

IN THE HIGH COURT OF SOUTH AFRICA
NORTH GAUTENG HIGH COURT

Case no. 31876/10

DEFENDANT'S LIST IS NOT / IS

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

2010/07/29

DATE

In the matter between:

THE TRADITIONAL AUTHORITY OF THE
BAPO BA MOGALE COMMUNITY

Applicant

and

MAKEPE JEREMIAH KENOSHI

First Respondent

THE PREMIER OF THE NORTH WEST
PROVINCIAL GOVERNMENT

Second Respondent

JUDGMENT

Judgment Reserved on: 07/07/2010

LEGODI J,

INTRODUCTION

1. On the 2 June 2010 the applicant, the Traditional Authority of the Bapo Ba Mogale Community, obtained an interim order as in paragraph 3 of the order in terms of which, the first

respondent pending the return date and finalization of the matter was:

- “3.1 Interdicted and restrained from in anyway carrying out any functions and/or duties as chief executive officer of the Applicant, and/or in any other capacity representing and/or purporting to represent the Applicant and/or the Bapo Ba Mogale Community in any dealings and/or relationships with any natural and /or juristic person.*
- 3.2 Directed and or ordered to vacate and not return, save as is necessary for compliance with paragraph 6 hereunder, to any premises occupied by him and/or any other employee of the Applicant for the purpose of carrying out any business and/or function for and/or on behalf of and/or on behalf of and/or purporting to be for and/or behalf (sic) of the Applicant and/or the Bapo Ba Mogale Community.*
- 3.3 Interdicted and restrained from having any direct and/or indirect contact whatsoever with any employee of the Applicant for any purpose directly and/or indirectly related to and/or connected with and/or concerning any aspect of the business and/or function of the applicant and/or the Bapo Ba Mogale Community.*
- 3.4 Interdicted and restrained from having any direct and/or indirect contact whatsoever with the Chief of the Bapo Ba Mogale Community and/or any member of the Royal Family of the Bapo Ba Mogale Community.*
- 3.5 Interdicted and restricted from having contact with and/or advising any member of the Community and/or any other natural person in regard to any aspect of the Bapo Ba Mogale Community's affairs and/or business relationships and/or power structures and/or any other matter directly and./or indirectly related to the Community.*
- 3.6 Directed and ordered not to use for his own purposes and/or for the purposes of any other natural or juristic person, nor to disclose to any other natural or juristic person, any information which he may have which*

is directly and/or indirectly related to and/or concerns the business and/or affairs of the applicant and/or the Bapo Ba Mogale Community.

3.7 Immediately upon service of this order on him by the Sheriff, to hand to the Sheriff the items listed at paragraphs 3.7 to 3.7.4 below:

3.7.1 All books, records and documents in his possession directly or indirectly dealing with, and/or related to, and/or connected with the discharge by him of his duties as chief executive officer of the Authority from 1 November 2009 to the time when he hands the said books, records and documents to the sheriff,

3.7.2 All electronic media in his possession on which is contained any and all information directly or indirectly dealing with, and/or related to and/or connected with the discharge by him of his duties as chief executive officer of the Authority from 1 November 2009 to the time when he hands the said electronic media to the Sheriff,

3.7.3 His laptop computer which is the property of the Authority and/or any other computer, together with the passwords and/or any other access codes, to enable the Authority and/or anyone designated by it to have full and unfettered access to the entire contents of the said laptop computer and/or other computer and the electronic media contained thereto.

3.7.4 All other property of the Community and/or the Authority in his possession, including the laptop computers of the project manager and community liaison officer.

3.8 Should any of the books and/or records and/or documents and/or computers and/or electronic media and/or property not in the First Respondent's possession at the time when this order is served on him by

the Sheriff, the First Respondent shall in writing give full details to the Sheriff of the address at which any one or more or all of the said books and/or records and documents and/or computers and/or electronic media and/or property are situate(sic)

3.9 Within 24 hours of the service on him of this order by the sheriff, the First Respondent shall deliver to the sheriff at the Sheriff's premises all of the books and/or records and documents and/or computers and/or electronic media and/or property referred to in paragraph 3.8 above.

3.10 Within two business days from the date and time of service on him of this order, the First Respondent shall make telephonic contact with the Applicant's attorneys Mr H. Eiser at 011 483 1540 or 083 432 7300, in order to make an appointment with Mr Eiser for a meeting to take place at 1 North Avenue, Riviera, Johannesburg, commencing no later than 16:00 on Monday, 7 June 2010.

3.11 At the meeting referred to in paragraph 3.10 above, he is to give a full account to Mr Eiser, and any person/s who will accompany Mr Eiser, of all his dealings with any natural or juristic person for and/or on behalf of and/or purporting to be for and/or on behalf of the Applicant and/or the Community, including the full details of the said dealings and the names and contact details of all of the natural persons with whom he had the said contact, from 1 November 2009 to the date upon which the said disclosures are made.

3.12 At the meeting referred to in paragraph 3.10 above, he is to hand to the applicant's attorney Mr H. Eiser all access devices and keys which enable ingress to and egress from the premise occupied and/or used by or on behalf of the Applicant and/or the Bapo Ba Mogale Community and/or any member of its staff.

4. The sheriff is ordered, on receipt of the items listed at paragraphs 3.7.1 to 3.7.4, 3.8 and 3.9 above, to immediately deliver these items to the Applicant's attorneys of record, Sanet De Lange Inc. who, in turn, will immediately deliver them to the Applicant's attorney, Mr H Eiser, for inspection."

2. A rule nisi was also issued returnable on 10 August 2010 in terms of which the first respondent was called upon to show cause as to why the orders set out in paragraphs 3 and 4 should not be made final, pending the expiry of the time period stipulated in the Labour Relations Act for the first respondent to refer his dismissal to the CCMA until the final outcome thereof.
3. Paragraphs 3 and 4 referred to in paragraph 2 above, are set out in paragraph 1 of this judgment.
4. On the 17 June 2010, Botha J, extended the rule nisi to the urgent motion roll of the 6th July 2010 and further ordered as follows:

"2. Pending finalization of this application the First Respondent undertakes:

- 2.1.1 To preserve all of the assets ultimately belonging to the Bapo ba Mogale Community presently in his possession or under his control.*
- 2.1.2 To preserve all of the documentation [inclusive of documents stored on a computer[s] under his control] relative to the affairs of the Bapo Ba Mogale Community.*
- 2.2 To refrain from entering into any agreement on behalf of the Bapo Ba Mogale Community or any body or person purporting to represent such Community.*
- 2.3 To refrain from making any payment on behalf of the Bapo Ba Mogale Community or any body purporting to represent such Community.*

2.4 *[Without delegation from the generality of 1.4 above] to refrain from payment i.r.o the acquisition of shares by the Bapo Ba Mogale Community through Mirroball [PTY] Ltd in Lonmin [Pty]Ltd.*

2.5 *To honour the letter & spirit of the order of 2 June 2010.*

3. *The Applicant is likewise ordered pending such adjudication for.*

4. *Refrain from executing the order of 2 June 2010.*

5. *More specifically, refrain from attempting to acquire any assets or document detailed in the order of 2 June 2010 from the First Respondent."*

5. The matter came before me on the urgent motion court on the 6 July 2010 as per the order of Botha J, on the 17 June 2010.

6. On the 6 July 2010, the matter was stood down until the 7 July 2010 when the matter was argued. As submissions could not be concluded on the 7 July 2010 due to some constraint of time in a very busy urgent motion court, further submissions were made on the afternoon of the 8th July 2010.

BACKGROUND

7. The second respondent, being the Premier of the North West Province, and seeking to act in terms of section 10(3) of the North West Traditional Leadership and Government Act no.2 of 2005, appointed an administrator to take charge of the affairs of the applicant for the period 12 December 2008 to 12 December 2009.

8. During or about October 2009, the Administrator aforesaid, and acting on behalf of the applicant, concluded an employment agreement with the first respondent in terms of which the first

respondent was appointed as the Chief Executive Officer for the applicant with effect from the 1 November 2009.

9. From the period January 2010, the first respondent is said to have sought to arrogate to himself powers he did not have. This is said to have resulted in breakdown of communication between the first respondent and the applicant's attorney. For example, the first respondent is said to have refused to take the attorney's calls and refused to respond to e-mail communications. The applicant's attorney has been involved in the applicant's affairs for about three and half years and is said to have been involved on many large commercial matters for the applicant or community.
10. On the 16 March 2010 the first respondent met with some community members including the deponent to the founding affidavit when he told them that he had been introduced to a property development in the Hartebeessport Dam area. The amount involved was said to be about R326 million. The first respondent then asked for authority from the applicant to sign the agreement. This was refused. Ultimately, it was agreed to look into the investment provided due diligence was conducted. This arrangement was later confirmed by the first respondent in an e-mail dated the 22 March 2010 as follows:
 - 10.1 that in a meeting held at Hartebeesportdam with the Traditional Council Elect, he (the first respondent) suggested that himself, Titus and Mapitso be given the task to do due diligence before Bapo could sign any commitment to purchase shares apparently in a company known as Henti 2784 (Proprietary) Limited.

10.1 that a final proposal from the seller was still awaited which court still be work shopped at a meeting to be held at a meeting to be held at Leopardpark Lodge on the 23 March with the Transitional Council Elect, for the parties to understand what the proposal requires.

10.2 that he in the meantime asked Titus to identify service providers who will conduct due diligence and request for their proposals, and that the proposal will be presented by the Estate Agent responsible for the sale to the entire Executive management and Traditional Council, who will invite questions for clarity”

- 11 When due diligence process was still pending, to the shock of the applicant, the deponent to the founding affidavit and other members of the applicant, a copy of the agreement signed by the first respondent on the 30 March 2010 was provided. The first respondent is alleged to have signed the agreement on the authorization by the applicant.
- 12 In terms of the agreement, the applicant was to pay more than R234 million by the 9 April 2010. I may mention that, the applicant's land is **underlain** by deposits of the platinum group metals, chrome and granite. The largest platinum producer in the world, Lonmin Plc is said to mining on the applicant's land. In excess of 10 years now, the applicant's community is said to be receiving considerable royalties.
- 13 Immediate steps were taken to inform the proposed seller that the first respondent was not authorized to conclude the agreement.

- 14 On the 14 May 2010, Chief Bop Edward Mogale, obtained an order on an urgent basis in the Mabatho High Court against the deponent to the founding affidavit in these proceedings and other 25 members of the applicant's community in the following terms:

"2. That a Rule Nisi do hereby issued, calling upon the Respondents to show cause, if any, on THURSDAY, the 10th June 2010 at 10h00 or so soon thereafter as the matter may be heard, why the following orders should not be made final:

2.1 Interdicting the First to Twenty Sixth Respondents from convening and/or attending a meeting of the Bapo Ba Mogale community under the auspices of the Bapo Ba Mogale Traditional Council on Saturday, the 15th May 2010 and at any date and time thereafter until the final determination of this matter;

2.2 The 1st Respondent be restrained from coming within a radius of 200 metres of the office of Bapo Ba Mogale Traditional Community offices, at Bapo 1 North West Province, without the written approval of Kgosi and accompanied by members of the South African Police Force;

2.3 The 1st Respondent be restrained from coming within a radius of 200 metres of the office of Bapo Ba Mogale Traditional Community offices, at No 101 Coleman Street Cosmos Property, Haartebeespoortdam, North West Province without the written approval of Kgosi and accompanied by members of the South African Police Force;

2.4 The 1st Respondent be ordered to direct any correspondence and forms that he may need to submit to the Chief Executive Officer of Bapo Ba Mogale traditional community situated at Skoonplaas Section, Bapong Village, Bapo 1, in the North West Province between the hours of 08h00 and 16h00 from Monday to Friday;

2.5 The 1st Respondent be restrained from intimidating, insulting and/or threatening the Applicant in any manner whatsoever;

2.6 Respondent be restrained from getting instructions to members of the Bapo Ba Mogale Traditional Community Staff, under the auspices of Bapo Ba Mogale Traditional Council.

3. That pending the final determination of the application, the relief in paragraphs 2.1 to 2.6 serve as interim interdict with immediate effect”.

15 The Chief of Bapo Ba Mogale tribe (the applicant in the North West High Court proceedings) is said not to possess mental capacity to discharge his functions as such and is said to have no control over cash assets, and business relationship of the applicant’s community. Such controls is said to vest in the applicant under the supervision of the second respondent. These sentiments were expressed in the judgment of Sithole AJ in another proceedings instituted in the North West High Court.

16 The contract that was concluded on the 30 March 2010 referred to earlier in this judgment, is said to be a product of manipulation of the Chief by people like the first respondent. The order granted in the North West High Court, is seen as an attempt by the first respondent and other people through the Chief to deal with the cash resources of the applicant which is said to exceed R300 million. For example:

16.1 that unauthorized agreements like the one concluded on the 30 March 2010 are facilitated,

16.2 that the applicant took a resolution that members of the applicant should attend a hearing in the Land Claims Court relating to the farm Wonderkop 400 JQ, a very valuable farm with a large platinum group metal deposits in, on, and under it. The first respondent is said

to have cancelled a transport to be used by the members to attend such a hearing,

16.3 that the first respondent without authority, hired premises for the applicant at Cosmos,

16.4 that the first respondent placed an advertisement for an engineer notwithstanding the fact that he had previously been warned by the MEC of the North West Province that he did not have the authority to do so, unless so authorized by the applicant,

17 Based on all of the above mentioned allegations against the first respondent, on the 20 April 2010 the applicant took a resolution to suspend the first respondent with immediate effect and summoned him to attend a disciplinary hearing on 5 May 2010. The charge sheet and the letter of suspension were delivered personally to the first respondent on the 21 April 2010.

18 Due to intervention of the MEC regarding the disciplinary process, a meeting was held on the 20 April 2010 which included other stakeholders, like the Chief and other people close to him. Attempts were made to persuade the applicant to rescind the disciplinary process, but he refused to do so. Instead, a meeting for this purpose was to be held not later than 7 May 2010. Such a meeting was not held due to no cooperation from the Chief and some of his supporters. As a consequence thereof, the applicant on the 11 May 2010 took a resolution to continue to with the disciplinary process against the first respondent. Additional charges were added to include:

18.1 that, in defiance of the decision to suspend the first respondent, he continued to perform duties and functions on behalf of the applicant as if he was not suspended,

18.1 that while under suspension, the first respondent in turn suspended the applicant's community liaison officer and project manager and then confiscated their work laptop computers and thus making it impossible for them to carry out their functions and duties,

18.2 that without the authority of the applicant, the first respondent entered into an agreement with Madisha and Associates, involving the tune of R4.5 million,

18.3 that without the applicant's authorization, the first respondent entered into an agreement with Basis Point Capital for the latter to raise finance for the community's development plan.

19. On the 13 May 2010, attempts were made to serve on the first respondent supplemented charge sheet and notice of disciplinary hearing for the 17 May 2010 at the applicant's Cosmos office. The first respondent is said to have refused to accept the documents, even after attempts were made to have the documents served by the South African Police official. Consequently, service was effected by leaving the documents in the post office box of the first respondent's residence. On the 17 May 2010, the disciplinary hearing was held in the absence of the first respondent. Evidence was adduced and the first respondent was found guilty on ten charges. The finding of the chairperson of the disciplinary proceedings was conveyed to the first respondent by e-mail. The first respondent was given an

opportunity to present mitigation. The first respondent neglected to do so and on the 24 May 2010, the chairperson of the disciplinary hearing recommended summary dismissal. At a meeting of the 26 May 2010, the applicant resolved to accept the recommendation to have the first respondent dismissed.

- 20 On the same day, 26 May 2010, the first respondent was accordingly informed by e-mail sent to him by the applicant's attorney. In the letter of the 26 May 2010, the first respondent was also told to return certain goods and items belonging to the applicant. When the first respondent did not heed to this demand, the present proceedings were instituted ex parte and interim relief as per the order of the 2 June 2010 referred to in paragraph 2 of this judgment was granted. The return date of the Rule Nisi was anticipated by the first respondent to the 15 June 2010.
- 21 On the 15 June 2010 based on the averments contained in the first respondent's answering affidavit and submissions made on his behalf in respect of locus standi of the applicant, the applicant requested for the stand down of the matter to afford the applicant the opportunity to reply to the answering affidavit of the second respondent. Eventually, the Rule Nisi together with further interim relief that was ordered on the 17 June 2010, as set out in paragraph 3 of this judgment was extended until the 6 July 2010.

ISSUES RAISED

22 In my view, the following issues have been raised by the nature of the submissions made with regard to the averments contained in the founding affidavit, answering affidavit and replying affidavit:

- 22.1 Whether the fact that the applicant in its founding affidavit did not pertinently deal with its authority is fatal to its case on locus standi?
- 22.2 Whether Bapo Ba Mogale Authority recognized in 1968 and constituted in 1978 had ceased to exist as on the date the present proceedings were instituted?
- 22.3 Whether the first respondent had authority and powers to run the affairs of the applicant as he sought to have done?
- 22.4 Whether the first respondent has averred facts necessary to avert confirmation of the interim orders?
- 22.5 Whether the interim orders or some part thereof, are capable of being implemented?

APPLICABLE LEGISLATION AND OTHER DOCUMENTS

23 I find the following legislations to have a bearing on some of the issues raised in paragraph 22 above:

- 23.1 The area of the Bapo Tribe and Bapo Ba Mogale Tribal Authority in the Rustenburg and Britz districts were defined and recognized by the President in terms of Government notice no. 1659 dated the 20 September 1968 which was

promulgated in terms of the provisions of the then Bantu Authorities Act 38 of 1927.

23.2 In terms of section 3(b) of the then Bophuthatswana Traditional Authority Act no 23 of 1978(hereinafter referred to as the 1978 Act), the Bapo Ba Mogale Tribal Authority (the applicant) was constituted by the President.

23.3 On the 11 December 2003, The National Traditional Leadership and Governance Framework Act no 41 of 2003 (hereinafter referred to as the 2003 Act) was assented to. This Act only came into operation on the 24 September 2004.

23.4 Section 3 of the 2003 Act, deals with establishment and recognition of Traditional Councils and it provides as follows:

“3. Establishment and recognition of traditional councils.-(1) *Once the Premier has recognized a traditional community, that traditional community must establish a traditional council in line with principles set out in provincial legislation.*

(2) (a) *A traditional council consists of the number of members determined by the Premier by formula published in the Provincial Gazette, after consultation with the provincial house, in accordance with the guidelines issued by the Minister in the Gazette.*

[Para. (a) substituted by s. 4 of Act No. 23 of 2009]

(b) *At least a third of the members of a traditional council must be women.*

(c) *The members of a traditional council must comprise-*

(i) *traditional leaders and members of the traditional community selected by the senior traditional leader concerned who is an ex officio member and chairperson of the traditional council, for a term*

of five years aligned with the term of office of the National House of Traditional Leaders, in terms of that community's customs, taking into account the need for overall compliance with paragraph (b); and

- (ii) *other members of the traditional community who are democratically elected for a term of five years aligned with the term of office of the National House of Traditional Leaders and who must constitute 40% of the members of the traditional council.*

[Para. (c) substituted by s. 4 of Act No. 23 of 2009]

- (d) *Where it has been proved that an insufficient number of women are available to participate in a traditional council, the Premier concerned may, in accordance with a procedure provided for in provincial legislation, determine a lower threshold for the particular traditional council than that required by paragraph (b).*

- (3) *The Premier concerned must, by notice in the Provincial Gazette and in accordance with the relevant provincial legislation, recognize a traditional council for the traditional community within a defined area of jurisdiction."*

24 On the 18 July 2005, North West Traditional Leadership and Governance Act 2 of 2005 (hereinafter referred to as the 2005 Act) was assented to. The 2005 Act commenced on the 20 March 2007.

25 Section 43 of the 2005 Act deal with transitional arrangements and it provides as follows:

"43. Transitional arrangements.-(1) *All tribal authorities established in terms of Act No. 23 of 1978 shall continue until such time that it is substituted by the newly reconstituted traditional councils contemplated in section 6*

(2)(a) Any notice defining an area of residence of a recognized traditional community which was issued under a law repealed in terms of

section 36 shall be deemed to have been issued in terms of this Act; and

- (b) the Premier may redefine an area contemplated in paragraph (a).
- (3)(a) The Premier must by notice in the Provincial Gazette, within one year of the commencement of this Act disestablish Regional Authorities, Community Authorities, and tribal authorities that have been established in terms of applicable legislation before the commencement of this Act.
- (b) A notice disestablishing Regional Authorities, Community Authorities, and tribal authorities must regulate the legal, practical and other consequences of the disestablishment, including-
 - i. the transfer of assets, liabilities and administrative and other records to an appropriate provincial department, or a municipality or local house of traditional leaders, or a traditional community and traditional council as circumstances may require;
 - ii. the vacation of office of any office bearer of such a regional authority or community authority; and
 - iii. the transfer of staff of such a regional authority or community authority.

Anything done in pursuance of the powers and functions conferred upon or assigned to any competent authority by or by virtue of any provision of any law repealed in terms of this Act, shall be deemed to have been done by the appropriate authority in pursuance of the powers and functions conferred upon or assigned to such authority by virtue or in terms of the corresponding provisions of this Act.

A tribal authority authorized to maintain a separate trust account from the trust account established in terms of Act No. 23 of 1978 shall continue to

operate such an account on such terms and conditions as were attached to their authorization to maintain the account”.

36 Section 9 of the 2005 Act deals with the functions of traditional council and it provides as follows:

“9. Functions of traditional council-(1) *The traditional council of any traditional community, shall subject to the provisions of this Act, the Constitution and/or any other law-*

- (a) *administer the affairs of the traditional community in accordance with customs and tradition, and perform such other functions conferred by customary law and customs, consistent with statutory law and the Constitution,*
- (b) *promote the interest, advancement and well-being of members of the traditional community,*
- (c) *subject to the provisions under this Act, administer the finances of the traditional community;*
- (d) *perform such roles and functions as may be delegated or assigned to it by or under any law;*
- (e) *assist, support and guide traditional leaders in the performance of their functions,*
- (f) *support municipalities in the identification of community needs;*
- (g) *facilitate and ensure involvement of its traditional community in the development or amendment of the integrated development plan of a municipality in whose area that community resides;*
- (h) *participate in the development of policy and legislation at local level through public hearings and active participation in local structures;*

- (i) *participate in developmental programmes of municipalities, provincial and nations spheres of government;*
- (j) *promoting indigenous knowledge systems for sustainable development and disaster management;*
- (k) *alerting any relevant municipality to any hazard or calamity that threatens the are of jurisdiction of the traditional council in question, or the well-being of people living in such area of jurisdiction, and contributing to disaster management in general; and*
- (l) *share information and co-operate with other traditional councils within the Province.*

27 Section 10 of the 2005 Act on the other hand deals with the administration of the traditional community and it provides as follows:

“10. Administration of a traditional community. –(1) *A traditional council and kgosi/kgosigadi shall endeavour to perform their roles and functions in the best interest of their traditional community and be responsible to the Premier for the efficient and effective performance of the functions assigned to such traditional council and kgosi/kgosigadi in terms of this Act.*

(2) *The Premier may, subject to the provisions of this Act and the Constitution and with due observance of the traditions applicable in a traditional community, take such steps as may be necessary to ensure the due performance of the functions referred to in subsection (1).*

(3)(a) *On the recommendation of the Royal Family the Premier may, if satisfied that a traditional council is unable to perform the functions assigned to it in terms of the Act in an efficient and effective manner or in a manner which is conducive to good governance and administration, appoint any person to assist the*

traditional council concerned to perform the functions assigned to such traditional council.

- (b) *An officer appointed in terms of paragraph (a) shall be competent to exercise and perform any power, authority or function conferred or imposed by law upon any such traditional council and shall be deemed to have been exercised or performed by such traditional council.*
- (c) *The appointment of any officer in terms of this section shall be reviewed after a period of 180 days.*

28 Section 18 of the 2005 Act deals with the role and functions of kgosi/kgosigadi and it provides as follows:

“18. Role and functions of kgosi/kgosigadi.-(1) *A kgosi/kgosigadi recognized in terms of section 8, shall subject to this Act and the Constitution-*

- (a) *administer the affairs of the traditional community;*
- (b) *maintain peace in the traditional community, by conciliating and mediating disputes between members;*
- (c) *forthwith report to the competent authorities-*
 - (i) *the death of any person within the traditional community area from violence or any other unnatural causes;*
 - (ii) *the outbreak of any contagious or infectious disease or epidemic;*
 - (iii) *any allegation of an act of witchcraft or divination;*
 - (iv) *the commission of any offence which cannot lawfully be disposed through the exercise of the powers in*

cooperation with the traditional council and jurisdiction conferred upon such kgosi/kgosigadi;

- (d) take such steps, which are necessary and effective, to make known to the members of the traditional community the provisions of any new law or policy;*
- (e) convene and attend meetings of the traditional council to discuss the affairs of the traditional community; Provided that such meetings shall be convened at least once every calendar month;*
- (f) take such steps which are necessary to make known to the members of the motsana and provisions of any new law of policy;*
- (g) convene and attend meetings of the traditional community to discuss the affairs of the traditional community; Provided that such meetings shall be convened and attended by members of traditional community; Provided that such meetings shall be convened at least once every six months;*
- (h) take of any problem, grievances or matters, if any, raised by any member of the traditional community at any meeting as referred to in paragraph (h) and shall take such steps which are necessary to attempt to resolve such grievance, problem or matter, as the case may be;*
- (i) generally seek to promote the interest of the traditional community and shall take such reasonable steps which may be necessary to promote the well-being and advancement of the traditional community.*
- (2) A kgosi/kgosigadi shall enjoy the status, rights and privileges conferred upon such kgosi/kgosigadi by customs and traditions applicable within the traditional community concerned.*

- (3) *A kgosi/kgosigadi shall be entitled, in the lawful execution of his/her functions, to loyalty, respect, support and obedience of any member of the traditional community.*

38.1 Section 3 of the 2005 Act deals with recognition of traditional community and it provides as follows:

“3. Recognition of traditional community. – (1) *The Premier may, on application by a community, recognize a community as a traditional community in the prescribed form: Provided such a community-*

- (a) *is subject to a system of traditional leadership in terms of that community's customs and practices; and*
- (b) *observes a system of customary law.*

(2) *The Premier shall consult with the community concerned, any other community affected by such application, the Local House of Traditional Leaders having jurisdiction within the area in which the applicant community resides, and the Provincial House of Traditional Leaders.*

(3) *The Premier shall, subject to the provisions of subsection (2), within a period of 12 months from the date of receipt of the application for recognition decide on such application.*

(4) *The Premier shall, by notice in the Gazette, publish any decision made in terms of subsection (1) within 30 days from the date of such decision.*

(5) *The Premier may at any time after the publication of the notice referred to in subsection (4) reverse his or her decision if it is subsequently established that the group of people who have been recognized as a traditional community-*

- (a) *are not subject to a system of traditional leadership in terms of that community's customs and practices,*
- (b) *do not observe a system of customary law; and or*

- (c) *recognition as a traditional community was erroneously granted..*

28.2 Section 6 of the 2005 Act deals with the constitution or establishment of the traditional council. It provides as follows:

"6. Constitution of a traditional council.-(1) *A traditional community recognized in terms of section 3 shall have a traditional council constituted in accordance with this Act as read with the Framework Act*

- (2)(a) *The Premier must determine, in accordance with a prescribed formula, the number of members of a traditional council taking into consideration the population of the traditional community;*
- (b) *Such number may not be more than 30 members depending on the needs of the traditional community concerned,*
- (c) *At least a third of members of a traditional council must be women; and*
- (d) *A senior Traditional Leader shall be the chairperson of the traditional council concerned.*
- (3) *The Premier must publish, by notice in the Gazette, the composition of any traditional council referred to in subsection (1) reflecting the names of the members and the area of jurisdiction of such traditional council".*

DISCUSSIONS, SUBMISSIONS AND FINDINGS

29 I have decided to deal with the issues chronologically as set out in paragraph 22 of this judgment.

**WHETHER THE FACT THAT THE APPLICANT IN ITS FOUNDING
DID NOT PERTINENTLY DEAL WITH ITS AUTHORITY IS FATAL
TO ITS CASE ON LOCUS STANDI?**

- 30 The question here was prompted by the submission which was made in the answering affidavit and persisted as follows in the written heads of argument filed on behalf of the first respondent:

"An applicant must make out his case on locus standi in the founding affidavit."

- 30.1 True, an applicant would not easily be allowed to supplement his or her founding papers or to make new material averments in the replying affidavit. In exceptional circumstances this would be permitted. In motion proceedings, three set of affidavits are allowed as of right, unless specifically excluded, that is, the founding affidavit and replying affidavit by the applicant and answering affidavit by the respondent. Further affidavits had to be sanctioned by the court, for example, where a defence of the respondent could not have been anticipated when the founding affidavit was drawn.

- 30.1.1 In the present application the deponent to the founding affidavit avers authority as follows:

"1.2 I am a member of the applicant. I am authorized to make this affidavit in terms of a resolution of the applicant dated 26 May 2010, a copy of which is annexed hereto marked FA1"

- 30.1.2 The resolution referred to and marked FA1 is a

resolution by the Bapo Ba Mogale Traditional Authority (the applicant). As it would appear later in this judgment it appears that the real point taken by the first respondent is that, such an Authority of Bapo Ba Mogale tribe does not exist. It suffices for now to mention that, it should have come as a surprise to the members of the applicant that the issue of authority was raised.

30.2 Secondly, the fourth affidavit would be allowed in circumstances where the court was to find that it would only be fair to do so, instead of striking off or disallowing such an affidavit. For example, where an applicant has sought to make out a new case in his or her replying affidavit and the court is of the view that it would be fair and in the best interest of justice to allow the respondent to file the fourth affidavit.

31 Counsel for the first respondent in his written heads of argument states as follows:

“3.

On the 15 June 2010 after limited argument in respect of the locus standi of the applicant, the applicant requested the matter to stand down to afford the applicant to reply to the answering affidavit of the second respondent”

31.1 Answering affidavit by the second respondent is titled “second respondent’s explanatory affidavit” which was deposed to on the 14 June 2010. In the second respondent’s explanatory affidavit, the Acting Chief State Law Adviser in

the office of the second respondent sought to give the legal exposition to the issue. In it, amongst others, the following is stated:

"4.

"... The primary intention of the second respondent is to place the content of this affidavit before this Honourable Court and clarify the status of the Bapo Ba Mogale Traditional Council" (My own emphasis).

31.2 Further in paragraph 6 of the second respondent's explanatory affidavit it is stated as follows:

"6.1 *The second respondent has not informed the applicant as an existing Traditional Council for Bapo Ba Mogale Traditional Community through proclamation in the Gazette, neither has the second respondent been asked to confirm the applicant as such. Therefore the only Traditional Council for Bapo Ba Mogale Traditional Community known to be second respondent's is as appearing in Gazette number 6514 published on 15 July 2008."*

32 I will deal later with the averment in paragraph 6.1 of the second respondent's explanatory affidavit. In consequence of the decision of the 15 June 2010 to allow the applicant to consider the second respondent's affidavit and to file further affidavit if it so wished, on the 16 June 2010 the applicant's attorney deposed to such an affidavit. Therefore whatever is stated in this latter affidavit and insofar as it relates to authority, was sanctioned by the court on the 15 June 2010.

33 Coming back to the replying affidavit that was deposed to on the 14 June 2010, the applicant in the affidavit seeks to deal with the issue of authority. It refers to section 10(3) and 43 of the 2005 Act as the basis for such authority by the applicant. This in my view, was

prompted by the lack of authority averred by the first respondent in his opposing affidavit.

- 34 Just before I conclude on this issue. The first respondent elected not to deal with further effect deposed to on 16 June 2010 by the applicant's attorneys. Counsel for the first respondent in his written heads of argument deals with the election not to file further affidavit by the first respondent as follows:

"4.

On the 17 June 2010, the Honourable Court postponed the matter to 6 July 2010 to afford the first respondent an opportunity to supplement its papers in respect of the locus standi of the applicant if it so wishes. First respondent has since considered the applicant's replying affidavit to the answering affidavit of the second respondent and has elected not to supplement."

- 35 The purpose of not allowing unsanctioned affidavits is to avoid prejudice. The first respondent having made an election not to deal with both explanatory affidavit by the second respondent and additional affidavit by the applicant's attorney, cannot now seek to take the point as referred to in paragraph 30.1.1 of this judgment. I now turn to deal with the second issue.

WHETHER BAPO BA MOGALE TRIBAL (TRADITIONAL) AUTHORITY RECOGNIZED IN 1968 AND CONSTITUTED IN 1978 HAD CEASED TO EXIST AS ON THE DATE THE PRESENT PROCEEDINGS WERE INSTITUTED?

- 36 This is the most important issue on the alleged lack of authority raised in these proceedings.

- 37 The first respondent on locus standi started by stating in paragraph 9 of the answering affidavit that argument will be presented in court with reference to the 2005 Act and the 2003 Act. I understand this to suggest that the applicant's lack of authority is founded on these legislations. It also appears that the first respondent also wish to rely on the assertion by the second respondent's Chief Law Adviser. For example, in paragraph 14 of the first respondent's answering affidavit he states as follows:

"...The Chief State Law Adviser of the North West Province employed in the office of the Premier, responded as per a letter dated the 9 June 2010. It is clear from such letter that the Premier does not in any way acknowledge that the applicant has any status in terms of the North West Act".

- 38 The above quotation and with reference to the State Law Adviser should be seen in light of the subsequent explanatory affidavit filed on behalf of the second respondent in these proceedings. In paragraph 6 of the affidavit aforesaid, and at the risk of repeating myself, the said State Law Adviser states as follows:

"6.1 *The second respondent has not confirmed the applicant as an existing Traditional Council for Bapo Ba Mogale Traditional Community through proclamation in the Provincial Gazette, neither has the second respondent been asked to confirm the applicant as such. Therefore, the only Traditional Council for Bapo Ba Mogale Traditional Community known to the second respondent is as appearing in Gazette number 6514 published on 15 July 2008.*

6.2 *As regard the Traditional Council appearing in Gazette number 6514 supra, the second respondent has been informed that they were dissolved by Kgosi BE Mogale in 2008. The decision to dissolve the Traditional Council was taken on review and the matter remained sub induce before the Mafikeng High Court.*

6.3 *I need to also record that it would have been legally impossible for the second respondent to proclaim a new Traditional Council when the case concerning the dissolved Traditional Council remains subject to litigation."*

39 Both letters of 9 June 2010 written on behalf of the second respondent and the explanatory affidavit deposed to on the 14 June 2010 on behalf of the second respondent are non-committal. For the following reasons, what is referred to in these proceedings as "Traditional Council" never existed:

39.1 The community must be recognized by the second respondent as provided for in terms of section 3 of the 2005 Act. The section is quoted in paragraph 28.1 above. Therefore, before the Traditional Council, there must be a community recognized in respect of which a Traditional Council must ultimately be established. This is clear from the provisions of section 3(1) of the 2003 Act. That is, once the Premier has recognized a traditional community, that traditional community must establish a traditional council in line with the principles set out in a provincial legislation. The entire provisions of section 3 of 2003 Act, is quoted in paragraph of this judgment. Such recognition of the community appears to have been intended in terms of paragraph 6.1 and 6.2 of the second respondent's explanatory affidavit quoted earlier in paragraph 38. This would have been in terms of section 3 of the 2005 Act.

39.2 However, such recognition of the community is not equivalent to the establishment of the traditional council.

Having recognized a community in terms of section 3 of the 2005 Act read together with section 3(1) of the 2003 Act, the Premier (the second respondent) was required to establish a traditional council as provided for in section 6 of the 2005 Act read together with section 3(2) of the 2003 Act, the provisions of which have been quoted in paragraphs 28.2 and 28.1 respectively. Neither the first respondent nor the second respondent is alleging that a traditional council has been properly constituted as required in terms of section 3(2) of the 2003 Act read with section 6(2) of the 2005 Act.

39.3 The suggestion that such a council does exist or that it existed previously is in my view, without any legal basis. For example:

39.3.1 During submission, it was contended on behalf of the first respondent that the date stamp on the resolution to dismiss the first respondent refers to Traditional Council and not Traditional Authority. The date stamp signifies nothing major to prove the existence of the Traditional Council. For example, in all the documents where the date stamp appears, the author or compiler of the document is Traditional Authority and not Traditional Council. Just to be more specific, the following documents have been issued by the Traditional Authority and not the Traditional Council and in my view, they signify the acceptance by all those involved the existence of Tribal Authority and not the Council:

39.3.1.1 Letter of appointment of the first respondent as a Chief Executive. The author of this letter is the ex-administrator of the Bapo Ba Mogale Traditional Authority. The first sentence of the letter reads as follows:

"We have pleasure in offering you a position as the Chief Executive Officer at Bapo Ba Mogale Tribal Authority and or the Traditional Council when the latter comes into existence" (My own emphasis)

39.3.1.2 This quotation in my view, says it all. As on the 5 October 2009 when the letter of appointment was issued, the Traditional Council has not as yet come into existence. I deal later in this judgment with the emphasis on "Tribal Authority".

39.3.2 In the e-mail that was sent out by the first respondent on the 7 May 2010, he refers to the Traditional Council Elect. This is clear acknowledgment that as on the 7 May 2010, there was no Traditional Council. It looks like the word "Council Elect" was imputed in the e-mail due to the elections that were made during November 2009. When counsel or the first respondent was pressed on the essence of the election that is said to have taken place during November 2009, he indicated that this was in preparation for the establishment or constitution of the council in the future. Remember, such Traditional Council is supposed to be established in terms of section 6 of the 2005 read with section 3(2) of the 2003 Act. Such preparation of establishment of council, cannot supersede a properly established or constituted authority as it would appear later in this judgment.

39.3.3 In the Share Sale Agreement that was concluded on the 30 March 2010, the first respondent purportedly acted on behalf of the Bapo Ba Mogale Tribal Authority and not on behalf of Traditional Council.

39.3.4 The resolution of the 20 April 2010 to take disciplinary action against the first respondent and the letter of suspension addressed to the first respondent dated the 20 April 2010, marked FA9, charge sheet dated the 20 April 2010, resolution taken on the 11 May 2010 confirming the suspension after intervention by the MEC, letter dated 11 May 2010 informing the first respondent of confirmation of the suspension, the additional charge sheet, outcome of the disciplinary enquiry marked FA12, final outcome to disciplinary enquiry marked FA14 and other documents, were issued by, for and or on behalf of Bapo Ba Mogale Traditional (Tribal) Authority and not on behalf of the "council". Therefore, lack of locus standi and the existence of Traditional Council is nothing else than a smoke screen. Both factually and legally, such a Traditional Council never existed.

39.4 In paragraph 3.6 of the replying affidavit, the deponent states as follows:

"3.6 Very serious allegations are made against the first respondent in the founding affidavit, and he has elected not to answer to them. These are allegations of fraud involving amounts exceeding R500 million.

Members of the Bapo Ba Mogale Community, as are all members of the Applicant, and therefore the loose association of persons referred to by the first respondent, have a direct and material interest in making sure that the first respondent does not behave as he has”.

- 39.5 The first respondent in his answering affidavit referred to the applicant as being constituted by “a loose association of persons”. What the deponent is saying in paragraph 36 of the replying affidavit is that, he has a direct and material interest in the affairs of the applicant or the community of Bapo Ba Mogale. This direct and material interest should confer locus standi on him as a member of the community.
- 39.6 The deponent to both the founding and replying affidavits, appears to be an active person in the community. For example, apart from actively participating in these proceedings on the basis of the resolution taken to this effect, he is also cited as a first respondent in the North West High Court. It appears the purpose of the proceedings in the North-West High Court are aimed at silencing the first respondent in particular. His active role in the community only serve to indicate the extent of his direct and material interest in the affairs of the Bapo Ba Mogale Community. This brings me back to the crux of the applicant’s case on authority.

THE EXISTENCE OR OTHERWISE OF THE APPLICANT (BAPO BA MOGALE TRADITIONAL AUTHORITY)

- 40 Bapo Ba Mogale Tribe was recognized by the then President in 1968. I referred to this earlier in paragraph 23.1 of this

judgment. Subsequent to the recognition, Bapo Ba Mogale Tribal Authority (the applicant) was constituted in 1978. I dealt with this in paragraph 23.2 above. The 2005 Act contains a saving provision, that is, all tribal authorities established in terms of the 1978 Act shall continue until such time that it is substituted by the newly reconstituted traditional councils contemplated in section 3 of 2003 Act, and section 6 of 2005 Act. At the risk of repeating myself, in terms of subsection (2)(a) of section 43, any notice defining an area of residence of a recognized traditional community which was issued under a law repealed in terms of section 36 shall be deemed to have been issued in terms of the 2005 Act and the Premier may redefine an area contemplated in paragraph (a). But even most importantly, in terms of subsection(1), all tribal authorities established in terms of the 1978 act, shall continue until such that it is substituted by a newly reconstituted traditional council contemplated in section 6.

- 41 Now, there is no newly reconstituted traditional council in terms of section 6 of 2005 Act to run the affairs of the applicant. The applicant is an authority established or constituted in terms of the 1978 Act referred to in subsection 1 of section 43. Therefore, in the absence of a newly reconstructed council in terms of section 6, the applicant should be found to have never ceased to exist.
- 42 The decisions and or resolutions or steps taken against the first respondent should be seen to have been taken by applicant having authority to do so.

- 43 Just before I conclude on this issue, section 28(4) of the 2003 Act, provides that, immediately before the commencement of this Act, any tribal authority that has been and was still recognized as such, is deemed to be a traditional council contemplated in section 3 and must perform the functions referred to in section 4 which provide that such a tribal authority must comply with section 3(2) within seven years of the commencement of this Act. The seven years was the period set in terms of Traditional Leadership and Governance Framework Amendment Act 23 of 2009 (the 2009 Act). The initial period of one year in section 28(4) was extended to seven years.
- 44 As the 2003 Act came into operation on the 24 September 2004, by the 24 September 2005, there should have been compliance in terms of section 3(2) of the 2003 Act. In other words, traditional council properly published in the Provincial Gazette or Notice should have been constituted within one year from the 24 September 2004. This did not happen. Instead, during July 2008, the second respondent sought to have made such a publication. However, by that time, the one year period had already expired. It is of no surprise that the second respondent is now seeking to allege that whatever council might have existed has been dissolved by the Chief of Bapo Ba Mogale tribe. The point is, such council never existed, and secondly, even if it did, the Chief could not have had the powers to dissolve it. The council is not established by the Chief, but rather by the second respondent.
- 45 I dealt earlier in this judgment with the publication that was made on the 15 July 2008. Such a publication was an exercise in futility. The seven years period with effect from the

commencement of the 2003 Act, being 24 September 2004, cannot revive invalidity of such a notice that was published after the one year period initially envisaged in section 28(4) of the 2003 Act.

46 I am therefore satisfied that as at the time the present proceedings were instituted, the applicant had the authority to institute the proceedings against the first respondent, not only as Tribal/Traditional authority established in the 1978 Act to take charge of the affairs of the community that was recognized in the 1968 notice, but as an employer that had entered into an employment agreement with the first respondent in terms of the letter of appointment dated the 5 October 2009 issued on behalf of the applicant.

46.1 Whilst the dispute between the applicant and the first respondent, is labour related, the present proceedings were instituted not to deal with such a dispute per se, but rather with a relief required on an urgent basis pending any challenge that the first respondent might wish to bring under Labour Relations Act. There is therefore, no bar to this court to deal with this matter on the basis of urgency and without going into the merits of the suspension and subsequent dismissal of the first respondent. I now turn to deal with the third issue raised in paragraph 22.3 of this judgment.

WHETHER THE FIRST RESPONDENT HAD AUTHORITY AND POWERS TO RUN THE AFFAIRS OF THE APPLICANT AS HE DID?

47 I need to be very careful on how I express myself on this issue. The issue might be the subject of subsequent proceedings in terms of the

Labour Relations Act. It is important to mention something about it as an explanation why the applicant was prompted to suspend the first respondent and to take disciplinary actions against him.

- 48 The first respondent's duties are defined in the letter of appointment as follows:

- 48.1 To provide strategic direction and advice,
- 48.2 To support overall management and decision making process to ensure that the Tribal Authority liable to meet its short, medium and long term objectives.
- 48.3 To develop, review, advice and report to the Tribal Authority's strategy and objectives.
- 48.4 To take overall responsibility for the management and administration of the Tribal Authority's budget, expenditure, contracts, personnel, projects and pre...
- 48.5 To network and cultivate relationships with business, government, community leaders and other relevant organizations and stake-holders.
- 48.6 To report to the community of a quarterly basis during the first year in office and half yearly thereafter.

- 49 The applicant in its founding affidavit branded the following actions of the first respondent as having been unauthorized:

- 49.1 entering into share sale agreement,

- 49.2 his defiance of a resolution taken by the applicant suspending him pending disciplinary enquiry,
 - 49.3 his defiance of a resolution by the applicant taken to attend a meeting in the Land Claims Court relating to a very valuable farm,
 - 49.4 his unauthorized hiring of premises for the applicant,
 - 49.5 his unauthorized placing of an advertisement for an engineer despite previous warnings to him not to do so,
 - 49.6 his unauthorized payment of over R4 million to Madisha & Associates.
- 50 The first respondent did not respond to all these allegations. In short, the first respondent in these proceedings, elected not to answer to the allegations that led to his suspension and dismissal thereof. Instead, he decided to content himself with a point in limine on locus standi. I have already indicated that his defence cannot stand and therefore there is nothing that stands on the way of confirming the interim orders or part thereof.
- 51 For the purpose of the proceedings before me, it suffices to state that on the face of it, there appears to be grounds to have suspended the first respondent and followed by his dismissal. His election not to participate in the disciplinary proceedings in my view, was ill-conceived or ill-advised. Until such that he has taken the matter up in terms of the Labour Relations Act, he must live with the consequences of his failure to participate in the disciplinary hearing.

I want to caution however, that I should not be understood as making a final determination on the fate of the first respondent regarding his suspension and dismissal.

52 What I have just said in paragraphs 49 to 51 of this judgment should also be seen as disposing of the issue that was raised in paragraph 22.4 of this judgment. As I said, the first respondent elected not to deal with merits of the case and therefore the allegations made against him remain uncontroverted. Before I deal with the last issue raised in paragraph 22.5 above, I find it necessary to deal with another aspect which to a certain extent displays the unhelpful tactic adopted by the first respondent towards the applicant.

52.1 The first respondent in his answering affidavit annexed what is referred to as RESPONSE TO ALLEGATIONS AGAINST CEO OF BAPO BAMOGALE. This document is issued under the letterhead of the applicant, that is, Bapo Ba Mogale Traditional Authority. Insofar as the first respondent might wish the document to be relied upon on merits, it cannot. Firstly, it does not deal specifically with the allegations leveled against him in the founding affidavit. Secondly, in it, he refers to some documents that are said to be the basis for some of his actions complained of, but failed to or elected not to annex such documents to form part of his answering affidavit.

THE NORTH WEST HIGH COURT ORDER

53 The terms of this order were quoted in paragraph 14 of this judgment and I do not find it necessary to repeat myself. The move to launch that application, must have been motivated by panic due

to the ensuing disciplinary action against the first respondent. Secondly, the proceedings in the North West High Court must have been prompted by the desire on the part of the first respondent and his supporters to keep the first respondent in office. For example, despite knowledge of the suspension, the first respondent proceeded as if such a suspension did not exist. The launching of the application in the North West High Court should be seen in the light of the discussions that ensued just before the proceedings were launched in the North-West High Court.

53.1 The first respondent having been suspended in the letter of the 30 April 2010, and the charge sheet having been served, the relevant MEC intervened with a view, to persuade members of the applicant to do away with the suspension and disciplinary hearing. As a compromise, it was agreed that a meeting for the purpose of reconsidering the suspension be convened for the 7 May 2010. The meeting did not take place. The meeting was to be convened and or to be chaired by Chief/Kgosi or one F R Mogale. Instead, the Chief on the 14 May 2010 obtained an order on *ex parte* basis and on terms as quoted in paragraph 14 of this judgment. The order was obtained after the applicant's members met again on the 11 May 2010, on which date the applicant took the decision to continue with the suspension and disciplinary hearing. The conduct of the Chief and the first respondent in obtaining the order of the 14 May 2010 is perhaps better articulated as follows in the founding affidavit:

"8.3 *FA2 is the one positive result to emerge from the 2008 dissension, in that it holds that the Chief does not have the mental capacity to discharge his functions as such, and expressly states that he has*

no control over the cash, assets and business relationship of the Community, which control vests solely in the applicant under the supervision of the second respondent. The judgment was, as appears from its contents, the result of an attempt by the Chief's then manipulators (the caste changes from time to time) to seize control of the Community's very large cash holdings, its assets and its business relationships, for their own purpose.

8.4 *The motivation of the current manipulators is identical. To this end with the nominal support of the Chief, FA 6 was entered into, and other contracts were entered into committing the Community to millions of Rand of expenditure. The group headed by the first respondent caused the Chief to bring an urgent application in the North West Provincial Division of the High Court on 14 May 2010, in effect, prevent the applicant from carrying out its functions, and leave the field wide open for them to continue with their illegal conduct. The applicant has been advised that the interdict does not prevent it from carrying out its functions, provided it does not use members of the staff to do this.*

8.6 *The interdicts which affect the ability of the applicant to conduct its legislatively stipulated business are in paragraphs 2.1 and 2.6. Paragraph 2.1 is of lesser importance, but paragraph 2.6 is of critical importance, as it prevents the applicant from giving instructions to members of the staff to carry out their duties, including those relating to the control by the applicant of the community's finances. This was deliberate on the part of the Chief's manipulators led by the first respondent, who want unhindered control over the vast cash resources which exceed R300 million. They are already instances where they have been able to get access to some of this money."*

54 As I said, it looks like the first respondent by all means wanted to abort the envisaged disciplinary proceedings against him. For example, serious difficulties were experienced in serving documents in relation to the suspension and notice of the disciplinary hearing

on the first respondent. Such difficulties were mentioned earlier in this judgment. I however, do not wish to be judgmental on the outcome of the proceedings in the North West High court and any other proceedings that might ensue in terms of the Labour Relations Act. This should then bring me to consider the last issue raised in paragraph 22.5 of this judgment.

**WHETHER THE INTERIM ORDERS OR SOME PARTS THEREOF
ARE CAPABLE OF BEING IMPLEMENTED**

- 55 In the order of the 17/18 June 2010, Botha J, restrained the applicant from executing the order of the 2 June 2010 and more specifically from attempting to acquire any assets or document detailed in the order of the 2 June 2010 from the first respondent and from demanding from the first respondent's attendance at a meeting with attorney Eiser or providing any account in respect of paragraph 3.11 of the order of the 2 June 2010.
- 56 To force the first respondent to present himself to Mr Eiser as envisaged in order 3.10 and 3.11 of the order of the 2 June 2010 in my view, would be undesirable. To subject the first respondent to any kind of mini trial and or investigation as envisaged, should in my view be the subject of forensic investigation if the applicant so wishes.
- 57 Paragraph 3.12 of the order of the 2 June 2010, should be patched up with paragraph 3.9 of the order, that is, the first respondent be ordered to hand over to the sheriff all access devices and keys which enable ingress to and egress from the premises occupied and or used by or on behalf of the applicant and or the Bapo Ba Mogale community and or any member of its staff.

- 58 Paragraph 2 of the order of the 17/18 June 2010 was to serve as a preservation order so to put it, pending finalization of the proceedings herein. Upon finalization of the present proceedings, the interim orders of the 2 June 2010 either has to be made final or discharged.
- 59 Paragraphs 3.10 and 3.11 of the interim order of the 2 June 2010 ought to be discharged. As far as paragraph 3.12 is concerned, this order is to be amended as indicated in paragraph 57 above. The rest of the interim orders have to be made final and executed with immediate effect. A concern was raised about the practicability of the enforcement of the order of the 2 June 2010. The concern was put to the parties. I raised the concern in the light of the possible implications of the order in the North West High Court. Secondly, I was concerned about the dispute and factionalism within the community of Bapo Ba Mogale including the Chief.
- 60 The first respondent in the North West High Court proceedings is the deponent to the proceedings before me. Paragraph 2.1 of that order refers to Bapo Ba Mogale Council. Such a council does not exist inasmuch as there has not been compliance with the legislation to establish such a council. Paragraph 2.2, relates to the first respondent. The applicant however, is not run by individuals. It is a community based institution that should be in a position to operate without the first respondent for now. Similarly, paragraphs 2.3 to 2.5 relate to the first respondent in that matter. Paragraph 2.6 refers to a respondent in singular. There are 20 respondents in the North West High Court order of the 14 May 2010. It does not refer to the applicant. I therefore do not see impediment in the way of the applicant to run the affairs of Bapo Ba Mogale Tribe or

Community. This should then bring me to consider the other concern intimidated in paragraph 59 above.

THE ROLE OF THE SECOND RESPONDENT

- 61 It is clear from the background revealed in the present proceedings, that there has been some sort of instability and factionalism going on in this community. Number of court proceedings instituted in the past bear testimony to this. What worries this court is, what if the Chief and his supporters do not cooperate with members of the applicant who had caused the present proceedings to be instituted? The state of affairs worries me, but such state of affairs cannot warrant the discharge of the interim relief granted to the applicant. To this, the second respondent should find it necessary to play a role in combating whatever problem might arise.
- 62 Remember, in terms of section 10(2) of the 2005 Act, the second respondent (the Premier) may subject to the provisions of this Act, and the constitution and with due observation of the traditions applicable in a traditional community, take such steps as may be necessary to ensure the due performance of the functions referred to in subsection (1). At the risk of repeating myself, in terms of subsection (1) thereof, a traditional council and Kgosi/Kgosigadi shall endeavor to perform their roles and functions in the best interest of their traditional community and be responsible to the Premier for the efficient and effective performance of the functions assigned to such traditional council and Kgosi/Kgosigadi in terms of the 2005 Act.
- 63 The applicant (tribal or traditional authority of Bapo ba Mogale) should be seen as the authority to which the provisions of

subsection (1) apply. The Traditional Council having not been constituted or established, the existence of the applicant is saved by section 43 of the 2005 Act.

64 Also in terms of section 9(3) of the 2005 Act, the Premier may take such steps not inconsistent with the 2005 Act, to ensure proper administration and good governance by traditional councils. Such “council” in the present case, remains to be the applicant in terms of the provisions of section 43. The functions assigned to any traditional council in terms of section 9 shall be performed under the supervision of the North West Provincial Government as provided for in subsection (2). As indicated previously in this judgment, section 9 deals with the functions of the traditional councils. Therefore, the North West Provincial Government under the leadership of its Premier, is under obligation to supervise the applicant.

65 The second respondent (the Premier) is not participating in these proceedings. However, the second respondent elected to abide by the decision of this court and whatever order is made concerning the second respondent should be seen in that context.

CONCLUSION

66 In conclusion, I make an order as follows:

66.1 The interim order or rule nisi issued on the 2 June 2010 with the exception of paragraphs 3.10, 3.11 and 3.12 thereof, is hereby made final and or confirmed,

- 66.2 The interim orders so confirmed are to take immediate effect and should accordingly be executed with immediate effect,
- 66.3 Paragraphs 3.10 and 3.11 of the interim order of the 2 June 2010 are hereby discharged,
- 66.4 Paragraph 3.12 of the interim order of the 2 June 2010 is amended to read ***“The first respondent is ordered to forthwith hand over to the Sheriff having jurisdiction in giving effect to this order, all access devices and keys which enable ingress to and egress from the premises occupied and/or used by or on behalf of the applicant and or the Bapo Ba Mogale Community and or any members of staff”,***
- 66.5 Upon execution of the order as envisaged in paragraph 3.7 of the order of the 2 June 2010, the Sheriff is directed to make inventory of the items listed in subparagraphs 3.7.1 to 3.7.4 thereof, and hand over such items to the responsible person at the applicant’s office or premises and make a return of such hand over.
- 66.6 Paragraph 66.5 above, should also include items referred to in paragraph 64.4 above,
- 66.7 The second respondent and or the Government of the North West Province is hereby directed to comply with its functions, role and or obligations in terms of sections 9 and 10 of the 2005 Act regarding the applicant insofar as it might be necessary and appropriate to do so,

66.8 The first respondent to pay the costs of the application including any other reserved costs.


M F LEGODI
JUDGE OF THE HIGH COURT

EISER & KANTOR
ATTORNEYS FOR THE APPLICANT
C/O SANET DE LANGE INC.
1st Floor, Duncan Walk, South Wing
Cnr. Duncan & South Streets
Hatfield, PRETORIA
REF: S de Lange/al/SA4475
Tel no. 012 362 3970

T G MOTSETO INC.
FOR THE FIRST RESPONDENT
Travel Studio House
648 Duncan Street
PRETORIA
Tel no. 087 722 7836