

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

Appeal case no: **HCAA22/2024**

Court a quo case no: **2505/2019**

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
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DATE <u>31/7/26</u>	SIGNATURE... 

In the matter between:

THE PREMIER OF LIMPOPO PROVINCE

1ST APPELLANT

MEC CO-OPERATIVE GOVERNANCE,

HUMAN SETTLEMENT AND TRADITIONAL

AFFAIRS

2ND APPELLANT

THE HEAD OF DEPARTMENT CO-OPERATIVE

GOVERNANCE, HUMAN SETTLEMENT AND

TRADITIONAL AFFAIRS

3RD APPELLANT

And

MKHACANI ADEYEMI MALULEKE HLANEKI

1ST RESPONDENT

HLANEKI TRADITIONAL COUNCIL

2ND RESPONDENT

HLANEKI TRADITIONAL COMMUNITY

3RD RESPONDENT

NATIONAL MINISTER OF CO-OPERATIVE

GOVERNANCE & TRADITIONAL AFFAIRS

4TH RESPONDENT

LIMPOPO PROVINCIAL HOUSE OF

TRADITIONAL LEADERS

5TH RESPONDENT

KHAYIZENI ISHMAEL MASWANGANYI

6TH RESPONDENT

KHAYIZENI SOLOMON MASWANGANYI

7TH RESPONDENT

COMMISSION ON TRADITIONAL LEADERSHIP

DISPUTES AND CLAIMS

8th RESPONDENT

Limpopo Provincial Committee on TRADITIONAL

LEADERSHIP DISPUTES AND CLAIMS

9th RESPONDENT

COMMISSIONER R.T KGATLA N.O &

OTHER COMMISSIONERS

10th RESPONDENT

Delivered: This judgment is handed down electronically to the parties legal representatives' email. The date for delivery is deemed to be 31 July 2026.

Reserved Date: 21 November 2025

JUDGMENT

Coram: Naude- Odendal J et al, Pillay AJ and Masilo AJ.

Introduction

- [1] This is an appeal against the judgment of Muller J, handed down on 10 November 2022, with the leave of the Supreme Court of Appeal order granted on 31 August 2023 to the Full Court of the Limpopo High Court.
- [2] This appeal comes against the backdrop of a fusillade of non-compliance by the Appellant, the latest of such is the Supplementary Founding Affidavit to the Condonation, filed on 19 November 2025, after the Court had granted the Appellants application for the postponement of this matter on 24 October 2025 to file a proper record of appeal.
- [3] The Limpopo Province is a rural province, which is mainly a consolidation of bantustans and parts of the former Transvaal Administration, with the bulk of its occupants being traditional communities and villages, who still practice and observe a system of customary law.
- [4] As a direct result of this backdrop and layout of this province, the Kgatla Commission found itself confronted with a quest to investigate traditional leadership disputes spanning to some 528 disputes and claims, as set out in the Interim Report to the Premier. This was in fact the start of problems for governments (both national and provincial) and courts, as the disputants

before the Kgatla Commission, upon being dissatisfied with the findings and recommendations, would then resort to court in terms of section 34 of the Constitution read with PAJA to have their disputes adjudicated by an independent tribunal.

- [5] It is not astounding that the consequence of this backdrop and work of the Commissions into traditional leadership disputes in terms of section 26 of the Framework Act, 2003, the Supreme Court of Appeal and Constitutional Courts find themselves inundated by appeals on traditional leadership mostly from this province.
- [6] This matter consists of three sets of applications. The first is an application for condonation and reinstatement of the late filing of the Notice of appeal. Second is the Application for the late filing of the record of appeal. Third is the 'application' for postponement. There is also a Rule 30A regarding the incoherent and non-compliant record of appeal. The 1st to 3rd Respondents oppose the condonation and the reinstatement application. Further, oppose the 'application' for the postponement of the appeal hearing or removal from the roll.

Ad Rule 30A

[7] On 13 November 2024, the First to Third Respondents served a Rule 30A, the nub of which is as follows –

- (a) failure to comply with Rule 49(6)(a);
- (b) failure to comply with the Rule 49(7)(a), 49(8)(a) and para 7.8 of the Practice Directives; this complaint centred around the abhorring state of the Record of Appeal
- © failure to comply with Rule 49(7)(a)(ii);
- (d) failure to comply with Rule 49(8)(a);

[8] I must state that instead of addressing the complaints in Rule 30A, the Appellants elected to bury their head in the sand, and hoped that the complaint would just disappear on its own.

[9] This rule is intended to deal with matters of form not of substance. See: Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd and Others [2023] ZACC 2. It is intended to deal with irregular steps taken by parties during litigation and where the irregularity emanates from the inappropriate use of the rules of court. D Harms Civil Procedure in the Superior Courts S1-69 at B30.3 .

[10] At its heart, the purpose of the Rules of Court is to oil the wheels of justice to attain the expeditious resolving of disputes with a minimization of costs. Quibbling about trivial deviations from the Rules of Court retards, instead of enhancing the civil court process. See: *Louw v Grobler and Another* (3074/2016) [2016] ZAFSHC 206. The object of the rules is to secure the inexpensive and expeditious and for the completion of litigation before the courts: they are not an end in themselves. See: *Hudson v Hudson* 1927 AD 259 at 267. *Eke v Parsons* 2016 (3) SA 37 (CC) at 53 A-D, *Centre for Child Law v Hoerskool, Fochville* 2016 (2) SA 121 (SCA) at 131G. To this end, the rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve disputes speedily and inexpensively. See: *Ncoweni v Bezuidenhout* 1927 AD 259 at 267.

[11] In *Mukaddam v Pioneer Foods Pty (Ltd)* 2013 (5) SA 89 (CC) the Constitutional Court commented on the purpose of the Rules of Court as follows:

"[32] It is important that the rules of court are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for the courts and the courts are established for rules. Therefore, the primary function of the rules of court is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper course in those

circumstances is to approach the court itself for guidance. After all, in terms s173 of the Constitution each superior court is the master of its own process.

[12] In *Eke v Parsons* 2016 (3) SA 37 (CC) the Constitutional Court said:

“[39] Without a doubt, rules governing the court process cannot be disregarded. They serve an undeniable important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. **Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said “[i]t is trite that rules exist for the courts, and not courts for the rules.”**

[13] This issue involves more than two traditional communities, we say more than two, as some of the villages falling under other traditional communities like the Hlaneki, Mashimbye, Mathonsi, Maswanganyi, Rikhotso, whose land includes, Basani, Bode, Dingamazi, Dzingidzing, Nwa Makena, Sikhanyani

villages, were incorporated into the gazetted land of the Maswanganyi. This occurred without consultation with either the Provincial House of traditional leaders, the Local House of traditional leaders or the affected communities.

Ad Condonation and reinstatement

- [14] The principles governing the granting of condonation are trite. Simply put, an application for condonation must set out justifiable reasons for non-compliance. In *Melane v Sanlam Insurance Co Ltd*⁴, Holmes JA stated the principle as follows:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success and the importance of the case...”

Notice of Appeal and Record of Appeal out of time

- [15] The Supreme Court of Appeal on 31 August 2023 granted the leave to appeal to the Full Court of the Limpopo High Court, Polokwane Division. This meant that the Appellants had 20 days reckoned from 1 September 2023. This, in terms of Rule 49(2), ended on 28 September 2023. It was only some

10 months late, on 16 July 2024, that the Notice of appeal was filed. This was accompanied by an application for condonation issued on the same date, 16 July 2024. In this condonation application the Appellants seek condonation for the late filing of the Notice of Appeal and the record of appeal.

[16] The record was only delivered on 10 October 2024, and filed with the Registrar of this Court on 14 October 2024. The deponent in the application also sought reinstatement of the deemed lapsed appeal. The irony of this application is that the deponent, put no effort into complying with the Rules and Practice Directives of filing a record timeously, instead, he anticipated failure to comply and sought condonation for that. This was despite having been 10 months late with the Notice of Appeal. The application for reinstatement and condonation is opposed by the 1st to 3rd Respondent, as there is also no condonation application to explain the failure to file the appeal record timeously. This non-compliant record of appeal necessitated a Notice in terms of Rule 30A which was served on 13 November 2024.

[17] This failure led to the 1st to 3rd Respondents filing a Supplementary Answering Affidavit on 20 January 2025 in which they raised queries with regard to defects in the appeal record and failure to comply with Rule 49. As at the hearing of this appeal on 24 October 2025, the Appellants had failed to

correct the appeal record. This was despite the Rule 30A notice being served on them on 13 November 2024. This resulted in the hearing of the appeal being postponed to 21 November 2025 to enable the Appellants to file a proper record of appeal.

[18] In this matter it is rather befitting to mention that the record of appeal was filed perceptibly out of time, as it was filed on 14 October 2024. There is no valid application for condonation. This is so given that the Appellants could not ask for condonation out of the abundance of caution, before the event occurred this is simply because in an application for condonation, the applicant is required to proffer an explanation for each time of the delay.

[19] As a result, the application for condonation of 16 July 2024 before the record was filed does not come near the level of compliance with the Rules, as it does not explain to the court what has transpired since 16 July 2024. There is an unexplained period of at least 72 days, which we believe not a smidgeon of explanation is proffered for the 72 court days. This is most certainly without doubt remiss of the Appellant. This is more so on the face of a Supplementary Answering Affidavit filed on 21 January 2025 in which the Respondents jeered the Appellants regarding their non-compliance.

[20] The Respondents in paragraph 20, bewailed that the Appellants litigate with the public purse. Further, in paragraph 21 lamented that the Appellants' conduct is habitual delays, with a pattern of bad faith. The sentiments and the description by the Respondents fit the Appellants' track record, which can be summed up as nothing but lackadaisical. The sad thing, is that neither the client, (being the legal officers in the respective Appellant Departments), nor the counsel in this matter saw anything wrong with the state of this matter. The Appellants elected not to even give the courtesy of a Replying Affidavit to the Answering Affidavit and Supplementary Answering Affidavit in the reinstatement and condonation application. The Appellants set the matter down, filed a practice note and Heads of Argument with no regard whatsoever to the state of the record and to attempt to proffer some form of explanation for this catholic non-compliance with the Rules of Court.

[21] The Constitutional Court per Cameron J writing for the majority decision had occasion to posit and settle the ever arising question by the obligations of the state, in the matter of MEC for Health, EC v Kirkland Inv (Pty) Ltd t/a an Eye & Lazer Institute 2014(3) SA 481 (CC) at para 82, where it was said –

“To demand this of government is not to stymie it by forcing upon it senseless formality. **It is to insist on due process, from which there is no reason to exam government.** On the contrary, **there is a higher duty on the state to respect the law to fulfil procedural requirements and to tread respectfully when dealing**

with rights. Government is not an indigent or bewildered litigant, adrift on the sea of litigious and certainty, to whom the court must extend a procedure-circumventing lifeline. **It is the constitution's primary agent it must do right and it must do it properly."**

[22] This Court needs to tabulate the history of non-compliance which has taken place since inception, and this conduct on the part of the state requires this court to take a dim view of such lackadaisical behavior by the officials. This behavior has become endemic, and the courts are confronted with a quagmire that they every time have to strike matters off the roll, resulting in poor litigants being denied access to speedy resolution of their disputes by an independent court as contemplated in section 34 of the Constitution.

[23] The law regarding condonation is trite, various courts including the Constitutional Court in *Mphephu Ramabulana & Another v Mphephu & Others* 2022 (1) BCLR 20 (CC), have had occasion to deal with the issue wherein Khampepe J posited that –

"[33] It is perspicuous that compliance with this Court's Rules and timelines is not optional, and that condonation for any non-compliance is not at hand merely for the asking. The question in each case is "whether the interests of justice permit" that condonation be granted. Factors such as the extent and cause of the delay, the reasonableness of the explanation for the delay, the effect of the delay on the administration of justice and other litigants, and the

prospects of success on the merits if condonation is granted, are relevant to determining what the interests of justice dictate in any given case.

[34] In casu, we are faced with a delay of over a year, which is evidently inordinate, and not justified by cogent reasons. I find myself compelled to take a dim view of the applicants' explanation that they had to wait for the reports of the Houses of Traditional Leaders in order to decide whether to appeal. It is not open to applicants simply to disregard this Court's Rules because they are mulling over whether or not to appeal. It is also plain from the grounds of appeal advanced that the Houses' reports bore little relevance to the applicants' decision to appeal."

[24] The learned Maya JA, in *Camps Bay*¹, confirmed the position as follows:

'...the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issues to be raised in the intended proceedings and the prospects of success.'

[25] The Constitutional Court in *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5, at para 45 quoted with approval, the SCA as follows-

¹ *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] 2 All SA 519 (SCA) para 54

"[45] ...The SCA, relying on this Court's decisions in Van Wyk[36] and eThekweni,[37] adeptly set out the factors that need to be considered when granting condonation as follows:

"Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."

[26] In Ramabulana, in considering an application for condonation, the Constitutional Court pointed out that –

"[38] While I am of the view that the extremity of the delay, coupled with the paucity of the explanation provided, justify the immediate refusal of condonation, I am mindful that this Court has said that lateness and inadequacy of the explanation provided are not necessarily dispositive of the question of condonation. This is because the other factors relevant to condonation may favour its granting and tilt the interests of justice to the other side of the scale."

[27] The court possesses wide discretionary powers which it exercises judiciously in the evaluation of relevant factors in a condonation application.

The factors for consideration in a condonation application are closely related, a reasonable explanation for the delay coupled with a good prospect of success may augment the chances of success of the application for condonation; a weak explanation, but good prospect of success and the importance of the case will permit for the granting of an application for condonation. The interests of justice underpin the court's exercise of its discretionary powers. A good explanation without prospect of success on the merits warrants a refusal of condonation.

- [28] The court may grant condonation despite a poor explanation for the delay where doing so will be in the interests of justice. The importance of this matter to the non-state respondents, who are affected by this judgment cannot be overemphasized.
- [29] The ripple effect of the findings and recommendation of the Kgatla Commission on the various neighbouring Headmen, who have signed the resolution on page 349, namely the Basani, Bode, Dzingidzingi, and Nwa-Makwena. It is undeniable that this matter touches on at least the two senior traditional leaders' territory, namely 'Hosi Maswanganyi' and Hosi Hlaneki.
- [30] This matter has been lingering in the corridors of justice since 2019, with no sense of finality in sight. The sad side of this protracted legal battle is that

communities on the ground are affected and are not able to get finality which is guaranteed in common law, that courts are there to provide parties who are disputants an element of finality and closure. Regrettably, this lack of finality is in this matter orchestrated and is at the instance of the state party who exercise statutory powers.

[31] As we have intimated herein above that there is no application for condonation for the late filing of the appeal record since, the Appellants filed their application for condonation when they filed their application for reinstatement 16 July 2024, prior to the filing of the record in 14 October 2024. This then brings to question whether one of the factors for consideration in a condonation application, namely a reasonable explanation for the delay has not been proffered. The Supreme Court of Appeal have said that each delay and the reasons for such delay must be explained.

[32] In this matter the application for condonation was insinuated in the application for reinstatement, which was made some months prior to the filing of the record of appeal. There is no reasonable explanation proffered for the period between the application for the reinstatement and the filing of the record of appeal. One can safely say the application for condonation was made in anticipation, as if it is out of the abundance of caution. The

application therefore does not meet the criterion regarding a reasonable explanation of every delay.

[33] Even if one was to consider the granting condonation despite the glaring lack of reasonable explanation, the second factor in an application for condonation, being a good prospect of success, to can augment the chances of success of the application for condonation is lacking too. This will become apparent as we deal with the aspect relating to the merits of the review application and the assailability of the decision of both the Premier and the Kgatla Commission's findings and recommendations.

[34] Another factor to consider is the importance of the case. As we have already indicated that the importance of this matter lies not only in the parties before this court, but in the affected communities of Basani, Bode, Dzingidzingi, and Nwa-Makwena.

[35] Further, the importance of this case lies in the set criteria in section 25(2)(a)(viii) **all traditional leadership claims and disputes dating from 1 September 1927**. Counsel for the Appellants conceded that the dispute dates back to 1894, which is well outside of the catchment period of section 25(2)(a)(vii). To permit this matter in which a dispute arose before the catchment period would open the flood gates, moreso that Parliament took a

conscious decision to look at the specific regulatory framework which had enormous impact on the institution of traditional leadership, being the Black Administration Act, 38 of 1927, which brought about serious distortions in the institution of traditional leadership.

- [36] The last element to consider in an application for condonation is interests of justice, which must underpin the court's exercise of its discretionary powers. As we have already traversed each and every factor in the set criteria for evaluating applications for condonation. We are satisfied that since there is no good explanation for the failure to comply with the Rules and for each time in the delay for the filing of the record of appeal. Further, we are satisfied that there are no prospects of success on the merits, be it from a perspective of the procedural aspect or the substantive aspect as shall be seen herein below.
- [37] Based on the above, it would not be in the interest of justice for this court to grant condonation for the late filing of the record of appeal, and therefore, condonation for the late filing of the appeal record must be refused.
- [38] The Appellants *ex abundante cautela* sought reinstatement of their lapsed appeal. The reason we say this is because the application for condonation is premised on the fact that the Appellants are of the firm view that their appeal

has not lapsed. However, in the event that, if it is found that *their* appeal had lapsed, the Appellants seek reinstatement of the lapsed appeal.

[39] The Appellants were on 31 August 2023 granted leave to appeal by the Supreme Court of Appeal. On 16 July 2024 the Appellants filed their Notice of Appeal. Rule 49(6)(a). The Appellants were enjoined within 60 days after delivery of a notice of appeal, to make written application to the registrar of the division where the appeal is to be heard for a date for the hearing of such appeal.

[40] Rule 49(6)(a) states that ...appellant fails to do so a respondent may within 10 days after the expiry of the said period of 60 days, as in the case of the appellant, apply for the set down of the appeal or cross-appeal which he may have noted. If no such application is made by either party the appeal and cross-appeal shall be deemed to have lapsed: Provided that a respondent shall have the right to apply for an order for his wasted costs.

[41] The Appellant on 15 November 2024 served and filed an application for trial date. This was after the Appellant had filed its Notice of Appeal on 16 July 2024. A period of 60 court days if reckoned from 17 July 2024, would end on 11 October 2024. This simply means that the appeal lapsed on 12 October

2024. As at 15 November 2024 when the Appellants through the office of the state attorney applied for trial date the appeal had lapsed.

[42] This then begs the question was there an appeal in respect of which the Appellant could apply for a trial date? Reluctantly, we do not for a second believe there was such an appeal, until the Appellants had applied for reinstatement of the appeal. This is the case given that as at when the record was filed, the appeal had lapsed, as it was deemed to have lapsed when the Appellants failed to file the record together with the application for a hearing date on or before the 11 October 2024.

[43] Without belaboring the point regarding the failure to proffer a reasonable explanation for the delay in filing an application for trial date and the record of appeal as contemplated in Rule 49(6)(a). Further, at the risk of sounding tautologous, the Appellants failed to provide an explanation for every time delay, from 16 July 2024 to 15 November 2024 when they ultimately filed an application for a hearing date. In the absence of an explanation for every time delay in the period 16 July 2024 to 15 November 2024 the only logical conclusion is that the requirements for reinstatement has not been satisfied.

[44] To make matters worse, there is no reasonable explanation for the delay, the only explanation proffered relates to period of confusion before Masete was

provided with a copy of the Supreme Court of Appeal leave granting judgment, which relate to the filing of the Notice of Appeal, which its failure does not have an in built remedy of deemed lapse as in Rule 49(6)(a).

[45] The next requirement for consideration of an application for leave to appeal is good prospects of success. We have tangibly dealt with the issue of prospects of success from a procedural point of view, in two fronts-

[45.1] Parliament had set a date of 1 September 1927 as the cut of date for the referral of disputes. The Maswanganyi party in its dispute referral form claimed to have lost their senior traditional leadership in 1957. In the hearings before the Kgatla Commission, as relied on by Counsel for the Appellants in his heads of argument, that Mr Joe Maswanganyi at pages 1059-1060, 1063 of case 2726/2020 testified that Maswanganyi held senior traditional leadership until it was lost in 1957.

[45.2] During the hearing on 21 November 2025, in reply Counsel for the Appellants on being confronted with a plethora of records dating back to 1910, 1913, 1932, 1934 and 1951 that shows that Maswanganyi's were a headmanship. Counsel the resorted to and conceded that the Manswanganyi's lost their senior traditional leadership in 1894. This

we accept being an inference drawn from the arrival of the Hlaneki's in 1894.

- [45.3] This then leads to the question whether the Kgatla Commission, from a procedural point of view had jurisdiction to investigate and to hear a traditional leadership dispute relating to senior traditional leadership of Maswanganyi which was lost before 1 September 1927.
- [45.4] Further, from a procedural point of view, the fact that the Kgatla Commission proceeded to conduct an inspection in loco, without inviting the Hlaneki's and held hearings in which people testified or gave explanations regarding historical artifacts is a serious breach of procedural fairness requirements.
- [45.5] The fact that the Premier, in deciding to accept the decision of the Kgatla Commission failed to refer the decision in terms of section 30 of the Limpopo Traditional Leadership & Institutions to the Provincial House of Traditional Leaders within seven days from the date of 29 May 2017. Further, that he had not received advice within fourteen days from the Provincial House of Traditional Leaders prior to taking a decision in terms of section 30(3) rendered the decision to be susceptible to being reviewed and set aside.
- [45.6] With regard to the substantive part of the review application, the Kgatla Commission had misdirected itself and found against overwhelming archival material that prove that as early as in 1910

when Assistant Native Commissioner went to investigate a boundary dispute between Maswanganyi and Ngove. The two headmen, who were interviewed and it was even recorded that even the subjects of the two headmen know the boundaries.

[45.7] Further, as early as 1912, 1913, 1932, 1938 the records including the report of the death of the father to the claimant. Even the dispute over who should succeed their father's headmanship.

[45.8] As late as 1951, the request to the SA Institute of Race relations by the contender for the headmanship, when he besieged the assistance of the S.A Institute of Race Relations for him to be recognised as a headman of the Maswanganyi area.

[45.9] The most crucial issue in the investigation of the question of prospects of success, is whether in the period in question, there was ever any senior traditional leadership on the Maswanganyi to restore?

[45.10] All of the above speak to one simple truth that the Appellants have no prospects of success on the merits. Therefore, to grant reinstatement when there is no reasonable explanation and there are no prospects of success is just incongruent with judicious exercise of this court's discretion.

[46] In the circumstances, the Appellants' application for condonation and reinstatement is dismissed with costs, including costs of two counsels on

scale C. Despite the dismissal, we deem it prudent to deal with the merits, as we had permitted the parties to proceed with full argument on the merits of the appeal, and would provide judgment thereafter. This is also based on the fact that we have dismissed the condonation application based on the fact that there are no reasonable prospects of success on the merits.

Background

[47] One Khanyizeni Ishmael Maswanganyi, on 30 August 2012 signed and completed a claim to the Commission on Traditional Leadership Disputes and Claims. The claim form specifically in clause 6.3 reads

“6.3 Select from the following the relevant description of your claim or Dispute:

Description	Mark your choice with a cross		
Dispute of an existing traditional leadership position	Kingship		
	Principal Traditional leader		
	Senior Traditional leader	x	
	Headman		
Boundary dispute between two	land		

<i>traditional authorities</i>	<i>Boundary</i> <i>Provide names of villages and/or farms involved</i>	x
<i>Claim for new traditional leadership position</i>		

[48] In the questionnaire on traditional leadership disputes and claims form, Khanyizeni Ishmael Maswanganyi, on 30 August 2012, completed and wrote the following answers:

“2.a. When was your traditional leadership status lost?

November 1957

2.b. How was your traditional leadership status lost?

We the Maswanganyi were incorporated into the newly established Hlaneki Tribal Authority. From that time our status was reduced to be that of Headman under Hlaneki.

4. Traditional leadership and leaders under your authority

a) How many traditional communities that are grouped together form your traditional leadership within your area of jurisdiction (name them and give their location)

Village

Headman

Silao

Shingomani

Dingamazi

Thavani Mathonsi

Dzingidzingi	Mashau Maswanganyi
Shamavhungu	Mbhangele
Nwa Makena	Chudu Mdaka
Basani	Manganyi Xihovhorolo
Gandlanani	Khani
Sikhanyani	Mashimbye"

[49] In a submission to the CTLDC, which this court has cause to believe must have served and been considered by the Kgatla Commission, the Hlaneke's attached the following documents, from which the following passages were extracted –

[50] In a document dated 30 September 1912 it is stated: -

*"In July 1910 I had occasion to proceed to the area of ground controlled by **Indunas** Ngobe and Maswanganyi to inquire into and determine a **dispute which had arisen between those two indunas** with respect to certain debatable ground to which both laid claim.*

...

I imagine that the Acting Sub-Native Commissioner, Groot Spelonken, has obtained much of his information from Mr Albasini and, if I mistake not, Hlaneke was one of the instruments used by the former in the agitation and engineered through Mr Barend Vorster to secure his appointment as Chief of Tshangaan."

- [51] In a document titled "Notes of meeting held at Groot Spelonken on 11th January 1913. On the second page it reads-

*"When Maswanganye was given his area by Mr Albasini, I was already established there together with the greater number of the above mentioned 48 kraals. As far as I can remember only seven kraals have come there since Maswanganye's appointment. When Maswanganye came to live near my kraal I was under Ndengeza. I never transferred my allegiance to Maswanganye, but when Capt Schiel and Mr Albasini had a quarrel I transferred my allegiance to Hlaneki, my reason for doing so was on account of my being a follower of Capt Schiel and Ndengeza sided with Mr Albasini. I was present when Capt Schiel pointed out the North Eastern boundary of Hlaneki's area to him and I remember him distinctly informing Hlaneki this boundary would be the Klein Letaba river. I, together with all 48 Natives above mentioned, reside on the South Western side of Klein Letaba River. When **Capt Schiel made this boundary line he informed Indunas Maswanganye and Nkomo** that they would have to be represented by Hlaneki. These **Indunas objected** and he ultimately allowed them to be **independent indunas**. Page 935-936*

- [52] Further, in a document dated 10 November 1932 titled "Inspection of Unsurveyed Crown Lands

"With reference to your Minute No. a/5/13/436 of the 24th ultimo, I have to inform you that it is understood and that the areas at present occupied by Hlaneki and Maswanganye and their followers were allotted to them during the days of the South

*African Republic. The boundaries of their respective areas are **known to these headmen** and their followers.” Page 962*

- [53] In a letter dated 12th August 1938 to the Additional Native Commissioner, Tzaneen. Titled Death of Independent Headman Samuel Maswanganye, it states-

*“It is with regret that I have to report the **death of Independent Headman** Samuel Maswanganye who died on unsurveyed crown land on 30th ultimo. The appointment of a successor will be advised in due course.
Assistant Native Commissioner.” Page 792 and 970*

- [54] In a letter dated 19th March 1951, one Petros Maswanganye wrote to “The S.A Institute of Race Relations

“Dear Sir

*With reference to the letter I wrote to you in **connection with headman** Samuel Maswanganye and myself in respect of being a leader.*

It has been investigated by the Native Commissioner Duiwelskloof on the 16th instant.

*And all agreed upon the matter that I am the son of Mikhadzani (Maswanganye), **the late headman**. ...It was found that he is not the son of my father who was headman before....” page 932*

- [55] In a letter dated 27 March 1951, addressed to Petrus Kedonga Maswanganye, titled “Unofficial headman of Maswanganye area.

"I have to advise you that the residents of the above area in this district ...and I as their leader in the place of headman Samuel Maswanganye. You are therefore requested not to interfere any further in the affairs of this community, or enter this district without permission.

VS Liefeldt" page 995"

- [56] On the 29th November 1951, Notice No. 1854 dealing with "DEFINITION OF THE AREAS OF CERTAIN TRIBES AND ESTABLISHMENT OF BANTU TRIBAL AUTHORITIES AREA OF DUIWELSKLOOF- LETABA DISTRICT.

"It is hereby notified for general information that His Excellency the Govenor General has been pleased –

...

Schedule A

1. Area of the Tsonga Tribe under Chief William Makatshana Hlaneki and the Hlaneki Tribal Authority.

The area in the area of Duiwelskloof, Letaba District, bounded as follows:

From a point at the centre of the concrete slab over the Molototsi River known as Verschfontein, near the south eastern beacon of the farm Verschfontein No. 24; thence in a straight line north eastwards to a beacon on the bank of the Middle Letaba River and on the boundary of the farm Sterkrivvier No.10 thence downstream along the Middle Letaba River and Klein Letaba Rivers to a beacon, at the bend of the Klein Letaba River, common to the Mabunda and the Hlaneki

Tribal Areas and opposite the Seandani dipping tank; thence south westwards in a straight line to the point of commencement."

[57] The above quoted are from the typed government records that formed part of the record of decision of the Kgatla Commission, as page 628 reads that "Documents filed: Unindexed and Unpaginated Records received from the State Respondent. Dated 1 December 2020"

[58] Archival Records as Evidence **by:** Albert J. Mills, Gabrielle Durepos & Elden Wiebe, **In:** Encyclopedia of Case Study Research, it is postulated that –

"Archives mostly consist of personal and/or public written documents, maps, and official and private letters, but more recently also of audio- and videotapes, and Internet-based materials have also been included among archival records. For centuries, archives have been gathered, preserved, managed, and analyzed by kings, local and national governments, religious organizations, the army, the courts, the police and the intelligence services, universities, communities, associations, and even individuals."

[59] Mills *et al.* in Archival Records as Evidence, further suggest that in the application of archival records the following must be considered –

"When using archival records as evidence, a number of questions need to be raised. Serious limitations can affect the nature of the questions researchers try to

answer and the reliability of their final research results. Some limitations can be mitigated by collecting additional information from sources independent of the archives initially consulted. Other times, however, researchers will need to reformulate their research question to take these limitations into account, and to be aware of the limited generalizability of their research results.

First, questions must be asked about the archival record under consideration. Is the archival record genuine? If not, which of its sections, paragraphs, sentences, or words cannot be dated with precision, and which ones appear to have been modified (added, deleted, altered) at a later time? The history of the record, as pieced together from independent sources and the archive holder, is a good starting point to ascertain how much of the record is genuine, and when (and sometimes even why) changes to it were made (by adding handwritten comments or deleting some words and paragraphs). An archival record will have to be dated, a process that can be difficult as not all archives were fully catalogued, and can result only in educated guesses, as the record might include no indication as to the time when it was produced.'

- [60] In this matter, this court is fortunate that the records referred to above, can be identified in terms of date and authors of the archival records. This is the same position in which the Kgatla Commission was, as the Hlanekis submitted and attached the archival records to their submission. It is from the reading of the record of decision of the Kgatla Commission that this court was able to find the above documents and extract the quoted passages.

- [61] The scholars in the field of archives, advise that when dealing with archival records as evidence, one needs to ask the question *Is the archival record genuine?* The reports, the notes of the meeting, the correspondence and notices are all dated, and were transmitted or recorded at a particular point in the history of South Africa. They were designed to report a particular set of facts, or to record a state of affairs at that time regarding the tribes in the Letaba and Tzaneen area.
- [62] The second criterion is, *If not, which of its sections, paragraphs, sentences, or words cannot be dated with precision, and which ones appear to have been modified (added, deleted, altered) at a later time?* The records referred to and attached to the record do not in any way suggest having been modified.
- [63] The sentences and paragraphs relating to indunas and the Maswanganyi being indunas or headmen, do not lend themselves to any suggestion that it cannot be dated and that it was modified at any stage in the life of the documents referred to. This holds true for the recordal of facts of headmanship from 1910 to 1951, which is a consistent record of the same thing for 41 years.

- [64] The Kgatla Commission was required in terms of the dispute referral by Khanyizeni Ishmael Maswanganyi, dated 30 August 2012, signed, and submitted to the Commission on Traditional Leadership Disputes and Claims, that their claim was for the restoration of the Senior Traditional Leadership of Maswanganyi.
- [65] The Concise Oxford English Dictionary 12th Edition, defines the term “**Restoration**” as 1. the action or process of restoring. 2. as the return of a monarch to a throne, a head of state to government, or a regime to power. “**Restore**” is defined as 1. bring back (a previous right, practice or situation) reinstate. return (something) to a former condition or position. “**Restitution**” the restoration of something lost or stolen to its proper owner, 3. restoration of something to its original state.
- [66] What is apparent from the claim form is that the Maswanganyi claim that they lost senior traditional leadership status and the boundary of their territory. This is expressed to have been lost in November 1957. As stated in the questionnaire to the claim form-
- “We the Maswanganyi were incorporated into the newly established Hlaneki Tribal Authority. From that time our status was reduced to be that of Headman under Hlaneki.”***

[67] The answer to the questionnaire raises two important questions, which are inextricably linked to the question of prospects of success in the review, namely: -

(a) Did the Maswanganyi have a Senior Traditional Leadership prior to November 1957?

(b) If no, then *cedit questio*. It is the end of the enquiry.

[68] The second question is, if it is found that they did have senior traditional leadership, when and where was it lost? If it was lost before 1 September 1927, then the Kgatla Commission did not have jurisdiction to investigate the matter as it fell outside the catchment period.

Application of the law

[69] This appeal emanates from a review of administrative decisions which were taken by the Kgatla Commission and subsequently by the Premier, exercising statutory powers. It is important that one traverses this legislative framework regulating the Institution of Traditional Leadership in South Africa.

[70] The Constitution of the Republic of South Africa, 1996 is the *grundnorm* for all acts by both private and state organs.

[70.1] Section 33 deals with the right to just administrative action. It states that –

- “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”*

[70.2] Section 211 deals with the recognition of traditional leadership. It provides that –

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

[70.3] Section 212 deals with the role of traditional leaders. It states that-

- “(1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.*

- (2) *To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law—*
- (a) *national or provincial legislation may provide for the establishment of houses of traditional leaders; and*
- (b) *national legislation may establish a council of traditional leaders.”*

[70.4] Section 237 deals with diligent performance of obligations. It provides that –

“All constitutional obligations must be performed diligently and without delay.”

[71] In order to give effect to section 212, and comply with section 237, Parliament passed the Traditional Leadership and Governance Framework Act, Act No. 41 of 2003. As its name speaks for itself, the Framework Act provided a legal framework to deal with provincial peculiarities, which resulted in the Limpopo Provincial legislature promulgating the Limpopo Traditional Leadership & Institutions Act No. 6 of 2005, as empowered by section 104(1)(b).

[72] **Ad Traditional Leadership and Governance Framework Act, Act No. 41 of 2003**

[72.1] The long title thereto states that –

“To provide for the recognition of traditional communities; to provide for the establishment and recognition of traditional councils; to provide a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders; to provide for houses of traditional leaders; to provide for the functions and roles of traditional leaders; to provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims; to provide for a code of conduct; to provide for amendments to the Remuneration of Public Office Bearers Act, 1998; and to provide for matters connected therewith.”

[72.2] Since this is Constitutional Legislation, as it is entrenched in section 212 of the Constitution, it contains a Preamble, which reads-

“WHEREAS the State, in accordance with the Constitution, seeks-

**to set out a national framework and norms and standards that will define the place and role of traditional leadership within the new system of democratic governance;*

**to transform the institution in line with constitutional imperatives; and*

**to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices;*

...”

[72.3] *Recognition of traditional communities is provided in section 2, which provides -*

- “(1) A community may be recognised as a traditional community if it-*
- (a) is subject to a system of traditional leadership in terms of that community's customs; and*
 - (b) observes a system of customary law.*
- (2) (a) The Premier of a province may, by notice in the Provincial Gazette, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders in the province, the community concerned, and, if applicable, the king or queen under whose authority that community would fall, recognise a community envisaged in subsection (1) as a traditional community.*
- (b) Provincial legislation referred to in paragraph (a) **must-***
 - (i) provide for a process that will allow for reasonably adequate consultation with the community concerned; and*
 - (ii) prescribe a fixed period within which the Premier of the province concerned must reach a decision regarding the recognition of a community envisaged in subsection (1) as a traditional community.*

[72.4] Section 11 deals with Recognition of senior traditional leaders, headmen or headwomen. It provides that -

- “(1) Whenever the position of senior traditional leader, headman or headwoman is to be filled-*
- (a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to applicable customary law-*
 - (i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account*

whether any of the grounds referred to in section 12 (1) (a),

(b) and (d) apply to that person; and

(ii) through the relevant customary structure, inform the Premier of the province concerned of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and

(b) the Premier concerned must, subject to subsection (3), recognise the person so identified by the royal family in accordance with provincial legislation as senior traditional leader, headman or headwoman, as the case may be.

(2) (a) The provincial legislation referred to in subsection (1) (b) must at least provide for-

(i) a notice in the Provincial Gazette recognising the person identified as senior traditional leader, headman or headwoman in terms of subsection (1);

(ii) a certificate of recognition to be issued to the identified person; and

(iii) the relevant provincial house of traditional leaders to be informed of the recognition of a senior traditional leader, headman or headwoman.

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

(a) may refer the matter to the relevant provincial house of traditional leaders for its recommendation; or

(b) may refuse to issue a certificate of recognition; and

(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

[72.5] Section 12 Removal of senior traditional leaders, headmen or headwomen, it states that –

“(1) A senior traditional leader, headman or headwoman may be removed from office on the grounds of-

(c) wrongful appointment or recognition; or

[72.6] Section 21 deals with Dispute and claim resolution. It provides that -

“(1) (a) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.

(b) If a dispute or claim cannot be resolved in terms of paragraph (a), subsection (2) applies.

(2) (a) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules and procedures.

(b) If a provincial house of traditional leaders is unable to resolve a dispute or claim as provided for in paragraph (a), the dispute or claim

must be referred to the Premier of the province concerned, who must resolve the dispute or claim after having consulted-

- (i) the parties to the dispute or claim; and
- (ii) the provincial house of traditional leaders concerned.

(c) A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.

- (3) Where a dispute or claim contemplated in subsection (1) has not been resolved as provided for in this section, the dispute or claim must be referred to the Commission."

[72.7] Section 25 sets out the Functions of the Commission. It states that -

"(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-

- (iii) a traditional leadership position where the title or right of the incumbent is contested;*
- (iv) claims by communities to be recognised as kingships, queenships, principal traditional communities, traditional communities, or headmanships;*
- (v) the legitimacy of the establishment or disestablishment of 'tribes' or headmanships;*

- (vi) disputes resulting from the determination of traditional authority boundaries as a result of merging or division of 'tribes';
- (viii) **all traditional leadership claims and disputes dating from 1 September 1927** to the coming into operation of provincial legislation dealing with traditional leadership and governance matters;

[72.8] Section 26 deals with the Recommendations of the Commission. It states that -

- “(1) A recommendation of the Commission is taken with the support of at least two thirds of the members of the Commission.*
- (2) A recommendation of the Commission must, within two weeks of the recommendation having been made, be conveyed to-*
 - b) the relevant provincial government and any other relevant functionary to which the recommendation of the Commission applies in accordance with applicable provincial legislation in so far as the consideration of the recommendation does not relate to the recognition or removal of a king or queen in terms of section 9, 9A or 10.*
- (3) The President or the other relevant functionary to whom the recommendations have been conveyed in terms of subsection (2) must, within a period of 60 days make a decision on the recommendation.”*

[72.9] The insertion of section 26A introduces Committees of the Commission. It provides that –

- “(1) There is [sic] hereby established provincial committees to deal with disputes and claims relating to traditional leadership.*
- (2) (a) Each provincial committee contemplated in subsection (1) consists of as many members as the Premier concerned may determine after consultation with the Minister and the Commission and such members are appointed by the Premier, by the notice in the Provincial Gazette, for a period not exceeding five years.*
- (b) The term of office of committee members must be linked to that of members of the Commission contemplated in section 23 (1) (a).*
- (c) The committee members of the Commission must have the same knowledge as the members of the Commission as contemplated in section 23 (1)(a).*
- (6) A provincial committee may make final recommendations on all matters delegated to it in terms of 25 (6): Provided that where a committee is of the view that exceptional circumstances exist it may refer the matter to the Commission for advice.*
- (7) The provisions of section 26 (2) (b) apply, with the necessary changes, to the recommendations of a committee.”*

[72.10] The legislature in section 28 sought to preserve and to maintain the status quo within tribes, and to set parameters to regulate a smooth

transitional arrangement into the Constitutional dispensation for traditional institutions. It provides that-

- “(1) Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26.*
- (3) Any “tribe” that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional community contemplated in section 2, subject to -*
 - (a) the withdrawal of its recognition in accordance with the provisions of section 7; or*
 - (b) a decision of the Commission in terms of section 26.*
- (4) A tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 3 and must perform the functions referred to in section 4: Provided that such a tribal authority must comply with section 3(2) within seven years of the commencement of this Act.”*

- [76] Key to the current issue on appeal is Chapter 6 of the Traditional Leadership Framework Act, 41 of 2003. Chapter 6 thereof in Section 22 established a Commission on Traditional Leadership Disputes and Claims.
- [77] The catchment period for the investigation of disputes by the Commission on Traditional Leadership Disputes and Claims, as set out in section 25(2)(a)(viii) all traditional leadership claims and disputes dating from **1 September 1927** to the coming into operation of provincial legislation dealing with traditional leadership and governance matters.
- [78] With the Amendment in 2009, which came into effect in January 2010, Provincial Committees were established to be delegated by the Commission on Traditional Leadership Disputes and Claims, which in Limpopo Province resulted in the Premier establishing a Provincial Committee in terms of section 26A(1). This Committee colloquially became known as the Kgatla Commission, taking after the name of the chairperson.
- [79] The Limpopo Provincial Legislature gave effect to section 212 read with the framework set out in the Preamble of the Framework Act, 2003, and promulgated the Limpopo Traditional Leadership & Institutions Act, 2005. It provides that -

Ad Limpopo Traditional Leadership & Institutions Act No. 6 of 2005

[79.1] The long title thereof provides as follows -

“Act to provide for the recognition of traditional communities; the recognition of traditional councils, the election and appointment of members of traditional councils, recognition of traditional leaders, their removal from office, their roles and functions, recognition of acting traditional leaders and regents, to provide for funds of traditional councils and management thereof; to provide for payment of allowances for travelling expenses of members of traditional councils; to provide for meetings of royal family and traditional councils; to provide for code of conduct; and for matters connected therewith.”

[79.2] The Preamble thereof recorded the following-

“WHEREAS the Constitution recognises -

- the institution, status and role of traditional leadership according to customary law; and*
- a traditional authority that observes a system of customary law;*

AND WHEREAS it is necessary to enact provincial legislation within the framework provided by Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) in order to provide for matters which are peculiar to the Province;.”

[79.3] Section 2 deals with Interpretation and application. It states that -

“(1) This Act is subject to the Framework Act.”

[79.4] The implementation of decisions of the Commission is provided for in section 30, which provides as follows-

- “(1) The Premier must, within seven days of receipt of the decision of the commission in terms of section 26(2) of the Framework Act, refer such decision to the provincial house of traditional leaders for its advice on implementation.*
- (2) The provincial house of traditional leaders must submit its advice contemplated in subsection (1) to the Premier within 14 days of receipt, provided that the Premier may, if he or she deems it necessary, require the provincial house of traditional leaders to submit its advice within a specified shorter period.*
- (3) The Premier must implement the decision of the commission within 30 days of receipt of such decision from the commission.”*

[79.5] Section 33 deals with transitional arrangements. It states that -

- “(4) Any tribe that, immediately before the commencement of this Act, existed under the provisions of any law, is deemed to be a traditional community established under this Act.*

(5) A tribal authority or tribal council that, immediately before the commencement of this Act, existed under the provisions of any law, is deemed to be a traditional council established under this Act: Provided that such traditional council must comply with the provisions of section 4 within one year of the commencement of this Act."

[80] The above regulatory framework has been traversed with a view to edify the discourse around the origin of the various statutory empowerments and the role of government in the exercise of statutory powers and duties.

[81] The Framework Act, 2003 was substantially amended by Act 23 of 2009. This amendment introduced Provincial Committees, and the fact that the Commission and Provincial Committees have no authority to make decisions but only to make recommendations. This development specifically changed the landscape and plateau of dealing with traditional leadership disputes. This must be looked at in the context of the changes that were introduced, being to remove the power to make decisions from the Commission.

[82] One must pause to note that the only provision in the Limpopo Traditional Leadership Act, 2005 dealing with anything to do with disputes and the Commission is in section 30. Except for this section, which does not empower the Premier to decide in line with the provisions of the Framework Act, 2003 as amended. It only enjoins the Premier to implement decisions of

the Commission in terms of section 26(2), when such power to make decisions by the Commission has been replaced with 'recommendation'.

- [83] The current legislation governing the institution of traditional leadership in Limpopo Province has not been aligned with the national framework, thus causing a discord between the two regulatory frameworks. This court is alive to the provisions of section 2 of the Limpopo Traditional Leadership Act, 2005 which has subjected itself to the Framework Act, 2003.
- [84] Further, this court is also mindful of the provisions of section 146 and section 147, which will be addressed herein below in this judgment. This discord is what has led to the Office of the Premier purporting to have acted in terms of section 30, when the Premier took a decision to recognize Khanyizeni Ishmael Maswanganyi as a Senior Traditional Leader of a non-existent and unrecognized traditional community.
- [85] This then leads this court to return to the question whether the Maswanganyi was a headman or a senior traditional leader prior to November 1957? From the archival records referred to herein above it is apparent that at least as early as in July 1910 when the Assistant Native Commissioner had occasion to proceed to the area of ground controlled by **Indunas** Ngobe and Maswanganyi to inquire into and determine a **dispute which had arisen**

between those two indunas, Maswanganyi was recognized as a headman or induna.”

[86] Further, that in the meeting of Groot Spelenkon, where in it was reported on 11 January 1913 that “*When **Capt Schiel made this boundary line he informed Indunas Maswanganye and Nkomo** that they would have to be represented by Hlaneki. These **Indunas objected** and he ultimately allowed them to be **independent indunas.***”

[87] Furthermore, that on 10 November 1932 “*Minute No. a/5/13/436 of the 24th ultimo, I have to inform you that it is understood and that the areas at present occupied by Hlaneki and Maswanganye and their followers were allotted to them during the days of the South African Republic. The boundaries of their respective areas are **known to these headmen** and their followers.*”

[88] That as late as 19th March 1951, one Petros Maswanganye wrote to “The S.A Institute of Race Relations

“Dear Sir

*With reference to the letter I wrote to you in **connection with headman Samuel Maswanganye** and myself in respect of being a leader. It has been investigated by the Native Commissioner Duiwelskloof on the 16th instant. And all agreed upon the*

*matter that I am the son of Mikhadzani (Maswanganye), **the late headman**. ...It was found that he is not the son of **my father who was headman before....**"*

- [89] Further, that at least in the alternative, on 27 March 1951, a letter was addressed to Petrus Kedonga Maswanganyi, titled "Unofficial headman of Maswanganyi area.

*"I have to advise you that the residents of the above area in this district ...and I as their leader in the place of **headman** Samuel Maswanganye. You are therefore requested not to interfere any further in the affairs of this community, or enter this district without permission.*

VS Liefeldt"

- [90] The above quoted archival records demonstrate that at least before November 1957, the Maswanganyi's were known as a headmanship. Even after their objection and protest to be placed under the care of the Hlaneki's in 1912 by Captain Schiel, who ultimately gave them independent headmanship.

- [91] To the extent that the Maswanganyi had independent headmanship, they could not have lost chieftainship in November 1957 when they did not have it for at least some 45years, when they were before Captain Schiel and even before then in 1910, when the Assistant Native Commissioner visited the area to investigate a boundary dispute.

- [92] It is therefore unfathomable how the Kgatla Commission could have come to the conclusion that the Maswanganyi had lost senior traditional leadership status in November 1957, when they actually never had it in South Africa in the first place. This then means it is incongruent for the Kgatla Commission to have found and recommended that the senior traditional leadership status of the Maswanganyi was purportedly lost in November 1957, and find that it ought to or should be restored.
- [93] This then leads to the next question, if the dispute regarding the loss of senior traditional leadership status took place before 1910, alternatively before 1912, alternatively before 1913, then the question to be asked is whether the alleged November 1957 timeline is correct or not? On the face of overwhelming evidence from archival material before 1957, the Maswanganyi never had chieftaincy to lose, as they were headmanship long before the alleged November 1957.
- [94] Since the catchment period for the investigation of traditional disputes, by either the Kgatla Commission or the Nhlapo Commission, was 1 September 1927, which is based on the coming into force and effect after its suspensive clause in section 37 of the Black Administration Act, 1927, when the Governor-General issued a Proclamation. Did the Kgatla Commission have

the necessary jurisdiction to investigate the alleged dispute relating to the loss of the Maswanganyi senior traditional leadership status, which did not occur on or after 1 September 1927.

[95] It is inexorable that the Proclamation of November 1957 defining the area of jurisdiction of the Hlaneki's did not take away the senior traditional leadership status of the Maswanganyi, as they did not have it at the time of the issue of the proclamation. This court is in terms of section 6(2)(a), enjoined to set aside such decision where the administrator who took it- (i) was not authorised to do so by the empowering provision, being to deal with disputes that arose before 1 September 1927.

[96] It is therefore clear that in terms of PAJA, if an administrative decision was based on irrelevant considerations, and relevant considerations were not taken into account, then such decision cannot escape the consequence of being set aside in terms of section 6(2)(iii), (v) and (vi). Further, in the event the administrative decision was taken arbitrarily or capriciously, then this court is, in terms of section 6(2)(a), bound to set aside such decision.

[97] The fact that the Kgatla Commission, on the face of archival material which evidenced that the Maswanganyi only had headmanship, and thus there was no senior traditional leadership to restore to the Maswanganyi, failed to

recognize this glaring fact. Therefore, from the substantive perspective, the decision of the Kgatla Commission to restore that which was never lost in South Africa, was vitiated by irrelevant consideration and relevant facts were ignored and not considered.

[98] Further, the fact that the Kgatla Commission did not have a lost senior traditional leadership of the Maswanganyi in South Africa, between 1 September 1927 to date, to restore, means that relevant factors such as the provisions of section 25(2)(a)(vii) were not considered as against the archival records evidencing lack of senior traditional leadership in the Maswanganyi.

[99] Now turning to the decision of the Premier, on 3 October 2017, to accept and approve the findings and recommendations of the Kgatla Commission. The Premier, is the only authority empowered by both the Framework Act, 2003 and the Limpopo Traditional Leadership & Institutions Act, 2005 to make a decision to recognize any traditional leadership position in this province.

[100] This power to recognize any traditional leadership position in a province must be exercised in line with the provisions of the empowering legislation, read with section 3 and 5 of PAJA. This enjoins the Premier to exercise his power or authority, after compliance with all the requirements set out in each

of the provisions of the Framework Act, 2003 and the Limpopo Traditional Leadership & Institutions Act, 2005.

[101] The Premier is in terms of section 30 of the Limpopo Traditional Leadership & Institutions Act, 2005 only empowered to implement the decision of the commission. This authority to implement took away the ability for the Premier to make any decision, it simply empowered him to 'rubberstamp' the decision of the Kgatla Commission. We need to emphasize that this is irreconcilable with the provisions of section 26 of the Framework Act, 2003, which empowers the Premier to decide, after having received the recommendations of the Commission.

[102] There are contradicting versions as to which provision and legislation the Premier accepts, approves and recognizes K.I Maswanganyi. In the record we find a letter signed by Stanley Chupu Mathabatha on 19 March 2019, in which in paragraph 2 thereof is stated –

'I hereby inform you that the Limpopo Provincial Committee on Traditional Leadership Disputes and Claims has considered your claim. I have considered the findings and recommendations of the said Committee in terms of the Traditional Leadership & Governance Framework Act, 2003 (Act No. 41 of 2003), as amended, I in my capacity as the Premier hereby inform you that the claim is accepted.'

[103] In the Appellants Answering Affidavit before the court a quo, there is a contention that the Premier approved exercising and implementing section 30 of the Limpopo Traditional Leadership & Institutions Act, 2005. This contention was buttressed by arguments submitted before the full court by Counsel for the Appellants when he also sought the court to remit back to the Premier to afford her an opportunity to fully comply with section 30. Although we find the section 30 contention to be more of an afterthought, as the letter is express, although on the recommendation is only a signature and date by the Premier.

[104] Either way, the Premier had to exercise his powers invoking a statutory empowering provision, which has a set procedure and requirements. We start with the provisions of the Framework Act, 2003, which section 26(3) provides that -

“(3) The President or the other relevant functionary to whom the recommendations have been conveyed in terms of subsection (2) must, within a period of 60 days make a decision on the recommendation.”

[105] In this matter the recommendation by the Kgatla Commission was made on 29 May 2017. This means the Premier had 60 days from 20 May 2017 to make a decision. The Kgatla Commission report is signed by the Premier

without indicating whether he approves or does not approve, on 19 March 2019. This is more than one year and 9 months and 20 days after the Kgatla Commission's recommendation. This is unequivocally contrary to section 26(3) of the Framework Act, 2003.

[106] Now going to the provisions of section 30 of the Limpopo Traditional Leadership & Institutions Act, 2005, as claimed by the Appellants that the Premier acted in terms of section 30. This section entails a three step decision process, namely –

- (a) Referral within 7 days of receipt of Commission's decision to the Provincial House of Traditional Leaders for advice, section 30(1);
- (b) A Report within 14 days of referral of decision from the Provincial House of Traditional Leaders for advice, section 30(2);
- (c) A directive to implement the decision of the Commission.

[107] Counsel for the Appellant was quizzed and correctly conceded that there was no referral to the Provincial House of Traditional Leaders for advice as contemplated in section 30(1). This omission has far-reaching implications on the jurisdictional factors required to invoke section 30.

[108] Further, based on the concession of non-compliance with section 30(1), Counsel for the Appellant had to accept that in the Record of Proceedings,

which forms part of the record of appeal, there is no report from the Provincial House of Traditional Leaders as contemplated in section 30(2). Hence, he submitted that the proper cause is for the court to remit the matter back to the Premier to fully comply with section 30.

[109] It is trite that the provisions of section 30 require a chain reaction, meaning there is a chain of events, which have a domino effect on one another to arrive at the final action being to implement the decision of the Kgatla Commission as enjoined by section 30(3). In the absence of compliance with the peremptory requirements of section 30, the Premier could not exercise the powers in section 30 to implement the decision of the Kgatla Commission.

[110] On this score, the purported decision of the Premier to implement the decision of the Kgatla Commission, when he signed the report on 19 March 2019, and to issue Ishmael K Maswanganyi with a letter of acceptance of the claim for the restoration of the senior traditional leadership of the Maswanganyi is flawed and stands to be reviewed and set aside.

[111] The elephant in the room now is what must we, as this full court do with the decision that has been reviewed and set aside. In paragraph 48 of the Appellants' Supplementary Heads of Argument, Counsel submitted that –

'We submit that it would be fair for all parties for the matter to be remitted back to the Commission.'

[112] The law regarding reviews in terms of PAJA, remittal and substitution of the decision of the court for that of the administrator is settled. This is governed by section 8, which provides that –

"8. Remedies in proceedings for judicial review

- (1) *The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-*
- (c) setting aside the administrative action and-*
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or*
 - (ii) in exceptional cases-*
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or*
 - (bb) directing the administrator or any other party to the proceedings to pay compensation;*
 - (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;*

[113] In *Gauteng Gambling Board v Silverstar Development Ltd and Others*², Heher JA, at paragraph 28, provided guidance on what constitutes exceptional cases as follows -

“A case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise the power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair”.

[114] The Supreme Court of Appeal, set a criteria that the following factors must exist for a matter to constitute an exceptional case : (a) ‘it would serve no purpose to remit the matter to the administrative body concerned because the end-result is a foregone conclusion (foregone conclusion); (b) ‘it is more than likely that further delay would cause undue prejudice to the other party if the matter is remitted’(delay); (c) ‘there is a reasonable apprehension of bias or incompetence on the part of the decision-maker’(bias or incomplete); (d) ‘the court is in as good a position as the decision-maker to make the decision’(in as good a position as administrator) and (e) ‘there is a likelihood of the decision-maker not applying his or her mind fairly or at all’ (failure to apply mind).

² 2005 (4) SA 67 (SCA).

[115] In order to assess whether the court a quo erred in not remitting the decision back to the Premier, this court must investigate the four elements of the settled criterion in this matter as follows-

[116] *Is the end result is a foregone conclusion such that remittal would be a 'mere formality' or 'waste of time' given the inevitability of the outcome;*³

[116.1] The question in this matter is whether the dispute relate to the loss of Maswanganyi senior traditional leadership which was before 1 September 1927, is a foregone conclusion? The answer is a resounding yes. This is buttressed by the concession by the Appellants' counsel that the Maswanganyi lost their senior traditional leadership in 1894 upon the arrival of the Hlanekis. This then means that the Kgatla Commission lacked the necessary jurisdiction to adjudicate over the Maswanganyi restoration claim or dispute.

[116.2] Further that throughout from 1910-1951 archival records, there is evidentiary material which demonstrate that before November 1957 the Maswanganyi's were a headmanship or indunas. This then means that the Kgatla Commission erred and misdirected itself in its adjudication over the Maswanganyi restoration claim or dispute, when

³ Johannesburg City Council v Administrator, Transvaal and Another 1969 (2) SA 72 (T)('JCC') at 76E-G; Baxter (note 11 above) at 682.

it found that Maswanganyi lost headmanship which ought to be restored.

[116.3] Schutz JA in Phambili Fisheries, had occasion to consider the provisions of section 33, and referred with approval the Constitutional Court judgment of Bel Porto as follows -

'[46] ...Section 33(1) of the Constitution enjoins that all administrative action must be 'lawful, reasonable and procedurally fair'. The common law and sections 3 to 6 of PAJA elaborate and give content to these standards. They are not new. As was stated by Chaskalson CJ in *Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* [2002] ZACC 2; 2002 (3) SA 265 (CC) at 292, para [87]:

'The role of the Courts has always been to ensure that the administrative process is conducted fairly and that decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation.'

[116.4] The decision of the Kgatla Commission to investigate the claim for restoration of Maswanganyi senior traditional leadership, which was lost long before 1 September 1927, was not in accordance with the provisions of section 25(2)(a)(viii) and the requirements of the Framework Act, 2003.

[116.5] Further the decision to hold an inspection in loco, and to listen to further evidence, in the absence of the Hlaneki's whom it was confirmed were an interested party. Also to hold an inspection in loco and hear evidence relating to the territory with included other headmen's villages without the headmen being present was a violation of the principle of fairness. It was also not in line with the well established principle of *audi alteram partem*.

[116.6] The question is also whether it is a foregone conclusion that remittal to the Kgatla Commission of the investigation of the restoration of senior traditional leadership was erroneous? The answer is yes, factually, the Kgatla Commission could not restore that which was not lost because of the Black Administration Act 38 of 1927, as the mischief sought to be investigated and remedied was actions that took place within the institution of traditional leadership as a result of that legislation.

[116.7] The Maswanganyi never had any senior traditional leadership prior to 1 September 1927. Therefore, there could not have been any loss of Maswanganyi senior traditional leadership. If one is for a moment to accept the submission by the Appellant's Counsel that it was lost in 1894 when the Hlaneki's arrived in the Klein Letaba area, then they

did not lose their status because of the Black Administration Act 38 of 1927.

[116.8] Another complicating factor is that the Kgatla Commission, as a statutory body, was time-linked. It existed for a period of five years as was contemplated in section 26A(2)(a) which stated that -

'(a) Each provincial committee contemplated in subsection (1) consists of as many members as the Premier concerned may determine after consultation with the Minister and the Commission and such members are appointed by the Premier, by the notice in the Provincial Gazette, for a period not exceeding five years.'

[116.8] All the provincial committees ceased to exist due to effluxion of time, this included the Kgatla Commission. To make matters worse, the Khoisan Act, 2019, Parliament appreciated that the Commission on Traditional Leadership Disputes and Claims had dealt with its mandate and finished and the chapter is closed. Parliament, specifically in section 59(1), provided for dispute which were dealt with by the Commission on Traditional Leadership Disputes and Claims are not to be dealt with in section 59 dealing with disputes. This means Parliament ousted the Premier's appointing a provincial investigative committee, to reinvent the wheel and investigate disputes that were

investigated by the Commission on Traditional Leadership Disputes and Claims.

[117] *Was the remittal of the decision to restore the Maswanganyi senior traditional leadership status a mere formality?* The answer is a resounding YES. This would hold, given the factual disposition that the claim of loss of Maswanganyi senior traditional leadership status predates 1 September 1927. Further, that there was no Maswanganyi senior traditional leadership status lost as a result of the Black Administration Act No. 38 of 1927 that needed to be investigated or that ought to be restored.

[118] *Was the remittal a waste of time?* The answer is in the affirmative, there was no fair hearing, as a result of the botched inspection in loco.

[118.1] The investigation of the Maswanganyi senior traditional leadership status was not authorised by the empowering provision. This is so because the investigation of the claim for restoration of Maswanganyi senior traditional leadership which was lost long before 1 September 1927, was not in accordance with the provisions of section 25(2)(a)(viii) and the requirements of the Framework Act, 2003.

[118.2] Further, the Kgatla Commission did not implement customary law as it applied at the time, given that it sought to restore Maswananyi senior traditional leadership status, which did not exist according to the records which date back to 1910-1951, yet the allegation was that it was lost in November 1957.

[118.3] Furthermore, remittal was a waste of time since the Kgatla Commission had long ceased to exist and the provisions of section 59 had barred the Premier from appointing an investigative committee for matters which were dealt with by the Commission on Traditional Leadership Disputes and Claims.

[119] *Was the outcome inevitable?* The answer is a resounding YES, this is given that, from a procedural point of view, there was no compliance with either the provisions of section 3 (2), (3) and (4) of PAJA by the Kgatla Commission.

[119.1] Further, the Premier in deciding to appoint Khayizeni Solomon Maswanganyi, failed to follow the provisions of section 12 of the Limpopo Traditional Leadership & Institutions Act, 2005.

[119.2] Further, the Premier in purporting to act in terms of section 30, failed to comply with the procedure as set out in section 30(1) and (2) of the

Limpopo Traditional Leadership & Institutions Act, 2005. Thus, contravened the provisions of section 3(4) of PAJA.

[119.3] Also from a substantive point of view, the Maswanganyi senior traditional leadership status was never lost as a result of the Black Administration Act, No.38 of 1927 for it to be restored. The Maswanganyi were a headmanship or indunas long before 1 September 1927 and even after 1927 but before the alleged November 1957.

[120] ***There is a delay causing unjustifiable prejudice to the affected party;***⁴

The decision to restore the Maswanganyi senior traditional leadership status when there was none to start with, resultantly placing some 5 other villages and their headmanship under the Maswanganyi senior traditional leadership, is prejudicial to the Hlanekis and the headmen appointed by the Hlanekis in respect of the Dzingidzingi, Bode, Nwa-Makwena and Basani villages. Any remittal will cause a delay in the return to the Dzingidzingi, Bode, Nwa-Makwena and Basani villages to the rule and authority of the Hlanekis. Further, it is prejudicial to the Hlaneki appointed headmen, as it is the Royal Family of the Senior traditional leader that appoints headmen. The appointment of the Maswanganyi senior traditional leadership Maswanganyi

⁴ M v Minister of Home Affairs and Others [2014] ZAGPPHC 649 at paras 166 and 175–176.

senior traditional leadership resulted in the removal of the Hlaneki appointed headmen without following section 13 of the Limpopo Traditional Leadership Act, 2005 in respect of Dzingidzingi, Bode, Nwa-Makwena and Basani villages. This resulted in the reduction of the jurisdiction of Hlanekis and to remit will cause a delay in restoring the status quo ante.

[121] ***Bias or incompetence on the part of the administrator is established such that 'it would be unfair to require the applicant to submit to the same jurisdiction again'.***

[121.1] In this matter we have noted that the Kgatla Commission last heard oral evidence and received evidence on 20 August 2015 and advised the parties that it would make a recommendation in due course. Surprisingly, on 10 June 2016, the Kgatla Commission travelled to Maswanganyi village, where it purportedly held an inspection in loco. The most notable in this record of the inspection in loco is the question on page 1110, which is the question by the Commissioner – **'Before we proceed, is there anyone who is a chief that you have invited? Joe answers: Yes, headman. Commissioner ask Headman? Joe answers: Yes, there is no hosi'**

[121.2] This question is clearly directed at the one side of the Applicant, being that if Khayizeni Ishmael Maswanganyi. Intriguingly, the other

claimant is not part of the inspection in loco, being Willy Mbhazima Maswanganyi. Notably, the Kgatla Commission seem to be dealing with the claimant group of Joe Maswanganyi only in the inspection in loco. Why is the other claimant Willy Mbhazima Maswanganyi not part of the inspection? Was the Willy Mbhazima Maswanganyi claimant group informed of the inspection in loco?

[121.3] The Kgatla Commission does not seem to be asking its secretariat to establish if it has executed its directive or instruction to invite parties, namely, the Hlanekis, and the Willy Mbhazima Maswanganyi claimant group. Instead they are asking Joe Maswanganyi, if there is anyone who is chief that he has invited? The Kgatla Commission seems to either have abdicated its responsibility or alternatively, delegated its responsibility to one of the parties, to the exclusion of the Hlanekis, and the Willy Mbhazima Maswanganyi claimant group. This, for us, whiffs of bias, and lack of objectivity on the part of the Kgatla Commission.

[121.4] Further, the failure of the Kgatla Commission to realize that the claim for restoration relates to Maswanganyi senior traditional leadership status which was lost before 1 September 1927. This clearly fell outside of the Commission's scope or catchment period and therefore ought to have declined to investigate the claim or the dispute for restoration of Maswanganyi senior traditional leadership status.

[121.5] The Kgatla Commission refused to see and to accept documentary evidence in the form of archival material submitted by the Hlanekis that show that the Maswanganyi senior traditional leadership status was never lost in November 1957 as it was claimed. Instead, the records showed that at least as early as 1910, 1912, 1932, 1934, 1938 and 1951 been the latest, the Maswanganyi's were recorded as a headmanship or as indunas.

[121.6] The above exposition points to one conclusion being that of bias or incompetence on the part of the Kgatla Commission, and hence 'it would be unfair to require the Hlanekis to submit to the same jurisdiction again.

[122.7] On the part of the Premier, the situation is grave, as there is a claim to have acted in terms of the Framework Act, 2003 which is to be read with section 30 of the Limpopo Traditional Leadership Act, 2005. Sadly, the requirements of section 30 were not met regarding the appointment of Solomon Khayizeni Maswanganyi.

[121.8] The Kgatla Commission's report, in its recommendation, identified a specific person with a specific identity number for restoration of Maswanganyi senior traditional leadership to be granted. The Premier, in the letter dated 19 March 2019 addressed to Khayizeni Ishmael Maswanganyi, informed him that his claim is accepted. The appointment of Khayizeni Solomon Maswanganyi is not what was

recommended, and any change, that occurred on 18 September 2020 when the Premier formally recognized him, is not an implementation in terms of section 30.

[121.9] Despite a diligent search in the record, there is no resolution of the 'Maswanganyi royal family' regarding the appointment of Solomon Khayizeni Maswanganyi, as a substitute for the recommended Khayizeni Ishmael Maswanganyi. This is not in line with section 12 of the Limpopo Traditional Leadership & Institutions Act, 2005. Instead, this is more of a demonstration of overzealousness by the Premier to appoint Khayizeni Solomon Maswanganyi without the requirements of section 12, read with section 30. The removal of the Hlaneki appointed headmen in respect of Dzingidzingi, Bode, Nwa-Makwena and Basani villages in the Greater Giyani Local Municipality who were removed without compliance with section 13.

[121.10] The above exposition, points to one conclusion being that of bias or incompetence on the part of the Kgatla Commission, and the Premier hence 'it would be unfair to require the Hlaneki's, the Hlaneki appointed headmen removed without compliance with section 13 to submit to the same jurisdiction again.

[122] ***Or where the court finds itself in 'as good a position' as the administrator to take the decision itself.***

[122.1] The decision of the Kgatla Commission was vitiated with procedural and substantive irregularities. Although not dealt with by the court a quo in its judgment, the decision of the Premier, was equally marred with the same tar brush, and worsened by non-compliance with section 12, 13 and 30 of the Limpopo Traditional Leadership & Institutions Act, 2005.

[122.2] This court is in as good a position as the administrator to return the status quo ante, as the decision could not be remitted since the Kgatla Commission ceased to exist. Further, given that the Premier could not take any decision if the jurisdictional factor of section 30, being the Kgatla Commission's recommendation, does not exist.

[123] In the circumstances, we find that in this matter exceptional circumstances existed to warrant the court a quo to substitute its decision for that of the Premier. This is so from a procedural perspective, that the Kgatla Commission failed to observe that the dispute arose before 1 September 1927, and thus had no jurisdiction to investigate the dispute. Further, the Kgatla Commission failed to observe the most cardinal of rules, and Constitutional imperative of giving the Hlanekis a fair hearing and observing the *audi alteram partem*.

- [124] Furthermore, the Premier exercised powers in terms of section 12(1)(b) without due compliance with the peremptory procedure of section 12(1)(a) of the Limpopo Traditional Leadership & Institutions Act, 2005. The record does not reflect a minuted resolution of the 'Maswanganyi royal family', and a recommendation from the Maswanganyi royal family for the appointment of Khayizeni Solomon Maswanganyi, which prompted the Premier on 18 September 2020 to recognize Khayizeni Solomon Maswanganyi as a senior traditional leader.
- [125] Secondly, from a substantive perspective, in that the Kgatla Commission misdirected itself, and failed to consider archival and evidential material submitted by Hlanekis that the Maswanganyi's as early as 1910, 1912, 1913, 1932, 1934, 1938 and 1951 were recorded as a headmanship. Further, that the Maswangwanyi's leadership was not a Chieftaincy or Captainship as was colloquially referred to during the two epochs, being the colonial and the apartheid epoch.
- [126] The remaining issue is the contention of costs, the First to Third Respondents have prayed for costs on an attorney and client scale, including costs of two counsels. The court a quo was also confronted with a similar application and almost similar conduct and repugnant failure to comply with Rules of court ordered costs on a punitive scale.

- [127] As a starting point, one is of the considered view that given the factual disposition and archival records in this matter, it was axiomatic that the Kgatla Commission had looked at the wrong considerations in finding and recommending the restoration of senior traditional leadership status which did not exist. Worse, restoration of Senior Traditional leadership without the jurisdictional factor of having a recognized traditional community to restore to status.
- [128] The criteria for determining the issue of costs in abortive proceedings have always depended on whether or not it is clear or ought to have been clear that the proceedings (in this instance prosecuting a defence) in question would have been abortive. **See: Engineering Management Services (Pty) Ltd v/s South Cape Corporation (Pty) Ltd 1979(3) SA 1341; See also: Schlesinger v/s Schlesinger 1979(3) SA**
- [129] This court believes that this appeal constitutes abortive proceedings on the part of the Appellants for a myriad of reasons as has been demonstrated herein above. The Appellants were fully aware that the Kgatla Commission committed serious irregularities, as pointed herein above, namely-

[129.1] Procedural irregularities in investigating when they did not have jurisdiction to investigate the restoration of senior traditional leadership status which was lost before 1 September 1927. Further, holding an inspection in loco and not inviting the Hlanekis, as well as Willie Mbazima Maswanganyi's group.

[129.2] When the Premier recognized Khayizeni Solomon Maswanganyi on 18 September 2020 without the requirements of section 12 and 30 being met. When the Premier appointed Maswanganyi headmen without compliance with section 13 and 12 for the Dzingidzingi, Bode, Nwa-Makwena and Basani villages.

[129.3] Substantive irregularities, when they ignored archival material which demonstrated that the Maswanganyi's were a headmanship or indunas, instead of senior traditional leadership, and therefore there was nothing to restore.

[130] In *Public Protector v South African Reserve Bank* 2019 (6) SA 253 CC. the Constitutional Court stated the following:

“... Costs on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process. As correctly stated by the Labour Appeal Court-

'(t)he scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible [manner]. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium

[131] This court finds that the conduct of the Appellants throughout these proceedings has not been honest with the court. There was vacillation between the fact that the Premier made a decision in terms of the Framework Act, 2003 and section 30 of the Limpopo Traditional Leadership & Institutions Act, 2005.

[132] Even in the affidavit deposed to by the Director General, Mr Nape Nchabeleng there were dishonest claims that the Maswanganyi's had always been senior traditional leaders instead of headmen, when that was devoid of the truth and contrary to Kgatla Commission's record of decision.

[133] There are claims that the State Attorney Bloemfontein Ms Cronje did not inform the State Attorney Polokwane of the Supreme Court of Appeal Petition outcome, when that was untrue and the Respondents had to provide

proof of such transmission dated 22 September 2023 in the Answering Affidavit to the reinstatement and condonation application. This latter conduct is, in our view vexatious conduct and conduct that amounts to an abuse of court process.

[134] Further abuse of court process was seen, when the Appellants, despite being notified in Rule 30 and correspondence by the Respondents that the appeal record was not compliant, elected not to remedy the complaint. Only on the day the matter was to be heard did the Appellants approach the court with a complaint that a record which they had filed was not complete and the appeal hearing could not proceed with the current record in the state of incompleteness.

[135] Despite being afforded time to correct the record, the Appellants filed a reduced record with omission of some of the documents which had to be filed by the Respondents in their Supplementary Heads of Argument. This resulted in this court having to shuttle between the appeal record of 10 November 2025 and the appeal record filed 14 October 2024, to avert a situation wherein the court did not have sight of or consider some pertinent documents and averments in the papers.

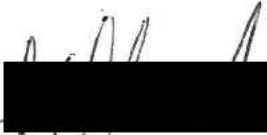
[136] This court's opprobrium needs to be expressed, and the only way this censure could be expressed is in the form of an award for costs. This is also to ensure that the poor Respondents who are ordinary members of the public, are not caused to be out of pocket by the negligent failures of government. Paired with a sense of lackadaisical conduct of the attorney who has no care whatsoever for the client's matter and to the court's inconvenience by his conduct. We believe that it is about time that this court, does not allow state parties who litigate with the public purse to continue with their *laissez-faire* attitude because they are not going to shoulder the costs attendant thereto.

[137] We have noted that the costs of the petition to the Supreme Court of Appeal were costs in the appeal. The conduct of the Appellant even in the Supreme Court of Appeal has not been exemplary. Further, noted that there were also untruths in the appeal papers by the Appellants, we see no reason why the Appellants should not be ordered to pay the costs of the Supreme Court of Appeal on a punitive scale too.

[138] In the circumstances, the following order is granted -

1. The application for condonation is dismissed;
2. The application for reinstatement is dismissed;

3. Despite the dismissal, the court in the interest of justice proceeded to hear the application on the merits, and came to the conclusion that the appeal stands to be dismissed with costs.
4. The Registrar of the Court is directed to cause this order to be served and brought to the attention of the Premier of Limpopo Province, the Director General, the MEC of COGHSTA, the Head of Department of COGHSTA, within 7 days of this order;
5. The Appellants are ordered to pay the costs of this appeal including costs of the petition to the Supreme Court of Appeal, such to include costs of two Counsel on an attorney and client scale, where so employed, such costs to be calculated at scale C.


M.H.M. MASILO AJ

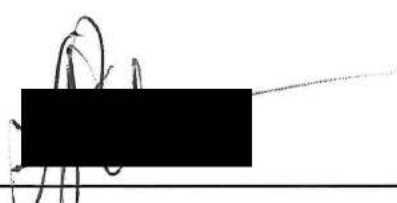
ACTING JUDGE OF THE HIGH COURT,
 LIMPOPO DIVISION, POLOKWANE

I concur,


NAUDE – ODENDAAL J

JUDGE OF THE HIGH COURT,
 LIMPOPO DIVISION, POLOKWANE

I concur,




K.L. PILLAY AJ

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

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