



CASE NO: A197/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHIEF OSWIN SHIFIONA MUKULU, N.O.

1st APPLICANT

OMBALANTU TRADITIONAL AUTHORITY

2nd APPLICANT

and

VAENDWA KALUMBU

1st RESPONDENT

MICHAEL SHAPUMBA NAUTA

2nd RESPONDENT

COUNCIL OF TRADITIONAL LEADERS

3rd RESPONDENT

CORAM: Smuts, J

Heard on: 26 January 2012

Delivered on: 3 February 2012

JUDGMENT

Smuts, J

[1] On the extended return date of a rule *nisi*, the applicants sought confirmation of the rule obtained against the first and second respondents. The third respondent is the Council of Traditional Leaders, cited by virtue of any interest that it may have in relation to the relief sought by the applicants. It did not oppose the application. Nor did the first respondent.

[2] The first applicant is the duly designated and recognised Chief of the Ombalantu Traditional Authority, established under the Traditional Authorities Act, 25 of 2000 (“the Act”). The applicants had obtained an order against the first and second respondents, as a matter of urgency on 30 July 2011 to the following effect:

“That a rule nisi is issued in terms of which the respondents are called upon to show cause, if any, to this Honourable Court on the 16th of September 2011 at 10h00 why this Court should not make a final order in the following terms:

2.1 Interdicting and restraining the first respondent from coronating, enthroning, inaugurating, appointing and ceremonially overseeing the enthronement of the second Respondent as the “Ohamba” or king of the Ombalantu Community on the 30th of July 2011 or on any other day.

- 2.2 *Interdicting and restraining any other person from coronating, enthroning, inaugurating, appointing and ceremonially overseeing the enthronement of the second Respondent as the “Ohamba” or king of the Ombalantu Community on the 30th of July 2011 or on any other day;*
- 2.3 *Interdicting and restraining the Second Respondent from accepting any enthronement, coronation or appointment from any person designating and or enthroning him as the “Ohamba” or king of the Ombalantu Community in contravention of the Traditional Authorities Act, Act No. 25 of 2000 as amended.*
- 2.4 *Interdicting and restraining the Second Respondent from participating in any coronation, enthronement, ceremony, ritual, anointment, inauguration that purports to enthrone, appoint or install the Second Respondent as the “Ohamba” or king of the Ombalantu Community in contravention of the Traditional Authorities Act, Act No. 25 of 2000 as amended.*
- 2.5 *Declaring the conduct of the Respondents and or any other person that relates to the coronation, enthronement, installation, inauguration and appointment of any person as the “Ohamba” or king of the Ombalantu Community in contravention of the*

Traditional Authorities Act, Act No. 25 of 2000 as amended as illegal, null and void.

2.6 *That the respondents are ordered to bear the costs of this application.”*

[3] The further terms of the order not relevant for present purposes and are excluded.

[4] The factual background to the application is as follows.

[5] The first applicant had under the then applicable legislation, been appointed as a Senior Headman in 1983. In the predecessor legislation to the Act, the erstwhile Traditional Authorities Act, 17 of 1995, the first applicant was recognised as the Chief of the Ombalantu Traditional Authority. By virtue of the savings and transitional provisions contained in the Act, his designation and recognition continued and he was deemed to have been done under the equivalent provisions in the Act. The long title of the Act essentially sets out its statutory purpose. It is:

“To provide for the establishment of Traditional Authorities and the designation, election, appointment and recognition of traditional leaders; to define the powers, duties and functions of Traditional Authorities and traditional leaders; and to provide for matters incidental thereto.”

[6] Section 2 of the Act deals with the establishment of Traditional Authorities. It provides:

(1) Subject to this Act, every traditional community may establish for such community a traditional authority consisting of-

(a) the chief or head of that traditional community, designated and recognized in accordance with this Act; and

(b) senior traditional councillors and traditional councillors appointed or elected in accordance with this Act.

(2) A traditional authority shall in the exercise of its powers and the execution of its duties and functions have jurisdiction over the members of the traditional community in respect of which it has been established."

[7] The powers, duties and functions of Traditional Authorities and its members are then set out in s 3. These include performing traditional ceremonies and functions held within the traditional community, upholding, promoting and protecting and preserving the culture and traditional values of a traditional community as well as preserving and maintaining the cultural sites, works of art and literary

works of that traditional community. Under s 4 of the Act the designation of a Chief or head of a Traditional Authority is provided for in the following way:

[8] *(1) Subject to sections 5 and 6, members of a traditional community who are authorised thereto by the customary law of that community, may designate in accordance with that law-*

[9]

[10] *(a) one person from the royal family of that traditional community, who shall be instituted as the chief or head, as the case may be, of that traditional community; or*

[11]

[12] *(b) if such community has no royal family, any member of that traditional community, who shall be instituted as head of that traditional community.*

[13] *(2) The qualifications for designation and the tenure of, removal from and succession to the office of chief or head of a traditional community shall be regulated by the customary law of the traditional community in respect of which such chief or head of a traditional community is designated."*

[14] The first applicant is recognised as the Chief or head of the traditional community which constitutes the Ombalantu Traditional Authority under s 4. The applicants approached this Court in July last

year on an urgent basis for the rule nisi set out above. They did so after receiving an invitation extended to them by the first respondent to the inauguration of the crowning of the second respondent as King (Ohamba) of the Ombalantu Community on 30 July 2011. The terms used in the invitation as translated are “the anointment ceremony of King”. The designated time was for 10h00 that morning.

[15] It is common cause that the respondents are members of the Ombalantu traditional community. The applicant, having served as a senior headman since 1983 and having been steeped in the traditions and customs of the Ombalantu traditional community from an early age, is duly qualified to testify the traditions and customs of the Ombalantu community¹. In his founding affidavit he refers to his position as head of the Ombalantu traditional authority and thus of the community in accordance with the traditions and customs of that community and states that the inauguration, anointment or coronation of a king in respect of the same community would be untenable and would violate his own rights as well as Ombalantu traditions and customs.

[16] In his answering affidavit, the second respondent states that he is of royal descent and had already been “confirmed” as King on 1 January 2000. He states that this position is merely symbolic and that

¹As to the proving of customs, see *Kaputuaza v Executive Committee for Hereros* 1984(4) SA 295 (SWA) at 301 E-302B.

the applicants did not provide any evidence that it would undermine the first applicant's position as statutorily recognised head of the community and of the second respondent. In reply, the first applicant amplified by pointing out that the anointing of the second respondent as a king and his claim to occupy that position would interfere with the first applicant's position as Chief and head of that community. This is also borne out by the portion of the book describing the customs and traditions of the Ombalantu people attached to the answering affidavit.

[17] The first applicant states in reply that the coronation or anointing of the second respondent as a king would derogate from his position and status as Chief and head of the community and the statutorily established traditional authority. The applicants accordingly sought the relief which was then granted as a matter of urgency on 30 July 2011.

[18] In the answering affidavit, the second respondent also stated that by the time the order was served, his anointing ceremony had already taken place and that the order is thus merely academic and should not be confirmed for that reason alone. It was also argued on behalf of the first respondent by Mr N Tjombe who appeared for him, that the applicants' application did not protect an alleged violation of the provisions of the Act or the customs and practices of the Ombalantu Community and that the first applicant was merely

obsessed with titles and was disappointed that the second respondent had referred to him as a senior headman or chief and referred to himself as a king.

[19] The first applicant however states that the anointing of a king for the same community would create confusion amongst members of that community and also could lead to unrest and divisions amongst the community and could lead to the peace and harmony of that community being disturbed. The second respondent in his answering affidavit stated that according to customs and the customary laws of the Ombalantu community the hereditary king for that community is chosen from royal lineage. He further stated that as a descendant of the royal family, he had already on 1 January 2000 been confirmed as king and was thus the “hereditary king of the Ombalantu community”. In the replying affidavit however the first applicant attached the invitation to the ceremony of 1 January 2000 involving the second applicant which stated that it was however merely the inauguration of the second respondent as a senior headman in the place of the former senior headman, Mr Petrus Aluvilu Neumbo.

[20] Given the fact that the ceremony proceeded prior to service of the order, it is clear to me that the entire order would not be capable of being confirmed. The question arises as to whether the applicant has established the requisites for a final interdict against the second respondent and for the declaratory relief contained in the rule. Mr

Khama who appeared for the applicants submitted that the applicants had established an entitlement to relief by virtue of the second respondent acting in conflict with s 11 of the Act, entitled "Use of traditional titles". This section provides:

"Nothing in this Act contained shall be construed as precluding the members of a traditional community from addressing a traditional leader by the traditional title accorded to that office, but such traditional title shall not derogate from, or add to, the status, powers, duties and functions associated with the office of a traditional leader as provided for in this Act."

[21] Having carefully considered the affidavits filed in this matter and the written and oral argument advanced on behalf of the applicants on the one hand and the second respondent on the other, it would seem to me that the conduct of the second respondent, by claiming to be anointed or inaugurated as the hereditary king (ohamba) of the Ombalantu Community, in the context of the Act would in my view derogate from the status, powers, duties and functions associated with the office of the first respondent, as well as undermining the authority and therefore derogating from the authority powers, duties and functions of the second respondent.

[22]

[23] Plainly, to claim to be the king of that community implies that the first applicant who has been statutorily recognised and designated

as head of that community, is subservient to him, particularly in the context of s4 of the Act. That section after all contemplates the designation of a person in position of the head of a traditional community being either from the royal family, of that community or, in the absence of a royal family a member of that community being designated as head of that community. By claiming to be the king of that same community after designation of the first respondent as head in 1995 thus derogates from the first applicants' status, powers and functions. It also derogates from the powers and functions of the second respondent which I have referred to above.

[24]

[25] Mr Tjombe's submission that the first respondent would thus be confined to a ceremonial and titular position would in my view undermine and derogate from the powers and functions of both the first and second respondents. The performance of ceremonial matters within the community is one of the statutory designated powers of both the applicants. The first applicant would perform those powers as head of that community. To claim to be the hereditary king in the context of the ceremonial functions of that same community would in my view clearly derogate from the ceremonial position of the first applicant.

[26] It follows in my view that the applicants have established a clear right to the confirmation of certain portions of the rule. In view of the fact that the ceremony had been completed at the time the

order was served, it would thus serve no purpose in confirming paragraphs 2.1 and 2.2 of the rule.

[27] Paragraphs 2.3 and 2.4 would in my view need to be confirmed. The applicants have in my view established their entitlement to the declaratory relief contained in paragraph 2.5. This is because the applicants have not only established a clear right to interdict the second respondent being designated as the King or “Ohamba” of the Ombalantu community and being installation in that position as well as the absence of an alternative remedy. By reason of their entitlement to the declaratory relief in paragraph 2.5 to part of the orders in paragraphs 2.3 and 2.4 being confirmed in confined form, the applicants have in my view been substantially successful in this litigation and are entitled to their costs on the basis of one instructed and one instructing counsel.

[28] I accordingly confirm paragraph 2.5 of the order and direct that the second respondent pays the costs of the application including one instructed and one instructing counsel, and that paragraphs 2.3 and 2.4 are to be confined to the following single paragraph:

[29] 2.3 Interdicting and restraining the second respondent from purporting to be installed or inaugurated as hereditary king of the Ombalantu community

[30] The further portions of the rule granted on 30 July 2011 are hereby discharged.

Smuts, J

ON BEHALF OF APPLICANTS

Instructed by:

MR D. KHAMA

The Government Attorney

ON BEHALF OF RESPONDENTS

Instructed by:

MR N. TJOMBE

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