



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 80/2012

In the matter between:

JOHANNES ISAACKS, N.O.

1ST APPLICANT

/HAI-/KHAUA TRADITIONAL AUTHORITY

2ND APPLICANT

and

JOHANNES FLEERMUYS

1ST RESPONDENT

COUNCIL OF TRADITIONAL LEADERS

2ND RESPONDENT

Neutral citation: *Isaack v Fleermuys* (A 80/2012) [2012] NAHCMD 20 (11 October 2012)

Coram: GEIER J

Heard: 18 September 2012

Delivered: 11 October 2012

Flynote: *Traditional Authorities Act 25 of 2000 – interpretation of section 3(4) - as read with sections 1, 2, 3, 4, 5, 6 and 7 – provisions of act and scheme created thereby indicating that legislature intended only one traditional authority – comprised of a chief or head of that traditional community - designated and recognized in accordance with the Act - and senior traditional councillors and traditional councilors - appointed or elected in accordance with the Act - for a particular traditional community –*

Traditional Authorities Act – interpretation of section 3(4) - as read with sections 1, 2, 3, 4, 5, 6 and 7 – provisions of act and scheme created thereby indicating that legislature intended that only a duly appointed traditional authority would be the entity that would be authorized by statute to exercise the powers and duties set out in Sections 3 and 7 of the Act – such intention to be inferred as otherwise the legislature would not have visited certain acts of a dissident group within a traditional community and within the area of jurisdiction of an established traditional authority with invalidity and criminal liability and sanction -

Intended inauguration of a second chief, by a particular group within a traditional community, within the area of jurisdiction of an already duly established traditional authority with a duly designated chief declared to be in conflict with the Traditional Authorities Act – therefore declared unlawful – intended conduct interdicted

Summary: Applicants – the duly designated and gazetted chief and traditional authority of the /Hai-/Khaua, also occupying the Berseba area, had obtained an urgent interim order interdicting the planned inauguration of the first respondent, as chief of the purported Goliath Traditional Authority in Berseba on 21 April 2012 – On the return day the question arose whether or not the applicants had established a clear right for purposes of having the interim relief confirmed – the parties being agreed that in the event of the applicants being able to show such clear right the first respondent's conduct would satisfy the further requirements for the confirmation of the rule –

Held : Given the provisions of section 3(4) it had to be inferred that the legislature intended only one traditional authority – comprised of one chief or head of that traditional community - designated and recognized in accordance with the Act – and only such senior traditional councillors and traditional councilors - appointed or elected in accordance with the Act - for that particular traditional community – which :traditional authority would then also be the entity that would be expressly authorized by statute to exercise the powers and duties set out in Sections 3 and 7 of the Act –

Held : as the first respondent and his followers – being a group of members of the /Hai-/Khaua traditional community – were attempting – through the first

respondent's inauguration as chief - to establish another authority purporting to be a traditional authority for such group under the first respondent's chieftainship in an area where there was already a duly established traditional authority – that such intended conduct would be in breach of the provisions and the scheme created by the Traditional Authorities Act-

Held : that it was to be inferred that the first respondent and his followers through the intended establishment of their own traditional authority with its own chief were obviously intending to ultimately exercise also the functions contemplated in paragraphs (b) and (h) of subsection (1) and paragraphs (a) and (b) of subsection (3) of section 3 of the Traditional Authorities Act-

Held : Any such intended acts would however be null and void and would attract criminal sanctions in terms of section 3(4)(a) and (b) -

Held : that the applicants had established a clear right for the granting of a final interdict and a reasonable apprehension of the infringement of such rights as a result of the conduct of the first respondent and his followers - Rule nisi thus confirmed in material respects-

ORDER

The rule nisi granted on 20 April 2012, as extended, is hereby confirmed to the following extent:

(a) The first respondent is hereby interdicted and restrained from being inaugurated or designated as chief of one purported Goliath Traditional Authority in contravention of the Traditional Authorities Act, Act 25 of 2000, as amended (hereinafter as the Traditional Authorities Act);

(b) The first respondent is hereby interdicted from participating in any event purporting to inaugurate or designate him as a chief of one purported Goliath Traditional Authority in Berseba in contravention of the Traditional Authorities Act;

(c) The first respondent is hereby interdicted and restrained from instigating and spearheading the inauguration or designation of himself or any other person as chief of one purported Goliath Traditional Authority in Berseba in contravention of the Traditional Authorities Act;

(d) The members of the purported Goliath Traditional Authority in Berseba who seek the inauguration and designation of the first respondent are hereby interdicted and restrained from participating in any conduct purporting to inaugurate or designate the first respondent or any other person as chief of the purported Goliath Traditional Authority in Berseba in contravention of the Traditional Authorities Act;

(e) The conduct of the first respondent, or any other person, that is aimed at inaugurating or designating the first respondent or any other person as chief of one purported Goliath Traditional Authority in Berseba in contravention of the Traditional Authorities Act, is hereby declared illegal and null and void.

(f) The first respondent is to pay the costs of this application.

JUDGMENT

GEIER J:

[1] The first applicant is the traditional leader of the /Hai-/Khaua Traditional Authority. This traditional authority then is also the second applicant herein.

[2] The first applicant has been duly designated as chief of the /Hai-/Khaua traditional community in accordance with the requirements set by the Traditional Authorities Act 25 of 2000.

[3] The second applicant has been duly established in terms of the Traditional Authorities Act 2000.

[4] The first respondent and his community the 'goliath traditional community' have been trying to obtain the first respondent's recognition as a traditional leader since 1998.

[5] The first applicant on the other hand has held his official designation¹ since 20 October 2011.

[6] On 19 March 2012 the first applicant learnt that an event was planned for the 21st of April 2012, to be held at Berseba,,at which event the first respondent was to be inaugurated as the chief of the so-called "Goliath Traditional Authority of Berseba".

[7] Berseba however is a village within the area occupied by the traditional community of the /Hai-/Khaua and falls within the area of jurisdiction of the /Hai-/Khaua Traditional Authority of which the first applicant is the chief. The first respondent and his followers constitute a group within the traditional community of the /Hai-/Khaua.

[8] It does not take much to fathom that the planned event had all the ingredients for a further conflict within the community and would not go unchallenged.

[9] There is indeed a history of conflict within the community inhabiting the Berseba area, which also relates to the recognition of its leaders.

[10] The parties thus almost immediately obtained legal representation. In the ensuing correspondence it was already pertinently pointed out, inter alia, to first

¹ See Proclamation No 16 - Government Gazette No 4834 of 15 November 2012

respondent that, in terms of the Traditional Authorities Act, no other traditional authority can be installed in the area under the jurisdiction of a recognised traditional authority.

[11] In spite of such warning and as no clear response was forthcoming from the first respondent and his followers, that they would desist with the planned inauguration, and as the applicants viewed the threatened instalment of another chief in an area, where there was already a chief, as a serious threat to the first applicant's chieftainship and also to the authority of the second applicant, the first and second applicants approached the court on an urgent basis for interim interdictory relief on 20 April 2012, which was granted to the following extent:

'(a) The 1st and 2nd applicant's non-compliance with the requirements relating to forms and service are hereby condoned and that this matter is heard as one of urgency as contemplated by Rule 6(12) of the Rules of this Honourable Court.

(b) A *rule nisi* is hereby issued calling upon the first and second respondent's to show cause, if any, on the **31st of May 2012 at 10:00** why an order in the following terms should not be made:

(c) Interdicting and restraining the first respondent from being inaugurated or designated as chief of one purported Goliath Traditional Authority in Berseba on 21 April 2012 at 09H00 or on any other day in contravention of the Traditional Authorities Act, Act 25 of 2000, as amended (hereinafter as the Traditional Authorities Act);

(d) Interdicting and restraining the first respondent from participating in any event purporting to inaugurate or designate him as a chief of one purported Goliath Traditional Authority in Berseba on 21 April 2012 or on any other day in contravention of the Traditional Authorities Act;

(e) Interdicting and restraining any other person from instigating and spearheading the inauguration or designation of the first respondent or any other person as chief of one purported Goliath Traditional Authority in Berseba on 21 April 2012 or on any other day in contravention of the Traditional Authorities Act;

- (f) Interdicting and restraining any other person from participating in any conduct purporting to inaugurate or designate the first respondent or any other person as chief of the purported Goliath Traditional Authority in Berseba in contravention of the Traditional Authorities Act;
- (g) An order declaring the conduct of the first respondent, or any other person, that is aimed at inaugurating or designating the first respondent or any other person as chief of one purported Goliath Traditional Authority in Berseba in contravention of the Traditional Authorities Act, as illegal and null and void.
- (h) That the first respondent pay the costs of this application.
- (i) The orders set out in paragraphs 2.1, 2.2, 2.3, 2.4, and 2.5 shall operate with immediate effect pending the finalization of this application.
- (j) The applicants are directed to serve this application and this order on the 2nd respondent.'

[12] On the extended return date the applicants now seek confirmation of the rule nisi obtained against first and second respondents.

[13] In this regard it will have to be determined whether the applicants have established the requisites for the granting of a final interdict.²

[14] Also impacting on any confirmation of the rule now sought is that those portions of the rule nisi - which relate to the past planned events of 21 April 2012 - are factually no longer capable of confirmation.

² ie : (i) a clear right; (ii) unlawful interference with that right, actually committed or reasonably apprehended; and (iii) the absence of any other satisfactory remedy' (per Smalberger JA in *Diepsloot Residents' and Landowners' Association and Another v Administrator, Transvaal* 1994 (3) SA 336 (A) at 344I-J) – As adopted for instance in : *PASSANO v LEISLER* 2004 NR 10 (HC) at p14 H- I'

[15] The parties' legal representatives were further *ad idem* that, - if the applicants would be able to establish, that the Traditional Authorities Act does not provide for the recognition and the designation of more than one traditional leader within one traditional authority and community – that in such event the complained of endeavours of the first respondent, to be inaugurated and/or designated as chief within the area of jurisdiction of the /Hai-/Khaua Traditional Authority, would constitute an infringement of such rights – or that there was at the very least a 'reasonable apprehension' of such infringement, which finding would thus also establish the second and third requirements for the granting of a final interdict.

[16] The legal representatives of the parties were thus agreed that the outcome of this case would turn on the question of whether or not the applicants' have established a clear right to the relief sought.

[17] Mr Khama, who appeared on behalf of the applicants, submitted that the applicants have indeed made out such case.

[18] More particularly he submitted that the respondents cannot interfere with the rights and powers of the applicants while the statutory designated leader is still in place and that the first respondent thus cannot be inaugurated as chief of a traditional community which recognises the first applicant as chief in a community that recognises the second applicant as its traditional authority in the community that is inhabiting the common communal area known as Berseba. He relied in this regard, in the main, on the provisions of sections 4,5,6,7 and 8 of the Traditional Authorities Act 2000.

[19] Mrs Schulz, on the other hand, submitted, on behalf of the first respondent, that it was clear from the outset that there is a division between two clans within the traditional community inhabiting the Berseba area and that several attempts had been made in the past to obtain the recognition of the first respondent as a

traditional chief and his followers as a traditional authority in their own right. The first respondent wishes to replace his predecessor, Chief Karools, as he has been elected by a part of the traditional community to do so and his inauguration was thereafter planned. The common practice in traditional communities is that if a royal bloodline exists a chief shall be replaced by a son or any other relative and that such relative shall be the next Chief of the traditional community. The first respondent is already known as the chief to his traditional community. Therefore the first respondent and his community should be legally recognized. She argued further that the Government should therefore be objective in its approach because the dispute concerns two clans who both applied for recognition as a traditional authority in their own right with a chief and a council. She thus submitted that the first respondent had made out a case that the rule nisi should not be made a final and that the court should 'recognize the first respondent as a traditional Chief to be inaugurated as such in his traditional community together with first applicant.

[20] Given the parameters of these issues it does not take much to fathom that the determination of this dispute hinges on the provisions of the Traditional Authorities Act 2000 and the scheme created by it. So much must have been clear also to the parties.

[21] Why of course the fairly obvious provisions of section 3(4) of the act were ignored or overlooked remains inexplicable. That section decrees:

(4) Where a traditional authority referred to in section 2(1) has been established for a traditional community, and a group of members of that traditional community establishes in conflict with the provisions of this Act another authority purporting to be a traditional authority for such group, and any member of such last-mentioned authority exercises or performs any of the functions contemplated in paragraphs (b) and (h) of subsection (1) and paragraphs (a) and (b) of subsection (3) of this section-

(a) any such act shall be null and void; and

(b) such member shall be guilty of an offence, and upon conviction be liable to a fine of N\$4 000 or to imprisonment for a period of twelve months or to both such fine and imprisonment.

[22] If one then considers the underlying common cause factual position against the backdrop of this section: ie

- a) were a traditional chief³ - here the first applicant – was already designated in accordance with section 4(1)(a) and recognised as such under section 6.as the supreme traditional leader of the/Hai-/Khaua traditional community; and
- b) were a traditional authority⁴ – here the second applicant – has already been established for the/Hai-/Khaua traditional community in terms of section 2 of the Traditional Authorities Act 2000; and
- c) were the first respondent and his followers are part of that traditional community⁵ inhabiting the Berseba area and therefore fall under the jurisdiction and authority of the applicants; and
- d) were the first respondent's followers – being a group of members of the/Hai-/Khaua traditional community – are attempting – through the first respondent's inauguration as chief - to establish another authority purporting to be a traditional authority for such group under the first respondents chieftainship -

it must be inferred also that - once the intended further traditional authority would have been established by the first respondent and his followers – that they would obviously also intend to exercise the functions contemplated in paragraphs (b) and (h) of subsection (1) and paragraphs (a) and (b) of subsection (3) of section 3 of the Traditional Authorities Act.

³ As defined in section 1 of the Traditional Authorities Act 25 of 2000

⁴ As defined in section 1 of the Traditional Authorities Act 25 of 2000

⁵ As defined in section 1 of the Traditional Authorities Act 25 of 2000

[23] Any such acts would however be null and void⁶ and would attract criminal sanctions⁷.

[24] What is more is that it is without doubt that the provisions of section 3(4) imply that the legislature intended only one traditional authority⁸ – comprised of a chief or head of that traditional community⁹ - designated and recognized in accordance with the Act - and senior traditional councilors and traditional councilors - appointed or elected in accordance with the Act¹⁰ - for a traditional community¹¹ – which traditional authority¹² will then also be the entity that is expressly authorized by statute to exercise the powers and duties set out in Sections 3 and 7 of the Act - as otherwise the legislature would not have visited the listed acts¹³ of a dissident group within a traditional community and within the area of jurisdiction of an established traditional authority with invalidity and criminal liability.

[25] This conclusion is reinforced by the terminology utilized in the Act. The terms ‘chief’ or ‘traditional leader’ - (defined to mean the ‘supreme traditional leader’) - do not imply ‘co-chiefs’ or ‘co-traditional leaders’- and in any event and by that same token – the term ‘authority’ does not imply more than one authority in the absence of a clear expression to the contrary. Any other interpretation would also not give effect to the word ‘supreme’, as used in the definition of the term ‘chief’, which term has been defined to mean ‘highest in authority, rank or degree’.¹⁴ If the legislature would have contemplated a traditional authority scheme with more than one chief and more than one traditional authority within a particular traditional community it would have been an easy matter to have expressed this. This the legislature did however not elect to do.

⁶ Section 3(4)(a)

⁷ Section 3(4)(b)

⁸ As defined

⁹ Section 2 (1)(a)

¹⁰ Section 2 (1)(b)

¹¹ As defined

¹² As defined

¹³ contemplated in paragraphs (b) and (h) of subsection (1) and paragraphs (a) and (b) of subsection (3) of section 3 of the Traditional Authorities Act

¹⁴ See for instance : Oxford Advanced Dictionary 4th Ed at p 1293

[26] It follows that the applicants were able to establish clear rights in terms of the above listed sections of the Traditional Authorities Act 2000.

[27] In the premises it must also be concluded that the first respondent's complained of conduct has established that the applicants correctly harboured a reasonable apprehension that the first respondent and his followers were about to infringe the rights conferred on the applicants by the Traditional Authorities Act 2000.

[28] In the absence of any other satisfactory remedy the applicants have shown their entitlement to the confirmation of the rule. The rule nisi granted on 20 April 2012, as extended, is accordingly confirmed to the following extent :

(a) The first respondent is hereby interdicted and restrained from being inaugurated or designated as chief of one purported Goliath Traditional Authority in contravention of the Traditional Authorities Act, Act 25 of 2000, as amended (hereinafter as the Traditional Authorities Act);

(b) The first respondent is hereby interdicted from participating in any event purporting to inaugurate or designate him as a chief of one purported Goliath Traditional Authority in Berseba in contravention of the Traditional Authorities Act;

(c) The first respondent is hereby interdicted and restrained from instigating and spearheading the inauguration or designation of himself or any other person as chief of one purported Goliath Traditional Authority in Berseba in contravention of the Traditional Authorities Act;

(d) The members of the purported Goliath Traditional Authority in Berseba who seek the inauguration and designation of the first respondent are hereby interdicted and restrained from participating in any conduct purporting to inaugurate or designate the first respondent or any other person as chief of the purported Goliath Traditional Authority in Berseba in contravention of the Traditional Authorities Act;

(e) The conduct of the first respondent, or any other person, that is aimed at inaugurating or designating the first respondent or any other person as chief of one purported Goliath Traditional Authority in Berseba in contravention of the Traditional Authorities Act, is hereby declared illegal and null and void.

(f) The first respondent is to pay the costs of this application.

H GEIER
Judge

APPEARANCES

APPLICANTS:

D KHAMA

Instructed by Government Attorney,
Windhoek.

RESPONDENTS:

F SCHULZ

PD Theron & Associates,
Windhoek