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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: REV126/2018

REPORTABLE: NO
OF INTEREST TO THE JUDGES: YES
REVISED.

In the matter between:

LESIBA VAALTYN KEKANA
(Identity Number: [...])

1ST APPLICANT

MOKOPANE TRADITIONAL AUTHORITY

2ND APPLICANT

and

PREMIER, LIMPOPO PROVINCIAL DEPARTMENT

1ST RESPONDENT

**MEMBER OF THE EXECUTIVE COUNCIL:
DEPARTMENT OF COOPERATIVE GOVERNANCE,
HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS,
LIMPOPO PROVINCIAL GOVERNMENT**

2ND RESPONDENT

**COMMISSION ON TRADITIONAL DISPUTES AND
CLAIMS**

3RD RESPONDENT

**LESIBA VAALTYN (LEKGOBO) KEKANA
(Identity Number: [....])**

4th RESPONDENT

MGOMBANE ROYAL COUNCIL

5TH RESPONDENT

SENIOR ROYAL FAMILY OF GA-KGUBUDI

6TH RESPONDENT

JUDGMENT

MAKGOBA JP

[1] At the heart of this application is the First Applicant's view that the decision taken by the Premier of Limpopo Province, based on the recommendation of the Commission on Traditional Leadership Disputes and Claims, to remove the First Applicant as a senior traditional leader of the Mokopane Traditional Authority is unlawful and should accordingly be reviewed and set aside.

[2] During April 2003, after the death of Acting Kgoshi Madimetja Alfred Kekana, the Premier appointed the First Applicant as the Senior Traditional Leader (Kgoshi) of the Mokopane Traditional Authority¹.

On 11 June 2018 the Premier removed the First Applicant as the Senior Traditional Leader. In so doing, the Premier acted on the recommendation of the Third Respondent, the Commission on Traditional Leadership Disputes and Claims, dated 4 December 2017.

[3] In his letter dated 11 June 2018, the Premier advised the First Applicant as follows:²

¹ See Annexure "LVK 7", page 79 of paginated papers.

“1. ...

2. I hereby inform you that the Limpopo Provincial Committee on Traditional Leadership Disputes and Claims has considered your claim/dispute. I have considered the findings and recommendations of the said Committee in terms of the provisions of the Traditional leadership and Governance Framework Act No 41 of 2003 as amended.

3. Kindly be informed that the claim/dispute for restoration and/or recognition of the Mgombane Senior Traditional Leadership by Kekana Lesiba “Lekgobo” Vaaltyn is declined.

4. The senior traditional leadership in the House of Naomi Langa is dissolved with immediate effect.

5. The Royal Council should marry a candle wife and the seed raiser be appointed to procreate the legitimate and rightful heir to succeed Mgombane.

6. ...”

[4] The present application is for the review and setting aside the decision of the Premier and the recommendation of the Third Respondent.

The First Applicant sought an order in the following terms:

4.1. The decision of the First Respondent (Premier) effectively removing the Applicant as Senior Traditional Leader of the Mokopane Traditional Authority is reviewed and set aside; and

4.2. The decision of the Third Respondent recommending the removal of the Applicant as the Senior Traditional Leader is hereby reviewed and set aside.

[5] The late Acting Kgoshi Madimetja Alfred Kekana died in 2000. After his death the Department of Traditional Affairs of the Limpopo Provincial Government did an extensive consultation with, amongst others, Amandebele Traditional Authorities and thereafter recommended the First Applicant to be appointed as the Senior Traditional Leader of

² Annexure “LVK 20”, page 133 of the paginated papers.

the Mokopane Traditional Authority.³ Following the recommendation the Premier on 9 May 2003 appointed the First Applicant as the Senior Traditional Leader.

Fifteen (15) years later on 11 June 2018, the Premier removed the First Applicant as the Senior Traditional Leader of the Mokopane Traditional Authority.

[6] This application is opposed by the First, Second, Third, Fifth and Sixth Respondents.

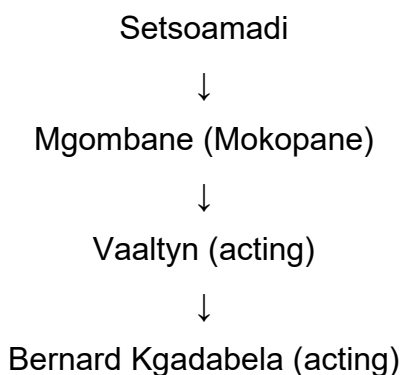
The Fifth and Sixth Respondents are in agreement with the recommendations made by the Third Respondent (“the Commission”) which ultimately led to the First Respondent’s decision and they intend to fully implement them.

Factual Background

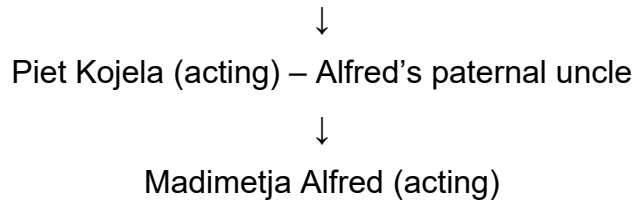
[7] The First, Second, Third and Fifth Respondents in their answering affidavits went at length in describing the traditions of Mgombane Traditional Community and provided a comprehensive historical account of the Mgombane Chieftaincy.

Save for differing with the Respondents on issues relating to the candle wife and the legitimacy of the First Applicant as the son of a candle wife, all the parties agree on the factual background relating to this case.

[8] The line of succession and genealogy of the Mgombane Chieftaincy can be illustrated as follows:



³ Annexure “LVK 6”, page 73 of the paginated papers.



[9] The last fully fledged kgoshi of the Mgombane Traditional Community is Kgoshi Mgombane who passed away over 100 years ago. His wife bore him a daughter who was not allowed, in terms of custom, to assume the position of Kgoshi owing to her gender.

Mgombane was succeeded by his son in another house, Lesiba Vaaltyn (Lekgobo) Kekana who was appointed in an acting capacity, so is everyone else that followed suit they were all acting Kgoshis.

[10] In the early 1960's Lesiba Barnard Kgadabela Kekana was succeeded by Madimetja Alfred Kekana who was also appointed in an acting position. The said Madimetja Alfred Kekana was unfortunately feeble minded and was unable to perform his duties properly resulting in one John Madimetja Molalakgori Kekana who was his junior paternal uncle (Rangwane) being appointed as his guardian. For the sake of convenience, the latter will be referred to as "John Molalakgori Kekana" in this judgment.

Opportunistically the said John Molalakgori Kekana effectively took over the decision-making process and performed the functions of the acting Kgoshi Madimetja Alfred Kekana.

[11] When the time came for the traditional community to marry a candle wife, the royal family of Mgombane appointed Madimetja Alfred Kekana as a seed raiser in order to beget a legitimate and rightful successor to the Mgombane throne. Madimetja Alfred Kekana had a wife, namely Anna Thabethe, whom he had voluntarily married as his love wife. The Fourth Respondent, Lesiba Vaaltyn (Lekgobo) Kekana is their son.

[12] Salome Langa from Mapela, was married as a candle wife for the purpose of procreating an heir to the throne. She was married by the Community for such purpose and it was expected that Acting Kgoshi Madimetja Alfred Kekana would be the seed raiser.

However, John Molalagori Kekana secretly entered the house of Salome with an intention to sleep with her, but she rebuffed his advances. Such a refusal led to John Molalagori Kekana and his friends devising a scheme to try and force Salome Langa to sleep with John Molalagori Kekana, but she still refused to accept John Molalagori Kekana. This resulted in Salome Langa returning to Mapela where she came from. She did not have any children.

[13] John Molalagori Kekana acting on a frolic of his own and without the authority of the Royal Family went to Mapela and brought one Naomi Langa whom she caused to marry Madimetja Alfred Kekana (acting kgoshi) and to be his “candle wife”. He did so without the mandate of the Royal Family and/or the traditional community.

The Fifth Respondent contends that Naomi Langa was never a candle wife whilst the First Applicant contends that Naomi was a candle wife.

John Molalagori Kekana took advantage of Madimetja Alfred Kekana’s feeble mindedness and entered the house of Naomi Langa and they started cohabitating. Such illicit cohabitation led to three children being born and the First Applicant is amongst the three children.

[14] John Molalagori Kekana is Acting Kgoshi Madimetja’s Alfred Kekana’s junior paternal uncle, he therefore could not be a seed raiser to Salome or Naomi, because both were in a position of daughters-in-law to him.

[15] John Molalagori Kekana’s wife Agnes, complained about the behavior of her husband and Naomi Langa which was destroying her marriage. John Molalagori Kekana was summoned to the Traditional Council to come and account for his misdemeanors, but he refused to come. He was forcefully brought before the Traditional

Council and because of his abhorrent behavior the Council disciplined him by imposing a fine of R 10.00 and he was dismissed as Madimetja Alfred Kekana's guardian.

[16] As a result, in 1974 Naomi Langa was banished or chased from the community and she went back to her parental home at Mapela. At more or less the same time John Molalakgori Kekana fled to the nearby Mahwelereng Township. Naomi Langa died at Mapela and was buried there and not at the royal place of Mgombane Community.

The conduct of John Molalakgori Kekana was an affront to the cultural values of Mgombane Traditional Community. His conduct was regarded by the said community as scandalous and was frowned upon.

[17] The Respondents contend that the First Applicant was born out of a relationship between John Molalakgori Kekana and Naomi Langa. This on its own disqualifies him from being referred to as a rightful heir to the throne.

The First Applicant in his papers does not account for Salome Langa at all. The picture he paints is that his mother Naomi Langa, is the one who was married as a candle wife, furthermore, he presents himself as the son of Madimetja Alfred Kekana.

[18] The minutes of a **"Meeting with Mokopane Local Government on Thursday 25 October 1990"**⁴ are relevant and appropriate in this regard. The meeting was organised and/or presided over by one Mr. P Lombard, an Ethnologist, representing the then Lebowa Government.

Amongst the persons who attended the said meeting was John Madimetja Molalakgori Kekana, who played a leading role at the meeting. In the minutes of the said meeting John Molalakgori Kekana is referred to as Madimetja.

[19] On page 3 of the minutes the following is recorded:

" Madimetja then explained that Naomi was not the first candle wife. The first candle wife was married from Mapela. She had divorced. She did not tell the

⁴ Annexure **"LVK 4"**, page 60 of the paginated papers.

tribe why she divorced. It was only later on that they found out that the Kgoši was not giving conjugal rights. It was then that when the second candle wife was married. Mr. Madimetja entered her bedroom. She was told before that Mr. Madimetja would enter her. Mr. Madimetja was the senior Mokgomana suitable to do this.

The problem started with other people who claimed bogoši because they also wanted to sleep with the Mohumagadi. Mr. Madimetja explained that even the Kgoši knew he was raising the children with Mohumagadi.” (my underlining).

[20] From the minutes of the aforesaid meeting John Molalakgori Kekana clearly admitted:

20.1. That there had been the first candle wife before Naomi Langa. This certainly referred to Salome.

20.2. That he, John Molalakgori Kekana, cohabited with Naomi.

20.3. That he was the senior Mokgomana suitable to do that.

20.4. That even the Kgoshi (Madimetja Alfred Kekana) knew that he was having children with Mohumagadi, that is the candle wife.

[21] On the basis of the admissions made by John Molalakgori Kekana, the contention by the Respondents that the First Applicant is the son of John Molalakgori Kekana and not Madimetja Alfred Kekana becomes a reality.

The truth of the matter is that John Molalakgori Kekana was not appointed by the Royal Family comprising of Bakgoma, Bakgomana and Dikgadi to be a seed raiser. He was immediately disqualified by the fact that as Rangwane (paternal uncle) he was akin to a father of Salome and Naomi.

[22] Even if Naomi Langa was a candle wife, which is denied by the Respondents, none of her children would have a claim to the chieftaincy due to the illicit relationship between their parents, namely John Molalakgori and Naomi Langa. It is against this

background that it is strongly contended by the Respondents that since Naomi Langa was not a candle wife, then the First Applicant does not have any claim to the throne.

Issues to be decided

[23] The issues to be decided in this matter are the following:

23.1. Whether the First Respondent (Premier) was correct in deciding that the First Applicant be relieved of his royal duties immediately and that the royal family should marry a candle wife to raise the seed.

23.2. Whether the Second and Third Respondents discharged their duties diligently when investigating the chieftainship dispute and claim.

23.3. Whether the Applicants had a right to be consulted prior to the decision by the Premier. If so, whether the Premier had a duty to afford to the Applicants an opportunity to make representations prior to the decision of the Premier.

23.4. Whether this matter was *res judicata* and that the Third Respondent (the Commission) was not supposed to entertain the claim brought in by the Fourth Respondent.

23.5. Whether the deponent of the Answering Affidavit of the First, Second and Third Respondents had the necessary authority to depose to the Answering Affidavit on their behalf.

[24] I prefer to deal with the last two issues since same have been raised in the form of points *in limine*. In the event of such points *in limine* being upheld, that will be dispositive of the present application before me.

Points *in Limine*

[25] The Applicants contend that the decision of the Premier to appoint the First Applicant as the Senior traditional leader of the Mokopane Traditional Authority was challenged by the Mgombane Royal Council (Fifth Respondent) in this Court and that challenge was dismissed with costs. In this regard reference is made to the judgment of Pretorius J in Case number 34/2012 delivered on 1 March 2013.⁵

The Court Order reads as follows:

- “ 1. The application is dismissed with costs.*
- 2. In as far as it is necessary the application for condonation is dismissed with costs.”*

Accordingly, the Applicants contend that this matter is *res judicata* and that the Commission was not supposed to entertain the chieftaincy claim by the Fourth Respondent.

[26] The Respondents contend that this matter does not fulfill the requirements of *res judicata* and therefore *res judicata* is not applicable in this instance. The judgment of Pretorius J was for a condonation application. That Pretorius J in her judgment went out of her way to quote seven (7) cases in support of the refusal to grant the condonation application. No single reference was made with regard to the merits. Pretorius J made a few comments on the merits in support of her judgment which was unavoidable.

[27] In essence Pretorius J dismissed the application on the basis that same was launched after the lapse of a period of nine years contrary to the provisions of section 7 of Promotion of Administrative Justice Act 3 of 2000 (PAJA) which provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the applicant had become aware of the decision.

⁵ Annexure “LVK 8”, page 80 of the paginated papers.

[28] Pretorius J reasoned as follows in paragraph [23] of the judgment:

“I have considered all the facts and circumstances and listened to the arguments by legal counsel. I have considered the authorities and I am of the opinion that the Applicant cannot succeed in the application for condonation. The Court finds that the application was launched after an unreasonable time and that the Court should not condone the unexplained length of time it took the Applicant to launch the present review application.”

[29] The learned Judge continued to state as follows in paragraph [28] of the judgment:

“The Court does not have to decide the merits of the matter, should the Court find that the condonation for the late application should not be granted...”

Furthermore the learned Judge concludes as follows in paragraph [30] of the judgment:

“In the circumstances the merits of the application is not such that it can persuade the Court to grant condonation for the launch of the review application nine years after the decision has been taken.”

[30] I am of the view that Pretorius J did not determine the merits of the application, but it was condonation for the late launching of the review proceedings which was adjudicated and dismissed.

Therefore, the judgment of Pretorius J does not render the present matter to be *res judicata*. The point *in limine* on this aspect dismissed.

[31] The Applicants in their Replying Affidavit raised an issue about the deponent of the Answering Affidavit of the First, Second and Third Respondents to the effect that she does not have authority to depose to the affidavit and that she does not have

personal knowledge of how the First Respondent (Premier) made a decision and that her evidence is hearsay.

[32] The deponent on behalf of the First, Second and Third Respondents is one Modjadji Melidah Malahlela who identifies herself as a Deputy Director General responsible for Traditional Affairs in the Department of Co-operative Governance, Human Settlement and Traditional Affairs in the Limpopo Province.

She further states that by virtue of her position she is authorized to make the Affidavit.⁶ She states that the facts contained therein are within her personal knowledge.

It was argued on behalf of the Applicants that the decision that is the subject of the review is not a departmental decision but a “personal” decision of the Premier.

That Ms. Malahlela does not have any knowledge of what was in the mind of the Premier when he made the decision, and that only the Premier can tell the Court what was in his mind.

I disagree.

[33] Section 211(1) of the Constitution⁷ provides for the recognition of institutions, status and role of traditional leadership according to customary law.

Section 212 provides further that national legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

[34] At national level, the national legislation for the establishment of houses of traditional leaders is led by the State President and the functions thereof are delegated to the Minister responsible for Traditional Affairs. Likewise, at provincial level, the provincial legislation (in this case the Limpopo Traditional Leadership and Institutions Act 6 of 2005) for the establishment of houses of traditional leaders is led by the Premier and the function is delegated to the Member of the Executive Committee (MEC) responsible for traditional affairs.

⁶ 1st, 2nd & 3rd Respondents Answering Affidavit, paragraph 1, page 488.

⁷ Act 108 of 1996 as amended.

[35] Section 32 of the Limpopo Traditional Leadership and Institutions Act, 2005 (the Limpopo Act) provides as follows:

(1) The Premier may delegate any of his or her powers or functions in terms of this Act to any person.

(2) A delegation referred to in subsection (1) may be withdrawn at any time by the Premier and does not prevent the Premier from exercising the power or function while the power or function is delegated.

[36] It is common cause that Ms. Malahlela is a Deputy Director General responsible for Traditional Affairs within the Limpopo Department of Co-operative Governance and Traditional Affairs. She is thereby duly authorised and delegated in terms of Section 32 of the Limpopo Act to perform the powers and functions in terms of the Limpopo Act. In her affidavit she expressly stated that she is duly authorised and that the facts therein contained are within her personal knowledge. Therefore, her evidence is not hearsay as she is responsible for issues of traditional affairs in the Limpopo Province.

[37] It is trite that a deponent to an affidavit in motion proceedings need not be authorised by the person concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.⁸

More recently in **Masako v Masako and Another**⁹ the Supreme Court of Appeal, per Mabindla-Boqwana JA at paragraph 11 said that:

“... It stands to reason that a deponent to an affidavit is a witness who states under oath facts that lie within her personal knowledge. She swears or affirms the truthfulness of such statements. She is no different from a witness who testifies orally, on oath or affirmation regarding events within her knowledge.”

⁸ See **Ganes and Another v Telkom Namibia Ltd** 2004 (3) SA 615 (SCA).

⁹ 2022 (3) SA 403 (SCA).

[38] In the result the Applicants' issue regarding the authority of Ms. Malahlela to depose to the Answering Affidavit on behalf of the First, Second and Third Respondents is dismissed.

How First Applicant was appointed as Senior Traditional Leader (Kgoshi)

[39] After the candle wife, Salome left the Mgombane Royal House, John Madimetja Molalagori Kekana ("Molalagori") and some bakgomana took back the lobola for Salome and approached Naomi's mother to marry Naomi as a candle wife. Naomi was brought to the royal house as the second candle wife after Salome left. Molalagori entered the house of Naomi to raise a seed with her. Molalagori alleged that he was the right Mokgoma to enter the house of a candle wife (Masechaba).¹⁰

[40] Molalagori and Naomi had three children, two daughters and a son called Vaaltyn II who it is alleged was born in 1969. However, the First Applicant herein stated in his Founding Affidavit that he was born in 1974.

Naomi left the royal household together with her children in 1974 after Molalagori's wife complained that Naomi was taking her husband. Molalagori left the royal household soon after Naomi left and stayed at nearby Mahwelereng Township.

[41] Molalagori was never seen at the royal household until in 1990 when the Lebowa Government appointed Mr. Lombard to sort out the administrative issues of the then Mokopane Tribal Authority. This was after the local magistrate at the time, Mr. Hager had complained that he was not clear about the correct Bakgomana of Mokopane Tribal Authority. Meetings were then arranged to sort out that problem.

¹⁰ See minutes of Meeting of 25 October 1990, Annexure "LVK 4" Volume I, page 62 of the paginated papers.

[42] In the first meeting¹¹ that was held with Mr. Lombard, Molalakgori was appointed the assistant to Acting Kgoshi Madimetja Alfred Kekana and the Bakgoma and Bakgomana were also identified at that meeting.

At the second meeting¹² that was held on 25 October 1990, Molalakgori requested that the children of Naomi should be brought back and that he wanted Vaaltyn II to succeed to the chieftaincy.

[43] The discussion and what was agreed in the meeting of 25 October 1990 ultimately led to the return of the First Applicant to the Mokopane/Mgombane royal house to take the position of senior traditional leader, that is Kgoshi.

An extract of the minutes of the said meeting is set out hereunder:

“Mr. Lombard asked why could the people not go and bring the children back. Mr. Madimetja replied that the people could not go and bring the children back while he was absent. Now that he was present arrangements would be made to reconcile and bring back the children. Afterall, they were chased away by people who claimed they were the Bakgomana but were not. Now the rightful bakgomana and the people wanted them back.

Madimetja explained that the Masetshaba was chased away on 17.01.1974. She died in 1978 and was buried at Mapela. Mr. Lombard asked the bakgomana what their plans now were since they had no Mmasetshaba. The bakgomana all answered that they have no problem because the Mmasetshaba had a son. The son’s name is Vaaltyn II.

Madimetja said that he did want Vaaltyn II to succeed to regency. The bakgomana should discuss and arrange for Vaaltyn II to come back.

¹¹ Annexure “LVK 2” Vol I, pages 39-45.

¹² Annexure “LVK 4” Volume I, pages 60-62.

Mr. Lombard then prompted the other bakgomana to respond. Edward said that they wanted Vaaltyn II back and did not need to marry another wife. All the other bakgomana supported Edward.

Mr. Lombard said that he appreciated their response. He urged them to discuss and report when they want him back. Madimetja pointed out the problem that the children have been at Mapela for some time now, with nobody taking care of them. He indicated that Vaaltyn II was born in 1969 and was now 21 years old.”

[44] The person referred to as Madimetja at that meeting is none other than Molalakgori. He played a prominent role in the appointment of the First Applicant as Kgoshi.

[45] Acting Kgoshi Madimetja Alfred Kekana passed away in 2000. After his death the Mgombane community was divided into two groups. The first group was led by Kekana Abram which group was behind the Fourth Respondent, the son of Anna.

The second group was led by Kekana Petrus who maintained that the First Applicant is the legitimate Kgoshi.

The Fourth Respondent, Lesiba Vaaltyn (Lekgobo) Kekana was subsequently appointed to succeed his father, Madimetja Alfred Kekana.

[46] The Fourth Respondent was relieved from the royal duties as Kgoshi after a complaint was raised with the Office of the Premier in 2003. An investigation was conducted by the Provincial House of Traditional leaders and the Strategic Business Unit (SBU) of Traditional Affairs. All the Amandebele Traditional Authorities that are related to Mokopane Traditional Authority were also consulted.

The resolution of the said dispute was that the First Applicant be confirmed as the Kgoshi. The First Applicant was then appointed Senior Traditional Leader of Mokopane Traditional Authority on 16 April 2003 and inaugurated on 3 October 2003.

[47] In 2004 the Fourth Respondent and other members of the royal family approached Court to have the recognition of the First Respondent as the senior traditional leader reviewed and set aside. The application was however abandoned.

The Fourth and Fifth Respondents went back to Court again in 2012 to challenge the decision of the Premier recognising the First Applicant as the senior traditional leader.

The matter was brought to Court about 9 (nine) years after the incident and the parties had to apply for condonation for the late launching of the application. The application for condonation was unsuccessful and the application was dismissed by Pretorius J on 1 March 2013.

[48] During 2016 the Fourth and Fifth Respondents approached the Third Respondent (Commission on Traditional Leadership Disputes and Claims) to dispute the legitimacy of the traditional leadership of the First Applicant.

The Commission investigated and made recommendations that the First Applicant must be removed as a Senior Traditional Leader and that the royal family should marry a candle wife and that a seed raiser be appointed to procreate the legitimate and rightful heir to succeed Mgombane.

This is the decision which the Applicants are challenging in the present application.

Proceedings of the Commission i.e. Third Respondent

[49] During 2016 the Fourth and Fifth Respondents approached the Third Respondent to lodge a claim about recognition of the First Applicant as the senior traditional leader of Mgombane. All the parties concerned were invited to the hearing including the First Applicant.

The First Applicant declined the invitation and instead launched an urgent court application on 20 September 2016 to interdict the hearing of the Commission. The matter was postponed *sine die* to date. The First Applicant never attended the hearing despite invitation by the Commission.

[50] The hearing of the Commission was conducted in September 2016. The Third Respondent (Commission) was requested to investigate the following issues by the Fourth and Fifth Respondents:

50.1. to establish if the disputant/claimant (being the Fourth Respondent) is the legitimate and rightful heir to the Mgombane Traditional Authority throne;

50.2. if he is the rightful and legitimate heir, why and how he lost his position;
and

50.3. to establish if the incumbent (being First Applicant) is the rightful and legitimate heir, if not, how did he manage to ascend to the throne. Was he properly installed in accordance with the customs and customary law of succession of the Mgombane Traditional Authority.

[51] The Traditional Leadership and Governance Framework Act 41 of 2003 (Framework Act) established the Commission in terms of section 22(1). Section 25(1) empowers the Commission to decide on any traditional leadership disputes and claims contemplated in terms of section 25(2) which arise from any province.

Section 25(2)(a) gives the Commission authority to investigate and make recommendations on:

(i) any case where there is doubt as to whether a kingship, senior traditional leadership or headman was established in terms of the 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;

(iii) a traditional leadership position where the title or right of the incumbent is contested;

(iv) ...

[52] The Framework Act was passed to deal with traditional leadership institutions created by the former apartheid government that were illegitimate and enforced upon the communities. Before 1994 many traditional leaders were removed from office and others were demoted. The result of this is that a number of traditional leadership institutions were established and people who did not qualify under customary law were appointed as traditional leaders.

It was therefore befitting that all traditional leaderships including that of Mgombane Traditional Authority be subjected to the scrutiny of the Commission. Whether the First Applicant was properly appointed or not, his leadership was still subject to the investigation by the Commission at the instance of any person who claimed to have been removed from the position of a Senior Traditional Leader.

The Fourth Respondent, supported by the Fifth Respondent was such a person who brought the dispute before the Third Respondent.

[53] In order to restore the dignity of traditional leadership, the Framework Act was enacted to resolve and restore the integrity and the legitimacy of the institution of traditional leadership in line with customary law and practices.

[54] In the present case the evidence that was led on behalf of the Fourth and Fifth Respondents at the Commission was undisputed. This is so because the Applicants declined the invitation and thus failed to attend the hearing.

[55] The evidence led at the Commission is summarised as follows:

55.1. Evidence adduced shows that Salome was legitimately married as the candle wife, but unfortunately, on her arrival at Moshate, she refused to be seed raised by Madimetja Alfred's junior paternal uncle, Molalakgori, and she went back to her parental home.

55.2. There is no convincing evidence to confirm that Naomi was the candle wife. When Molalakgori married Naomi as the "candle wife", he did that

unilaterally, without the participation and consent of the Bakgoma, Bakgomana and the Dikgadi. Molalakgori further entered Naomi's house without being appointed seed raiser and had an illicit relationship with her. Because of this misconduct, Molalakgori was disciplined and was fined R10.

55.3. The three chiefs who investigated the matter, namely, Chiefs Kutama, Tshabalala and Sumbana who were members of the Executive of the House of Traditional Leaders in Limpopo, could not find any proof to confirm that Naomi was a candle wife.

55.4. Annah was not a candle wife, if she was a candle wife they would not have later married Salome as the candle wife therefore the disputant is not a child of a candle wife.

55.5. Molalakgori is Madimetja Alfred's junior paternal uncle, he therefore, cannot be the selepe (seed raiser) to Naomi, because she is in a position of a daughter-in-law to him. The contention that Molalakgori was appointed seed raiser with Salome or Naomi was unthinkable, the Royal family could not have appointed him to seed raise for Madimetja his "son".

55.6. It is not clear why both claimant/disputant and respondent are named "Lesiba Vaaltyn", whereas both are sons of Madimetja Alfred. However, explanation from Mokono Malesela John Knox is that the respondent changed his name from Kgabagare Langa to Lesiba Vaaltyn in preparation for ascension to the throne.

55.7. Kekana Matsobana Joyce, Kekane Mokgaetsi Lucky, Mokono Malesela John Knox and Kekana Lesiba Bernard testified that they know Salome as the only wife of the late Madimetja Alfred, who was married as the candle wife, they however conceded that Salome refused to be seed raised by John Molalakgori and she voluntarily returned to her parental home.

55.8. The disputant wants the respondent, Lesiba Vaaltyn, to be removed from chieftaincy because, he alleges, the respondent is not the rightful and legitimate heir, his mother, Naomi, was not a candle wife. The respondent, Vaaltyn, on the other hand, alleges that Annah was not a candle wife and the disputant/claimant, Lesiba Vaaltyn, cannot be the legitimate and rightful heir.

It is apparent that the appointment of the respondent was made on the belief and recommendation that Naomi was a candle wife. The Commission however found that both the claimant and the respondent are not born of candle wives, and consequently they cannot be the legitimate and rightful heirs.

55.9. The House of Traditional Leaders recommended that the Mokopane Royal Council should marry a candle wife and appoint a mokgoma to be the seed raiser. Both parties rejected this suggestion. Consequently, the Department of Traditional Affairs recommended on the 27 November 2002, that the respondent be appointed chief. The Commission finds the decision of the House of Traditional Leaders to be correct and should have been applied/followed.

[56] Upon analyzing the evidence the Commission made the following findings:

56.1. Both the claimant (Fourth Respondent) and respondent (First Applicant) are not the legitimate and rightful heirs to succeed Mgombane, the last undisputed Kgoshi of the Mgombane (Mokopane) Senior Traditional Community.

56.2. The decision by Molalakgori to substitute Naomi for Salome is void and does not mean that Naomi becomes the candle wife in Salome's stead.

[57] It is against that background that the Commission made the following recommendations that are the subject of the present litigation:

57.1. That the dispute against Kekana Lesiba Kgabagare Vaaltyn (ID No. [...]) by Kekana Lesiba Lekgobo Vaaltyn (ID No. [...]) for his reinstatement as the senior traditional leader of the Mgombane Traditional Community is dismissed; and

57.2. That the current incumbent Lesiba Kgabagare Vaaltyn Kekana be removed as a Senior Traditional Leader of Mgombane Traditional Council.

57.3. That the Royal Family should marry a candle wife, and the seed raiser be appointed to procreate the legitimate and rightful heir to succeed Mgombane.

[58] The method of investigation followed by the Commission is that of an analysis of submissions by all parties to the dispute, the review of literature, interviews and public hearings.

[59] In the Constitutional Court case of ***Bapedi Marota Mamone v The Commission on Traditional Leadership Disputes and Claims***¹³ it was said that:

“A level of deference is necessary – and this is especially the case where matters fall within the special expertise of a particular decision-making body. We should as the Court counselled in Bato Star, treat a decision of administrative bodies with “appropriate respect” and give due weight to findings of fact... made by those with special expertise and experience.”

In the present case and having regard to the undisputed evidence led at the Commission. I have no basis to differ with the Commission and I accordingly defer to the findings of the Third Respondent (Commission).

In my view the Second and Third Respondents discharged their duties diligently when investigating the Mgombane Chieftaincy dispute.

¹³ [2015] 3 BCLR 268 (CC).

Whether the Applicants had a right to be consulted and make representations prior to the decision of the Premier

[60] It is the Applicants' case that the decision taken by the Premier to remove the First Applicant as a Senior Traditional Leader was procedurally unfair and therefore should be reviewed and set aside in terms of the provisions of section 6(2)(c) of PAJA for the following reasons that:

60.1. Prior to the decision been taken by the Premier the Applicant was not given any notice of the intended action or decision and was therefore not given an opportunity to make representations as to why such a decision should not be taken.

60.2. None of the Bakgoma or the royal family was informed of the intended action or decision by the Premier. As a result, none of the Bakgoma or the royal family members were given any opportunity to make representations as to why the adverse decision by the Premier should be made.

[61] It is common cause that the Premier made the impugned decision without giving the Applicants the right to be heard. The Respondents contend that the Premier is not obliged to give the affected party a hearing before making such a decision. The Respondents submit that there is no provision in the Limpopo Act and the Framework Act that gives the First Respondent (Premier) a duty to call upon the First Applicant to make a representation to the First Respondent before a decision that will affect the First Applicant could be taken.

[62] It is common cause that the First Applicant was given an opportunity to present his case against the claims made by the Fourth Respondent to the Third Respondent

(Commission) and he refused and threatened the Second and Third Respondents with an urgent court application to interdict the hearing.¹⁴

[63] Section 30(3) of the Limpopo Act¹⁵ empowers the Premier to implement the recommendations of the Commission within certain days upon receipt of the report from the Commission. Neither the Limpopo Act nor the Framework Act makes provision for the First Respondent (Premier) or Second Respondent to give the senior traditional leader an opportunity to make representations before a decision that affects him can be taken.

[64] In ***Langa v Premier of Limpopo and Others***¹⁶ this Court stated the following at paragraph 48:

“It must be pointed out from the onset that when the Premier took the aforesaid decision he acted in terms of Section 30 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 in that he was implementing the recommendations of the Kgatla Commission. Nowhere in Section 30 of the Act or in any other section of the Act is it provided that the Premier should hold any enquiry or invite the affected traditional leader to make representations or submissions before the decision to relieve the traditional leader of his royal duties is taken.”

[65] The decision of this Court on this issue was confirmed by the Constitutional Court in the case of ***Langa v Premier, Limpopo and Others***¹⁷. At paragraphs 42 – 43 the Court said:

“[42] But if a Premier is not empowered by section 13(3) to remove a traditional leader on the grounds of wrongful appointment or recognition, is there another legal basis for doing so? While section 12(1)(c) of the Framework Act and

¹⁴ Annexures “LVK 17” & “LVK 18” Volume I, pages 125 – 129.

¹⁵ Section 30(3) states that the Premier must implement the decision of the Commission within 30 days of receipt of such decision from the Commission.

¹⁶ 2019 ZALMPPHC 15 (3 May 2019).

¹⁷ ***Langa v Premier, Limpopo and Others*** [2021] ZACC 38.

section 13 (1)(c) of the Limpopo Act clearly authorise the removal of a senior traditional leader on either of these grounds, these provisions do not prescribe the procedure that must be followed, nor do they say who is empowered to exercise this power of removal. However, as I explain, when these provisions are read with sections 25 and 26 of the Framework Act, it is clear that the Premier, acting on the recommendation of a commission, has the power to remove a senior traditional leader on the ground of either wrongful appointment or recognition.

*[43] Section 25 (2)(b)(ii) of the Framework Act specifically confers on a commission the authority to investigate, either on request or of its own accord, a traditional leadership position where the title or right of the incumbent is contested. Upon undertaking such an investigation, a commission may very well conclude that the incumbent does not have a legitimate claim to the position and should be replaced on the ground that he or she was wrongfully appointed. Section 26 of the Framework Act then requires the commission to communicate its recommendation **to the Premier, who in turn is obliged to decide whether to accept the recommendation and implement it.** If the Premier decides to accept and implement a recommendation regarding the outcome of a traditional leadership dispute which requires the removal of the incumbent traditional leader, the removal would be authorised by section 12 (1)(c) of the Framework Act and section 13 (1)(c) of the Limpopo Act, to the extent that it is applicable. Section 30 of the Limpopo Act (to the extent that it is applicable) would then empower the Premier to implement the removal.” (emphasis)*

[66] The function of the Premier in terms of such matters is not to be a tribunal or to chair a hearing or to investigate but to decide on the recommendation of the Commission and provide value or principle.

The proper forum where the First Applicant could have been given a hearing was at the Commission and before any decision was made. It is a known fact that the First

Applicant deliberately avoided to attend the hearing of the Commission to give his version or make representations.

[67] Together, section 26 of the Framework Act and section 30 of the Limpopo Act empower the Premier to take a decision on a recommendation made by the Commission and to implement that recommendation, provided the requirements of each provision are met. Giving the affected traditional leader a hearing by the Premier is not a requirement to be satisfied by the Premier.

[68] Accordingly, once the Commission has made a decision or recommendation, such decision or recommendation is final and stands unless set aside by a Court of law on review.¹⁸

It is not open for the Premier to give the affected traditional leader any notice of the intended action or decision or an opportunity to make representations as to why such a decision should be taken.

Whether the First Applicant qualifies as a Senior Traditional Leader in terms of Customary Law

[69] All parties in this matter are in agreement that according to the Ndebele customs and traditions, a senior traditional leader (Kgoshi) is legitimate if he meets the following requirements:

69.1. He is the first-born son of Masechaba (candle wife);

69.2. Masechaba was married by the tribe for Kgoshi;

69.3. If Kgoshi is impotent, the inner circle nominates one of his senior brothers to get into Masechaba's house without the knowledge of Kgoshi to procreate for him;

¹⁸ *Wesizwe Feziwe Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others* [2018] ZACC 28 at paragraph 45.

69.4. If Masechaba cannot bear children, her younger sister is married to bear children on her behalf.

[70] These customs and traditions are practiced or followed by all the Ndebele tribal authorities that are related to the Mgombane (Mokopane) Traditional Authority, i.e. the Mapela Traditional Authority, Bakenberg Traditional Authority, Lekalakala Traditional Authority and the Zebediela Traditional Authority. This information came to the fore during an investigation which was done by the SBU of Traditional Affairs in 2002 that led to the appointment of the First Applicant as a senior traditional leader.

The same information was canvassed and used by the Third Respondent (Commission) when compiling their report together with the oral submissions made at the hearing.

[71] The question that arises in the present matter is whether the First Applicant meets the aforementioned requirements in order to qualify as a Kgoshi.

Anyone alleging to be the legitimate Kgoshi in the Ndebele culture should meet all the requirements as stated in paragraph [69] above.

[72] The Respondents contend that the First Applicant falls short of these requirements based on the fact that there is no conclusive proof that his mother, Naomi was married by the tribe as a candle wife and that she was a daughter of the royal family. Furthermore that the lobola for Naomi was paid direct to her mother by Molalakgori and his group.

I agree.

[73] In my view Naomi was not the candle wife in terms of the Ndebele customs and culture.

The Third Respondent (Commission) was correct in finding that the decision of Molalakgori to substitute Naomi for Salome is void and does not mean that Naomi becomes the candle wife.

Even if Naomi was a candle wife, which fact is denied, none of her children will have a claim to the chieftaincy due to the illicit relationship between their parents namely John Molalakgori Kekana and Naomi Langa.

Molalakgori can never be a seed raiser to Naomi in terms of the Ndebele custom. He was a paternal uncle of Acting Kgoshi Madimetja Alfred Kekana. Only a senior brother to the Kgoshi at the time can be a seed raiser, not an uncle as is the position in this case.

[74] This is inconsistent with the Ndebele culture and customs which disqualifies the First Applicant to be a legitimate Kgoshi. The First Applicant by virtue of being born of Molalakgori who is the uncle of Acting Kgoshi Madimetja Alfred Kekana, is by all means and purpose, a brother to Acting Kgoshi Alfred.

Therefore, the First Applicant cannot be the son of Acting Kgoshi Alfred and an heir to the throne.

The Position of the Sixth Respondent

[75] The position of the Sixth Respondent in the Mgombane Traditional Authority and its role in the present application is dubious. The Sixth Respondent call themselves as “Senior Royal Family of Ga-Kgubudi”.

The Sixth Respondent was initially not cited by the Applicants in this application. They became involved in this matter by virtue of an unopposed application for intervention and were ultimately cited as Sixth Respondent.

[76] The Fifth Respondent contends that the Sixth Respondent does not have any role to play in the affairs of the Fifth Respondent, that is Mgombane Royal Council. That they are actually unknown to the Fifth Respondent and it is categorically denied that they are a Senior house of the Fifth Respondent.

[77] The First Applicant also denies that there is such an entity or royal family called Ga-Kgubudi Royal Family in their traditional community.

The deponent to the answering affidavit of the Sixth Respondent alleges that the Commission (Third Respondent) has recommended that the Royal Family of Ga-Kgubudi should marry a candle wife.¹⁹ No such recommendation appears from the report of the Commission.

[78] The participation of the Sixth Respondent is misconceived and opportunistic. There is absolutely no basis for them at all to be participating in this matter. In the first place there is no evidence that they have ever laid a claim of Chieftainship, either with the Commission or the Traditional Authorities in the Limpopo Province. They did not participate in the Commission hearing.

[79] In my view their participation in this matter is without any justification and it is intended to delay the finalization of the Chieftainship dispute between the First Applicant and the Fifth respondent.

Furthermore, their participation is intended to divert the implementation of the Commission and Premier's decision that **"The Royal Council should marry a candle wife, and seed raiser be appointed to procreate the legitimate and rightful heir to succeed Mgombane"**.

Conclusion

[80] On the conspectus of the evidence before me as outlined in the papers, I arrive at the following conclusions:

80.1. The First Applicant is not the correct Senior Traditional Leader of Mgombane (Mokopane) Royal Council and that his mother Naomi is not the candle wife. Naomi was not married by the community according to Ndebele customs and the person (Molalakgori) who was the seed raiser to Naomi, could not have been a seed raiser according to Ndebele custom or any other African culture. Molalakgori was an uncle to Acting Kgoshi Madimetja Alfred Kekana.

¹⁹ 6th Respondent Answering Affidavit, paragraph 27; Volume I, page 203.

80.2. There was a real and material dispute concerning the leadership of the Mgombane (Mokopane) Traditional Community which was ultimately resolved when the Third Respondent (Commission) found that neither the First Applicant nor the Fourth Respondent have any claim to the chieftaincy and that a seed raiser be appointed and a candle wife married to procreate the lawful heir to the throne.

80.3. The Third Respondent (Commission) conducted a thorough investigation that was well structured and properly mandated by the Framework Act. The Third Respondent took into consideration all the relevant information through relevant and interested parties that attended the hearings as well as information that was with the Provincial Government.

The First Applicant declined the invitation to attend and participate in the hearing.

80.4. The Applicants have failed to make out a case for the review and setting aside of the decision of the First Respondent i.e. the Premier.

The Premier is the supreme authority concerning the resolution of traditional leadership disputes. He is far from being a rubber stamp to the decisions of the Commission and may either agree or disagree with the Commission's findings.

Order

[81] In the result the following order is granted:

1. The Application is dismissed with costs.
2. The Sixth Respondent shall not be entitled to the costs of this application.

**E M MAKGOBA
JUDGE PRESIDENT OF THE HIGH
COURT, LIMPOPO DIVISION**

APPEARANCES

Heard on : 13 October 2022

Judgment delivered on : 28 October 2022

**For the Applicants : Adv. M M Mojapelo
: Adv. M R Maphutha**

**Instructed by : Makhafole & Verter Inc.
c/o CJ Ntsoane Attorneys**

**For the 1st, 2nd & 3rd Respondents : Adv. F Thema
Instructed by : State Attorney**

**For the 5th Respondent : Adv. L A Nkoana
Instructed by : Mokgotho Attorneys**

**For the 6th Respondent : Adv. K M Kgomongwe
Instructed by : Popela Maake Inc.**