Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

CASE NO.: CIV APP MG 17/23

TRIBAL COURT CASE NO: TC28/2022

In the matter between

ANGELINAH MATHULOE **APPELLANT**

and

NANIKI RASOGO **RESPONDENT**

CIVIL APPEAL

CORAM: HENDRICKS JP AND PETERSEN J

DATE OF HEARING : 23 FEBRUARY 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time for hand-down is deemed to be 14H00 pm on 04 March 2024.

ORDER

(i) The appeal is upheld.

(ii) The order of the Tribal Appeal Court is set aside and replaced with the following order:

"The appeal against the order of the Tribal Court is upheld with costs and replaced with the following order:

The application is dismissed with no order as to costs, which includes the costs in the Tribal Court."

(iii) There is no order as to costs in the appeal.

JUDGMENT

PETERSEN J

Introduction

[1] This is an appeal against an order of the Tlhabane Magistrates Court (sitting as a Tribal Appeal Court). The Tribal Appeal Court dismissed with costs an appeal by the appellant against a decision of the Tribal Court of the Royal Bafokeng Nation ('the Tribal Court') on 02 June 2023. The appellant seeks an order upholding the appeal against the order of the Tribal Appeal Court with costs, which by implication implies replacing that order with an order that the Tribal Court should have given.

Background

[2] A brief exposition of the factual dispute between the appellant and the respondent should suffice. During 1999 the appellant and her children were displaced from their home when divorce proceedings were pending between herself and her erstwhile husband. The divorce was only finalized in 2006. There is a factual dispute whether it was the appellant or the respondent who, because of the displacement, directed a request to the Tribal Council or Kgotla to allocate a stand on tribal land, to her and her children. This factual dispute, as will become evident later, need not detain the Court. A piece of land was identified, and the appellant was

informed that she would be allowed to occupy the land for a period of six months whilst the Kgotla looked for a permanent site for her. The determination of a period of six months is not clear from the evidence and similarly need not detain the Court. In any event, any conjecture and speculation in that regard would not suffice, save to say that six months passed, and the appellant continued to occupy the property unabated for 21 years until 2018.

[3] The year 2018 marks the genesis of the dispute between the appellant and the respondent. In 2018, the appellant decided to register the property as her own following an approach to the Kgosana of the tribal community, Kgosana Setuke. He was Kgosana at the time and responsible for granting permission to the appellant to occupy the property in 1999. The respondent learnt of this development and queried the registration of the property in the name of the appellant. The complaint of the respondent was that the site or property belonged to her cousin's children. The respondent consequently referred the dispute to the Tribal Court. A reference to the judgments of the Tribal Court and the Tribal Appeal Court relevant to the issues on appeal identified *supra*, should suffice for purposes of this appeal.

The grounds of appeal

[4] Without derogating from the plethora of grounds of appeal, there are essentially two salient issues before this Court. First, whether a Tribal Court and Tribal Appeal Court are vested with civil jurisdiction to deal with applications for eviction ('the jurisdiction

issue'). Second, whether the respondent (applicant in the Tribal Court), was clothed with the necessary *locus standi in iudicio* to bring the application before the Tribal Court ('the *locus standi* issue').

[5] The jurisdiction issue implicates jurisdiction arising from the application of customary law and whether such jurisdiction is conferred on a Tribal Court and Tribal Appeal Court by the Bophuthatswana Traditional Courts Act 29 of 1979. This must be juxtaposed against the Constitution of the Republic of South Africa and the law of general application found in the Prevention of Illegal Occupiers of Land Act 19 of 1998 ('PIE').

[6] The *locus standi* issue implicates the legal standing of the respondent, if any, to institute legal proceedings from a customary law perspective, juxtaposed against the principles applicable to legal standing in general.

The judgments of the Tribal Court and the Tribal Appeal Court

The Tribal Court

[7] The judgment of the Tribal Court of 29 August 2022, is very brief and is therefore quoted *in toto* to provide context to the relief sought in this appeal. To appreciate the judgment of the Tribal Court, the appellant in that court was the respondent, and the respondent was the applicant. The judgment of the Tribal Court (per Mr TL Rampe) reads as follows:

"**INTRODUCTION**

1. The applicant seeks an order:
   Instructing the respondent to vacate the site that does not belong to her.

BACKGROUND

2. Parties are co-villagers. The respondent was involved in a divorce and needed a place to stay. The applicant and kgotla agreed she stay on site in dispute for a limited period whilst still seeking her own residence.

THE APPLICANT'S CASE

3. The applicant is a cousin to the owner of the site. The respondent presently resides there. The applicant approached court to order the respondent to vacate and the children of the cousin to be allowed on the site.

RESPONDENTS CASE

4. She contests the site is hers. She has even gone further to award it to her child.

ANALYSIS

5. The site in question belonged to the applicant's cousin. The respondent was allowed to stay on site temporarily whilst a temporary site was still sought after the respondent's divorce.

ISSUES

The only issue to be decided on is.....

6. Whether the respondent has a right to be on site and decare it as hers.

JUDGEMENT

7. Judgement granted in favour of the applicant.
8. The respondent has no right over the property in question.

9. **Consequently, I make the following order**:

- The the respondent to vacate the site in question forthwith. The applicant's *locus standi* in respect of the site asserted by her relationship with the owner of the site who is her cousin.
- She thus has the right to institute action on behalf of her nieces and she also was involved in the arrangement to allocate the site to the respondent temporarily, pending she acquiring her permanent site.

REASONS FOR JUDGEMENT

The applicant has *locus standi* in respect of the site as a cousin to the owner. The special plea thus fails. The respondent could not prove ownership of the site even her witness. The nieces presently reside at the applicant and need to have their own home."

The Tribal Appeal Court

[8] The relevant portion of the judgment of the Tribal Appeal Court reads as follows:

"As regards the appellant's grounds of appeal, the appellant raised the issue of the Respondent's *locus standi*. In the matter of **Bagatla-Ba-Kgafela Property Assocation v Pilane and Others (M450/2021) [2023] ZANWHC 62** at paragraph 26 its is stated that:

"Locus standi is a Latin phrase that means a place to stand. The terms refers to:

(i) a party's right to be heard by the court on a particular issie;

(ii) a party has either a direct connection with a case before the courts;

(iii) a reasonable connection with the case or is legal entitled to be heard."

In casu the Respondent testified that she is the one who called the Kgotla and her cousin's children in order to accommodate the appellant temporarily she had the *locus standi* to approach the Tribal Court when the appellant reneged on their agreement.

Turning on the appellant's second ground of appeal the court *a quo* clearly took all the evidence into consideration and the appellant herself did not dispute the authenticity of Exhibit "A" so the court *a quo* did not err in its decision.

...

We did not find anything in the proceedings before the court *a quo* where it can said that it had not exercised its discretion in a judicial manner or had acted capriciously. In fact the court *a quo* applied its mind to the facts before it at the time.

ORDER

Accordingly the appellant's appeal is dismissed.

COSTS

It is trite that costs ought to follow the successful party, accordingly costs are awarded in favour of the Respondent excluding costs for the 05th May 2023 as there was no appearance for the Respondent on the day."

Approach to jurisdiction issue, raised on appeal for the first time

[9] The jurisdiction issue was not raised in the courts below but raised for the first time in this appeal. *Adv Malatji* for the appellant makes

the submission that the Tribal Appeal Court and by implication the Tribal Court is not enjoined with civil jurisdiction in respect of eviction matters. The nub of the submission is that the Bophuthatswana Traditional Courts Act 29 of 1979 does not confer jurisdiction on tribal courts to order evictions from land. The jurisdiction to consider eviction matters is presently limited by PIE to the High Court or Magistrates Court, to the exclusion of the Tribal Courts.

[10] *Mr Tau* for the respondent has seemingly misconstrued the jurisdiction issue predicated on Subrule 50(1) and (3) of the Magistrates Court Rules which provides for the transfer of appeals and actions of the Tribal Court to the Magistrates Court. Section 9 of the Bophuthatswana Traditional Courts Act 29 of 1979 ('the Act'), which Act remains extant until the Traditional Courts Bill, which has been approved by Parliament is assented to by the President, aside from the Magistrates Court Rules, provides for appeals from tribal courts by a special court. That court, being a Magistrates Court, shall consist of the magistrate of such district as well as two additional members, and has the jurisdiction to hear any appeal against a decision or judgment of a tribal court situated in such district.

[11] The issue raised by the appellant in this Court is not related to the procedural aspect of jurisdiction of the Tribal Courts' as aforesaid but impacts an issue of substance predicated on a legal question. It is this issue on a question of law that has been raised for the first time in this appeal which engages this Court.

[12] The approach adumbrated in *Moipone Moroka v Premier of the Free State Province and Others* (295/2020) [2022] ZASCA 34 (31 March 2022) is apposite on the jurisdiction issue. The SCA stated as follows:

> "[3] There are two preliminary issues that I need to deal with before dealing with the merits of this matter. These are: (a) whether the appeal has become moot, and (b) whether this court can entertain an issue that is raised for the first time on appeal.
>
> ...
>
> [8] **Regarding the argument raised for the first time on appeal, the most common situation when an appeal court may consider an argument raised for the first time on appeal is where the argument involves a question of law. Such argument must be apparent from the record, which could not have been avoided if raised at the proper juncture... The attack on the Commission's authority is a point of law and this court can deal with it. Furthermore, this court's consideration of the new point of law will not occasion unfairness to the parties. Thus, the interests of justice do not militate against the consideration of the new argument raised by the appellant for the first time on appeal**. I now turn to deal with the merits of the appeal.
>
> (emphasis added)

[13] The jurisdiction issue in this appeal, is a question of law, which impacts the Tribal Courts and the Tribal Appeal Court. It involves the right to housing as recognised as a basic right in the Constitution and the Republic of South Africa, which determines how that right can be limited by law of general application in terms of section 36 of the Constitution. As in *Moipone Moroka supra*, the consideration of this new point of law on appeal will not occasion unfairness to the parties. Instead, it will place the issue of evictions

brought in the Tribal Court in perspective when viewed through the prism of the Constitution of the Republic of South Africa, and law of general application applicable to evictions in PIE.

Discussion

The jurisdiction issue

[14] The Bophuthatswana Traditional Courts Act 29 of 1979 ('the Act') remains in force until the enactment of the Traditional Court Bill which has been approved by Parliament is assented to and put into operation by promulgation in the Government Gazette by the President of the Republic of South Africa. The Act provides for the conferment and assignment of jurisdiction to tribal and community authorities regrading the Administration of justice. The Act defines a "civil claim" as a legal process between parties whereby the enforcement of a right is ought and "civil case" and "civil causes" have a corresponding meaning.

[15] Section 3 of the Act deals with conferment of jurisdiction. Whilst it refers to the then President of the Republic of Bophuthatswana, same must be read to be a reference to the Premier of the North West Province by virtue of the transfer of such authority to the Premier. It provides as follows:

"Conferment of civil jurisdiction. – The President may -

(a) authorise any tribal authority to hear and determine civil claims arising out of tribal law;

(b) at the request of the tribal authority, authorize any subordinate body of the tribal authority concerned to hear and determine civil claims arising

out of tribal law;

(c) in the cause where authority is granted in terms of paragraph (b) and with due regard having had of the tribal law applicable in the tribe concerned restrict the jurisdiction of the said subordinate body as to the area, the persons involved and as to the causes of action and may prescribe such conditions subject to which such authority is granted as he may deem fit;

(d) at any time revoke the authority granted in terms of this section.

[16] As to the law to be applied in tribal courts, section 4 provides as follows:

"4. What law to be applied in tribal courts.-

In all proceedings involving questions of customs followed by persons in Bophuthatswana, the court shall decide such questions in accordance with the tribal law applying to such customs **except in so far as such law shall have been repealed or modified** or is contrary to public policy or opposed to the principles of natural justice."

[17] Section 5 of the Act determines the extent of civil jurisdiction of the tribal courts by providing as follows:

"5. Extent of civil jurisdiction. –

(1) Subject to any other jurisdiction assigned to a tribal court by this Act or by any other law, a tribal court shall have original and exclusive jurisdiction to hear and determine **all civil cases and matters** -

(a) arising between persons of its own tribe;

...

(2) A tribal court shall have no jurisdiction to hear and determine any civil action not arising out of and is foreign to tribal law and shall have no jurisdiction in matters –

(a) in which the validity or interpretation of a will or other testamentary documents is in question;

(b) in which the status of a person in respect of mental capacity is sought to be affected;

(c) in which is sought a decree of perpetual silence;

(d) in which a decree of nullity, divorce or separation in respect of a marriage is sought;

(e) to which the tribal authority or the chief or the headman, as the case may be, is a party."

[18] From the above, the civil jurisdiction of the tribal courts is clearly delineated. The blanket statement by *Adv Malatji* that the Act does not confer jurisdiction on the tribal courts to order evictions from land is not entirely correct. The Act must be placed in proper perspective to the Constitution of the Republic of South Africa and PIE. Clearly, the tribal courts would have been enjoined to consider **all civil actions** with exclusive jurisdiction accorded it in accordance with tribal law applicable to the customs of the relevant tribe or group, prior to the advent of our constitutional dispensation and PIE. The Act precludes only certain causes of action from the jurisdiction of the tribal courts.

[19] Ironically, the Act recognized in section 4, albeit that it was clearly not in anticipation of our present constitutional dispensation, that the law to be applied in tribal courts "In all proceedings involving questions of customs followed by persons in Bophuthatswana," should be decided in accordance with tribal law applying to such customs **except in so far as such law shall have been repealed or modified** or is

contrary to public policy or opposed to the principles of natural justice." It is this provision which provides the answer to the question whether the tribal courts have jurisdiction in matters involving property and evictions from such property. Consequently, there is no need for any order on the constitutionality of sections 3 and 5 of the Act, on the submission proffered by *Adv Malatji*. In any event, the appellant has not given notice to the Registrar that a constitutional issue would be raised in terms of Rule 16A of the Uniform Rules of Court.

[20] The importance of customary law in South Africa and the fact that it is like all law subject to the Constitution, was emphasized in *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) where Van Der Westhuizen J writing for the Court said, in the context of determining customary law, that:

"Determining customary law

[42] The status of customary law in South Africa is constitutionally entrenched. Section 211 of the Constitution provides that the institution, status and role of traditional leadership are recognised subject to the Constitution. **It further states that a traditional authority that observes a system of customary law may function subject to applicable legislation and customs, including amendments to or repeal of that legislation and those customs, and that courts must apply customary law where it is applicable, subject to the Constitution and relevant legislation**.

[43] The import of this section, in the words of Langa DCJ in Bhe, is that customary law 'is protected by and subject to the Constitution in its own right'. **Customary law, like any other law, must accord with the Constitution**. Like any other law, customary law has a status that requires

respect. As this court held in Alexkor v Richtersveld Community, customary law must be recognised as 'an integral part of our law' and 'an independent source of norms within the legal system'. It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly."

[21] On **5 June 1998**, five years into our nascent democracy, PIE was signed into law. The purpose of PIE was identified in PIE to "provide for the prohibition of unlawful eviction; to provide for procedures for the eviction of unlawful occupiers; and to repeal the Prevention of Illegal Squatting Act, 1951, and other obsolete laws; and to provide for matters incidental thereto." The Preamble of PIE is instructive in so far as it provides that "**no one may be deprived of property except in terms of law of general application**, and no law may permit arbitrary deprivation of property;

AND "it is desirable that the law should regulate the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances;..."

[22] Since PIE is relevant to this matter, it envisages that "**no one may be deprived of property except in terms of law of general application**." The law of general application applicable to this matter is PIE and no other law, including the Act. In terms of PIE, the only courts vested with jurisdiction to consider applications for an eviction order are any division of the High Court or the Magistrate's court in whose area of jurisdiction the land in question is situated.

[23] More telling is that section 2 of PIE provides that it applies in respect of all land throughout the Republic. Section 11(3) of PIE further provides that any law in force in parts of the Republic which formerly constituted, *inter alia*, the national territory of the

erstwhile Bophuthatswana, is repealed to the extent that such law is inconsistent with or deals with any matter dealt with by this Act. **On section 11(3) of PIE alone the jurisdiction of the tribal courts has been ousted since 5 June 1998**.

[24] The jurisdiction issue, as a ground of appeal accordingly stands to be upheld and that should mark the end of the appeal. However, the issue of *locus standi in iudicio* was raised in this appeal and merits brief consideration.

The locus standi in iudicio issue

[25] In *Jacobs en 'n Ander v Waks en Andere* 1992 (1) SA 521 (A) at 534D-E, Botha JA, said the following in respect of the issue of determining *locus standi* (loosely translated from Afrikaans):

> "In the circumstances of the present matter the requirement that there must be a direct interest is at the forefront. As far as that is concerned, the adjudication of the question if the interest of a litigant in a dispute qualify as direct interest, or if it is too remote, is always dependent on the peculiar facts of every matter, and no fixed or general applicable rules can be determined to answer the question (see *Dalrymple and Others v Colonial Treasurer* 1910 TS 372 *per* Wessels J on 390 *in fine*, and cf *Director of Education, Transvaal v McCagie and Others* 1918 AD 616 *per* Juta AJA on 627). Previous decisions can provide helpful guidelines for specific cases, but mostly it will serve no purpose to compare the specific facts of one case with another."

[26] In *Firm-O-Seal CC v Prinsloo & Van Eeden Inc and Another* (483/22) [2023] ZASCA 107 (27 June 2023), Ponnan JA and

Kathree-Setiloane AJA (Meyer JA concurring) stated as follows in an appeal premised on a special plea of lack of *locus standi* to institute legal proceedings (the cases referenced as footnotes have been included in the body of the quotation):

"[6] *Locus standi in iudicio* **is an access mechanism controlled by the court itself.** (*Watt v Sea Plant Products Bpk* [1998] 4 All SA 109 (C) at 113H.) Generally, the requirements for *locus standi* are these: the plaintiff must have an adequate interest in the subject matter of the litigation, usually described as a direct interest in the relief sought; the interest must not be too remote; the interest must be actual, not abstract or academic; and, it must be a current interest and not a hypothetical one. (*Four Wheel Drive CC v Leshni Rattan NO* [2018] ZASCA 124 para 7.) Standing is thus not just a procedural question, it is also a question of substance, concerning as it does the sufficiency of a litigant's interest in the proceedings. (*Wessels en Andere v Sinodale Kerkkantoor Kommissie van die Nederduitse Gereformeerde Kerk, OVS* 1978 (3) SA 716 (A) at 725H; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 11 (A) at 388B-E.) **The sufficiency of the interest depends on the particular facts in any given situation**.(*Jacobs en 'n Ander v Waks en Andere* [1991] ZASCA 152; 1992 (1) SA 521 (A) at 534D); *Gross and Others v Pentz* 1996 (4) SA 617 (A) 632 B-D.) **The real enquiry being whether the events constitute a wrong as against the litigant**.(*Muller v De Wet NO & Others* 2001(2) SA 489 (W)."

[27] As with the jurisdiction issue, locus standi *in iudicio* is an access mechanism controlled by the court. At a substantive level and not merely procedural, it concerns the litigant's interest in the proceedings. The sufficiency of that interest depends on the peculiar facts of the matter. As *Firm-O-Seal CC* makes it clear, the real enquiry must be whether the events constitute a wrong as

against the litigant. In the present appeal, that is the deciding factor.

[28] There is a factual dispute between the appellant and respondent as to who called for the Kgotla to consider allocating a site to the appellant. Each of the parties maintains that the other called for the Kgotla. That factual dispute need not engage the Court as stated *supra*. From a purely legal perspective, having regard to the authorities *supra*, the events, that is the allocation of the disputed property or site by the Kgotla to the appellant, is a matter which affects the Kgotla. The fact that the respondent brought the application before the Tribal Court on a contention that the site belonged to her cousin and should be given to her cousin's children, militates against the real enquiry postulated in Firm-O-Seal. On the real enquiry test, the events leading to the appellant taking steps to register the property in her name, does not constitute a wrong against the respondent.

[29] The interest of the respondent in the litigation is neither direct nor adequate but remote. The respondent in taking up the cudgels on behalf of her cousin's children as a purported good deed, does not vest the respondent with *locus standi in iudicio*.

[30] The lack of *locus standi* of the respondent, as the second main ground of appeal, also stands to be upheld.

Conclusion

[31] The appeal succeeds on the issue of jurisdiction and *locus standi* and is upheld in respect of the order of the Tribal Appeal Court and by implication the Tribal Court. The order of the Tribal Appeal Court accordingly stands to be set aside and replaced with an appropriate order.

Costs

[32] The approach to costs which has evolved in our law was confirmed very early in our new legal dispensation by the Constitutional Court, in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC) at paragraph 3 (footnotes omitted), as follows:

> "*The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer, and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation....*"

(emphasis added)

[33] There are three facets to the consideration of costs, before this Court. The first and second facets involve the costs awarded by the Tribal Court and Tribal Appeal Court. In the ordinary course of an appeal, the appellant being successful and since the orders of those Courts are subject to being overturned, the appellant would be entitled to costs. The issue of jurisdiction is ordinarily the only issue which can be raised *mero motu* by a lower court, including a Tribal Court. The jurisdiction point was not taken in the Tribal Court nor raised *mero motu* by the presiding officer. It was also not raised in the Tribal Appeal Court. An important consideration on costs in this Court, is that the jurisdiction issue was raised for the first time by the appellant in this Court. The appeal has succeeded, *inter alia*, on this issue which should be a very important consideration on the costs order.

[34] The appeal also having succeeded on absence of *locus standi in iudicio* of the respondent, in circumstances where the Tribal Court was the gatekeeper on this issue, is a further important consideration on the costs order.

[35] As a reminder, by operation of the law, section 11(3) of PIE ousted the jurisdiction of the Tribal Court as the court of first instance as far back as 5 June 1998. The Tribal Court therefore had no jurisdiction to entertain the application and should have transferred the matter to the Magistrates Court having jurisdiction or removed the application from the roll, with no order as to costs, which would

have been a fair order. That would have put paid to the issue of *locus standi*.

[36] It follows axiomatically that the Tribal Appeal Court, by virtue of the Tribal Court having no jurisdiction to entertain the application, had no jurisdiction to entertain the appeal from the Tribal Court. It stands to reason that the costs order of the Tribal Appeal Court should similarly be an award of no order as to costs.

[37] What remains are the costs in this Court. A fair order would similarly be no order as to costs for the same reasons stated *supra*. The pivotal consideration being that the jurisdiction issue was raised in this Court for the first time.

Order

[38] In the result, the following order is made:

(i) The appeal is upheld.

(ii) The order of the Tribal Appeal Court is set aside and replaced with the following order:

"The appeal against the order of the Tribal Court is upheld with costs and replaced with the following order:

The application is dismissed with no order as to costs, which includes the costs in the Tribal Court."

(iii) There is no order as to costs in the appeal.

A H PETERSEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree.

R D HENDRICKS
JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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