CONSTITUTIONAL COURT OF SOUTH AFRICA

Mamadi and Another v Premier of Limpopo Province and Others

CCT 176/21

Date of judgment: 6 July 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Wednesday, 6 July 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal from the High Court of South Africa, Limpopo Division, Polokwane (High Court). This matter arose out of a protracted dispute about the recognition of the Kgoshi (Traditional Leader) of the Babirwa BaGa Mamadi traditional community (Mamadi Community). Essentially, on the applicants' version, the first applicant ought to have been recognised as the Kgoshi of the Mamadi Community. On the respondents' version the fifth respondent was rightfully appointed as such.

The applicants instituted review proceedings in the High Court in terms of the Promotion of Administrative Justice Act (PAJA) to review and set aside a decision of the Premier of the Limpopo Province to recognise the fifth respondent as acting Kgoshi of the Mamadi Community. They also applied to review and set aside the recommendations of the Commission on Traditional Leadership Disputes and Claims (Kgatla Commission), which found that the first applicant did not have a claim to the position of Kgoshi.

The applicants in the review application advanced a sweeping set of grounds of review. In essence, the case advanced was that the Kgatla Commission's report was irrational, unlawful and procedurally unfair. The crux of the rationality challenge was that the Kgatla Commission failed to take into account various submissions, which the applicants contend were relevant. These were said to include submissions on relevant customary law, which the Kgatla Commission was obliged to consider and apply in terms of section 25(4)(a) of the Traditional Leadership and Governance Framework Act (Traditional Leadership Act).

The High Court dismissed the application with costs. The basis of the High Court's decision was that the matter involves disputes of fact, irresoluble on the papers; these disputes of fact were reasonably foreseeable and the application should therefore have been brought as an action, and, in any event, the applicants failed timeously to apply for a referral to oral evidence, and no referral was warranted, because oral evidence was unlikely to tilt the balance of

probabilities in favour of the applicants. Leave to appeal was refused by the Supreme Court of Appeal.

Leave to appeal was granted by the Constitutional Court which noted that the matter bears on a litigant's right to administrative action in terms of section 33 of the Constitution and the right in terms of section 34 of the Constitution to have "any dispute that can be resolved by the application of law decided in a fair public hearing before a court".

As to the central question before the Constitutional Court in the matter – what approach a court should adopt, where disputes of fact, irresoluble on the papers, arise in a review application – the Court held the following. Litigants are not obliged to bring review proceedings in terms of rule 53 of the Uniform Rules of Court and a review application is capable of being brought by way of action. However, a litigant is also not obliged to institute a review by way of action proceedings, even in matters where disputes of fact irresoluble on the papers are reasonably foreseeable, because this would mean she is forced to forego the procedural advantages of obtaining the rule 53 record.

This Court went on to hold that in review proceedings brought in terms of rule 53, and after the applicant has obtained the record, a court may not in terms of its discretion under rule (6)(5)(g), on the basis that the matter cannot be decided on affidavit, dismiss the matter without rendering a final decision. This Court held that in these instances, general principles governing the referral of a matter to oral evidence or trial apply. Litigants should apply for a referral to oral evidence or trial as soon as affidavits have been exchanged. Where litigants do not make this application timeously, courts are entitled to resolve the dispute by application of the *Plascon-Evans* rule (the rule allows the courts, in certain circumstances, to make a determination on disputes of fact in application proceedings without having to hear oral evidence and on the respondent's written version). For this reason, the Court held that the High Court was not entitled to refuse referral to oral evidence on the basis that oral evidence would not tip the balance in favour of the applicants, without assessing the merits of the grounds advanced in the review application. The High Court ought to have referred the matter to trial. The Constitutional Court upheld the appeal, set aside the order of the High Court and remitted the matter back to the High Court for trial before a different Judge.