

**IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)**

Case No: 1039/2007

In the appeal between:

PARAMOUNT CHIEF L C MOTA

Applicant

and

PREMIER OF THE FREE STATE PROVINCE
THE MEC FOR THE DEPARTMENT OF
LOCAL GOVERNMENT AND HOUSING
SD SEKONYELA
THE FREE STATE HOUSE OF TRADITIONAL
LEADERS

1ST Respondent

2ND Respondent

3RD Respondent

4TH Respondent

CORAM:

C.J. MUSI, J

JUDGMENT:

C.J. MUSI, J

DATE HEARD:

16 AUGUST 2007

DATE DELIVERED:

07 SEPTEMBER 2007

[1] On 16 August 2007 I made an order which effectively confirmed the *Rule nisi* in this matter. These are my reasons for doing so.

[2] On 9 March 2007 I made the following order:

“1. That condonation be granted for applicant’s non compliance with this Honourable Court’s rules with regard

to time, procedures and service and that the application be heard as an urgent application in terms of Rule 6 (12).

2. That Condonation be granted for the short service of this application on the first, second and fourth respondent, and thus, non compliance with section 35 of the General Law Amendment Act.

3. That a rule nisi be issued, returnable on Thursday, 19 April 2007 in terms of which the respondents are called upon to show cause, if any, why the following order should not be made final:

3.1 Interdicting and restraining the first, second and third respondents, from proceeding with the proposed formal inauguration of the third respondent as Chief of the Thibella District on Saturday, 10 March 2007;

3.2 interdicting and restraining the respondents, from forthwith arranging and/or holding the formal inauguration function of the third respondent, until such time as the Commission on Traditional Leadership Disputes and Claims has dealt with and finalised the dispute referred by the applicant pertaining to the position held by the third respondent as Senior Traditional Leader of Thibella District;

3.3 That those respondents who choose to oppose the application be ordered to pay the costs of this

application, jointly and severally, the one paying the other to be absolved.

4. That the order, contained in paragraphs 3.1 and 3.2 hereof, serve as interim interdicts with immediate effect.
5. That the order be served on the respondents by the Sheriff of this Honourable Court, in accordance with Rule 4.
6. That the Registrar of this Honourable Court be authorised and directed to, telephonically, convey the contents of this order to the State Attorney, Bloemfontein.”

[3] The appellant styles himself as the King (Paramount Chief) of the Batlokoa Tribe. He resides at Phomolong, Witsieshoek, Free State Province. The first respondent is the Premier of the Free State Province. The second respondent is the MEC for the Department of Local Government and Housing in the Free State Province. The third respondent is Mr SD Sekonyela and the fourth respondent is the Free State House of Traditional Leaders. The matter was defended by the first and second defendants only.

[4] According to the applicant he is the Paramount Chief of the Batlokoa Tribe in the whole Qwa Qwa region since 1989. He contends that the Batlokoa consist of three districts, with

each district having its own Chief (a Headman or Senior Traditional Leader). The district in dispute in this matter, the Batlokoa ba Thibella, is one of the districts.

[5] It is not in dispute that the third respondent is officially recognised by the first respondent. His recognition was announced in the Free State Provincial Gazette no 39 of 14 May 2004. The applicant however avers that certain customary practices and protocols were not adhered to during the recognition process, inter alia:

5.1 The Royal Family, of which he is a member, was not consulted. The recognition of the third respondent only came to the knowledge of the Royal Family in March 2004;

5.2 A formal inauguration ceremony (installation) at which the third respondent is presented to the community over which he was appointed was not held.

[6] Ignorant of the effect of the certificate of recognition issued by the first respondent the Royal Family endeavoured to install their own nominee (M K Mota), on 25 August 2006, as traditional leader over the Thibella District for which the third respondent was already “appointed” by the first respondent.

The first and second respondents successfully applied, on 24 August 2006, for an interim interdict prohibiting the installation of M K Mota as Chief of the Batlokoa ba Thibella. The interim interdict was not opposed and confirmed on that basis on 21 September 2006. Paragraph 2 of the order reads as follows:

“2 A rule nisi be issued calling upon respondents to give reasons, if any, to this Honourable Court on Thursday, 21 September 2006 at 09h30 why:

2.1 respondents shall not be interdicted and prohibited from staging third respondent’s inauguration as chief of the Batlokwa Tribe in Thibella, arranged for Friday, 25 August 2006, or to be arranged at any stage thereafter, pending the decision of the Commission on Traditional Leadership Disputes and Claims in respect of the Traditional Leadership Position of Chief of the Batlokwa Tribe in Thibella, alternatively pending any application to have the decision of the MEC for Local Government and Housing in terms whereof Dira Solomon Sekonyela was appointed and recognised as Chief of the Batlokwa Tribe in Thibella, be reviewed and set aside.”

- [7] On 6 November 2006 the applicant wrote to the first respondent and registered the Royal House's discontent and requested that the recognition of the third respondent should be withdrawn. He received no response.
- [8] On 22 January 2007 the applicant's attorneys wrote to the first, second and fourth respondents and pointed out that the Royal Family do not recognise the third respondent as the Chief of the Batlokoa ba Thibella. They inter alia stated that:

“Due to the fact that the ongoing dispute with regards to Mr Sekonyela's (third respondent) appointment could not be resolved through various discussion and correspondence, our clients now wish to formally involve the procedures prescribed in the Traditional Leadership and Governance Framework Act number 41 of 2003 and the Free State Traditional Leadership and Government Act number 8 of 2005. With specific reference to section 21(2) (b) it is our instructions that the matter has already unsuccessfully been referred to the Free State House of Traditional Leaders and our clients therefore request that the dispute be referred to the office of the Premier of the Free State so that the issue could be resolved.”

It was also pointed out that the matter requires urgent attention due to the tension that existed between the various factions of the Thibella Tribe.

[9] On 1 February 2007 the second respondent responded and intimated that the provincial government regards the matter as closed and that they “await the Commission on the Traditional Leadership Disputes to pronounce itself as stated in the judgement” with reference to the order obtained on 21 September 2006.

[10] On 19 February 2007 the applicant was informed by Mr Kaizer Maxatshwana, a Chief Director in the second respondent’s office, that the third respondent will be inaugurated on 10 March 2007. The applicant wrote a letter to the Director Traditional Affairs in the second respondent’s office informing him yet again about the dispute and the fact that the matter was referred to the Commission on Traditional Leadership Disputes (the Commission). On 6 March 2007 the Head of Department in the second respondent’s office wrote to the applicant and informed him that they are not aware that the dispute has been referred to the Commission and that the inauguration of the third

respondent will go ahead on 10 March 2007. The applicant did lodge a complaint with the Commission. On 10 February 2006 the Commission sent him an acknowledgement of receipt which reads as follows:

“I hereby acknowledge receipt of claim forms.

The Commission is attending to the matter and will further communicate with you in due course.”

The letter is signed on behalf of Prof. Nhlapo who is the Chairperson of the Commission.

- [11] The respondents’ evidence is to the effect that the former area of Qwa Qwa comprised of two main tribal authorities, viz the Bakwena and the Batlokoa ba Mokotleng tribal communities. The Batlokoa was divided into three separate and distinct communities namely the Batlokoa ba Mokotleng ba Phomolong under the Chieftainship of the Mota Royal Family, the Batlokoa ba Mokotleng ba Linkweng under the Chieftainship of the Tsotetsi Royal Family and the Batlokwa ba Mokotleng ba Thibella under the Chieftainship of the Sekonyela Royal Family. The applicant only has jurisdiction over the Batlokoa ba Mokotleng ba Phomolong and not over the other two. The third respondent is the Chief of the

Batlokoa ba Mokotleng ba Thibella and was so identified by the Royal House of Sekonyela.

- [12] The respondents point out that the applicant's position as Paramount Chief (King) of the Batlokoa tribe is the subject of an inquiry by the Commission and as far as they are aware no decision has been taken by the Commission on this matter. On 9 March 2007 the secretary of the Commission wrote a letter to the Head: Local Government and Housing Free State Provincial Government, stating to the following:

“DISPUTE: THIBELLA SENIOR TRADITIONAL LEADERSHIP:
SD SEKONYELA

1. ...
2. ...
3. With regard to the question as to how soon the matter can be expected to be resolved, unfortunately the Commission cannot commit to any date as the “disputes” will be handled at Phase 2 of its investigations, which Phase have not even been commenced with.
4. The Commission is about to finalise Phase 1 of its investigations of the currently recognised paramountees as dictated to by the Traditional Leadership and Governance Framework Act, 2003 (Act No 41 of 2003). However, it is our view that the High Court may deal with

the matter since its jurisdiction is not affected by referral of this matter to the Commission, more specifically the Commission is not seized with the matter and any Court of competent jurisdiction can deal with it.”

[13] Mr Bokaba on behalf of the respondents argued that the applicant’s relief is of a final nature and therefore they should satisfy all the requirements for a final interdict. Secondly that the applicants should have brought a review application, to challenge the recognition of the third respondent by the first respondent. Lastly that this Court should declare the third respondent as properly recognised in terms of customary law and relevant legislation. Mr Wessels SC on behalf of the applicant argued that the relief is of an interim nature. He further argued that the respondents should have approached the court for an order declaring the third respondent to be the rightful chief as that is what they are seeking to achieve, with their arguments.

[14] Mr Bokaba’s arguments in relation to the nature of the relief sought by the applicants are that the relief is final in nature although couched as an interim interdict, secondly that the Commission has already pronounced itself on the dispute referred to it by the applicants. I do not agree with Mr

Bokaba's contentions. The applicant is clearly asking for relief *pendente lite*. He wants the matter to be resolved, finally, by the Commission. He is not requesting this Court to finally determine the issues between the parties. What he in effect wants to achieve is to have the first respondent's decision reviewed by a statutory body. The final decision in this matter for him would be that of the Commission. In fact, the respondents (first and second) agree and actually advised the applicant to approach the Commission. It is also clear from the relief that the respondents received on 21 September 2006 that they respondents in that matter (including current applicant) were prohibited from inaugurating their nominee pending the decision of the Commission. The relief sought is in my view interim relief. See, generally, **Airodexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban & Others** 1986 (2) SA 663 (A). In **Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others** 1995 (2) SA 813 (W) at 827 B – C Heher J said the following:

“The Constitution unequivocally vests Provincial and Local Divisions with all powers, including inherent powers, which they possessed prior to the date of its operation (s 101 (2)). One of the powers of these Courts has always been to grant interim

relief where that is necessary to protect persons against the threatened violation of a right irrespective of the subject – matter or source of that right. It did not matter whether the Provincial or Local Division itself had ultimate jurisdiction over the determination of that right. So, for example, the final determination might lie with the Appellate Division, the State President (as in the case of executive clemency) or a Minister (as in the case of a banning or deportation order) or an administrative official or private body (such as the Jockery Club).”

To which I might add or an administrative / *quasi judicial* Commission that is created by statute (such as the Commission).

[15] Mr Bokaba’s argument that the Commission pronounced itself on this issue is without merit. The letter quoted in paragraph 12 above clearly states that the Commission is aware of the dispute. It was lodged with them. They don’t know when the matter will be finalised because it will only be dealt with during the second phase. The fact of the matter is that the Commission will deal with it whether it is in the second, third or subsequent phase. Mr Bokaba, taking his cue from the said letter, requested me to deal with the matter as I have jurisdiction to do so. I can’t deal with the matter on

these papers. There is no relief sought that the third respondent should or should not be declared the Chief of the Batlokoa ba Thibella. Likewise there is no prayer for an order that the applicant should be declared a Paramount Chief / Chief over only the Batlokoa ba Phomolong. If the respondents wanted this Court to issue a *declarator* they should have brought a counter application and requested that it be adjudicated *pari passu* with this application. That was not done. The argument that I should deal with the matter is therefore misplaced.

[16] Having decided that the interdict is temporary in nature I now turn to the requirements of an interim interdict. In **Herbstein and Van Winsen: The Civil Practice of the Supreme Court of South Africa 4th ed** at page 1065 the requirements are correctly stated as:

- “(a) the right that forms the subject matter of the main action and that the applicant seeks to protect is prima facie established, even though open to some doubt.
- (b) 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) the balance of convenience favours the granting of interim relief and
- (d) the applicant has no other satisfactory remedy.”

[17] The principles by which an application for a temporary interdict are judged are set out in the well known case of **Webster v Mitchell** 1948 (1) SA 1186 (W.L.D.) at 1189 viz

“In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court in my view 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 I think 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 I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicants could on those facts obtain final relief at a trial. 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, for his right, prima facie established, may only be open to “some doubt.”

The decision in Webster v Mitchell (*supra*) was reconsidered in Gool v Minister of Justice and Another 1955 (2) SA 682 (C). Ogilvie Thompson J at 688 D – E qualified what was said in Webster v Mitchell as follows:

“With the greatest respect, I am of the opinion that the criterion prescribed in this statement for the first branch of the inquiry thus outlined is somewhat too favourably expressed towards the applicant for an interdict. In my view the criterion on an applicant’s own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial. Subject to that qualification I respectfully agree that the approach outlined in Webster v Mitchell, *supra*, is the correct approach for ordinary interdict application.”

[18] In casu the applicant states that he is the Paramount Chief (King) of the Batlokoa ba Mokotleng the Free State and that the Chiefs of the other Batlokoa ba Mokotleng are only to be identified by the Royal House of Mota to which he belongs as it is the only Royal House of the Batlokoa ba Mokotleng. The respondents do not dispute that the applicant is the Paramount Chief of the Batlokoa ba Mokotleng. They allege that there are three Royal Houses in the Batlokoa ba

Mokotleng tribe/ nation / peoples. Mr N P Malunga, Director: Traditional Affairs in the second respondent's office however states categorically that the three groups "belongs to one King (Paramount Chief)." See JM 6. On the papers before me it is also clear (*prima facie*) that there is only one Paramount Chief of the Batlokoa ba Mokotleng and that is the applicant. Even Dr T K Mopeli states that "the day Chief W S Mota was appointed as the Paramount Chief of the Batlokoa tribe, Mr MD Sekonyela was appointed as Chief of the Thibella district." It is common cause that the applicant is the successor to W S Mota's title. There is again a clear distinction between the Paramount Chief of the Batlokoa and a Chief of a district. The applicant contends that by virtue of him being the King or Paramount Chief he together with the Royal Family should identify any senior traditional leader, headman or headwoman of the Batlokoa. See section 11 of Act 41 of 2003. He must officiate at the inauguration of any senior traditional leader. He must also introduce the said leader to the people over which he is going to "govern". Applying the test in **Webster v Mitchell** *supra* as qualified in **Gool v Minister of Justice** *supra* I am of the view that the applicant had shown that he has a *prima facie* right though open to some doubt.

[19] A Paramount Chief / King, traditional leader or headman or headwoman's power is only as great as the willingness of the subjects or tribe members to obey his/her orders or decrees. In order to obey the King or leader the subjects have to respect the leader. Institutional power, without the concomitant respect for such power, renders it fickle. The installation of a Chief is not just an ancillary activity. It is central to the whole recognition process. The symbolism of the Paramount Chief or representative of the Royal House presiding over the installation of a chief is very important. It is the manner in which the Paramount Chief says to his subjects that he has delegated some powers to the chief and he simultaneously request them to obey and respect the person on whom he has bestowed chieftaincy. If the Paramount Chief and the Royal Family do not participate in the proceedings the subjects might perceive the Paramount Chief as a figure head who does not have to be consulted in such important matters. On the other hand some of the subjects might perceive the non participation or consultation of the Paramount Chief as an insult to their customs, traditions and monarchy. I am therefore not surprised that the applicant says that he and the Royal Family will lose face

if the installation proceeds without them being consulted. The nation might lose confidence not only in the Royal Family and the Paramount Chief but long standing tribal traditions, laws and customs will be ignored. The result of the uncertainty and tension might well be a fractious nation engaged in an internecine war. Such war might lead to injury, loss of life and property.

[20] The third respondent currently enjoys all the privileges attached to his recognition by the first respondent. He is not prejudiced at all. That is probably the reason why he is not opposing this application. If the installation is done and the third respondent is introduced to the Batlokoa as the Chief of the Batlokoa ba Mokotleng ba Thibella it will greatly undermine the Royal Family and the applicant. It would be in everybody's interest that this matter be adjudicated by the Commission in order to lay it to rest. The respondents will have sufficient opportunity, at that forum, to ventilate all the issues and to present full argument as to why the applicant does not have jurisdiction over the Batlokoa ba Mokotleng ba Thibella.

[21] It is clear that the applicant had no other remedy but to approach this court for the order that it sought.

[22] Mr Bokaba also referred me to **Oudekraal Estate (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 SCA at 341H to 242 A – B. Where Howie P and Nugent JA said the following:

“In other words, was the Cape Metropolitan Council entitled to disregard the Administrator’s approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. Until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question.”

The **Oudekral Estate** case *supra* is distinguishable from this case. In casu the recognition of the third respondent by the first respondent is respected. The third respondent currently enjoys all the consequences of his recognition. What the applicant seeks to do is to have that recognition and

consequences thereof set aside by a competent Statutory Commission that was set up to deal exactly with disputes of this nature. Should the Commission find that the applicant is wrong or that the respondents are correct the Commission will within two weeks after reaching its decision send same to the President for immediate implementation. (See section 25 and 26 of Act 41 of 2003). The effect of this would actually be more than a review it is tantamount to a review, setting aside and a *declarator*. The English Romantic Poet Percy Bysshe Shelley once wrote that kings are like stars – they rise and set, they have the worship of the world but no repose. The Commission's decision will give the applicant some repose and, if it rules in his favour, restore his subject's worship.

[23] In my view the Rule nisi should be confirmed. Paragraph 3.1 of the notice of motion has been overtaken by events and it would be senseless to confirm it.

[24] The applicant was successful. The applicant specifically requested that the respondents who choose to oppose the application should be ordered to pay the costs of the application jointly and severally. Only the first and second

respondents opposed the application. The first and second respondents as well as the applicant were represented by two counsel. There is no reason why the costs of both counsel should not be paid. Likewise there is no reason why the costs should not follow the event in this matter.

[25] It is for the above reasons that I made the following order:

- (1) That paragraphs 1, 2 and 3.2 of the notice of motion are confirmed.**
- (2) The first and second respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved, such costs shall include the costs occasioned by the employment of two Counsel.**

C.J. MUSI, J

On behalf of the appellant:
Assisted by:

Adv. M.H. Wessels SC
Adv. S. Grobler
Instructed by:
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On behalf of the respondent:
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