CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 03/07
[2007] ZACC 14

TINYIKO LWANDHLAMUNI PHILLA NWAMITWA SHILUBANA	First Applicant
WALTER MBIZANA MBHALATI	Second Applicant
DISTRICT CONTROL OFFICER	Third Applicant
PREMIER, LIMPOPO	Fourth Applicant
MEC FOR LOCAL GOVERNMENT AND HOUSING, LIMPOPO	Fifth Applicant
HOUSE FOR TRADITIONAL LEADERS	Sixth Applicant
CHRISTINA SOMISA NWAMITWA	Seventh Applicant
MATHEWS TN NWAMITWA	Eighth Applicant
BEN SHIPALANA	Ninth Applicant
ERNEST RISABA	Tenth Applicant
STONE NGOBENI	Eleventh Applicant
versus	
SIDWELL NWAMITWA	Respondent
and	
NATIONAL MOVEMENT OF RURAL WOMEN	First Amicus Curiae
COMMISSION FOR GENDER EQUALITY	Second Amicus Curiae

Heard on	:	17 May 2007
Decided on	:	17 May 2007
Reasons furnished on	:	8 June 2007

JUDGMENT

VAN DER WESTHUIZEN J:

Introduction and background

[1] On 17 May 2007 this Court issued the following order in this matter:

> "1. The hearing is postponed until 10h00 on Tuesday 4 September 2007.
> 2. The costs of the postponement are reserved.
> 3. Directions regarding the further conduct of this matter will be issued as soon as possible.
> 4. Reasons for this order will be issued as soon as possible."

[2] The order resulted from an application for a postponement by the respondent, filed the day before the matter was scheduled to be argued in this Court. The application was opposed and oral submissions were heard. In view of the nature of the matter and the interest shown in it, an explanation for the postponement is required. The reasons for the order now follow. The further directions mentioned in the order appear in the last paragraph.

[3] In deciding the application for postponement, it is imperative to keep the significance of the underlying issues and context in mind.[1] This is a dispute for the

[1] See *Sibiya and Others v Director of Public Prosecutions, Johannesburg High Court and Others* 2006 (2) BCLR 293 (CC) at para 6.

right to succeed as Hosi (Chief) of the Valoyi Tribe in Limpopo, between the first applicant ("the applicant"), daughter of Hosi Fofoza Nwamitwa ("Hosi Fofoza"), and the respondent, son of Hosi Mahlathini Richard Nwamitwa ("Hosi Richard"). When Hosi Fofoza died in 1968 without a male heir, succession to Hosi of the Tribe was, according to tradition, determined by the principle of male primogeniture. Therefore the applicant, Hosi Fofoza's oldest daughter, was not considered for the position. Instead, Hosi Fofoza's younger brother, Richard, succeeded him. Hosi Richard died in October 2001. During his reign, the tribal institutions seemingly decided to appoint the applicant as Hosi, relying on the constitutional principle of equality. The relevant government officials approved the appointment. However, the appointment came to be contested. In 2002 the respondent sought a declarator in the Pretoria High Court that he, and not the applicant, is the rightful heir to be Hosi of the Valoyi Tribe. The High Court,[2] and eventually the Supreme Court of Appeal,[3] held in the respondent's favour.

[4] The applicants applied for leave to appeal against the decision of the Supreme Court of Appeal.[4] On 28 February 2007 the matter was set down for hearing in this Court on 17 May 2007.[5] The National Movement of Rural Women and the

[2] *Nwamitwa v Phillia and Others* 2005 (3) SA 536 (T).

[3] *Shilubana and Others v Nwamitwa (Commission for Gender Equality as* Amicus Curiae*)* 2007 (2) SA 432 (SCA).

[4] The applicants also applied for condonation for the late filing of the application for leave to appeal.

[5] The parties were instructed to address the following issues in written argument:

> "(a) Does the Royal family have the authority to develop the customs and traditions of the Valoyi community so as to outlaw gender discrimination in the succession to traditional leadership?

Commission for Gender Equality were admitted as amici curiae (friends of the court). On 16 May 2007 the respondent filed an "Application [for] Postponement and Leave to Dispute the Authority of Legal Practitioners to Act on Behalf of the Applicants in Terms of Rule 32 and Rule 9".

[5] This matter appears to pose fundamental questions regarding the interplay between customary law and the Constitution and to raise delicate issues regarding the relationship between traditional community structures and courts of law. How these matters are resolved might be of paramount importance not only to the immediate parties, but to the community of which they are a part, as well as the nation.

Submissions in support of postponement

[6] The respondent made two general submissions regarding the application for postponement. Firstly, he argued that the State Attorney is not authorised to represent the non-governmental applicants in this matter, because such representation would not be on behalf of the government as required by statute.[6] To the extent that the State Attorney is permitted to continue representing the applicants, however, the respondent

---

(b) In the course of developing the customs and the traditions of a community, does the Royal Family have the authority to restore the position of traditional leadership to the house from which it was removed by reason of gender discrimination even if this discrimination occurred prior to the coming into operation of the Constitution?

(c) Are the provisions of the Traditional Leadership and Governance Framework Act [41 of] 2003 applicable to these proceedings?

(d) If the provisions of the Traditional Leadership and Governance Framework Act [41 of] 2003 are applicable, is the dispute relating to the restoration of traditional leadership the kind of dispute that ought to be dealt with by the Commission as required by Section 21(1)(b) read with section [25(2)] of the Traditional Leadership and Governance Framework Act [41 of] 2003?"

[6] See section 3 of the State Attorney Act 56 of 1957.

argued that he too should receive funding from the State Attorney. Secondly, he claimed that his lack of resources has left him ill-equipped to prepare properly for the hearing.[7]

[7] No opinion is expressed on the first claim. Before this Court will consider the argument, the appropriate procedures to bring the claim before the Court must be followed. No notice, for example, has been given.[8] This Court also expresses no view on whether it would be permissible and possible for the State Attorney to fund both sides to the litigation. Furthermore, it would appear that, even if meritorious, the respondent's argument would not, on its own, warrant a postponement – particularly one requested at this late date. However, the respondent's claim about his lack of resources, which is related to his point about State Attorney representation, requires more attention.

[8] Until 15 May 2007, the respondent was only able to secure representation of junior counsel, Mr BLM Bokaba. Two days before the scheduled hearing, however, the respondent was able to secure the services of senior counsel, Mr M Motimele SC. Not only would it have been impossible for Mr Motimele to have adequately prepared himself for a hearing involving important and complex issues on two-days notice, but he was otherwise engaged and could not represent the respondent at the scheduled hearing, according to the respondent.

[7] In his affidavit, the respondent also alleged several problems with the record submitted by the applicant to this Court, but his counsel did not pursue this point during oral argument.

[8] See Rule 9 of the Constitutional Court Rules.

Postponement

[9] In *National Police Service Union and Others v Minister of Safety and Security and Others*,[9] this Court was faced with an application for postponement in a similar situation. The appellants applied for a postponement the day before the scheduled hearing, after apparently having reached an agreement with the respondents that a postponement would be sought.[10] Accordingly, counsel for the respondents did not appear.[11] The Court found the reasons furnished to be inadequate and denied the postponement.[12]

[10] It was made clear in *National Police Service Union* that the question is whether it is in the interests of justice for a postponement to be granted by this Court. A postponement cannot be claimed as of right. The party applying for postponement must therefore show good cause that one should be granted.[13] The factors to be taken into account include –

> "whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed."[14] (Footnote omitted.)

[9] 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC).

[10] Id at paras 1 and 2.

[11] Id at para 2.

[12] Id at para 6.

[13] Id at para 4.

[14] Id.

[11] In *Lekolwane and Another v Minister of Justice and Constitutional Development*[15] this Court added the following factors to be considered in granting a postponement: (1) the broader public interest; and (2) the prospects of success on the merits. The following factors could non-exhaustively be added to the above: the reason for the lateness of the application if not timeously made; the conduct of counsel; the costs involved in the postponement; the potential prejudice to other interested parties; the consequences of not granting a postponement; and the scope of the issues that ultimately must be decided.[16] In balancing these factors it is of vital importance to keep in mind that –

> "[w]hat is in the interests of justice will . . . be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this Court finalised without undue delay."[17]

[12] A standard way to mitigate prejudice to other parties is for the party asking for the court's indulgence to postpone a hearing – particularly one requested at the last minute – to offer, or to be ordered, to pay the costs of the postponement.[18]

Conduct of respondent's counsel

[15] 2007 (3) BCLR 280 (CC) at para 17.

[16] Some of these factors have been recognised by other courts over time. See for example *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 399; *Ngcobo v Union & South West African Insurance Co Ltd* 1964 (1) SA 42 (D) at 44F-G; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 315B-G. See also Van Winsen et al *Herbstein and Van Winsen The Civil Practice of the Supreme Court of South Africa* 4 ed (Juta & Co, Ltd, Kenwyn 1997) at 666-668.

[17] *National Police Service Union* above n 9 at para 5.

[18] See for example id at para 2; Van Winsen et al above n 16 at 668.

[13] The conduct of respondent's counsel, Mr Bokaba, and perhaps that of his instructing attorneys, is relevant to our consideration of the application for postponement. It deserves censure. The untimeliness of the respondent's submissions is the first unsatisfactory aspect. The application for leave to appeal was filed (albeit late) on 30 January 2007. The respondent's notice of intention to oppose was therefore due on 13 February 2007. It was never filed. The respondent's answering affidavit was filed only on 3 May 2007. The respondent's written submissions were due to be filed, in terms of the Chief Justice's revised directions dated 14 March 2007, on 30 April 2007. These too were filed on 3 May 2007. And then, as mentioned, the respondent filed this application for postponement on 16 May 2007, the day before the scheduled hearing.

[14] The explanation for the late filing of the submissions, as well as the justification for the late date on which the application for postponement was filed, and indeed for the need to postpone at all, was the respondent's lack of funds. It is understandable as an explanation for the late filing and perhaps even in so far as the application for postponement is concerned. The last-minute nature of the application for postponement is, however, inexcusable. There is no reason why the application could not have been filed at any time after 28 February 2007, when the date of the hearing was determined and furnished to all concerned. Although the services of senior counsel were only secured on 15 May 2007, the lack of funds and the need for proper legal representation were not sudden developments.

[15] At the hearing counsel admitted that he was unprepared to present his client's case, should the application for postponement be denied. He appeared to presume that the application would be granted – a presumption one makes at the peril of one's client. In *National Police Service Union* it was stated:

> "Ordinarily . . . if an application for a postponement is to be made on the day of the hearing of a case, the legal representatives . . . *must* appear and be ready to assist the Court both in regard to the application for the postponement itself and if the application is refused, the consequences that would follow."[19] (Emphasis in original.)

[16] Mr Bokaba had known for some time that he alone represented his client, and at least since 28 February 2007, that he would have to be prepared to argue the matter in this Court on 17 May 2007. He did not prepare, and prior to the day before the hearing, he felt no need to communicate that fact to anyone. What would have happened had senior counsel not been secured two days before the hearing remains unclear.

[17] Counsel's conduct went from frustrating to astonishing. During oral argument he matter-of-factly and repeatedly stated that, despite the respondent's lack of funds, he had adamantly refused to do the matter with funding from the Legal Aid Board. The rates, he said, are too low; the payments, he lamented, are too slow. As a practising advocate, it is of course his decision whether or not to accept Legal Aid funding. He cannot be forced to do so. If he refuses Legal Aid funding, however, he must then either comply with the Court's rules and represent his client properly, or

[19] Above n 9 at para 7.

withdraw from the brief timeously. His client would then be free – through his attorney – to approach one of the many legal practitioners who might well be willing to accept the fees and render the required services. The system of state-sponsored legal aid is aimed at providing legal services to the many people who would not otherwise have access to justice.[20]

[18] Mr Bokaba is doing a disservice to his client, to his honourable profession and to the constitutional principles his client seeks to vindicate. With this in mind, the Registrar of this Court is directed to bring this judgment to the attention of the Pretoria Bar Council.

[19] However, counsel's conduct alone cannot be decisive of the application for a postponement. The issues at stake are too important not to factor them into the equation. The fact that the courtroom was filled with people who appeared to be interested members of the community, who probably had travelled from afar, underscores that. The merits of the request for postponement must therefore be grappled with as well.

Equality of arms

[20] Section 3 of the Legal Aid Act 22 of 1969 (as amended) states that the objects of the Legal Aid Board "shall be to render or make available legal aid to indigent persons and to provide legal representation at State expense as contemplated in the Constitution . . . ." The Legal Aid Board has funded a number of cases with considerable public impact. See for example *Masiya v Director of Public Prosecutions (Pretoria) and Another (Centre for Applied Legal Studies and Another as Amici Curiae)* CCT 54/06, 10 May 2007, as yet unreported; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC).

[20] Counsel for the respondent argued that the respondent and the applicants were not represented on an equal basis before this Court. This argument was related to and based on the respondent's claims regarding State Attorney representation and insufficient funding. According to the respondent, the first applicant has unlawfully been able to conduct this litigation using public resources, whereas the respondent has had to fund his representation himself. Because of a lack of funds, the respondent, until recently, has only been represented by junior counsel. Making matters worse, the respondent has not been able to have portions of the record transcribed into braille for the benefit of Mr Bokaba, who is unsighted. Mr Bokaba argued that, without the aid of senior counsel, he was overmatched, and his client unfairly under-represented before this Court.

[21] The respondent's argument is essentially that, faced with applicants unfairly represented by the State Attorney who briefed senior counsel, as well as two amici curiae who broadly support the applicants' case – six advocates in total – and hampered by insufficient funds, there was not an "equality of arms" between the parties. This concept has its constitutional basis, in the civil context, in section 34's guarantee of a fair public hearing.[21] In this Court the term itself has been used in the criminal context[22] and alluded to in the civil context.[23] Whatever the merits of the

[21] Section 34 of the Constitution states:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[22] See *Ex Parte Institute for Security Studies: In re S v Basson* 2006 (6) SA 195 (CC); 2006 (2) SACR 350 (CC) at para 15:

> "As a general matter, in criminal matters a court should be astute not to allow the submissions of an *amicus* to stack the odds against an accused person. Ordinarily, an accused in criminal

claim, it is not desirable, without submissions by all concerned parties, to decide whether the concept has any traction as it relates to civil proceedings in this Court. Nor is it necessary to decide whether an "inequality of arms" actually existed, what an appropriate counsel ratio might be and whether an inequality necessitated a postponement in this case. In other words, we need not address the question whether the asserted imbalance of representation – an assertion made despite the fact that the respondent has prevailed in both the High Court and the Supreme Court of Appeal – is constitutionally cognisable or problematic.[24] The central issue is what the interests of justice dictate in the present matter. One of the questions to be asked in this regard is whether the parties are effectively represented, given the nature of the issues to be decided.

The interests of justice

[22] In response to a question from the bench, counsel for the respondent expressly stated that he was not in a position to represent his client effectively. He felt overwhelmed and uncomfortable. The interests of the affected parties are too weighty, the importance for the community too high and the benefit of prepared argument too great, to proceed undeterred by these circumstances. In view of the fact that senior counsel was secured at the last minute, a postponement may result in more

---

> matters is entitled to a well-defined case emanating from the State. If the submissions of an *amicus* tend to strengthen the case against the accused, this is cause for caution. This, however, is not an inflexible rule. But it is a consideration based on fairness, equality of arms, and more importantly, what is in the interests of justice."

[23] See *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at fn 154: "The principle of 'equality of arms', implicit in the right to a fair trial, has not been applied to situations such as the one we are considering in the case before us."

[24] The Court is grateful, however, for the helpful submissions in this regard by counsel for the first amicus.

helpful argument. When considering the interests of justice there is room to consider the alignment of both amici with the applicant, the one-to-six counsel ratio in this case and the fact that senior counsel could be helpful in wading through difficult and important constitutional issues.

[23] This Court is not unmindful of the considerable costs of this decision. The time, effort and commitment of the parties, the amici, the Court and the community have been considered. On balance, however, one has to conclude that it is in the interests of justice for the hearing to be postponed. This Court is ultimately persuaded that the benefits to the respondent, the Valoyi community and the process of constitutional decision-making outweigh the conduct of respondent's legal representatives and the costs associated with postponement. This certainly does not mean that it is generally open for counsel to make eleventh-hour applications for postponement claiming an imbalance of counsel or lack of preparation. Only in an exceptional case will an application of this kind succeed. And even then, conduct of this sort is worthy of censure.

Costs

[24] In his notice of motion the respondent sought a costs order against the applicants on the scale of attorney and own client, despite the fact that it was the conduct of the respondent's legal representatives that forced the other parties, the Court and the community to prepare and to attend the hearing on 17 May 2007. During oral argument, counsel for the respondent did not pursue this position, but

proposed that costs be ordered to be costs in the cause. Counsel for the applicants recognised that a cost order against the respondent at this stage would not serve to mitigate prejudice, but would be futile. The respondent's justification for requesting a postponement is, after all, his inability to fund his own counsel. Nor would it make sense for the costs of postponement to be costs in the cause. Whether the applicants or respondent is ultimately successful, this Court will not necessarily award costs in a case involving important constitutional questions.[25] Moreover, the additional costs incurred on the basis of the postponement are not related to the ultimate merits of the appeal. Accordingly, the issue of costs was reserved. It may be argued in conjunction with the hearing on 4 September 2007, when issues regarding funding will be clearer and argument may benefit from the presence of senior counsel on the side of the applicants as well as the respondent.

Directions

[25] In view of the above, the following directions are issued:

1. The application for leave to appeal against the judgment of the Supreme Court of Appeal and the application for condonation are set down for hearing on Tuesday 4 September 2007 at 10h00, in terms of the order of this Court dated 17 May 2007.
2. Supplementary written argument, if any, shall be lodged –
   (a) on behalf of the respondent, on or before 10 July 2007; and

[25] See for example *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another; Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC), 1999 (12) BCLR 1360 (CC) at para 138.

(b) on behalf of the applicants and the amici, on or before 31 July 2007.

3. Should the respondent wish to dispute the authority of the State Attorney to represent any of the applicants, proper notice should be given in terms of the relevant rules of Court. The respondent must apply for condonation should notice not be given within the required time.

4. The Registrar is directed to serve a copy of this judgment on the applicants, respondent, amici, the Commission on Traditional Leadership Disputes and Claims, the Congress of Traditional Leaders of South Africa and the Pretoria Bar Council.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, Nkabinde J, O'Regan J, Sachs J and Skweyiya J concur in the judgment of Van der Westhuizen J.

For the Applicants:	Advocate IAM Semenya SC, Advocate SBS Dlwathi and Advocate NI Mayet, instructed by The State Attorney, Pretoria.
For the Respondent:	Advocate BLM Bokaba, instructed by Mashobane Attorneys.
For Amicus Curiae National Movement of Rural Women:	Advocate G Budlender and Advocate R Moultrie, instructed by the Legal Resources Centre.
For Amicus Curiae Commission for Gender Equality:	Advocate K Pillay, instructed by the Legal Resources Centre.