

DELETE WHICHEVER IS NOT APPLICABLE

- 1 REPORTABLE: YES ~~NO~~
2 OF INTEREST TO OTHER JUDGES: YES ~~NO~~ A...../Mm
3 REVISED.

DATE 28.01.2011. IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

28/01/2011

CASE NO: 37898/07

In the matter between:

NGAKO ISAAC LEBOHO
NTIKANE PHILLIP LEBOHO
NGAKO RICHARD LEBOHO
MATOME WILSON LEBOHO
NTSIHEISENG PETER LEBOHO

FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT
FIFTH APPLICANT

And

PREMIER OF LIMPOPO PROVINCE
TLABO JOSEPH LEBOHO

FIRST RESPONDENT
SECOND RESPONDENT

TLHATLUDI LEBOHO
GILBERT MALEBOHO
FRANS LEBOHO

THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT

JUDGMENT

RAULINGA J

INTRODUCTION

1. This is a review application that was referred to trial. For the sake of convenience the parties will be referred to as Applicants and Respondents. The Applicants seek an order in the following terms:

- 1.1 that the First Respondent's official recognition of the Second Respondent, Tlabo Joseph Leboho, as Chief or " Kgoshi" of the Bahananwa Traditional Community with effect from the 6th September

2006 per decision No 123/2006, be reviewed and set aside or corrected.

1.2 That the First Respondent's official recognition of the Second Respondent, Tlabo Joseph Leboho, as the Chief or "Kgoshi" of the Bahananwa Traditional Community with effect from the 6th September 2006 per decision No 123/2006 be declared null and void.

1.3 That it be declared that the First Applicant Ngako Isaac Leboho, is the rightful and legitimate successor and heir of the deceased Chief or "Kgoshi" Seiphi of the Bahananwa Traditional Community and the person who qualifies in terms of the customary law of the Bahananwa Traditional Community to be officially recognised as the Chief or "Kgoshi" of the Bahananwa Traditional Community in terms of Section 12 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 read with Section 11 of the Traditional Leadership and Governance Framework Act 41 of 2003.

1.4 That the First and/or Second Respondent, either jointly or severally or jointly and severally pay the costs of the Applicants on a scale as between attorney and client; and

1.5 That such further and/or alternative relief be granted as the Honourable Court deems just and equitable.

At the pre-trial conference held on the 8th April 2010 the parties agreed that the main issues in this matter can be formulated as follows:

1. Whether the said official recognition of the said Tlabo Joseph Leboho falls to be set aside on the basis that:

- 1.1 the Premier of Limpopo Province did not apply his mind properly to the matter before him; and/or
- 1.2 the Premier acted *ultra vires* in recognising the said Tlabo Joseph Leboho as the Chief or "Kgoshi" of the Bahananwa Traditional Community; and
- 1.3 which one of the two persons (namely the said Tlabo Joseph Leboho or Ngako Isaac Leboho) qualifies in terms of the customary law of the Bahananwa Traditional Community to assume the position of Chief or "Kgoshi" of the Bahananwa Traditional Community.

[2] Before summarising the oral evidence presented by the Applicants, I wish to extend my gratitude to both Counsel for the Applicants and the Respondents for their well prepared heads of argument which were very helpful in the preparation of this Judgment.

I also wish to indicate that during the trial the term "Kgoshi" instead of Chief or senior traditional leader was used in line with the original meaning accorded to the status of the person occupying that office according to the Bapedi Royal Customs. It is my respectful view that the use of any other term other than "Kgoshi" adulterates the true meaning of that office. (Bapedi is used in its generic form which may refer to all so called Northern Sotho speaking people).

The Applicants bore the onus to prove as well as the duty to begin. While the Applicants presented oral evidence of a number of witnesses, upon the closure of the case for the Applicants, the Respondents closed their case without tendering any evidence.

Certain documentary evidence was submitted during the course of trial. I will refer to some of these documents in this judgment.

THE PLAINTIFF PRESENTED THE FOLLOWING EVIDENCE:

Ntikane Phillip Tshwenyegi Leboho.

He testified that he is the surviving most senior "Mokgoma" of the Bahananwa Royal Council. At the initiation school he was given the name "Tshwenyegi". The traditional leader of the initiation school was Molele who was also the leader of the regiment. He is the son of the late Chief "Kgoshi" Seiphi. Chief "Kgoshi" Seiphi had (5) five wives, namely; Mosima (the principal wife), Mabojabogele (the witness's mother), Manakedi, Mathanti and Mamohale. A principal wife within the meaning of Bahananwa Royal Community is the first wife and the bearer of the "Kgoshi". Mosima was the rightful masechaba to bear a "Kgoshi". Mosima had children who died while they were still infants. He does not know whether there were any surviving children of Mosima who were still alive at the time Seiphi died. He knew Mafori,

she was the wife of his father's younger brother, one Wilson Matume Leboho.

When Seiphi died, his wife Mosima reigned over the Bahananwa people. However, Mosima did not reign for a long time, she was soon replaced by Matume Wilson Leboho after he was appointed as acting Chief "Kgoshi". Matume was a Mokgoma.

The Royal family went to look for a "ngwetsi" a Tlhatswadirope, for Mosima. This was the mother to Ngako. The witness's grandmother Manchaku and Mamphikela went to marry Mmangako as a ngwetsi to Seiphi.

[3] Matume was present when the discussions took place, Mosima was also involved in the discussions. He did not take part in the marriage, but he was present when the matter was discussed.

The principal wife for the Bahananwa Traditional Community comes from the Rangata family. The Bahananwa approached the Rangata family who told them that they had no daughter available. He does not know what they discussed thereafter.

Mmangako comes from the Mokgobu family. She is the granddaughter of Mamphikela. His grandfather was Rachahcha – Kgalushi who was one of the Chiefs "Dikgoshi" of Bahananwa. The great grandmother of Mmangako was Mamphoku from Rangata. Mampuku was the wife of Rachacha – Kgalushi.

The Bahananwa royal family paid five (5) head of cattle as magadi when Mmangako was married. The cattle were paid over to Ramutla

from Mokgobu. Once magadi were paid Mmangako moved into the royal kraal. She fell pregnant and gave birth to Ngako Isaac Leboho, in order to revive the house of his father, Seiphi. The witness regards Ngako Isaac Leboho as his elder brother because he is a "Kgoshi". Matume was merely a seed-raiser. Ngako is his brother, his father's son. He is son of Seiphi. Ngako is his elder brother because he is a "Kgoshi".

- [4] After the death of Matume Wilson Leboho, Matee Collins Leboho was installed to act as "Kgoshi" on behalf of Ngako Isaac Leboho, because Ngako was still young and at school. Matee is the son of Matume – and Mafori. Matume had other sons, but his principal wife had only daughters. Matee is Matume's oldest son. It is not possible that a younger brother to Matee could become a Kgoshi. After the death of Matee they met as a Royal Council and agreed to install Ngako as kgoshi although he was still at school.

Matee was identified because he was the oldest son of Matume Wilson. After the death of Matee, Ngako was supposed to have been installed. However there were those who imposed upon the Royal Council that Seraki should be recognised.

After the death of a Kgoshi there is a mourning period of one year. It is only after the expiry of a year that the Bahananwa Royal Council would identify a Kgoshi.

After the death of Ben Seraki Leboho he was not present when the discussions to identify Tlabo Joseph Leboho took place. Nobody

requested him to sign a document to confirm the identify of Tlaabo Joseph Leboho as Kgoshi.

Mafori is the wife of Matume. Mmatshaku is the wife of Mabea. Matume is the son of Mabea. Mafori and Mmanchaku came from the Rangata family.

Masechaba is a queen – the Kgoshi's wife. A candle wife is a woman for whom dowry has been paid. Neither Mafori nor Mmanchaku were queens.

He is a mokgoma. The meetings are called by the senior mokgoma, but in this instance of Tlabo Joseph Leboho he did not call the meetings. Mmanchaku died before Matume died. Matume slaughtered a cow for the cleansing ceremony of Mmanchaku. During that ceremony Matume Wilson told the gathering that the property of Mmachaku would be shared between his two (2) wives, namely Mafori and Mamolatelo and his children.

Mmangako would get her share from the royal property of the Bahananwa. The rest of them did not get anything.

Under cross-examination

He can neither read nor write. He cannot see.

Molele was a traditional header.

When the witness was referred to Exhibit "B" page 158, he testified that Kgalushi is also known as Rachacha. He was the leader of a regiment called Makobi. Mabea was the leader of Marutla. His father Seiphi was the leader of Ditlhage. Tlatlhudi was the leader of Madingwane. He led Molau whereas Matee Collin led Mapulana.

- [5] Masechaba is the wife who bears the future Kgoshi. The wife who bears a Kgoshi comes from Rangata. His mother was not a masechaba because she did not come from Rangata family. Ngako's mother comes from Mokgobu, because they could not find a nubile at Rangata. She is a grand-daughter of Leboho. A ngwetsi can be a masechaba. When Ngako's mother was married she was a ngwetsi who was going to be a masechaba. Mmangako was married by Mamphikela and Manchaku to revive the house of Mosima.

Seantlo is a woman who gets married when the wife of that house has died in order to revive that house. Ngwetsi is any woman who is married into a family. Tlhatwadirope is a woman who is married in order to bear children for the principal wife. Ngako's mother was a Seantlo. When a house is revived the brother to the Kgoshi can procreate children with a Seantlo.

Mosima was a masechaba for Seiphi. She was from the Rangata family. When the witness was referred to Bundle "B" page 173 – i.e. the genealogy, he indicated that he had never seen the document before.

However he conceded that Johannes Tau Molele had approached him.

He does not know if Molele is the one who prepared the genealogy.

(the witness was also referred to Bundle A- page 36- the genealogy prepared by Phakula S.G and Fambe S.P)

Mosima gave birth to children but they died while still infants.

When Mmangako was married Mosima was still alive. Mosima participated in the decision that Mmangako should revive her house.

Matume Wilson's mother came from Rangata. Mabea's wife one Mmamoloko came from Rangata. When Mmamoloko died they married her sister Mmanchaku who came from Rangata.

[6] When Mmangako was married Mafori was already married to Matume.

Mafori is a younger sister of Mosima – they both came from Rangata.

When they went to look for a nubile at Rangata they could not get Mosima's sister because Mafori was already married. Mafori was Motume's wife and not a Seantlo.

There was a period when masechaba of the Bahananwa Royal Community came from Morudu and later they came from Rangata.

Kgalushi's wife came from Morudu.

Tlatludi was a Mokgoma. He was the leader of the regiment called Madingwane. Matume never led a regiment.

He was not present when Tlabo Joseph Leboho was identified as a Kgoshi. He does not know one Kekana.

He was not present when Tlabo Joseph Leboho was introduced to the Premier as a Kgoshi. He was indisposed at the time (See letter dated 21 December 2005) he knows nothing about the letter.

Matee and Seraki are children of the same mother one Mafori.

In re-examination:

There is nobody in the Bahananwa Royal House who becomes a Kgoshi unless he has been a leader of a regiment.

Matume married Mafori because she was going to join her aunt at her place i.e one Mmanchaku.

Shadrack Makwiting

Between 2000 and 2006 he was employed at the Bahananwa Tribal office as an administrative clerk. He stopped working in 2006.

(The witness was then referred to Bundle "A" page 68)

From time to time the Bakgoma would hold meetings and he kept the minutes. The meetings were called by the secretary of the cabinet. He was not involved in writing the letters. The letters were distributed by the messenger.

The signature appearing on the letter shown to him on page 68 under "Tribal Council No1" is his. He is not a member of the tribal council. He signed the letter because some of the cabinet members were not present. Phineas Moremi and Gilbert Maleboho requested him to sign.

Ben Seraki died in December 2005. (The letter is dated 21st December 2005). He does not know of a meeting of the Tribal Council that took place in December 2005. There was no such a meeting in December 2005.

The signature under No 2 is that of April Masoka who is a security guard at the Tribal Office. The third signature is that of Steve Leboho. (The witness was then referred to pages 69 – 70 – Letter dated 21 December 2005). He has never seen this letter before.

Under cross- examination

He never signed any other letters in December 2005. The signature appearing on page 68 is his.

(At this stage the Respondents produce a letter dated 5 December 2005. The Applicants object to the production of the letter since it was not discovered. When the Respondents were given the original file the said letter was not in the file). The court received the letter provisionally.

The witness admits having signed the letter. However he cannot recall signing any other letter. He conceded that most of the Bakgoma cannot read and write but they invite them by means of letters and somebody would read the letters to them.

A "kgoshi" does not call meetings. The Tribal Council is separate from Bakgoma. The Tribal Council is composed by people who are not Bakgoma and those who are.

Although Gilbert Leboho and Phineas Moremi did not force him to sign the letter he respects them and he took their instructions.

He left the Tribal Council in February 2006, after there were allegations that he had stolen money from the Tribal office. A criminal case which was opened against him was later withdrawn. He has a letter in his possession that the charges were dropped.

According to him Ngako Isaac Leboho is the "Kgoshi". He does not think that Tlabo Joseph Leboho is a "Kgoshi".

During the reign of Ben Seraki there were problems about Ngako. The letter dated 21st December 2005 was meant to block Ngako from becoming Kgoshi. At that time he was on the side of Tlabo Joseph Leboho. He did not withdraw his support for Tlabo because of allegations of theft against him. He has no motive for shifting support. The two letters on pages 69 and 70 were not brought to his attention.

Ngako Richard Leboho

- [8] He is one of the Bakgomana of the Bahananwa. He is the son of the late Kgoshi Mabea of the Bahananwa. Seiphi is his brother. He was present when Seiphi was still alive. Tshwenyegi Phillip is the son of Seiphi. Mosima was Seiphi's principal wife. Mosima had no living son when Seiphi died. After Seiphi's death Mosima acted as a regent of the Bahananwa Community. Mosima was still alive when they went to look for a daughter in law (ngwetsi) He and Tshwenyegi Phillip were

present when the matter was discussed. They decided to marry a surrogate mother to the "Kgoshi". They married Mmangako from the Mokgobu family because when they approached the Rangata family they were told that there is no nubile.

They went to the Mokgobu family because Mmangako is the granddaughter of Mamphoku. Mamphoku was from the Rangata family. Mmangako is Rachacha's grand-daughter. Mamphoku went to marry Mmangako.

Manchaku Matume's mother died in 1977. In 1978 Matume held a cleansing ceremony. He was not present at the cleansing ceremony.

Matume said that Manchaku's cattle would be divided amongst his children and that Mmangako and Ngako would get their share from the tribal cattle.

§1 He still remembers December 2005 when Ben Seraki died. Although he is a mokgomana he did not know of a meeting which was called after Seraki's death. After a Kgoshi has died they perform a cleansing ceremony and thereafter they can decide on a future "Kgoshi".

After they have ploughed and only after the harvest do they use the harvest for the cleansing ceremony.

After the death of Ben Seraki he was one of those who participated in deciding that Ngako should be identified as a "Kgoshi". He was not part of those who decided that Tlabo Joseph should be "Kgoshi".

The father of Matume is Mabea, however the biological father of Matume is Rakuta.

Under cross – examination

The “Kgoshi” of the Bahananwa is born and not appointed. The elders are the ones who go and look for a masechaba.

After Matume died his son Collin became an acting Kgoshi. Collin was acting on behalf of Ngako.

Although he cannot read and write he however knows that Collin was acting on behalf of Ngako. Ben Seraki was acting as a “Kgoshi”, but his behaviour was not befitting that of “Kgoshi”.

Mmangako came to bear a “Kgoshi” because she is a grand-daughter of Mosima and Seiphi.

After Seiphi died Mosima acted for a while as a regent. She took over from her husband.

He knows nothing about the involvement of Contralesa.

Mmangako is from Rangata because she is a grandchild of Rangata. In their tradition masechaba is a ngwetsi. The mourning period did not take a year. There can never be more than one “Kgoshi” from the same mother. Mafori is Matume’s wife.

Nelly Leboho

[10] She was born in 1958. She is the wife of Matee Collin Leboho. She cannot read and write.

Matee was an acting “Kgoshi” on behalf of Ngako.

Matee was born on the 25 July 1952. Matee was an acting Kgoshi.

During her marriage to Matee she lived with Mafori.

Masechaba is the wife of the "Kgoshi" whose magadi is paid by the tribal community she is the one who must bear the "Kgoshi". She never heard Mafori claiming that she is a masechaba. She never met Manchaku in her life.

She knows that Matee was an acting "Kgoshi" because he used to tell her that he was not a "Kgoshi", but he was only acting. He even told her children that he was acting on behalf of "Ngako". Matume junior was present when this was discussed. Ben Seraki and Tlabo Joseph were also present when this was discussed.

After the death of her husband she was told that Ben Seraki was to become a "Kgoshi". There is nothing she could do because is not a masechaba.

After a "Kgoshi" has died, the tribe goes for mourning for a period of a year. After the mourning period for Matee, Ben Seraki, Tlabo Joseph and Rampodu came to her house and damaged the property of Matee. She does not know why they damaged Matee's property.

Cross- examination by Counsel for the Respondents.

Ngako's mother is from Mokgobu and she does not know what Ngako's mother's status is. She was still too young when the masechaba's came from Rangata. She did not understand anything about masechaba

then. She does not know Mosima. Mafori is her mother-in-law and she came from Rangata. She is the mother of Seraki and Tlabo Joseph.

Matee is Matume's son. She used to discuss issues with Mafori, but Mafori never told her that she had a sister called Mosima. She knows who the parents of Mafori are. Richard is the brother to Mafori. Mafori never told her how she came into the Leboho family. She never told her that she came into the Leboho family to revive Mosima's house.

If her house were to be revived, the Leboho family would go to the Mmanyane family (where she comes from). It will depend on whether there is a sister. They would look for a younger sister within the Mmanyane family. Masechaba is chosen by the tribal community. She is no longer in good terms with Tlabo, since he came and ransacked her house. She is not angry with him.

By court

If there is no girl available within the Mmanyane family the Leboho family would approach the uncles or get a grand child.

Matume Wilson Leboho [Junior]

- [11] He was born in 1979 and he is the first born child of Matee Leboho. He is a member of the Royal Family and also a mokgoma. Matume Wilson

Leboho is his grandfather. He does not know whether his grandfather was a "Kgoshi" or acting "Kgoshi".

When referred to letters at pages D-67 and D-80 dated 27 January 1988 and 15th September 1960 respectively, the witness responded by saying that his father was an acting "Kgoshi". His father was born in 1952. His father never claimed that he was a "Kgoshi".

He was present when his father told them that he was acting on behalf of Ngako and that there must not be strife with Ngako. His sister Connie, Ben Seraki and Tiabo Joseph were also present. Ngako was already born at the time.

After his father's death he became a Mokgoma. They observed a mourning period for a year after his father's death. There were no discussions on the successor to the throne. He does not know how Ben Seraki became a "Kgoshi". He does not know of a meeting of the Bakgoma where it was agreed that Ben Seraki would become a "Kgoshi". He remembers vividly when his mother's house was ransacked. The people involved were Ben Seraki, Tiabo Joseph, Mmeshai and Mmamokati. They removed his father's property from the house.

[12] He was present when Tshwenyegi Phillip Leboho made an announcement that Ngako is "Kgoshi". It was in 2005. His father was still alive. His father told them that at the initiation school, he could not take a position because Ngako as the heir had to take that position. He

does not know why there was no initiation school between 1967 and 1984

In December 2005 he never attended a meeting where the future "kgoshi" was discussed, nor was he invited to such a meeting.

His father Matee told him twice that he must regard Ngako as his father's elder brother.

Under cross examination

[3] He is the great grand son of "Kgoshi" Mabea. At the initiation school he was a member of the Mabitsi regiment.

Although he was the most senior at the initiation school because of his status as a prince, Kharametsi was however the leader of the mphato (regiment).

His father Matee was issued with a certificate to confirm that he is an acting "Kgoshi". However no mention is made in the certificate or letter dated 27 January 1982 that his father was acting on behalf of Ngako. After his father's death there were divisions and strives within the royal family, otherwise the royal council would have met and identified Ngako as "Kgoshi".

If at all Mafori were a surrogate masechaba, her first born son (Matee) would have been installed as Kgoshi and not as an acting "Kgoshi". It is not possible that Tlabo Joseph who is the third born son can become a "Kgoshi". (See letter of 24th November 2000- Genealogy) (Traditional Authority – page A18) and (page 20- A36).

They opened a criminal case at the Police Station after his mother's house was ransacked. (Counsel for the Respondents admits that Tlabo Joseph visited Nelly's house and some Royal Property was taken.) The said property belonged to the witness's father.

When Mosima died in 1961, Mafori was already at the Royal Place/house. Normally the Royal Council would identify a "Kgoshi" and call a tribe's meeting and announce the "Kgoshi".

- [14] The people whose names appear on Bundle A page A15 – do not belong to the Royal Council. Since his father died, he never attended any meeting of the Bakgoma. He never had a problem with Tlabo.

Re-examination

The Bakgoma bear the surname of Leboho or Maleboho. Moremi, Moruthu and Moremi on page A15 do not qualify to be Bakgoma. Kharametsi is his uncle's younger brother and he is junior to him. The name of Tshwenyegi does not appear on the list on page A15. Tshwenyegi was one of the most senior Bakgoma.

His father died in 1999 and Tlabo Joseph and others came to their home after the cleansing ceremony of his father – which was held after the expiry of a year. The Bahananwa royal family does not approach any Rangata family for a masechaba – they would approach a particular Rangata family.

Mmamoyahabo Thanyane

She is a member of Bahananwa Traditional Community but not from the royal family. She is the grandmother of Johannes Tau Molele(the person who prepared the genealogy) When Matume Wilson Leboho married Mafori, she was an emissary (mediator) (maditsela)during the negotiations of the marriage. Mafori is her sister in law's daughter. She then continued to say that she did not see any magadi (dowry) and that she was not present when magadi was negotiated.

She also told the court that Mafori was troubled by a madman and as a result she had to go and stay at the mountain. (This meaning she went to the hill where the royal family lives). (The interpretation would be that she was taken to the royal family for protection from the madman) (The court noted that the witness is very old and as a result the sequence of events and explanations do not come out as one would expect).

[15] Mafori is not Masechaba, Mmangako is a masechaba. Kabela Ngako's grandmother and herself negotiated magadi for Mmangako. When Mafori was married both Seiphi and Mosima were still alive. Mafori and Mosima married because they loved each other. Mafori was not masechaba.

In fact Seiphi was not happy when Matume married Mafori because Seiphi said that Mosima and Mafori came from the same family. When magadi for Mafori were negotiated, Mafori already had a child by the

name of Ramamphu who was an acting Kgoshi on behalf of Ngako. Ramamphu's wife is the daughter of Mmanyane.

Under cross examination

In their culture, the bride price is paid to the bride's family for the purpose of uniting the two families. She was a maditsela (emissary) for Mafori while Kabela was an emissary for Matume. Kabela is Mmangako's grandmother.

Mosima and Mafori are sisters from Rangata. Although Mosima welcomed Mafori into the Leboho family, Mafori however did not come to revive Mosima's house. It is Mmangako who came to revive Mosima's house. Mosima was already dead when Mmangako was married. Mosima did not participate in the marriage of Mmangako. Mosima was still alive when the negotiations that Mmangako should revive her house were discussed. Although Mmangako is from Mokgobu, she can revive the house of Mosima. She is surprised why Counsel says Mmangako cannot revive Mosima's house.

Ramamphu Matee Collin was born out of wedlock, because when he was born magadi were not yet paid for Mafori.

Under re examination

Kabela's mother is Mamphikela who is from Rangata family. Since Mosima could not bear children, they arranged that Mmangako would bear children on her behalf.

Mohlahlodi Caiphus Rangata

[16] He is a member of the Rangata family. The Leboho Royal family approached the Rangata family for a bride. They told them that they did not have a nubile available. They then approached the Mokgobu family and went to marry Mmangako. He knows Tlabo Joseph Leboho. Nobody approached their family for a wife for Tlabo. Nobody came and asked for a bride for Ben Seraki. Nobody approached their family for a bride for Matee Collin.

Mafori is his uncle's daughter, she was a Rangata as well. Mafori was the wife of Matume Wilson Leboho. Mafori went to the Leboho family to assist Manchaku with the harvesting of mabele (brown corn). At the time when she was at Manchaku's place, Matume Wilson entered her sexually and they ended up marrying each other.

Masechaba is a ngwetsi of the Leboho Royal family. A Kgoshi can be born from any women from another family rather than Rangata. Masechaba can come from the Morudu, Mokgobu, Makwiting or Rangata families. These are families from which a "Kgoshi" can be born.

The principal wife of a "Kgoshi" is the masechaba of the Royal family. (The witness was then referred to Bundle B - p15 an extract from Van Schalkwyk Book or Thesis).

The first born son or daughter can become a "Kgoshi". A masechaba may be married from any of the families mentioned above to revive the

house where there is no child. These families are Rangata, Kubu and Morudu. He does not know who the emissaries were when Mafori was married.

Under cross examination

He is neither a mokgoma nor a mokgomana. He does not know of any woman from the Mokgobu family who was married to the "Kgoshi" before. He agrees that a masechaba would come from Rangata, Kubu and Morudu.

Bahananwa came to the Rangata family and when they were told that there was no nubile, they approached the Mokgobu family. They came back to the Rangata family and reported that they found a bride at Mokgobu family. Mosima was his aunt and she was married to the Leboho royal family.

There is only one masechaba in the royal family. Mmangako is a Mokgobu, a grand daughter of the Rangata. For a certain period the masechaba's came from Rangata. Tlabo's mother is a Rangata – ie Mafori. Matume and Matee were acting "Dikgoshi". Mmangako came into the royal family to bear a "Kgoshi"

(The witness was then referred to Bundle A – 127- Certificate of Recognition dated 6th September 2006)

When approached, the Rangata family did not refuse to give a daughter to the Leboho royal family. The Rangata family told the Leboho family that there was no daughter available. He knows that

Mafori had gone to Leboho to assist with the harvest of mabele. A masechaba can come from Rangata, Kubu, Mokgobu, Morudu and Makwiting.

- [17] (The witness was then referred to family tree Bundle A 19 – 36 and Bundle B 174) All the families he mentioned would produce a masechaba. He does not know if Tlabo is married to a Rangata woman. If this was the case, he would have been invited to the negotiations.

Under re examination

The Rangata are also known as Phephame. He knew Mafori personally. At the time Seiphi and Mosima died there was no nubile who was available within the Rangata family as bride to the Leboho family.

Maselelo Ramokone Leboho

- [18] She is a member of the Royal council as well as a member of the royal aunts (Dikgadi). She knows Mmangako as ngwetsi for Mosima. The elders of the Bahananwa Royal family went to ask for Mmangako's hand. Mmanchaku was involved in the negotiations. They first approached the Rangata family for a bride and they were told that there is none. They then approached the aunt's family (Rakgadi). Mosima was still alive when they approached the Mokgobu family for a bride. They approached the aunt's (kgadi's) family, one Mmamphikela,

Mabea's sister. They were looking for a ngwetsi to revive Mosima's house since Mosima had no offsprings.

She was present at the cleansing ceremony when Matume, who is Mmanchaku's son divided her property, amongst his wives and children. Matume said that Mmangako would receive her share from the tribal cattle. This was done in the presence of the community.

In essence Ngako is Mosima and Seiphi's child.

Under cross examination

There is no need for a dispute over the bogoshi of Bahananwa because it is clear that Ngako is "Kgoshi" and not Tlabo. Seiphi did not want Matume to marry from Rangata. Matume's wives are Mafori and Mmamolatelo. Matume entered the wife of Seiphi (ie Mmangako) in order to revive the house of Mosima. Mafori is not a surrogate to Mosima – she is Matume's wife. Ramamphu Collin was acting as Kgoshi on behalf of Ngako. Mosima was still alive when Mmangako came into the Royal family.

Under- re- examination

Mosima and Mafori share a father, but are from different mothers. When Matume entered Mafori sexually, Seiphi was still alive. Matume could not enter Mosima when Seiphi was still alive. Mosima is the elder sister to Mmanchaku.

Pheaha Richard Leboho

[19] He was born in 1961. He is Tshwenyegi's son. Ngako is his father's elder brother. Ngako is "kgoshi". He and Ben Seraki did not attend the royal initiation school at the time because they had to wait for Ngako to come of age, since he (Ngako) had to lead a regiment. Matume and Tshwenyegi informed them about this.

After Ben Seraki was buried, the mayor of Blueberg Municipality one Refiloe Kubyane called a meeting and told the gathering that Tlabo Joseph would rule as Ben Seraki did. He exited the meeting because what the mayor was saying was not true.

According to the Bahananwa custom the mourning period for a "Kgoshi" is a period of a year. No Kgoshi can be installed during the mourning period. On the 13th July 2006, Mr Kekana from the Premier's Office visited the Bahananwa Tribal Council with a view to identify a "Kgoshi". He the (witness) told the meeting that Ngako is "Kgoshi". He further produced Ngako's father's certificate an acting certificate of Matee Collin. Mr Kekana said that Ngako's supporters were arguing with evidence. At the meeting it was mentioned that Ngako and Tlabo attended the same initiation school, but Ngako was the leader of the regiment (mpahto). Mr Kekana then closed the meeting and said that he would give the gathering a feed-back in two weeks.

No explanation was given why Tlabo was identified a "Kgosi" (Page A56 –Memorandum) He does not know why false information about Matume was given to the Premier.

Under cross examination

He does not know why Contralesa report was challenged in court. The dispute is about the recognition of Tlabo Joseph Leboho as "Kgoshi" and not about Ben Seraki. The identification of a Kgoshi is not done by the Premier's office. Bakgoma identify a Kgoshi. The Premier has no choice but to endorse what the Royal Council has decided.

(The witness is referred to A – 68 and A -54). The witness states that he can neither read nor write. His father Tshwenyegi, participated in the decision to identify Mattee Leboho as an acting "kgoshi". Tlhatludi Leboho is not senior to his father Tshwenyegi Phillip.

As reflected on bundle A – 54 the following people's status would be:

- (i) Elias Mafolo Leboho – Mokgomana
- (ii) Nicholas Matome Leboho – Mokgomana
- (iii) Patrick Seleko Leboho – Mokgomana
- (iv) Alpheus Masilo Leboho – Mokgomana

He denied that the minutes (register) which reflects that his father Tshwenyegi Phillip was present at the meeting which identified Joseph Leboho as kgoshi is correct as he was not there. He does not know

what happened at the meeting of 21st December 2005 since he was not present. The meeting as appears on page 69 includes Bakgomana. His father, Tswenyegi was not present at the meeting of the 21st December 2005 – his name was merely inserted.

He attended the meeting of the 13 July 2006. (See page 90 only names appear – there are no supporting minutes) George Leboho is a mokgoma. Only Bakgoma were supposed to be present at the meeting. Ngako became the leader of the regiment at the initiation school because he is the son of a masechaba. Mafori was not a masechaba - she was Matume's wife.

Under – re –examination

(The witness is referred to Bundle G- 1) – (Same letter as one on page A- 68). (The letter was filed in October 2007. However letter appearing in Bundle A -69 does not appear in Bundle G). (The letter was not originally filed when Bundle G was compiled by the Premier's office).

According to the Bahananwa custom a person who may be identified as "Kgoshi" does not participate in the decision meant for the identification of a "Kgoshi". The name appearing on A – 70 number 21 is that of Tlabo Joseph Leboho. He was not supposed to be present at the meeting.

TAU JOHANNES MOLELE

[20] Tau Johannes Molele testified that he is a traditional healer and in particular a traditional healer for the Bahananwa royal family. His father who is still alive was the traditional healer for the "Kgoshi". When he took over from his father, he was informed that he is a traditional healer for "Kgoshi" Ngako Leboho.

(The witness was then referred to Bundle B – 174 – Genealogy). He is the author of the genealogy of the Bahananwa. He got information from Tshwenyegi Phillip Leboho, Richard Leboho and his father.

The genealogy appearing on Bundle A19 -36 and the one appearing on B -174 were compared) The distinction between the two is that under A19 -36 Mmangako is reflected as a ngwetsi or wife of Matume whereas under B – 174 she is mentioned as ngwetsi to Mosima.

However in the affidavit of Tlabo Joseph (C – 160) he states that Mmangako was not married to Matume, as his wife because she came from the Mokgobu family. Mmangako was Mosima's ngwetsi.

Under cross examination

[21] The genealogy appearing on B -174 is the correct one. He knows that Mmangako lost a child before Ngako was born. At the time he prepared the genealogy there were no strifes and factions within the royal family. The dispute over Bogoshi was manifesting itself already

by the year 2000. He also consulted with senior bakgoma including Tlhatludi Leboho when he compiled the genealogy.

His grandfather was a traditional healer for Seiphi. He is responsible for staging initiation schools. It is the royal family who decides who the leader of the regiment is.

Under re examination

(A – 19 – 36 Genealogy) Mosima had no children. Matee, Freddy, Ben Seraki e.c.t are not reflected as Mosima's children. Mafori is not reflected as masechaba or Mosima's ngwetsi. Matee, Ben and Tlabo are not reflected as Mosima's children.

(It can be mentioned that on the 29 April 2010 when the court resumed, the Respondents raised an objection when the Applicants produced Bundle "J" – expert documents). The procedural point raised by the respondents was dismissed).

When the Applicants called the expert, the Respondents objected on the basis that the witness was sitting in court during the proceedings). The objection was not sustained.

[72] Christo Jansen Van Vuuren – (The curriculum vitae of the witness is agreed upon by the parties). He is a Professor at Unisa in the Department of Anthropology and Archaeology. He holds a D. Phil degree in Anthropology. His publications and papers appear on pages J 34 – 38.

The witness was then referred to Bundle E- an extract from the book of Van Schalkwyk. The study was done under supervision. He was a co- supervisor of Van Schalkwyk. At that time he was already the holder of a doctorate which he obtained in 1992.

He then explained the chronology of Kings – in Africa there are (3) systems of regimentation. In East Africa there is a system called cyclical linear and generation system. In South Africa among Sotho speaking people they use a linear system. The Ndebele of South Africa use the cyclical system. Linear system demonstrates the leaders of the specific regiments and kings. It also indicates the year and the date of succession. Matume Wilson Leboho was not a leader of a regiment because there was somebody more senior available at the time. He further told the court that it is correct that not all people who became leaders of the regiments became "Dikgoshi".

He testified that the letters mentioned hereinbelow in Bundle "B" demonstrate that Bahananwa Traditional Community was in mourning and the community does not discuss the identification of a Kgoshi during the mourning period.

- (i) Letter dated 2 May 1939 found at page 199.
- (ii) Letter at page 198
- (iii) Letter dated 7 December 1940 at page 193
- (iv) Letter dated 8 January 1941
- (v) Letter dated 29 November 1941 at page 186
- (vi) Letter dated 24 August 1945 at page 185

[23] The period for mourning is one year. The letters appearing on pages 174 and 177 are a confirmation that Seiphi was installed a Kgoshi. The letter in Bundle "D" dated 23 November 1953 states that Seiphi died in November 1953. The letters dated 22 January 1954 and 15 February 1954 on pages 163 and 164 of Bundle "D" confirmed that Mosima was identified to reign as a regent until her death. The letters appear on pages 155, 156 and 159 of Bundle "D" are an indication of how the government of the day imposed on the tribe as to who must be installed as Kgoshi and how the Kgoshi had to discharge his duties. The letter dated 2 June 1954 denotes that the late "Kgoshi" Maleboho broke the custom of his tribe by marrying a wife from Rangata instead of Morudu or Kubu family. Letters at pages 82 and 85 of Bundle "D" state that the tribe identified Matume Wilson Leboho as Acting Kgoshi until such time that a successor would be raised. Letter at page 33 of Bundle "D" denotes that Mosima passed on around June 1960. The witness testified that Pheaha Richard Leboho addresses Ngako Isaac leboho as uncle (rangwane) in terms of Bahananwa traditional custom and status. He also told the court that it is unusual that the fourth son, such as Tiabo Joseph Leboho should be installed as Kgoshi.

Under cross examination

Kgoshi Seiphi was an heir of Mabea and not Rachacha. According to the letter dated 2 May 1939 on page 199 of Bundle "D" the mourning period was less than a year. In the past once a "Kgoshi" was identified he would be introduced by the Bakgoma to the Commissioners. Presently he would be recognised by the Premier.

He has not come across authority confirming that masechaba for the Bahananwa royal family would come from the Mokgobu family. The thesis of Van Schalkwyk does not specifically deal with the subject relating to that fact that the future Kgoshi would be born by a masechaba from a particular family including the Mokgobu family. However he conceded that a masechaba plays an important role within the Bahananwa royal family.

He has not seen a resolution endorsed by the Bahananwa Royal Family to the extent that Ngako should be identified as a Kgoshi. He denied that children of Mafori were Mosima's children. Mafori did not come into the royal family to revive Mosima's house.

Under re examination

Mabea died before his father, Rachacha (kalushi) died. Rachacha died in 1939.

Evaluation and Analysis

Sections 211 and 212 in Chapter 12 of the Constitution of the Republic of South Africa Act 108 of 1996 regulate the official recognition of traditional leadership in traditional communities.

- (1) Section 211 - The institution status and role of traditional leadership according to customary law are recognised subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

Section 212 – (1) National Legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. (2) to deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law –

- (a) National or provincial legislation may provide for the establishment of houses of traditional leaders;
- (b) National legislation may establish a council of traditional leaders.

Traditional leadership as an institution in the South African legal system is underpinned by a number of fundamental rights. In **Minister of Public Works and Others vs Kyalami Ridge Environmental Association and Another 2001 (3) SA 1151 (CC)** at 1172 para 54,

Chaskalson P was of the view that "the doctrine of legality applies to the exercise of all public power.if it were an unlawful decision it would be invalid and liable to be set aside whether it infringed their rights or not". The Premiers' powers therefore would reside under this dictum.

The authority of this power was elucidated by Langa CJ in **AAA Investments (Pty) Ltd v Micro Finance Regulatory Council 2007 (1) SA 343** at pages 372 -373 para 68 – "this is a matter of the application of the rule of law and the principle of legality which flows from the value of the rule of law enshrined in Section 1 of the Constitution. This court has held that the exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of the law. The doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised".

Section 12 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 read with Section 11 of the Traditional Leadership and Governance Framework Act 41 of 2003 regulate the traditional leadership in the Limpopo Province and on a national level.

- [25] The official recognition of a person as a "Kgoshi" of the Bahananwa Traditional Community or a senior traditional leader as it is coached in the Legislation will be governed by these sections.

Section 11 of Act 41 reads as follows:

- (1) Whenever the position of senior traditional leader.....is to be filled
- (a) the royal family concerned must within a reasonable time after the need arises for any of those positions to be filled, and with due regard to applicable customary law –
- (i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 12 (1) (a) (b) and (d) apply to that person; and
 - (ii) through the relevant customary structure, inform the Premier of the province concerned of the particulars of the person so identified to fill the position and of the reasons for the identification of that person and
- (b) the Premier concerned must subject to subsection (3) recognise the person so identified by the royal family in accordance with provincial legislation as senior traditional leader.....
- (2) (a) The provincial legislation referred to in subsection (1) (b) must at least provide for –
- (i) a notice in the Provincial Gazette recognising the person identified as senior traditional leader.....in terms of subsection (1);
 - (ii) a certificate of recognition to be issued to the identified person; and
 - (iii) the relevant provincial house of traditional leaders to be informed of the recognition of a senior traditional leader....

(c) Provincial Legislation may also provide for –

- (i); and
- (ii) Consultation by the Premier with the traditional council concerned where the position of a senior traditional leader.....is to be filled.

(3) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the Premier –

- (a) may refer the matter to the relevant provincial house of traditional leaders for its recommendation; or
- (b) may refuse to issue a certificate of recognition; and
- (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate has been refused.

(4) where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (3) had been reconsidered and resolved the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law,

[25] The national legislation framework mirrors the provincial legislation framework and they are more or else a copycat of each other. Therefore the discussions of one of them should be regarded as the discussion of the other. The legislation for the Limpopo Province,

contemplated in Section 12 of Act 6 of 2005, is contained in Section 11 of Act 41 of 2003. However, Section 12 of Act 6 of 2005 has an additional rider under subsections (1) (b) (iii) and (2) (a) where the Premier is also obliged to refer the matter to the relevant local house of traditional leaders. There is therefore no need to regurgitate Section 12.

It therefore holds that before the Premier can lawfully and properly recognise someone as a senior traditional leader or "Kgoshi" of the Bahananwa Traditional community, he should be satisfied that certain requirements are met. It is clear from the reading of the relevant legislation that if e.g the provisions of Section 12 (a) are complied with, the Premier must subject to subsection 12 (2) – act in terms of Section 12 (b).

Where there is evidence or even a mere allegation that the identification of a person as a "Kgoshi" was not done in accordance with customary law, customs or processes, of the Bahananwa Traditional Community the Premier is open to two options;

(1) to either refer the matter to the Provincial House of Traditional Leaders and the relevant Local House of Traditional Leaders for their recommendations or

(ii) to refer the matter back to the Royal Family.

The Premier has no discretionary power to resolve the dispute on his own, his power and/or function is expressly restricted by legislation to refer the matter to one of the two forums referred to above to obtain a

recommendation or otherwise refer the matter to the Royal Family for a resolution.

It is now common cause that the matter was not referred to the Provincial House of Traditional Leaders and the relevant Local House of Traditional Leaders for their recommendation. It is indeed true that at one stage the matter was referred to Contralesa. While I respect the role that Contralesa plays in the matter of traditional leaders, one must state that in this instance Contralesa was playing a role of an advisor. Its decision is not legally binding.

As already indicated above the Premier is under an obligation to ensure that all the steps necessary have been followed before he/she recognises the person so identified. The use of the word "must" in the legislation is intended to convey a meaning of compulsion, duty and obligation upon the Premier. The context of the doctrine of legality and the clear restrictions for Legislative power binds the Premier to follow the prescribed process in the recognition of the senior traditional leader.

In Mashego v Premier, Mpumalanga Province & Others 2006

JOL 17887 T, it was held that; in the context of our new Constitutional regime, the appointment or disposition of a traditional leader is an administrative act governed by administrative law.

Whereas in **Shilubana and others v Nwamitwa and others 2008**

(9) BCLR 914 (CC) the court found that; Section 211 (2) of the

Constitution, required that courts should respect the right of traditional communities to develop their own law.

In my view, this would also include other branches of government such as the executive. All of us are therefore enjoined to respect the right of traditional communities.

The historical background already referred to in this judgment should serve as a reminder to those presiding over the identification and recognition of traditional leaders. Section 11 of Act 41 of 2003 and Section 12 of Act 6 of 2005 were brought in to prevent the iniquities that occurred during the apartheid era. Neither the Premier nor, for that matter, the Royal Family of the Bahananwa Traditional Community are free to elect or choose, identify, or recognise the candidate whom they support or prefer. A "Kgoshi" of the Bahananwa Traditional Community is born and not elected, chosen or appointed.

The requirements, procedures and processes for the identification by the Royal Family and the recognition by the Premier of a "Kgoshi" of the Bahananwa Traditional Community should be regulated by the provisions of Act 41 of 2003 and Act 6 of 2005.

Anything done outside the provisions of Act 41 of 2003 and Act 6 of 2005 is *ultra vires* and beyond the scope of the empowering legislation. The factual basis as discussed hereinbelow will indicate as to who qualifies in terms of the customary law of the Bahananwa Traditional Community to assume the position of "Kgoshi" of that community.

**A synopsis of the Bahananwa royal succession to the throne –
from Maleboho to Seiphi.**

[17] Legend has it that the Bahananwa people moved from Botswana to what is now known as Blouberg or Maleboho. Kgalushi Seketa Rachacha Leboho ascended the throne which he inherited from his forefathers.

After many tribulations of resistant wars against the colonial forces he was captured and imprisoned. He was subsequently released in 1900 and continued to rule over his people until 1939 when he died. He was succeeded by Seiphi. According to evidence tendered in court, Kgalushi's son, ie Mabea died before him. (See Bundle B pages 98 – 100). When Kgalushi died in 1939 his wife Mmamphoku ruled for a while until 1940 when she died. There is no dispute that Seiphi died in 1953 and that his wife Mosima ruled as a regent thereafter until she was removed by the colonial government in 1957.

There is also evidence before court that Rachacha's principal wife (masechaba) was from Rangata which broke the tradition of the Bahananwa of taking the masechaba from kubu and Morudu. In fact it was revealed in evidence that the Bahananwa Royal Family marry their masechaba from Morudu, Rangata and Kubu families.

J A Van Schalkwyk opines that from the time of the reign of Leboho to immediately after the death of Seiphi the masechaba of the

Bahananwa would take over the reigns from their husbands. Mmamphoku took over from Kalushi. Mmanchaku also ruled for a while. Mosima took the reigns from her husband Seiphi. Surprisingly, this practice was never followed since the period after Mosima.

- [28] Seiphi's inauguration was delayed by many years until 1946 when he was installed. The same trend was followed in the case of Mosima. The reason why the Native Commissioner at Bochum delayed Seiphi's inauguration as Kgoshi was simply because he was not co-operating with the government of the day. See Van Schalkwyk page 122 and files F541074/2: 24 and F541074/248. The government would also raise drunkenness on the part of Seiphi as an excuse.

Mosima was a masechaba from the Rangata family. She was childless. After the death of Seiphi in 1953, the Bahananwa Royal family hastened to install Mosima as a regent. However this was delayed by the government – File F54/1074/2:49

- [29] The State ethnologist N J Van Warmelo was against the installation of Mosima as a regent raising questions of traditional practise and also the fact that she might not have been the rightful person to take over the reigns - See files F54/074/2: 53 and F54/ 1074/2:80. Since she had no child the family had wished that her house should be revived.

It would later transpire that all these tactics were used by government because the Bahananwa people were regarded as hard-headed and uncooperative with government, due to the fact that they refused to

pay tax and rejected the system of registration of birth and death. As a consequence, inauguration of Mosima had to be stalled. The payment of pensions and maintenance of water supply had to be terminated. – See file F54/1074/2: 56, 57). And also the letter of the Chief Native Commissioner: Pietersburg (as it then was) file F54/1074/2:58.

In the past the following was the rule: "The Governor – General may recognise or appoint any person as a chief or headman in charge of a tribe or of a location, and is hereby authorised to make regulations prescribing the duties, powers and privileges of such chiefs and headmen. The Governor-General may depose any chief or headman so recognised or appointed" – Subparagraph 7, Section 2 of the Native Administration Act of 1927.

In august 1954 the Secretary of Native Affairs (W.W.M Eiselen) wrote a letter to the Chief Native Commissioner in which he categorically stated that Mosima could not be appointed as a regent until there is clear indication that she and her people would co-operate with the government – File F54/1074/2:60. The Commissioner threatened to withdraw social grants, maintenance of roads, dams and windmills, and school development. Mosima was only installed on the 22nd May 1956 on probation. File 54/1074/2: 108. Mosima died around June 1960.

I lay this foundation for discussion of a similar matter hereinbelow

[31] THE PERIOD BETWEEN MATUME WILSON MALEBOHO AND BEN SERAKI LEBOHO.

Matume Wilson Leboho was born in 1926. He is the son of Mabea and Mmantshaku. Mmantshaku and Mmamphoku are sisters from the Rangata family. Mmamphaku, as it has been mentioned above is Seiphi's mother. As a young girl Mmanchaku was a care giver

(babysitter) for Seiphi. Mabea then decided to marry her. Seiphi and Wilson are half brothers. Matume Wilson was installed as an Acting "Kgoshi" in January 1958 – it was also the intention of the family that Matume would become a seed-raiser for Seiphi in order to revive the house of Mosima – See in this regard Van Schalkwyk page 128.

There is evidence by Nelly Leboho, Ngako Richard Leboho and Maselelo Ramokone that at the cleansing ceremony of Mmanchaku, (ie Matume's mother) Matume informed the Bahananwa gathering that the property of his mother would be divided amongst his wives and children and that Mmangako and her son would share from the royal property. There is also evidence that Matume Wilson made it clear that he was not a Kgoshi, but was acting on behalf of "Ngako".

The letter of appointment for Matume Wilson Leboho dated 27 January 1958 is in an acting capacity. The appointment letter of Matee Collins Leboho dated the 8th July 1982 is also in an acting capacity. Pheeha Ben Seraki Leboho was also appointed in an acting capacity – see letter dated 1st November 2001. (Bundle F). This is confirmed by the evidence of the Applicant's witnesses to wit, Matume Leboho. Tshwenyegi Phillip Leboho, Nelly Leboho e.ct.

Matume Leboho was nominated as a seed-raiser to father a child with Mmangako Mokgobu as "ngwetsi" for Mosima Rangata to revive her (Mosima) house. The offspring between Matume and Mosima would then be regarded as Seiphi and Mosima's child – that is Ngako, who would then become the future "Kgoshi".

Matee Collins Leboho held his acting position on behalf of Ngako. He related this to his wife and children. The evidence of Matume Wilson (Jnr) confirms this. Tlabo Joseph, the 2nd Respondent was also present when this was said. The Respondents wouldn't refute the reason why

the three Digoshi ruled in acting positions. There is no evidence to the contrary. The absence of any written document that the three of them acted on behalf of Ngako is no proof that it is not true. Circumstances are such that most of the Bakgoma cannot read and write and a lot was handed down by word of mouth. Even, so, Ben Seraki himself did not obtain a permanent appointment even after the recommendation by Contralesa. It can be mentioned that while one respects Contralesa as an organisation which plays an important role in the affairs of traditional leaders, in this instance it was merely giving an advice which advice has no binding effect at all.

When Matume Wilson Leboho was approached by some young men among them, his grandson, the late Ben Seraki and Pheeha Richard Leboho in 1975 to convene a royal initiation school, he refused because the said Ngako Isaac Leboho was still young and not old enough because the others had to wait for him as the future "Kgoshi" to establish a regiment. The evidence concerning this incident also stands uncontradicted.

[31] The significance of leading a regiment (mphato) in the Bahananwa custom.

According to the Bahananwa custom boys are taken through initiation schools to introduce them to the understanding of the coming of manhood. It is not the actual transition, biologically or socially, it is a form of preparation which emphasises the male qualities of the growing boys – (Swantz 1970: (70).

It is trite that when a "Kgoshi" establishes an initiation school one of his sons should attend as an initiate. Although some sons of the Digoshi may attend the initiation school, one of his sons or in the absence thereof a son of bakgomana may lead the regiment (mphato). It is the custom and tradition of the Bahananwa Traditional Community

that has been practised since time immemorial that no person who has not been the leader of the regiment was ever a legitimate "Kgoshi" of the Bahananwa Traditional Community. This is confirmed by Table 5 of Van Schalkwyk (Mansregimente Van die Hananwa).

The Maohu/Makoba regiment was led by Kalushi who later became a Kgoshi. The Marutho regiment led by Mabea was a Kgoshi. The Dithaga regiment was led by Seiphi who was a Kgoshi. Ngako who is the subject of adjudication in this judgment became the leader of the Makoba regiment. It is also significant to note that Matume Wilson and his sons, Ben Seraki and Tlabo Joseph were not leaders of any regiment. In fact Tlabo Joseph and Ngako Isaac Leboho attended the same royal initiation school of 1984 and Ngako is the one who established the Makoba Regiment of which he was the leader. - (See Bundle "B" Page 21 footnote 4).

- [32] The evidence before court confirms that the said initiation school was only convened once the said Ngako Isaac Leboho was old enough to attend and it was therefore specially convened for him. This is proof that Ngako was destined to become a "Kgoshi".

Ngako's own traditional healer from the same lineage.

There is uncontested and unchallenged evidence by Johannes Tau Molele before the court that at least from the time of "Kgoshi" Rachacha Leboho every "Kgoshi" of the Bahananwa Traditional Community had a traditional healer for himself. The grandfather of Johannes Tau Molele occupied this position, which was taken over by his father then himself. He is presently the traditional healer of Ngako Leboho and not for Tlabo Joseph Leboho. There is no evidence by the Respondents that there is a traditional healer for Tlabo Joseph Leboho from the same lineage.

[33] The role of a masechaba/timamollo/seantlo in order to legitimise an heir to the throne for the Bahananwa Traditional Community.

In their book *Die Privaatreg van die Suid Afrikaanse Bantoetaal – sprekkers – 3rd uitgawe*, Olivier A J J et al refer to Monning en Harries at page 447 and write on; the Bapedi, that: "if a man has no sons his possessions cannot revert to other relatives since efforts will have to be made to produce a son for him posthumously.....if there is no heir, and the widow is no longer capable of having children, or if there is no widow, the control over property is automatically assumed by the closest male relative, but it is his duty to use this property to obtain an heir for the deceased".

In the instant case, after Matume ascended the throne in an acting position, he facilitated the procreation of a son with Mmangako Mmangako through the Bakgoma and Royal family. He was identified as a seed raiser and out of that Ngako was born. This is in accordance with the Bapedi customs of succession. The report of the Commission on Traditional Leadership Disputes and Claims (the Nhlapo Commission) in particular, "Determination on Bapedi Paramountcy" discusses "Succession to the Kingship of Bapedi" and refers to H O Monning; "The Pedi" (1967).

At pages 20- 21 the following is of cardinal importance:

"5.11 (a) customary succession is based on a system of male primogeniture. A female cannot succeed. The status of a wife within a polygamous marriage determines succession to kingship.

(b) Amongst the wives of a "Kgoshi", there is timamollo or candle wife. The Magadi (lobola) of the candle wife (great wife) is derived from contributions made by the community;

..... (d) Timamollo is married in order to bear an heir to the throne;
 5.12 if customary laws of succession discussed above fail to provide an heir, the following customary practices are restored to-

(a) If a timamollo is unable to bear an heir, thlatswadirope acts as a surrogate mother;
 (b) Where a candle wife dies without issue, one of her sisters or close relatives is provided as Seantlo, to bear children on her behalf(or an heir) (my own emphasis). The same ritual of marrying a timamollo is followed in marrying the Seantlo.

(c) in the event of the death of a "Kgoshi" without issue, the royal family appoints someone to raise seed on behalf of the deceased".

If has been confirmed that after the death of Seiphi, Mosima acted as a regent during interregnum. Thereafter Matume took over the reigns as an acting "Kgoshi". Mmangako was then married as a thlatswadirope or Seantlo to raise a seed for Mosima. Matume was a seed raiser and Ngako was born.

It can be mentioned that Matume Wilson Leboho and all his descendants, including the said Tlabo Joseph Leboho are not blood relations of "Kgoshi" Seiphi Leboho , the late "Kgoshi" Mabea Leboho or the late "Kgoshi" Rachacha Leboho . According to the undisputed evidence, his mother was Mantshaku Rangata but his biological father was one Rakuta Leboho and not the late "Kgoshi" Mabea Leboho. However, although he does not belong to the Bahananwa Traditional Community throne as a "Kgoshi", he had royal blood running in his stream – Rakuta was a Leboho by blood. - See the evidence of Ngako Richard Leboho page 15 of this judgment.)

A question therefore arises whether, Matume Wilson was the rightful seed raiser. In the first place he is a Leboho by blood. In the second

place he was an acting "Kgoshi" after the death of Seiphi and Mosima. Lastly, according to the custom of Bapedi it is irrelevant who fathers the heir, so long as (the heir) is born of timamollo, tlhatswadirope or seantlo. See the Nhlapo Commission Report page 16. Matume was therefore the rightfully seed-raiser. Since Mmangako was hlatswadirope or seantlo and Ngako was born of Matume and Mmangako it makes Ngako Isaac Leboho a preference to the throne instead of Tlabo Joseph Leboho.

While the Kgoshi remains the pinnacle of the tribe or community, his roots and legitimacy is determined by his mother (Masechaba). It is for this reason that the origin of the masechaba is of paramount importance. The family from which a masechaba originates is determined by the royal family. In a number of royal families the masechaba would come from another royal family or from their close relations – such as cousins or grand daughters.

As already mentioned above, the Basotho speaking people use a linear system – the shorter Oxford English Dictionary page 1608 defines it as "Arranged or measured along a straight line, extended in a line or length, involving measurement in one dimension only; involving or exhibiting directly proportional change in two related qualities; progressing in a single direction by regular stems or stages. The linear system in amongst the Bapedi demonstrates the leaders of the specific regiments and Kings. However, this is also determined by a masechaba who must come from a particular family.

There is evidence that the Bahananwa Royal Family married their masechaba from the Kubu, Morudu and Rangata families. – See also Van Schalkwyk page 117. The mother of the late "Kgoshi" Rachacha Leboho came from the Morudu family. Rachacha's principal wife (Maserule Morudu) came from the Morudu family. However, Rachacha

cut ties with the Morudu family and took Mamphaku from the Rangata family and made her his principal wife instead. It is therefore not cast in stone that the masechaba from whom the future "Kgoshi" was to be born always came from the Rangata family. If the Royal family discusses the matter and decides on a particular family so would that be carried.

[34] The other deciding factor is that the "magadi" (bride-cattle) or (dowry) must come from the Bahananwa community. Caiphus Rangata of the Rangata family testified to the effect that the principal wife of a "Kgoshi" of the Bahananwa Traditional Community does not only come from the Rangata family but also from Morudu, Kubu, Makwiteng and Mokgobu. Mmamoyahabo Thanyane testified that it was discussed and decided by the elders that a nubile from the Mokgobu be married as a "Ngwetsi" for Mosima in order to revive her house.

Counsel for the Respondents conceded that it would be allowed in exceptional circumstances. Caiphus Rangata also testified that the Bahananwa approached the Rangata family for a nubile and they were informed that there is none. Under these exceptional circumstances the Bahananwa approached the Mokgobu family.

It can be mentioned that Mmangako is not a distant relative. She is said to be a great grand daughter of Kgoshi Leboho. This exception or departure is permissible where at a relevant time the Rangata family had no nubile available. There is no contradicting evidence by the Respondents.

[35] It is also necessary to discuss the status of Mafori Rangata under this heading. On this aspect the contention of the Applicants stands to be sustained. It is this that the Respondents advanced a theory without any supporting evidence that Mafori was married to become a "Ngwetsi" for Mosima Rangata in order to revive her house. This theory was advanced under cross-examination.

The evidence before court is that the said Mafori was the wife of the late Acting "Kgoshi" Matume Wilson Leboho and not a principal wife from whom the future "Kgoshi" of the Bahananwa Traditional Community would be born. Further, that Mafori was not available at the time when the Bahananwa were seeking a masechaba from whom a future "Kgoshi" was to be born, precisely because at the time she was married to Matume Wilson.

In addition by 1952 (before the late "Kgoshi" Seiphi died in November 1953, she already had her oldest son with the late Acting "Kgoshi" Matume Wilson and not by the late "Kgoshi" Seiphi. - (Bundle D pg 30 the letter dated 10th September 1960). In the said letter it is reported that in 1960 there was no successor as "Kgoshi" available. At that time Collin Matee was already born (in 1952) and he was approximately eight years old. If the theory for the Respondents were true, then the late Collin Matee would have been the future "Kgoshi" by birth and he would have been the successor. This would therefore mean that presently the contest would be between Ngako Isaac and Matume Wilson Leboho (jnr) and not Tlabo Joseph Leboho.

Another argument by the Applicants, which I accept, is that current abstract theory advanced by the Respondents, that the said Mafori somehow was married to become a "ngwetsi" for Mosima so as to revive her house, is in any event contradicted by a different theory that was advanced on their behalf previously (although it was not canvassed fully in oral evidence or during cross – examination, but appears clearly from documentary evidence). That other theory is that, when Mosima died without a son, the Bahananwa Community allegedly decided to go back to the "second house of Mabea" as the house from which the future "Kgoshi" of the Bahananwa would come, on the basis that Mmanchaku Rangata (the mother of the late Acting "Kgoshi" Matume Wilson) then become the principal wife from whom the "Kgoshi" would spring.

On this basis the late Matume Wilson Leboho, her oldest son, would then have been first new "Kgoshi" in a new lineage. That this other theory is false appears not only from the undisputed evidence, but also from the fact that both the late Matume Wilson and his oldest son the late Collin Matee had acting appointments, orally and both expressly indicated that they held that appointment on behalf of Ngako Isaac Leboho.(record page 38) However, after having advanced this other theory to the Premier and after having obtained the official recognition of the said Tlabo Joseph Leboho on this basis, the Respondents abandoned that theory in favour of a new theory.

Obviously the old theory did not require a construction that Mafori had to revive the house of her step sister Mosima and it is with respect clear that the new theory about the alleged special status of Mafori is an after thought and superficial reconstruction so that the Respondents can tack their sails to the wind: up to the initiation of these proceedings, one was not aware of any document or statement on behalf of the Respondents claiming that Mafori Rangata had to revive the house of her step sister Mosima Rangata.

[36] Even more ambivalence appears from the answering affidavit of the said Tlabo Joseph (the second respondent) which was filed in the review application proceedings. Therein he states under oath that his mother (Mafori Rangata) was the principal wife of the late "Kgoshi" Seiphi Leboho – See Bundle C page 158. He also states under oath in the same breath that his mother was the principal wife of the late Acting "Kgoshi" Matume Wilson Leboho – See Bundle C page 160. In addition there is no allegation in the said answering affidavit that Mafori had to revive the house of her step sister Mosima.

On the contrary, instead of being portrayed as a "Ngwetsi" for Mosima she is artificially elevated to a principal wife in her own right as if she established her own house. This is with respect yet another indication that the new theory about the alleged special status of Mafori was an opportunistic construction resulting from the ingenuity of the Respondents.

In my view, this serves to confirm why the Respondents closed their case without calling any witnesses, and claiming instead absolution from the instance. In fact the whole case for the Respondents may fall on this point alone.

It is therefore my considered view that the procedure followed by the Bahananwa when Mmangako was married was proper and is therefore valid. This is based on the evidence of Tshwenyegi who testified that "magadi" in the form of five (5) head of cattle for Mmangako Mokgobu (Ngako's mother) was agreed upon and paid to her family from the cattle of the Royal Kraal, whereafter she moved to the Royal Kraal. This evidence was never disputed or challenged by the Respondents. The allegation that Mmangako came into the Royal family as Matume's wife cannot stand because there was no evidence that Matome paid "magadi" for Mmangako.

- [37] The Respondents aver that Mmamoyahabo Thanyane contradicted this evidence. This is absurd, in that although she might have contradicted herself on the issue of the emissary, she was very clear that "magadi" were delivered. It is therefore clear that Mmangako was married as a "Ngwetsi" or Seantlo to revive the house of Mosima. This therefore brings us to the question whether Ngako should be regarded as Seiphi and Mosima's son.

Status of Ngako Isaac Leboho

The truth of the matter is that after the death of "Kgoshi" Seiphi in 1953, the Bahananwa Royal Family could not fill his vacant position because there was no successor to the throne. Ngako Isaac Leboho enjoys the support of Ntikane Phillip Leboho (known as Tshwenyegi and the first witness for the Applicants). The said Tshwenyegi is the chief senior councillor of the Royal Family of the Bahananwa Traditional Community. He is in fact the most senior of the "bakgoma" since 1995, after Tlhatludi died in that year. Tshwenyegi's son one Richard Peaha Leboho set the record straight when he testified that in fact Tlhatludi was not the most senior mokgoma, that the most senior mokgoma was his father Tshwenyegi. Documentary evidence in a form of an extract from the Doctoral Thesis of Van Schalkwyk indicates that by 1995 Phillip Leboho was the chief senior councillor – Bundle E page 118. This allegation of the status of Tshwenyegi was also made in the founding affidavit for the review application without any contrary version being stated in the answering affidavit – Bundle A (pages 37 – 38).

- [38] Tshwenyegi testified that he regards the said Ngako Isaac as his elder brother and the oldest son of "Kgoshi" Seiphi Leboho and Mosima. Matume Wilson (jnr) the grandson of Matume, testified that he regards Ngako Isaac as the senior in status as did his late father Collin. This was corroborated by Richard Pheaha. The undisputed evidence before court is that Mosima as masechaba was to bear the future "Kgoshi" and not from the second house of Mabea or the house of Mafori.

While Mosima was still alive, so is the evidence before court, the elders of the Royal family met and discussed the issue of succession to the throne. Tshwenyegi was present when it was agreed that the Rangata family should be approached for a 'daughter in law' to revive Mosima's house. After the Rangata family had indicated that they had no daughter, the Mokgobu family was then approached and it is where Mmangako was indentified as a possible "Ngwetsi". Mmangako was then married in order to revive Mosima's house, Mmangako was selected because she was the great grand daughter of one Mmamphoku Rangata and a great grand daughter of the late "Kgoshi" Rachacha Leboho. Mmangako therefore had in her stream the Rangata blood as well as Leboho blood.

Acting "Kgoshi" Matume Wilson (who is the stepbrother of the late "Kgoshi" Seiphi was identified as the seed-raiser who fathered Ngako Isaac on behalf of the late "Kgoshi" Seiphi. This institution, custom or tradition of seed raising is widely recognised in traditional communities. A seed raiser is identified from amongst the younger brothers or the sons of the younger brothers of the late "Kgoshi". It is therefore not surprising that Matume was so identified. Even if his biological father could be Rakuta, according to the Bapedi custom he is regarded as the sonof Mabea.

The (family tree) or (genealogy) marked K reflects Mmangako as a "Ngwetsi" of Mosima. It also reflects Ngako Isaac as the eldest son of the late "Kgoshi" Seiphi. The genealogy is consistent with the evidence

of Tswenyegi, and Richard Pheaha. There is no document prepared by the Respondents which indicates that any offspring of Mafori was regarded as a child of the late "Kgoshi" Seiphi and his principal wife Mafori.

[39] Acting "Kgoshi" Matume Wilson and his late son acting "Kgoshi" Collin Mattee held their acting appointments on behalf of Ngako Isaac. This is also confirmed by the fact that, while Mosima acted as regent, Mafori was never appointed to act as masechaba. Moreover, Matume was identified as a seed-raiser.

The fact that Matume announced at the cleansing ceremony that his mother's property should be divided amongst his wives (including Mafori) and his children and that Mmangako and Ngako would receive their share from the Royal family property was a concession that Ngako is the de jure future "Kgoshi" of the Bahananwa.

Evidence further shows that Collin Mattee also confirmed this by telling his wife and children that Ngako is the future "Kgoshi". It must be noted that Collin Mattee and Tlabo Joseph are the biological children of Matume Wilson and Mafori.

One can but conclude that though knowledgeable that Matume held that position in an acting capacity and which was common sense to Collin Mattee from that premise they made a deduction which is their syllogism. I must confess that with the limited knowledge and experience that I hold, I have never come across an instance where children of the same father and mother would succeed one another as

"Dikgoshi" for the same tribal community. If anything, to the extent that Matume was the rightful heir, maybe his son Collin could have become a "Kgoshi", but it is clear from the evidence that he too is not a rightful heir. If that be the case there is no way in which his two younger brothers could have become "Dikgoshi". Instead, maybe his son Matume Wilson (jnr) could enter the fray. In the absence of any evidence to the contrary, Ngako Isaac Leboho qualifies as the heir to the throne.

Certain documentary evidence on the identification of the heir to the throne.

During cross-examination of Tswenyegi, the Respondents relied on a letter dated 21 December 2005, for alleged proof that the Tribal Council of the Bahananwa Traditional Community as well as the Royal Council of the Bahananwa Traditional Community duly identified Tlabo Joseph Leboho as the person who qualifies to assume the position of the next "Kgoshi" – Bundle A pages 68 -70.

One is bound to support the version of the Applicant in that the authors of these letters were not called as witnesses and there is no witness who confirmed the contents thereof under oath. As a result no reliance can be placed on these letters.

There is also evidence that no such meeting as reflected on the said documentary evidence was ever held. Tswenyegi as the most senior

mokgoma ad convenor of the Royal Council denied ever calling or attending such a meeting. There are names and signatures of certain people who are purported to have attended the meeting who were not present or did not qualify to be present at such a meeting.

There is also evidence by Shadrack Makwiting that the documentation was fabricated as a ploy to outmanoeuvre Ngako Isaac Leboho. During the review application only one letter formed part of the original record. The second letter purporting to be from the royal Family and allegedly carrying signature of Tshwenyegi, who as we know from his evidence can neither read nor write, came to the fore without any explanation under oath as to why both letters were not available from the outset – Letter appearing in Bundle G was not originally filed when this Bundle was compiled – page 30 of Judgment. The letters also reflect names of people who are not bakgoma of the Bahananwa Traditional Community. This is further exacerbated by the fact that Tlabo Joseph Leboho who was to be identified as “Kgoshi” also participated in the alleged meetings where he was allegedly so identified. This is unheard of in the Bapedi tradition. One is therefore bound to conclude that the letters were fabricated.

[47] This then takes me back to the aspect that I raised above concerning interference in matters of the royal succession. The royal institution is very noble and it should be left alone to administer its affairs without interference by government officials. There is evidence before court that an official from the Premier’s office conducted meetings of the

Royal Council where the issue of the identification of a future "Kgoshi" was discussed. Some officials even went to the extent of preparing a genealogy for the Royal Family. This is a matter that could have been left in the hands of the family and experts. While it is accepted that the royal institution cannot exist in limbo, it must also be emphasised that this institution should be allowed some independence.

APPLICATION FOR ABSOLUTION FROM THE INSTANCE.

[41] As already indicated above, the Applicants tendered evidence of a number of witnesses, where after the Respondents closed their case without calling a single witness. The Respondents then launched an application for absolution from the instance.

At the close of the case for the Plaintiff, therefore, the question which arises for the consideration of the court is: "Is there evidence upon which a reasonable man might find for the Plaintiff? If the Defendant does not call any evidence but closes his case immediately, the question for the court would then be:" Is there such evidence upon which the court ought to give judgment in favour of the Plaintiff?" If the evidence is not only not convincing, but actually found by the trial Court to be an utter fabrication or if it be a fact that it is too vague and contradictory to serve as proof of the question in issue, then it would be evidence on which a reasonable man would not find and the Court would be perfectly justified in granting absolution from the instance at

the close of the case for the Plaintiff – Ruto Flour Mills (Pty) Ltd v Adelson (3) SA 1958 (4) 309 (T) at 309 (E-F).

[42] In casu, the (Applicants) and the (Respondents) have closed their cases, albeit the Respondents did not tender any evidence. The court is dealing with a comprehensive case, where there is a possibility of some contradictions in the witnesses' evidence. In my opinion the contradictions do not paralyse the Applicants' case. Further, it does not seem that there are any fabrications in the evidence of the Applicants. Since the Respondents did not adduce any evidence, it would appear that there is no need for the court to fall back on the onus of proof in order to make a final finding. Applicants now only carry a burden to show a prima facie case which in the absence of any contrary evidence becomes conclusive.

"In Ex Parte Minister of Justice: in re R v Jacobson and Levy, Stratford JA said:

"Prima facie evidence in its usual sense is used to mean prima facie proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus".

In order to survive absolution a Plaintiff had to make out a prima facie case in the sense that there was evidence relating to all the elements of the claim, because, without such evidence, no court would find for the Plaintiff. As for the inferences, from the evidence were concerned,

the inference relied upon by the Plaintiff had to be a reasonable one, not the only reasonable one. In this respect, a court ought not to be concerned with what someone else might think that is another 'reasonable' person or court, but rather with its own judgment. Absolution should be granted sparingly but when the occasion arose, a court should order it in the "interest of justice" – Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) SA 88 SCA.

The inferences that the Plaintiff may rely on are reasonable. There is sufficient evidence relating to all the elements. In my opinion this is not one of the cases in which the occasion for absolution from the instance has arisen.

- [43] In the circumstances I find no reason why absolution from the instance should be granted.

[44] **CONCLUSION**

Despite a few discrepancies in the testimonies of Mmamoyahabo Thanyane and one Makwiting, the evidence tendered by the Applicants is overwhelming in a material respect. There is no way in which their version can be faulted. During cross-examination the Respondents were vigorous that they would call a number of witnesses to contradict the version of the Applicants. Nothing of the sort happened – the Respondents closed their case without calling a single witness. It is my considered view that the Applicants succeeded in proving their case on a preponderance of probabilities.

This therefore gives me an opportunity to formally receive of the documentary evidence tendered, but for a letter handed in by the Respondents which appears in Bundle A - 69 but not appearing in Bundle G. The hearsy evidence tendered by certain witnesses was confirmed by eye witness. To that extent the hearsy evidence is found to be admissible.

In the circumstances I have come to the following, conclusion that:

- (a) When considering the identification of a future "Kgoshi" the Bahananwa Royal Council was not properly constituted because present at the meeting were people who were not members of the said council, and therefore the council failed to observe the customary law, customs and processes of the Bahananwa Traditional Community.
- (b) The second Respondent, Tlabo Joseph Leboho sat at the proceedings of a meeting where he was identified as "Kgoshi".
- (c) The said Tlabo Joseph Leboho does not belong to the house whose sons are legible to ascend the throne.
- (d) Tlabo Joseph Leboho's mother one Mafori is neither a timamollo, tlhatswadirope nor a seantlo, and therefore she did not qualify to bear a future "Kgoshi".
- (e) Tlabo Joseph Leboho was not a leader of a regiment (mphato).
- (f) The Premier failed to recognise the person so identified by notice in the Gazette.

(g) By recognising Tlabo Joseph Leboho, as senior traditional leader or "Kgoshi", the Premier acted *ultra-vires* because there was evidence or allegations that the identification of the said Tlabo Joseph Leboho, was not done in accordance with customary law, customs and processes of the Bahananwa Traditional Community.

(h) In the absence of any evidence to the contrary, Ngako Isaac Leboho should qualify as the heir to the throne.

The court has been approached to grant an order in terms of prayers 1.1, 1.2, 1.3 and 1.4. Much as the court might have formed an opinion on this matter, it would be disingenuous of me to make an order in terms of prayer 1.3. This will be tantamount to installing or recognising Ngako Isaac Leboho as "Kgoshi" and thereby usurping the powers of the Premier and all the relevant structures. While it might be necessary to make an order in exceptional instances, I am not tempted to do that in this case. Even if one is of the view that the proper procedures and processes were not followed in the recognition of the 2nd Respondent, one is also mindful of the separation of powers and the respect that must be accorded to the executive and its administration. I am therefore enclined to making an order in terms of prayer 1.1 without any correction and 1.2. Prayer 1.3 is therefore considered but not granted. Proper procedures and processes must still be followed to identify and recognise the "Kgoshi".

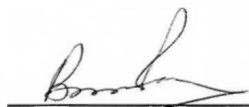
The Respondents have submitted that the court should make a punitive cost order. First, in view of the fact that the Respondents were threatening to call their witnesses which did not materialise. Second because the matter started as an ordinary review application which culminated into a long trial because of the factual disputes arising from

the answering affidavit. It is now clear that the factual disputes were not genuine. The Respondents were not candid with the court.

One other important aspect is that the Respondents litigated through the office of the Premier.

In the result I make the following order:

- 1. The First Respondent's official recognition of the Second Respondent; Tlabo Joseph Leboho, as a senior traditional leader or "Kgoshi" of the Bahananwa Traditional Community with effect from the 6th September 2006 per decision No 123/2006 is declared null and void, reviewed and set aside.**
- 2. The First and Second Respondents, are jointly and severally ordered to pay the costs of this application on a scale as between attorney and own client, the one paying the other to be absolved.**



**TJ RAULINGA
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT**