committee, the premier as the ultimate recognition authority appointed **Ms Patronella Mamasegare Phasha** as the senior traditional leader of Baroka Ba Nkwana Traditional Community.
- [20] The act of appointment and recognition of **Ms Petronella Mamasegare Phasha** as a Senior Traditional Leader of the Baroka Ba Nkwana by the Premier constitutes an administrative act as defined in PAJA and therefore susceptible to review and set aside if the court adjudicating on part B finds sufficient grounds to do so. I am however not called upon to review the Premier's decision. This will be done later when all interested and affected parties have joined the fray and the full record of the decision is at hand.
- [21] In part A, applicants seek an interim relief pending review. To succeed, they need to satisfy all the requirements set out in **Setlogelo v Setlogelo, 1914 AD 221** as well as **Webster v Mitchell, 1948(1) SA 1186 (WLD)**, namely a *prime facie* right even if open to doubt, apprehension of irreparable harm, if the interdict is not granted, the

balance of convenience favourable to the grant of the interdict and the absence of any other remedy.

- [22] The proper approach to adjudicate on applications for interim interdicts was expressed with cogency and absolute clarity in **Webster v Mitchell**, as follows: -

"In the grant of a temporary interdict, apart from prejudice involved, the first question for the court is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase "prima facie established though open to some doubt" indicates that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach is to take the facts as set out by the applicant, together with the facts set out by the respondent which the applicant cannot dispute, and to consider whether having regard to the inherent probabilities the applicant could on those facts obtain final relief. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant, he could not succeed in obtaining temporary relief".

- [23] The applicants have interest in the affairs of **Baroka Ba Nkwana** and are within their rights to approach the court whenever their interests or rights are threatened.
- [24] The Constitutional court has however ruled that the right to approach the court for an interim relief is circumscribed. In **National Treasury and Others v Opposition to Urban Tolling Alliance and Others**, 2012(6) SA 223(CC), Moseneke J said that :-

"the prima facie right a claimant must establish is not merely the right to approach a court in order to

review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made."

- [25] The Premier has already proclaimed the third respondent a Senior traditional leader and gazetted her name. The applicants seek an order to suspend the operation of a decision which has been effected and the rights consequential to that decision are already vested. As in *Outa*, I do not think the right to review the decision by the Premier requires any preservation *pendente lite*.
- [26] One of the critical requirements for an interim interdict is that the applicant must demonstrate an apprehension of irreparable and imminent harm occurring in the event the order is not granted. This will mean that the effects of the harm will not be repaired or reversed by the subsequent order(s) made.
- [27] I fail to see how the favourable outcome of the review if continued with, will not be able to reverse the harm that the applicants allege that they will suffer as a result of the appointment of the third respondent. Whilst they may believe in the strength of their case, it is not a foregone conclusion that the decision by the premier will be reversed. In that case, how do they hope to compensate the third respondent for the loss she would have suffered. They are dealing with this aspect in their papers and as I see it the balance of convenience favours the third respondent.
- [28] The applicants prayer for the appointment of **Mr Saviour Legadimane Phasha** as the Acting Senior Traditional Leader in the face of the averments by his mother that he is unsuitable for such an acting appointment fortifies my view that the premier may have acted rationally in recognizing the third respondent as the senior traditional leader. Her appointment followed a process prescribed in **Section 12(2) of the Limpopo Traditional Leadership Act** as there was indeed evidence presented to him that the identification of **Mr Legadimane Saviour Phasha** was not done in line with customary law, customs or processes. I however express no firm

view on the legitimacy of the “**royal family**” that initially recommended her. This is what is to be determined by the review court.

- [29] Regarding the remainder of the requirements, I am of the view that the balance of convenience favours the third respondent whose recognition was made by an appropriate authority and her rights as a senior traditional leader have already vested. The applicants have an alternative remedy in the form of the pending review. In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*, 2012 (6) SA 223 (CC) **Moseneke DCJ**, cautioned against the violation of separation of powers when considering the granting of interim orders. He said:-

“A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of government even before the final determination of the review grounds. A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of government provided they act lawfully”. para 26

- [30] With the above said, I conclude that the applicants have failed to make out a case for the relief they seek in part A of their application.

- [31] Consequently, I order as follows: -

31.1 **The application is dismissed with costs on a party and party scale B of the High Court which costs includes that of Counsel.**


M.I. MANGENA AJ
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

FOR APPLICANT : MAKGOBA KGOMO MAKGALENG INCORPORATED

FOR RESPONDENTS : ADVOCATE T.D SIBIYA

HEARD ON : 16 & 17 MAY 2025

DELIVERED ON : 10 JUNE 2025

POLOKWANE HIGH COURT