

IN THE REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

DATE: 4/03/2022

Signature

CASE NO: 17639/15

In the matter between:

**THE BAKGATLA BA MOCHA BA PHOPOLO
TRADITIONAL COMMUNITY (OF MMAMETLHAKE)**

FIRST APPLICANT

AMOS PHOPOLO MALOKA III

SECOND APPLICANT

And

**THE PREMIER: MPUMALANGA
PROVINCE**

FIRST APPLICANT

**THE CHAIRPERSON OF THE PROVINCIAL
COMMITTEE ON TRADITIONAL LEADERSHIP
DISPUTES AND CLAIMS (MPUMALANGA)[CTLDC]**

SECOND RESPONDENT

And

**THE COMMISSION ON
RESTITUTION OF LAND RIGHTS**

THIRD RESPONDENT

**THE REGIONAL LAND CLAIMS
COMMISSIONER (MPUMALANGA PROVINCE)**

FOURTH RESPONDENT

**THE REGIONAL LAND CLAIMS
COMMISSIONER (LIMPOPO PROVINCE)**

FIFTH RESPONDENT

**THE MINISTER OF COOPERATIVE
GOVERNANCE AND TRADITIONAL
AFFAIRS**

SIXTH RESPONDENT

JUDGMENT

MAHLANGU AJ

INTRODUCTION

[1] This matter relates to an application brought by the applicants seeking the following relief:

- 1.1 Reviewing and setting aside the recommendations of the Second Respondent (CTLDC) and the decision of the First Respondent (The Premier of Mpumalanga Province).
- 1.2 The existence and formal recognition of the Bakgatla Ba Mocha Phopolo Traditional Community (of Mmametlhake), and

1.3 The status and the position of the Applicant, Amos Phopola Maloka III as its Senior Tradition Leader.

2

2.1 **Alternatively**, the Applicants seek the following:

2.2 Steps or guidelines to be taken to bring the matter of existence and formal recognition of the Bakgatla Ba Mocha Phopolo Traditional Community (of Mmametlhake) and the position of the Applicant Amos Phopolo Maloka III as its Senior Traditional leader to finality,

2.3 A declaratory order to explain and clarify the relevant legal position and the powers and the obligations of all parties involved therein, and

2.4 An appropriate orders to give effect to the guidelines and the declaratory order,

2.5 A cost order against the First and Second Respondents.

2.6 For ease of reference and convenience, the First to Second Applicants will (hereinafter be referred to as “the Applicants” and the First to Sixth Respondents will (hereinafter be referred as “Respondents”).

2.7 It is important to note that only the first and second respondents are opposing this application of the applicants.

FACTUAL BACKGROUND

[2] In a nutshell, the historical background to this matter is the fact this application came as a result of a longstanding battle of the chieftainship status of the Bakgatla ba Mocha ba Phopolo Traditional Community of Mmametlhake spanning the two decades since the beginning of the new Constitutional democracy in the country.

[3] Subsequent to this battle there was the first Commission on Traditional Leadership Disputes and Claims (CTLDC) otherwise referred to the (Nhlapo Commission), which was established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (hereinafter referred as the “Framework

Act”).

- [4] The term of office of that Commission was (5) five years and it was composed of not more than (15) fifteen members.
- [5] The aim and purpose of this Commission was to investigate and resolve all claims and disputes related to the positions of paramount chiefs, traditional leadership positions, claims by communities to be recognized as traditional communities and the legitimacy of the establishment or disestablishment of ‘tribes’.
- [6] It is common cause that the Nhlapo’s Commission’s term of office came to an end at the end of January 2010 and the Commission’s findings were announced on the 29th July 2010.
- [7] In September 2011, a second Commission on Traditional Leadership Disputes and Claims (hereinafter referred as ‘the Commission’) was announced and established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003.
- [8] The difference between the previous Commission and the current one is the fact that the current Commission is required to handle and investigate all claims and disputes that were lodged with the Nhlapo Commission. The only difference is that the present Commission has recommendation of powers only, unlike its predecessor which also had to make a final decision.
- [9] It is further common cause that the Commission’s term ended in December 2017 and since then, the Premier has not established any other Commission.
- [10] The Applicants contend that there is a conclusive case made in its affidavit for the review and setting aside the recommendations of the Committee on Traditional Leadership Disputes and Claims (CTLDC) and the decision of the Premier of Mpumalanga Province as prayed for in its notice of motion.
- [11] They contend that the administrative application is based on a two-pronged approach to obtain official recognition in the following-
 - (i) The first is the existence and recognition of the Bakgatla ba Mocha ba Phopolo Traditional community (of Mmametlhake)
 - (ii) The second application is based on their Senior Traditional leader.
- [12] They contend further that the second respondent did not have jurisdiction and

should not have been involved in the process, therefore its recommendations were ultra vires.

[13] They submit that the consideration by the first respondent was irregular.

[14] According to the Applicants the respondents did not hear any evidence from Kgosi/Chief/Senior Traditional Leader Mokgoko or from the Bakgatla ba Mmakau and neither did they afford the applicants the opportunity to have insight into and to challenge the evidence of such witnesses.

[15] They submit that if the respondent's argument for joinder were indeed correct, it would serve as proof that the respondents did not apply their minds properly. Further, the applicants submit that the respondents did not comply with the *audi alteram partem* principle as according to him, the applicants were not afforded the opportunity to be heard.

[16] According to the Applicants no evidence from or on behalf of Kgosi" Mokgoko" and none of his subjects presented in the said proceedings. They submit that the respondents never gave any indication during the proceedings that such evidence was necessary, and they did not apply the *audit alteram partem* principle by revealing any such evidence to the applicants for a response.

[17] The applicants contend that the criticism of the respondents is based on their irrational and erroneous conclusion that the applicants were attempting to take over the jurisdiction of Kgosi/Chief/Senior Traditional Leader Mokgoko and that the Applicants had no separate area of jurisdiction.

[18] The applicants have also challenged the second point *in limine* raised by the respondents and contends that it should be struck out for the reason that it is fatally flawed in that it denies the existence of the 'royal family' and 'inner royal family' structures within the First Applicant structures however, at the same time insists that non-joinder of those structures constitutes a 'fatal omission'. I return to this contention in the paragraphs below.

[19] The Respondents have raised two points *in limine* as follows:

- (i) Non-joinder of the Bakgatla Ba Mmakau under Chief Mokgoko.
- (ii) Non-joinder of the Royal Family.

[20] The Respondents contend that the first one which is non-joinder of the Bakgatla

ba Mmakau under Chief Mokgoko was raised in line with what was held in **Pilane and Another(CCT 46/12)[2013]ZACC 3** where the court held, in paragraph 101 as follows:

“It is necessary to remind ourselves of the objects of the Framework Act and the North West Act. These statutes were enacted, among other things, not only for legalizing, regulating and giving recognition to traditional leadership in areas like Moruleng, but also to incorporate observant of the system of customary law and community custom to the extent they are consistent with the Bill of Rights, status, These legislative enactments broadly set out norms and standards to define the place and role of traditional leadership with a view to transform the institution in line with the constitutional imperatives. They also give recognition to the institution, status and role of the traditional and governance according to custom and promote nation building, harmony and peace among all the people.”

[21] According to the Respondents failure to join the traditional leadership from whom the Applicants want to secede has a negative impact on the part of the Applicants` success in the application.

[22] The second point *in limine* raised by the Respondents is the non-joinder of the Royal Family. According to the Respondents this point is raised not to delay the process, but it is raised because it is a statutory requirement in both the two acts of the Framework Act and the Mpumalanga Act. Section 11 of the Framework Act deals with the recognition of Senior Traditional Leaders, Head-men or Head-women and provides as follows:”

“(1) whenever the position of Senior Traditional Leader, head-men or head-women is to be filled-

(a) the Royal Family must consent, 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) Identifies a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the ground referred to in Section 12(1)(a),(b) and (d) apply to that person....”

- [23] The Royal Family is defined in Section 1 of the Framework Act-
“means” the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family.”
- [24] According to the Respondent the Mpumalanga Act takes the issue further and include the inner Royal Family and defines the Inner Royal Family as-
“means” a structure consisting of the senior members of the ruling family of a traditional community who have been identified in terms of custom.”
- [25] The Mpumalanga Act further deals with the leadership positions within the institution of traditional leadership in chapter 3 from Section 17 as follows:
“means” a structure consisting of the senior members of the ruling family of a traditional community who have been identified in terms of custom”
- [26] The Mpumalanga Act deals with the leadership positions within the institution of traditional leadership in Chapter 3 from Section 17 as follows:
“Identification of Inkosi”
(18) after the birth of a person who qualifies in terms of customary law to assume the position of Inkosi, the Inner Royal Family must-
(a) identify such a person as the person who will assume the position of Inkosi in terms of Section 19, and
(b) inform the Premier of the particulars of the person identified.”
(a)The inner Royal Family must, within a reasonable time and after the need arises for the position of the Inkosi is to be filled, and with due regard to customary law applicable in the traditional community-
(i) Identify a person who qualifies in terms of customary law to assume the position of Inkosi, after taking into account whether any of the grounds referred to in Section 20(1)(a), (b) or (d) apply to the person, and...”
- [27] Respondents submit that it is clear from both the Framework and Mpumalanga Acts that the Royal Family and the Inner Royal Family play a very important part in recognizing a traditional leader within a traditional community and it is therefore, on those basis, that the Respondents have raised the point *in limine*

that the Applicants have failed to include a very important role player in the recognition of the traditional leader within the traditional institution. They contend that is not in line with existing statutes that an individual identifies themselves as a traditional leader of a particular traditional community. They are further of the view that failure to include or to join the Royal Family or the inner Royal family as a core Applicant was fatal to the Applicants' application.

[28] The Respondents therefore, pray for an order that the application be dismissed for non-compliance with the relevant statutes.

[29] Respondents also brought the court to the attention of Section 211 of the 1996 (Constitution) which makes provision for the recognition of the institution, role and status of traditional leadership according to customary law subject to the Constitution. According to the Respondents traditional leadership functions subject to applicable legislation and customs which include amendments to and repeal of those legislation or customs.

[30] Respondents submit that Applicants are aware that they are not recognized as traditional community. According to the Respondents their chieftainship was deposed in 1904 and they never took steps to restore their chieftainship.

Respondents contend that a group of people that have not been recognized as a traditional community cannot hold themselves as such. They submit that this view was held in **Pilane and Another v Pilane** (*supra*), and in terms of section 2 of the Framework Act, a community may be recognized as a traditional community if it is subject to a system of traditional leadership in terms of its customs and it observes a system of customary law.

[31] The Respondents contend further that Section 3 of the Mpumalanga Act provides that a community may apply in writing to the Premier to be recognized as a traditional community and upon receipt of such an application, the Premier-

- (i) may consult with relevant stakeholders on the applicant;
- (ii) must forward such an application to the Provincial House of Traditional Leaders.
- (iii) may conduct an investigation in respect of the application to ascertain whether the community concerned qualifies to be recognized as a traditional community, or

(iv) may convene referendum

[32] It is also contended by the Respondents that the functions of the Commission are explained in section 25(3) of the Traditional Leadership Framework as follows:

“(1) The Commission operates nationally in plenary and provincially in committees and has authority to investigate and make recommendations on any traditional leadership dispute and claim contemplated in subsection (2)

(2)(a) The Commission has authority to investigate and make recommendations on-

(i) a case where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headman ship was established was established in accordance with customary law and customs;

(ii) a case where there is doubt as to whether a principal traditional leadership, senior traditional leadership or headman ship was established in accordance with customary law and customs. This section 25(3) of the Traditional Leadership Framework will be dealt with in more detailed in the forthcoming paragraphs.

[33] According to the Respondents where the Committee has investigated a claim as lodged by any aggrieved party, the recommendations of the committee are submitted to the Premier for his consideration.

[34] They submit further that the allegation made by the Applicants that the Premier just rubber-stamped the recommendations made by the committee is far-fetched. They are of the view that if there are no contrary views apart from that of the Committee, the Premier does not have a reason not to believe or to rely on the information that is placed before him/her, in order to decide whether to recognize an individual is a traditional leader or not.

[35] It is also the Respondents' contention that the Premier cannot act outside both the Framework Act and Mpumalanga Act. Respondent contends that both these Acts provide that a traditional community should have recognized the Royal Family or Inner Royal Family and should have also identified the Traditional leader of that Traditional committee and it is only then that the Premier can issue a certificate of recognition to whoever has been identified by the Royal Family or the Inner Royal Family as the Traditional Leader.

- [36] Respondents are of the view that in the case of the Applicants' situation, there is no recognized traditional community, therefore, the Premier cannot issue a recognition certificate to the traditional leader as there is no recognized traditional community.
- [37] The fundamental questions to be asked in this matter before the court, are amongst others as follows -
- (i) Whether are there any legal bases for reviewing and setting aside the recommendations of the second Respondent (CTLDC) and the decision of the First Respondent (The Premier: Mpumalanga Province) relating to:
 - (a) The existence and formal recognition of the Bakgatla Ba Mocha Phopolo Traditional Community (of Mmametlhake).
 - (b) The position of the Applicant, Amos Phopola Maloka III as its Senior Traditional Leader.
 - (ii) Whether has the First Respondent (the Premier's) decision not to grant formal recognition to the Bakgatla ba Mocha ba Phopolo Traditional Community within the confines of the law regulating the institution of Traditional Community or Leaders?
 - (iii) Whether the Applicants were afforded a hearing or opportunity in terms of the rules of natural justice (*Audi Alteram Partem* Rule) to challenge the evidence of the Respondents and its witnesses.
- [38] There are two Acts of Parliament brought before this court by the Respondents, namely, the Traditional Leadership and Governance Framework Act 41 of 2003 (herein after referred as "the Framework Act" and the Mpumalanga Traditional Leadership and Governance Act 3 of 2005 (hereinafter referred as "the Mpumalanga Act" It is to be noted that these two pieces of legislation aim at legalizing and regulating, as well as giving recognition to this institution of Traditional Leadership in areas where this concept of Traditional Leadership applies.
- [39] As indicated in the aforesaid paragraphs by the Respondents, the Applicants wish to be recognized as a separate entity from the traditional leadership of Chief Mokgoko, but the Applicants has not been able to indicate the legal basis of this separation or rather provide the Court with any legislative authority on this point. In other words the Court has not been referred to any authority, legal or otherwise,

which supports the Applicants' view of separate entity. The Court has before it only the two Acts, i.e. Framework Act and Mpumalanga Act referred to it by the Respondents which provides for the basis for recognition of Traditional community and Traditional leaders. The Applicants have not provided any kind of legal basis for this separation, even though, it is a fact that this separation will in one way or the other have an impact, on the Chief Mkgoko's area of jurisdiction, in so far as the number of Head-men and head-women that will be under his jurisdiction.

[40] It is my view that this separation will definitely have an impact either negative or positive on Chief Mkgoko. On that basis he will certainly have a legal and substantive interest in the matter as the stand-alone arrangement which Applicants wish to have, will affect him as the Chief. It will be critical for him to be part of those discussions/proceedings of the traditional leadership. Therefore, merely serving the papers on the Acting Chief of Bakgatla Ba Mmakau would not satisfy the legal requirement of joining a party to the proceedings. It is my view that where traditional leaders are appointed, all the traditional structures need to be informed as provided by the two Acts mentioned above, namely "the Framework Act" and "the Mpumalanga Act". I am entirely in agreement with the contention made by the Respondents that failure to join the traditional leadership from whom the Applicants want to be a stand-alone entity would be disastrous and not be in the best interest of the Applicants, more so that this matter is regulated by the Acts of Parliament.

[41] The Respondents are of the view that the issue of Non-Joinder of the Royal Family is an important factor to consider when dealing with the recognition and position of Senior Traditional Leaders, Head-men. As mentioned above, Section 11 of the Framework Act makes provision for the recognition of Senior Traditional, Head-men or Head-women and provides as follows:

"(1) whenever the position of Senior Traditional Leader, head-men or head-women is to be filled-

(b) the Royal Family must consent, 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) Identifies a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the ground referred in Section 12(1), (b) and (d) apply to that person,

[42] The Royal Family is defined in Section 1 of the Framework Act as:

“means, the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family,”

[43] In terms of the Mpumalanga Act, the Royal Family is defined as:

“means, members of the extended Royal Family within a traditional community who have been identified in terms of the traditions, norms and customs of the traditional community consent”

[44] The Mpumalanga Act takes the issue further and include the inner Royal Family and defines the Inner Royal Family as:

“means, a structure consisting of the senior members of the ruling family of a traditional community who have been identified in terms of custom.”

[45] It is clear and evident from both the two Acts i.e. Framework and Mpumalanga that the Royal Family and Inner Royal Family plays a very pivotal and critical role in recognizing a traditional leader within a traditional community. It is therefore, indeed on these basis that the Respondents have raised a concern as well a *point in limine* that the Applicants have failed and ignored a crucial aspect of including a very important role player, namely, the Royal Family in the recognition of the traditional leader of a particular traditional community.

[46] Therefore, failure to include or join the Royal Family or the inner Royal Family as a core and key player, would not have been good for the Applicants` case. It is evident that the Applicant that there is a serious non-compliance with these important and relevant pieces of legislation which have been pointed out *supra*.

[47] Section 211 of the 1996 Constitution of the Republic of South Africa (“the Constitution”) provides for the recognition of the institution, role and status of traditional leadership in terms of customary law subject to the Constitution. It is

true that traditional leaders do not function or operate in a vacuum but there are laws, customs and legislation within which this institution of Traditional Leaders operates. This will include even the amendment and repeals of these legislations.

[48] The Respondents contend that the Applicants are aware that they are not recognized as traditional community, because according to the Respondents, the Applicants' chieftainship was deposed in 1904 and they never took steps to restore their chieftainship.

[49] In the case of **Pilane and Another (CCT 46/12)[2013]ZACC 3** the court held, at paragraph 101 that a group of people that have not been recognized as traditional community, cannot hold themselves as such. Section 2 of the Framework Act (*supra*) provides that a community may be recognized as a traditional community if it is subject to a system of traditional leadership in terms of its customs and it observes a system of customary law. It further provides that a Premier of the Province may by notice in the provincial gazette, recognize a community as a traditional community. In the current matter the Applicants have not been able to show any indication or rather any evidence that they are subject to a system of traditional leaders in terms of any customs that observes a system of customary law.

[50] The Mpumalanga Act also deals with the recognition of the traditional communities in Section 3 of the Act where it provides that a community may apply in writing to the Premier to be recognized as a Traditional community and upon receipt of such an application, the Premier:-

“(a) may consult relevant stakeholders on the application;

(b) must forward such an application to the Provincial House of Traditional Leaders

(c) may conduct an investigation in respect of the application to ascertain whether the community concerned have qualities to be recognized as a traditional community, or

(d) may convene a referendum.”

As contended by the Respondents, I am of the view that none of these processes have been done or meaningfully embarked upon by the Applicants. This court wonders on what grounds or basis the Applicants have called themselves a

traditional community when there is material non-compliance with the laws, customs and relevant legislation regulating Traditional Community or leaders. The Court has not been provided with sufficient evidence or facts so far, which prove or justify the Applicants to refer or rather call themselves as traditional community or leaders.

[51] Section 11 of the Constitution recognizes the institution and system of the traditional leadership.

As discussed above, this Section demonstrates that even the Supreme law of the country observes and recognizes this Institution of Traditional leadership. This means non-compliance with the system will be tantamount to contravention of the Constitution or any other law which supports this traditional institution. The kind of *laissez affair* attitude adopted towards the system cannot be tolerated by the courts or any other institution which has been given the power or responsibility to recognize and operate within the confines of that system of Traditional Community and Leadership.

[52] The Commission and its Functions are explained in Section 25(3) of the Traditional Leadership Framework.

“(1) The Commission operates nationally in plenary and provincially in committees and has authority to investigate and make recommendations on any traditional leadership dispute and claim contemplated in subsection (2)

(2)(a) As indicated above by the Respondents, the Commission has authority to investigate and make recommendations on-

(i) a case where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;

(ii) a case where there is doubt as to whether a principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;

[53] To illustrate the process of determining the content of a particular customary law norm, the Respondents brought the court`s attention to the case of **Shilubana v Nwamitwa 2009(2)SA66(c)** where the following was said:

“As a result, the process of determining the content of a particular customary law norm must be the one informed by several factors. First, it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules and norms that has been developed over the centuries. An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, in line with the approach set out in the case of **Bhe v Magistrate, Khayelitsha 2005(1)SA 850 CC(“Bhe”)**. This question was also considered in the case of **Alexkor Ltd v Richtersveld Community 2004940A 460 CC** where it was said courts embarking on this enquiry, must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it.

[54] The above discussion indicates that it is critical and important to respect the right of communities that observe systems of customary law to develop their law. It is the Respondents` contention that this is the second factor which the court must consider. They submit that the right of communities under section 211(2) includes the right of traditional authorities to amend and repeal their own customs. The respondents are of the view that customary law is by its nature a constantly evolving system.

[55] It has been said that the practice of a particular community is relevant when determining the content of a customary law norm. In case of **Richtersveld supra** it was held the content of a customary must be determined with reference to both the history and the usage of the community concerned. However, it is provided that where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and the courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.

[56] Contrary to the above statement which states that where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, but in the present matter before this

court, unfortunately the Applicants have not adduced any kind of evidence of the present practice of that community, which indicates the practice of the community the Applicants are representing. The Court's duty will be to examine the law in the context of the community and to acknowledge developments if they have occurred.

[57] Applicants made a contention that the Respondents did not comply with the Constitutional imperative of fair administrative action and with the principle of natural justice of i.e. ***audi alteram partem*** to allow the applicants the opportunity to address concerns which they raised, without including those concerns in the reasons furnished to the applicants.

[58] It is not in dispute that the applicants made an application in terms of Rule 53 which deals with reviews. The Applicants purport to request the court to review and set aside both the recommendations of the CTLDC (Commission) and the decision of the Mpumalanga Premier. In terms of rule 53 the review proceedings are brought on notice and the Respondents are required to file a record. It is true that the record was filed. It is the Respondents' contention that after the filing of the record the Applicants are given another opportunity to supplement their founding papers and thereafter the Respondents would file the answering affidavit. It is to be noted that the Commission outlined in its answering affidavit the process that they followed in any investigation of any claim that was lodged and the same was done in respect of the claim lodged by the Applicants.

[59] From the papers which appear before this court, it is clear that the mere fact that the CTLDC had to do internet search, consult archaeological material and search in the relevant existing literature to find reference of the First Applicants, it is not out of the ordinary and therefore are not illegal or unlawful.

[60] The Respondents submit that this process should not necessarily include the Applicants. It is the Respondents' contention that the process is that, the Applicants prepared their documents which they lodged with the Commission and the Applicants were given a chance or opportunity to give oral evidence. According to the Respondents' contention what the CTLDC does beyond that process, is an internal procedure or rather process which is governed by the

terms of reference of the Commission or Committee, therefore the Applicants are not justified to complain that they were not involved in the research or further investigation undertaken by the CTLDC.

[61] The Respondent further contended that the same would apply to any form of further investigation or enquiry that the Premier engages in, after receiving recommendations from CTLDC. It is the Respondent's further contention that the Premier is not obliged to further consult with the Applicants in order to make his final decision unless if there is a particular issue that needs to be dealt with by either the Royal Family or the Applicants themselves, then this would be the moment when the Premier would consult the Applicants again.

[62] According to the Respondents, the Applicants raised a concern with reference to their lack of joining of the Royal Family or the Inner Royal Family structures that are provided for in both the Framework Act and Mpumalanga Act. According to Respondents this requirement of structures and institutions is essential and mandatory.

The Respondents submit that the Applicants confuse the process and procedure in the CTLDC with the response in the review application.

According to the Respondents this is evident from the replying affidavit where the Applicants assert that during the proceedings before the CTLDC, they were never confronted with any indication that they should be a Royal Family or an Inner Royal Family. The Respondents submit that the Applicants have lost sight of the fact that the Premier would only issue a certificate of recognition if all the processes and prerequisites as dictated by the two Acts have been complied with. The Respondents contend that it is the duty of the Premier to uphold any statute of the country and therefore, Applicants' contention that the reference to the inner Royal Family and the Royal Family together with the two Acts is new evidence and cannot be relied upon.

[63] Applicants have taken issue with the numbering of the Respondents' affidavit. It appeared upon the perusal of the affidavit that the numbering from paragraph 52 onwards, on page 17 do not have a chronological order. The Respondents

contended that the few technical points which the Applicants raised in their replying affidavit could be attributed to typing errors or formatting when the affidavits were exchanged between deponents and legal representatives. The Applicants contend that amongst others, is the incorrect numbering of the Respondents Affidavit. The respondents contend that this does detract from the logic and sequence of the events as presented in the answering affidavit. The Respondent has apologized for the inconveniencing caused.

[64] On other hand the Respondents contend that the Applicants seek to rectify the mistakes that they have committed by placing new evidence in their replying affidavits. Respondents raised concern due to that and contend that it is trite that the litigant should outline their case in their founding affidavit in such a particular way that the Respondent is able to know exactly which case they are expected to meet.

[65] Applicants took issue with the fact that the Respondents did not file a condonation application together with their answering affidavit. Respondent is concerned by the fact that matter is only raised in the replying affidavit months after the Applicant has long received the answering affidavit, and the fact that they took their time to file a replying affidavit without a formal condonation application accompanying the replying affidavit.

[66] The Respondents submit that it requested condonation in the circumstances where the court holds that a condonation application should have been filed, and that the late filing of the answering affidavit be condoned. The Respondent has explained the reasons for the late filing which has to do with both parties, and subsequently requested the court to condone the late filing of the answering affidavit.

[67] It is not clear why the Applicants is still raising the question of the late filing of the Respondents` answering affidavit when the Respondents have applied for condonation and explained the circumstances under which this late filing happened. In the above paragraphs the Applicant also had the problem of replying late when the answering affidavit was long received by him. It is evident that the present parties have both committed errors and non-compliance with rules in terms of the filing of the affidavits. It seems that the Respondents have tried to adequately deal with question of the late filing of the answering affidavit

as well as to correct the numbering of the documents. It is my view that the Respondents have adequately dealt with the question of the late filing of the answering affidavit and explained the circumstances under which it came about. It is further the view of this court that this matter does not warrant further debate, and as such the condonation of the late filing has been considered by the court in detail.

[68] The question to be answered by the Applicants is why it would seem that the Applicants are paying more attention to the question of the late filing of the answering affidavit by the Respondent, more than following the correct legal procedure enshrined in the Constitution and relevant Acts in dealing with the recognition of the Traditional community and its traditional leaders.

[69] It is also important to address the question of chronology processes as seen in the papers of the Applicants. The question of chronology processes followed by the Applicants starting from 1904 to 2014, have been outlined in detail by the Respondents' answering affidavit. It is the Respondents' contention that the chronology was constructed from the evidence in both the Applicants' founding papers and the submission made by the Applicants to the Commission. The Respondents' contention is that merely denying the chronology and sequence of events does not make the Applicants' contentions to be correct. It is the court's view that with the absence of a contrary evidence or report from the Applicants to what the Respondents have adduced, or have put in the chronological order the Applicants would have failed to point out to this Court the right record contravening that one of the Respondents.

[70] As per the discussion above is clear that there was a Commission i.e. (Nhlapo Commission) on Traditional Leadership Disputes and Claims (CTLDC) established by the President of South Africa in terms of Section 22(1) of the Framework Act No.41 of 2003. Its term of office came to an end of January 2010.

[71] At the expiry of the Nhlapo Commission which was the first Commission, the President established the second Commission in September 2011 for 5(Five) years. The second Commission's term ended in December 2017. It is not in dispute that the successor to the Nhlapo Commission inherited all the claims that were lodged with the previous commission. It is also important to mention that as

a result of the constitution of the commission by the President of Republic of South Africa, the Provincial Premiers constituted committees on traditional leadership, disputes and claims, which dealt with disputes and claims within specific provinces.

[72] As stated above the term of the Committee chaired by the Second Respondent came to an end in 2017 and since then, the Premier has not proclaimed another committee and the President has not constituted another Commission. It is also clear that where the committee has investigated a claim lodged by any aggrieved party, the recommendations of the committee are submitted to the Premier for his consideration.

[73] Therefore, by all accounts is clear in the present matter that the relief sought by the Applicant will not be executable as there will be no committee or commission to hear any traditional leadership disputes anymore.

[74] It is evident from the contentions made above by the Respondents that the only office that will handle the traditional leadership disputes is the office of the Premier as provided for in Section 21 and 22 of the Framework Act. Therefore, the correct procedure in dealing with this dispute would be to refer the complaint to the relevant office which is the office of the Premier. It seems the Premier has been enjoined by the Constitution, relevant legislation (i.e. the Framework Act and Mpumalanga Act) to apply his mind in dealing with the recommendations of the committee. It seems that if there are no contrary views apart from that of the committee tasked to advise him, the Premier will have no reason to believe or rely on the information provided by the committee (2nd respondent) in order to decide whether to recognize a community or individual as a traditional community or traditional leader respectively.

[75] Therefore is also clear that the Premier in each province has been tasked with this responsibility to deal with any issues relating to traditional leadership, which includes any disputes and claims in the absence of a commission or committee as provided for in Section 21 and 22 of the Framework Act.

[76] It is evident that where the Committee has investigated a claim as lodged by any aggrieved party, the recommendations of the committee are submitted to the Premier for his consideration. It would therefore seem that the Premier cannot act outside both the Framework Act and Mpumalanga Act.

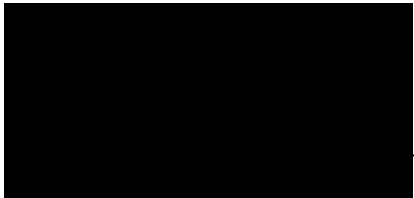
- [77] It is further evident that both these Acts provide that a traditional community should have recognized the Royal Family or Inner Royal Family and should have identified the Traditional leader of that Traditional committee, and it is only then that the Premier can issue a certificate of recognition to whoever has been identified by the Royal Family or the Inner Royal Family as the Traditional Leader.
- [78] It is further the Respondents` contention that in the Applicants` situation, there is no recognized traditional community therefore, the Respondents contend that the Premier cannot issue a recognition certificates to the traditional community or leader if there is no recognized traditional community.
- [79] Respondents further contend that if there are no contrary views apart from that of the Committee, the Premier does not have a reason not to believe or to rely on the information that is placed before him/her, in order to decide whether to recognize an individual as a traditional leader or not.
- [80] According to Respondents the Premier cannot act outside both the Framework and Mpumalanga Acts. The Respondents submit that both these Acts provide that a traditional community should have recognized the Royal Family or Inner Royal Family and should have identified the Traditional leader of that Traditional community. It is only then that the Premier can issue a certificate of recognition to whoever has been identified by the Royal Family or the Inner Royal Family as the Traditional Leader.
- [81] From the discussion above it is evident that in the Applicants` situation, there is no recognized traditional community, therefore the Premier cannot issue a recognition certificates to an individual or traditional leader where there is no recognized traditional community.
- [82] Based on the above discussion it might therefore seems unwarranted, unfair and unjustified for the sweeping statements made by the Applicants that the Premier just rubber-stamped the recommendations by the committee.
- [83] It is once more, an important point to be made by this Court that it is the responsibility of the First and Second Respondents to inform and put across the provisions of the relevant Acts to the Court for it to adjudicate this matter on an informed basis.
- [84] It is my view that in this matter, the Applicants have failed to show exceptional circumstances where a Court will be compelled to review and set aside the

Premier`s decision, and to take the responsibility of the Premier as outlined by both the Framework and Mpumalanga Acts, and recognize the Bakgatla Ba Mocha Ba Phopolo Traditional Community as a traditional community in terms of Section 2 of the Framework Act, and to also recognize Amos Phopolo Maloka III as the Senior Traditional Leader in terms of Section 8 of the Framework Act.

[85] Applicants have failed to make up a case for the reviewing and setting aside both the recommendation of the CTLDC and the decision of the Premier, I therefore have no choice but to hold the view that the Applicants have failed to show sufficient evidence that entitles the Applicants the relief sought in their notice of motion.

Accordingly, **IT IS ORDERED THAT:**

The Applicants' application should be dismissed with costs, such costs to include costs of the two counsels.



MAHLANGU AJ

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing:

**JUDGEMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES OF THE
4 MARCH 2022.**

APPEARANCES

For the Applicants: Maphalla Mokate Conradie Inc.

 Attorneys for the Applicants

 453 Winfred Yell Street

 Suite 1, Peak House

 Garsfontein, 0042

 Tel:012 369 6200

 Email: crystalm@motcon.co.za

For The Respondents: The State Attorney

 Attorneys For The 1st and 2nd Respondents

 Respondents

Salu Building

255 Thabo Sehume

Cnr Thabo Sehume & Francis Baard

Tel: 012 309 1627

Fax: 086 629 1380

Email: Simathebula@Justice.Gov.Za

Ref: 594/18/Z51

And To: Bakgatla Ba Mmakau Traditional Council

Service by Sheriff

And To: Princess Kgomotso Mokgoko

Service by Sheriff