Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

(EASTERN CAPE LOCAL DIVISION - MTHATHA)

CASE NO. : 995/2013

Heard on : 20 August 2013

Date delivered : 30 January 3014

In the matter between:

GETRUDE THANDEKA NOTA STEPHEN Applicant

And

MEMBER OF THE EXECUTIVE COUNCIL FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS First Respondent

THE SUPERINTENDENT – GENERAL FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS Second Respondent

NQABA SIVE NOTA Third Respondent

QAUKENI REGIONAL COUNCIL Fourth Respondent

JUDGMENT

MAJIKI J:

[1] This is an application wherein the applicant seeks an order for the review of the decision of the first and second respondents to appoint the third respondent as the chief of Amahlubi aseRode ("Amahlubi") at Rode

Administrative Area, Mount Ayliff. Furthermore, the applicant seeks an order interdicting the first, second and fourth respondents from introducing the third respondent on 29 April 2013, as the chief of Amahlubi and an order that the issue of chieftainship of Amahlubi should be referred to the house of traditional leaders for the hearing of any dispute relating to the appointment of the third respondent as the chief.

[2] The applicant is the daughter of the late chief Tana Nota ("late chief"). She was appointed as acting chief of Amahlubi on occasions that are central to the dispute between the parties. Welile is the son of the late chief who otherwise would succeed his father as the heir to the throne. The said Welile took permanent citizenship and resides in Botswana. Andile is the younger son of the late chief. The third respondent is the son of the said Andile who on 11 March 2007 was identified as the person designated as the chief of Amahlubi by the Amahlubi Royal Family.

[3] It is in dispute between the parties whether the third respondent at present remains so identified as the designated chief of Amahlubi. According to the applicant, on 12 July 2009, on the advice of the house of the traditional leaders in Bhisho, her faction withdrew the third respondent's name as the designated chief of Amahlubi. The respondents on the other hand state that the third respondent's appointment still stands. It was never revoked or withdrawn.

[4] The matter came to court on urgent basis for hearing on 29 April 2013. However, the applicants were directed to serve the papers on all the respondents. The matter eventually served before court on 30 April 2013, an order setting out times within which all papers were to be filed together with all the heads of argument was made. After a few postponements the matter was finally argued on 20 August 2013, in its totality, including the issue of urgency.

[5] In her urgent application the applicant in the main seeks the following orders:-

5.1 *That the decision of the first and second respondents to appoint the third respondent as the full Chief of Amahlubi at Rode Administrative Area, Mount Ayliff be and is hereby reviewed and set aside.*

5.2 *That the first, second and fourth respondents are hereby interdicted and/or restrained from introducing the third respondent on the 29th April 2013 as the Chief of Amahlubi of Rode Administrative Area, Mount Ayliff.*

5.3 *That the issue of Chieftainship of Amahlubi be referred to the House of Traditional Leaders for the hearing of any dispute relating to the appointment of Sive Nqaba Nota as the full Chief.*

5.4 *That the first, second and third respondents pay the costs of this application jointly and severally one paying the other to be absolved and the fourth respondent pay such costs only in the event of it opposing this application.*

5.5 *That this order be served by the sheriff of this Honourable court together with the other papers, duly assisted by the members of the South African Police Service.*

Urgency

[6] The applicant approached court on 29 April 2013, she was directed to serve the papers on the respondents. A Notice to Oppose on behalf of first and second respondents was filed on the same date. On 30 April 2013 when the

matter served before court it was only the fourth respondent that had not been served. On the said date the following order was made:-

6.1 *that the matter be and is hereby postponed to the 23rd day of May 2013;*

6.2 *The respondents are directed to file their answering on or before the 9th May 2013; if any;*

6.3 *The applicant be and is hereby directed to file her replying affidavit on or before the 15th May 2013; if any;*

6.4 *Costs shall be costs in the cause.*

[7] The applicant had advanced her reasons for the application to be heard as a matter of urgency as being that there was going to be a meeting to be held on 29 April 2013 at 10h00 and that the mother of the third respondent had told her that the purpose of the meeting was to introduce the third respondent to the people as their chief. There is no indication about what eventually happened with regard to the said meeting.

[8] The main opposing affidavit is deposed to by Sidumo Mateta a general manager for Traditional Leadership Institutional Support Services. The third respondent also deposed to an opposing affidavit which also confirms the averments Mateta made that relate to him. They both deny that the application is urgent. In my view when the matter could not be heard before 10h00 on 29 April 2013, the basis for urgency as averred by the applicant fell away.

Review and setting aside of the decision of first and second respondents

[9] The following are common cause:

9.1 that the late chief Tana Nota died living Welile as the heir; the said Welile and his son Bungane live in Botswana and are not South African citizens;

9.2 that the applicant was appointed as acting chief of Amahlubi in the stead of Welile;

9.3 that on 11 March 2007 the third respondent, Welile's younger brother's son, was identified by Amahlubi Royal Family as the chief; and

9.4 that on the same 11 March 2007 the applicant was identified as acting chief in the stead of the third respondent who was 20 years of age and a scholar at the time. This is further supported by the royal family resolution, annexed to the founding affidavit, signed by both the chairperson of the royal family (the applicant) and the secretary of the royal family.

[10] The applicant's case can be summarised as follows:

10.1 Chief Ngangomhlaba Matanzima of the Eastern Cape House of Traditional Leaders informed her and her family that they acted wrongly by taking the chieftaincy away from one house to another (I presume this to mean taking it from Welile's house to Andile's house, the two brothers born of late chief Tana);

10.2 her faction decided to withdraw the name of the third respondent as permanent chief. In her founding affidavit she attached a copy of typed unsigned minutes of a meeting held on 20 February 2011. No attendance register is annexed and there is no record of

who the chairperson was or any other person who officiated at the said meeting. The minutes record that chief Welile Nota is the rightful heir to the throne and is still alive. The royal family unanimously agree that Mrs G T Nota/Stephen (the applicant) be the acting chief, acting for chief Welile Nota who was inaugurated in 2002;

10.3 she has not been removed as an acting inkosi in terms of the Traditional Leadership and Governance Act 4 of 2005;

10.4 the department acted improperly by appointing a chief while she as the acting chief is still in that position; and

10.5 the department cannot appoint a chief when a person who is supposed to be a chief is still alive.

[11] The respondents oppose the setting aside of the decision mainly on the basis that the decision to remove the applicant as the acting chief was made on 12 July 2009, and she was not removed at the time the second respondent addressed a letter appointing the third respondent.

[12] On 24 February 2012 the office of the superintendent-general, Department of Local Government and Traditional Affairs addressed a letter to the applicant, which she received on 07 March 2012 its main contents being as follows :

"The Department has received a resolution from Amahlubi Traditional Council to remove you from your position as an Acting Inkosi.

You are hereby requested in terms of Section 20(3)(a) of Traditional Leadership and Governance Act No. 4 of 2005, to

make representations as to why the decision to remove you from the position as Inkosi cannot be effected.

You are given fourteen (14) days within which to respond, starting from the date of receipt of this correspondence."

[13] On 15 March 2013, the same office addressed a letter to the third respondent which was received by him on 18 March 2013 with the following contents:

"It is with great pleasure to inform you of the MEC's decision, as delegated by the Premier, to recognise you as the inkosi of amaHlubi aseRode in terms of Section 18(1)(b) of the Eastern Cape Traditional Leadership and Governance Act, 2005 (Act No. 4 of 2005).

Your appointment to the said traditional leadership position is in terms of the following particulars and conditions :-

NAME *: Sive Nqaba Nota*
IDETITY NUMBER *:*
TRADITIONAL LEADERSHIP POSITION*: Inkosi*
ADMINISTRATIVE AREA*: Rode (Mt Ayliff)*
TRADITIONAL COUCIL *: Hlubi*
DATE OF APPOINTMENT*: March, 2013 01 May 2013*
CURRENT SALARY *: R179 451.00*
SPECIAL CONDITION : The appointment is conditional to the customary heir, Welile Nota and/or his heir, meeting the requirements listed in Section 6(3) of the Eastern Cape Traditional Leadership and Governance Act, 2005 (Act No. 4 of

2005) and claiming the position, in which event your recognition shall automatically cease.

APPOINTMNENT AS AN INKOSI OF AMAHLUBI ASERODE UNDER THE HLUBI TRADITIONAL COUNCIL IN THE DISTRICT OF MT AYLIFF.

Wishing you all the success in your traditional leadership position."

[14] Section 18 of the Eastern Cape Traditional Leadership and Governance Act 4 of 2005 ("Eastern Cape Act") provides that :

(1) Whenever the position of an iNkosi or iNkosana is to be filled—

(a) the royal family concerned must subject to such conditions and procedure as prescribed, within sixty days after the position becomes vacant, and with due regard to applicable customary law—

(i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 6 (3) apply to that person; and

(ii) through the relevant customary structure, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and

(b) The Premier must, subject to subsection (5), by notice in the Gazette, recognize the person so identified by the royal family as an iNkosi or iNkosana, as the case may be.

(2) Before a notice recognizing an iNkosi or iNkosana is published in the Gazette, the Premier must inform the Provincial House of Traditional Leaders of such recognition.

(3) The Premier must, within a period of thirty days after the date of publication of the notice recognizing an iNkosi or iNkosana issue to the person who is identified in terms of paragraph (a) (i), a certificate of recognition.

(4) Where the Premier has received evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with the provisions of this Act, customary law or custom the Premier—

(a) may refer the matter to the Provincial House of Traditional Leaders for its recommendation; or

(b) may refuse to issue a certificate of recognition; and

(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

(5) Where a matter, which has been referred back to the royal family for reconsideration and resolution in terms of subsection (4) (a), has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.

[15] Section 20 of the Eastern Cape Act provides that :

(1) An iNkosi or iNkosana may be removed from office on the grounds of —

(a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;

(b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that iNkosi or iNkosana to function as such;

(c) wrongful appointment or recognition; or

(d) a transgression of a customary rule or principle that warrants removal.

(2) Whenever any of the grounds referred to in subsection (1) (a), (b) and (d) come to the attention of—

(a) the royal family and the royal family decides to remove an iNkosi or iNkosana, the royal family concerned must, within a reasonable time and through the relevant customary structure—

(i) inform the Premier of the particulars of the iNkosi or iNkosana to be removed from office; and

(ii) furnish reasons for such removal;

(b) any person, such a person must inform the Premier and the Premier must—

(i) refer the matter to the royal family under whose jurisdiction the iNkosi or iNkosana falls, for an investigation and a decision, and a report thereon; and

(ii) consider the report and act in terms of subsection (3).

(3) Where it has been decided by a royal family to remove an iNkosi or iNkosana in terms of subsection (2), the Premier must—

(a) advise the iNkosi or iNkosana of such decision and, in writing, call upon such iNkosi or iNkosana to make representations to him or her as to why the decision to remove him or her should not be given effect to;

(b) consider the representations submitted to him or her and withdraw the certificate of recognition with effect from the date of removal if the decision to remove him or her is in accordance with custom;

(c) inform the royal family concerned, the removed iNkosi or iNkosana, and the Provincial House of Traditional Leaders concerned, of such removal;

(d) publish a notice with particulars of the removed iNkosi or iNkosana in the Gazette.

(4) Where an iNkosi or iNkosana is removed from office, a successor in line with custom may assume the position, role and responsibilities, subject to the provisions of this Act.

[16] The determination of this application centres around whether the identification and designation of the third respondent as the chief of Amahlubi by the royal family was validly withdrawn and whether the applicant can validly continue to act as the chief of Amahlubi after the third respondent became ready to assume his duties in terms of the said designation.

[17] Section 21 of the Eastern Cape Act provides for recognition of regents as follows:

(1) Where a royal family has identified the successor to the position of iKumkani, iNkosi or iNkosana who is a minor in terms of applicable customary law or customs and advised the Premier, the Premier must—

(a) within a reasonable time, by notice in the Gazette, recognize the person so identified by the royal family as a regent;

(b) before a notice recognizing a regent is published in the Gazette, inform the Provincial House of Traditional Leaders of such recognition;

(2) The Premier must, within a period of thirty days after the date of publication of the notice recognizing a regent issue to the person who is identified in terms of paragraph (1) (a), a certificate of recognition; and

(3) The Premier must review the recognition of a regent—

(a) at least once every three years, and

(b) immediately after the successor has attained the age of majority.

(4) Where there is evidence or an allegation that the identification of a person as regent was not done in accordance with customary law, customs or processes, the Premier—

(a) may refer the matter to the Provincial House of Traditional Leaders for its recommendation; or

(b) may refuse to issue a certificate of recognition; and

(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

(5) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (4) has been reconsidered and resolved, the Premier must recognize the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family have been done in accordance with customary law.

(6) As soon as the successor to the position of iKumkani, iNkosi, iNkosana ceases to be a minor in terms of customary law—

(a) the regent recognised in terms of subsection (1) must relinquish his or her position as regent.

Application of the law to the facts

[18] The third respondent was identified as the chief of Amahlubi by the royal house on 11 March 2007, this decision was communicated to the provincial government. The applicant does not aver that the identification of the third respondent was not done in accordance with the provisions of the Act, customary law or custom as provided for in Section 18(4) of the Eastern Cape Act. Her case is that they got advice from chief Ngangomhlaba Matanzima and her faction therefore withdrew the third respondent's name as the designated chief of Amahlubi. This assertion is not supported in any way by the applicant.

[19] Secondly, the applicant avers that it was a faction of the royal family that withdrew the identification of the third respondent. I have already made the point that this is denied by the respondents, furthermore, it is only in the replying affidavit that the attendance register containing 15 names of the faction that constituted some meeting is annexed, they are referred to as core Nota royal family in the said register, they are recorded as:

N C Nota Sogoni
C T Nota Stephen
L C Z Nota
Z Nota
B Nota
X L Nota
V Nota
L Nota
Bonga Nota
Zoliswa Nota

Nunu Nota
Voyokazi Nota
Girly Nota

Immediately after the attendance register the applicant attached a Xhosa version of the minutes of 26 August 2012. The said minutes record the issue of withdrawal of the applicant as acting in the stead of the third respondent and resolution that the applicant is instead acting for Welile. It appears that this is not the same meeting whose minutes of 20 February 2011 are attached to the founding affidavit. The minutes of 20 February 2011 referred to above in paragraph 10.2 is also a record to the effect that the royal family unanimously agreed that the applicant be the acting chief in the stead of Welile.

[20] The royal family in the Eastern Cape Act is defined as, "*the core customary institution or structure of the immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family*." The reading of this definition clearly does not refer to a faction.

[21] In my view, the identification of the third respondent could not and was not validly withdrawn by only a faction of the royal family. In fact, there is no support in the founding papers that there was such a withdrawal in the first place. In the applicant's own version, the unanimous decision that was taken in the meeting of 20 February 2011 was that she be the acting chief in the stead of Welile. The further annexures, albeit their being to the replying papers, are not consistent with the minutes annexed as being the minutes of the meeting of 20 February 2011.

[22] Sections 18(4) read with section 20(1)(c), (d), 2(a)(i)-(ii) provide of the procedure to be followed when the chief's identification is sought to be

reconsidered and or his or her removal is sought. The purported resolution by the applicant's faction is nowhere closer to the provisions of the said sections.

[23] The first and second respondents on the strength of identification by the royal family in terms of Section 18(1)(b) and in compliance with section 21(6)(a) of the Eastern Cape Act, appointed the third respondent as the chief when he became of age. The applicant seeks to take a point that when the third respondent communicated his readiness to assume his duties as a chief, he did so in a meeting that was not a properly constituted royal family meeting. Section 21 of the Eastern Cape Act provides for the recognition of regents who act on behalf of minors identified as iiNkosi. In terms of Section 21 (3)(b) this recognition must be reviewed immediately after the identified successor attains the age of majority. Finally Section 21 6(a) provides that as the successor to the position of iKumkani, iNkosi or inkosana ceases to be a minor in terms of customary law, the regent recognised in terms of subsection (1) must relinquish his or her position as regent.

[24] In my view it was not necessary for a royal family meeting to announce or communicate the identified successor's readiness to assume the chieftaincy. It followed that when the third respondent ceased to be a minor the applicant had to relinquish her position. Nevertheless, the applicant was in attendance in the meeting of 12 July 2009 when the third respondent's readiness to assume chieftaincy was communicated. In this regard, I find support in the authority in **Umndeni Clan of Amantungwa and others v MEC, Housing and Traditional Affairs, kwaZulu Natal and another [2011] (2) AllSA 548 SCA** at **paragraph 17** where the court had the following to say with regard to acting persons, and referring to relevant statutes which in my view are the equivalents of Section 21(6)(a) of the Eastern Cape Act referred to above, "where a successor is identified and recognised, an acting chief is not "removed" from office as envisaged in Section 21 of the Governance Act. His or her duties

come to an end when the successor assumes duty as a chief or traditional leader …"

[25] In my view, it was also not necessary for the second respondent's letter of 24 February 2012 to call upon the applicant to make representations in terms of Section 20(3)(a). Her acting appointment comes to an end when the third respondent assumes duty as the chief of Amahlubi. It is open to the applicant to approach the Premier in accordance with Sections 18(4) and 20(1) (c) and (d), if she is of the view that such assumption of duties was wrongful.

Issue of citizenship of a chief

[26] Section 18(1)(i) provides that the royal family must identify a person who qualifies to be iNkosi in terms of customary law to assume the position in question after taking into account whether any of the grounds referred to in section 6(3) apply to that person. Section 6(3)(d) and (e) provides that a member of a traditional council shall be a person who is a South African citizen and is ordinarily resident within the traditional council. It follows therefore that Welile or his son do not, at present qualify to be the chief/s of Amahlubi. The third respondent's conditional appointment has taken into account their future consideration if and when their positions regarding citizenship and residency may change.

Requirements for an interdict

[27] One of the requirements for an interdict is that there must be no other remedy available to the applicant. I have set out the provisions of Sections 18(4) and 20(1)(c) and (d) above. The Act provides for the remedies available to the applicant. It does seem that the applicant initiated this process in a letter to the Premier of the Eastern Cape Province dated 25 April 2013. However, it falls beyond the determination of the present application to consider the said

issue. The applicant has not sought an order compelling the premier to act in terms of Section 18(4) or 20(2)(1)(a)-(b) nor has she joined the premier in these proceedings.

[28] The other requirement for an interdict is that the applicant must satisfy the court that she will suffer irreparable harm if the interdict is not granted. The applicant has not made out any case in this regard.

[29] In the circumstances, I find no basis to review and set aside the conditional appointment of the third applicant by the first and second respondents. The application has to fail.

[30] In the result, the application is dismissed with costs.

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B MAJIKI
JUDGE OF THE HIGH COURT

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