



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 14349/2017

**DELETE WHICHEVER IS NOT
APPLICABLE**
(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) NOT REVISED:

In the matter between:

**BAKUBUNG BA RATHEO TRADITIONAL COMMUNITY
JABULANI BEN GUMBI
ITUMELENG TIRO MONNAKGOTLA**

1st Applicant
2nd Applicant
3rd Applicant

and

**BAKUBUNG COMMUNITY DEVELOPMENT
CORPORATION
BAKUBUNG ECONOMIC DEVELOPMENT
UNIT (PTY) LTD
TRANSAFRICA MINING VENTURES (PTY)LTD
AFRICA CONTINENTAL RESOURCE VENTURES
(PTY) LTD
DISELE JOHANNES PHOLOGANE
MARY ANNAH MMALENYALO DIALE
KELEBOGILE ELIZABETH MOUTLOATSE
PEGGY MPHILANE
TSIETSI DAVID TSELADIMITLWA**

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent

JUDGMENT

YACOOB J:

1. The second and third applicants are members of the first applicant community. Purporting also to represent the first applicant, they seek an order against the respondents preventing the sale of certain shares (“the Wesizwe shares”) without specific consultation with the Royal Family, Dikgoro (clans), and the general body of members of the first applicant, as well as the Department of Minerals and Energy, the House of Traditional Leaders of the North West Province, that information be provided to the applicants about any disposal of shares and that a written mandate be obtained from the first applicant for the sale of the shares.
2. The applicants obtained an interim order in the urgent court, interdicting the passing of any resolution by the first and second respondents to dispose of shares beneficially held by the first applicant, and requiring notice of any meeting held for passing such a resolution by the first to fourth respondents to the applicants’ attorneys, pending the final resolution of this application.
3. The applicants, having obtained the interim order, then did not prosecute the remainder of the application, and it was left to the respondents to compel the applicants to file heads of argument, and to take steps to set the matter down.
4. The third and fourth respondents, although they caused explanatory affidavits to be filed, did not participate in these proceedings. Where I refer to “the respondents”, this is a reference to the remaining respondents. For reasons which will shortly become clear, where I refer to “the applicants” this is a

reference to the second and third applicants, unless the context requires a different interpretation.

5. The respondents raised a number of points *in limine* and also brought an application in terms of Rule 7 to the authority of the second and third applicants to represent the first applicant. The applicants did not file an answering affidavit in the Rule 7 application nor did they file a replying affidavit in the main application.
6. The points *in limine* raised by respondents were that the applicants did not have *locus standi*, that the relief claimed by the applicants is not capable of enforcement, and that the application does not disclose a cause of action.

THE RULE 7 APPLICATION

7. The basis of the Rule 7 application is that the power to institute proceedings on behalf of a traditional community such as the first applicant is regulated by traditional law and by the North West Traditional Leadership and Governance Act, 2 of 2005 (“the North West Act”).
8. The community is recognised in terms of the Traditional Leadership and Governance Framework Act, 41 of 2003 (“the Framework Act”) read with the North West Act.
9. In terms of section 32 of the North West Act, the Kgosi of the community has the power to institute proceedings on the community’s behalf. In this matter the Kgosi is the eleventh respondent and has not instituted or authorised proceedings on the community’s behalf. Also, a general meeting of the community was held after this application was instituted, at which the community stated that no mandate was given to the applicants’ erstwhile attorneys, or to anyone for opposing the deal in which the shares are to be disposed of.
10. In addition, according to the respondents, the Khuduthamaga which is only a part of the Royal Family and does not substitute for the Traditional Council, nor

does it have the right to speak for the community. A resolution by the Khuduthamaga as attached to the founding affidavit therefore would not authorise action on behalf of the community.

11. Finally, the respondents aver that of the signatories to the Khuduthamaga resolution, only one of them, the third applicant in this matter, is actually a member of the Khuduthamaga. So the resolution is not valid in any event.
12. As I have mentioned above, the applicants failed to file any affidavit in response to the respondents' version, either in the main application or the Rule 7 application. There is therefore only the respondents' version on this issue.
13. In argument, it was submitted that the North West Act uses the word "may" to empower the Kgosi to institute legal proceedings on the community's behalf and that this means that in addition to the community anyone else may also bring legal proceedings on the community's behalf. In my view there is no merit in this argument unless a factual basis is laid why another person other than the Kgosi may do so. Use of the word "may" rather than "must" is clearly empowering the Kgosi to bring legal proceedings. Use of the word "must" as suggested by the applicants would oblige him to bring proceedings, which would be nonsensical.
14. The applicants relied in argument on the Constitutional Court's judgment in *Pilane and Another v Pilane and Another*¹ to support the submission that someone other than the Kgosi would in ordinary circumstances be empowered to institute proceedings on behalf of a recognised Traditional Community. The judgment is not authority for that proposition, as it deals with a defined group of people within a recognised Traditional Community who wish to speak for themselves, rather than purporting to speak for the Traditional Community itself.
15. I was satisfied and ruled that the second and third applicants have not established any authority to represent the first applicant. The Rule 7 application succeeded, and the so-called first applicant is accordingly not an applicant before this court.

THE POINTS IN LIMINE

¹ (CCT46/12) [2013] ZACC 3; 2013 (4) BCLR 431 (CC)

16. The respondents raised as points in *limine* the applicants' lack of *locus standi*, that the relief sought was not capable of enforcement, and that the papers disclosed no cause of action.
17. It is clear that as members of the community the applicants have the right to come to court to prosecute their interests as members of the community members. Whether they come to court correctly or not, or can establish a right to the relief sought, is a separate question and must be dealt with as part of the main application.
18. In my view the remaining points in *limine* are so bound up in the merits of the main application that they are better dealt with in a consideration of the main application than as points in *limine*.

THE MAIN APPLICATION

19. The applicants seek an order compelling the respondents to consult with them and with the community before decisions are taken regarding certain shares. According to them an order granted in the North West province also requires the respondents to consult.
20. The respondents contend that some of the relief seeks consultation with people who are not required to be consulted with, and that there is no evidence that any consultation which ought to happen will not happen. As far as the order in the North West is concerned, they contend that it is no longer relevant.
21. I deal first with the order in the North West. This granted on 22 September 2010. It was granted in favour of applicants who are not the applicants before me. It contains an interim order interdicting parties from holding out a person who is not before this court as the Kgosi or Acting Kgosi of the Traditional Community, and preventing that person from performing any act in that capacity. It referred the question to oral evidence and deals with the procedure to be followed in having the oral evidence heard. According to the respondents the oral evidence portion was never pursued.

22. The order also interdicts the second and third respondents in that matter from committing or causing to be committed violence or damage to property. Those respondents are not parties before this court.
23. The first to sixth respondents in that matter then undertake to inform the attorneys of the applicants in that matter fifteen court days before they seek to dispose of or encumber the Wesizwe shares (the same shares at issue in this case). They are also ordered to inform the applicants' attorneys if they seek to alienate or encumber any asset outside the ordinary course of business, and to furnish the applicants in that matter specific information by 4 October 2010. The remainder of the order deals with costs.
24. Of the respondents in that matter only the fifth and sixth respondents are before this court, they are the first and second respondents.
25. The applicants contend that they are obliged to inform the attorneys of the applicants in that North West matter 15 days before they dispose of the Wesizwe shares. Those attorneys happen to be the attorneys of the applicants in this matter. That is irrelevant. The North West order requires them to be informed in their capacity as the attorneys in that matter. That does not entitle the applicants before me to any information through their attorneys. In any event there is no evidence that the respondents have not or will not comply with that order to the extent that it still applies. The order was made pending the hearing and determination of the oral evidence in that matter, not in perpetuity. If it is still in force, on which I venture no opinion, and if the first and second respondents in this matter do not inform the applicants in that matter, then those applicants have the remedy of applying for a contempt order in that court.
26. The order is irrelevant to what the applicants in this matter may be entitled to. It certainly does not establish the right to consultation that the applicants claim it does.
27. Nevertheless I assume that the applicants have a right to consultation as members of the community. The respondents implicitly accept that the

community must be consulted with. They aver that as a matter of policy they have and will consult with the community.

28. In order to establish that they are entitled to an order, the applicants must establish that there is a danger that the community (and they as members thereof) will not be consulted with.

29. The uncontradicted evidence of the respondents is that they have consulted with the community regarding the disposal of the Wesizwe shares and that as a matter of policy they do consult with the community. The response by the applicants is that they addressed letters of demand to the respondents which were never responded to and this shows that there will not be consultation with the community.

30. However, the letters of demand require information for the second and third respondents themselves, as directors of the companies. They have since resigned. In addition, the letters refer to decisions taken not consistent with the articles of incorporation of the companies. That is not the case made out in the founding affidavit nor is it relevant to the relief sought.

31. I am not convinced that the letters of demand and the failure of the respondents to respond are proof that the community will not be consulted with. Since the second and third applicants have no right beyond that as members of the community to be consulted with, in general community consultations, this means they have not established that their right to consultation is in any way in danger.

32. For these reasons I make the following order:

32.1. The application is dismissed with costs.

S. YACOOB

**JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances

For the applicants: Mr Esterhuyse of Du Plessis Van Der Westhuizen Inc

Counsel for the 1st, 2nd and 5th to 11th Respondents: G Nel SC
 E Eksteen
 B Maphosa

Instructed by: Fasken Martineau

For the 3rd and 4th Respondents: None.

Instructed by:

Date of hearing: 24 August 2021

Date of judgment: 02 August 2022