

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: 1167/2025

In the matter between:

GABOILELWE MOROKA

FIRST APPLICANT

THE ROYAL FAMILY OF THE BAROLONG

BOO SELEKA TRADITIONAL COMMUNITY

SECOND APPLICANT

BAROLONG BOO SELEKA ROYAL FAMILY

COUNCIL

THIRD RESPONDENT

and

**THE PREMIER OF THE FREE STATE
PROVINCE**

FIRST RESPONDENT

**THE MEMBER OF THE EXECUTIVE
COUNCIL, FREE STATE DEPARTMENT
OF CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

SECOND RESPONDENT

**THE FREE STATE PROVINCIAL HOUSE OF
TRADITIONAL AND KHOI-SAN LEADERS**

THIRD RESPONDENT

THE BAROLONG BOO SELEKA

TRADITIONAL COUNCIL

FOURTH RESPONDENT

ARCHBALD LETSHEGO MOROKA

FIFTH RESPONDENT

Neutral citation: *Moroka and Others v The Premier of the Free State Province and Others* (1167/2025) [2026] ZAFSHC 389 (5 August 2026)

Coram: REINDERS *et* MOLITSOANE JJ

Heard: 20 October 2025

Delivered: 5 August 2026

Summary: Customary law – recognition of a *Kgosi* in terms of the Free State Traditional Leadership and Governance Act 8 of 2005 – failure to take a decision in terms of s 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 – failure by the Premier to take a decision to recognise the identified person to the position of *Kgosi* as require by s 18(3) of the Free State Traditional Leadership Act – remittal to the Premier to take a decision.

ORDER

1 The administrative action of the first respondent in failing to take a decision to recognise the first applicant as *Kgosi* of the Barolong Boo Seleka Traditional Community in terms of s 18(3) of the Free State Traditional Leadership and Governance Act 8 of 2005 (the Act), as requested in writing by the Barolong Boo Seleka Royal Family Council in terms of s 18(2)(a)(ii) of the Act on 26 April 2026 following the identification by the Barolong Boo Seleka Royal Family of the first applicant as the person who should be recognised as *Kgosi* in terms of s 18(2)(a)(i) of the Act, alternatively the refusal by the first respondent to comply with this request, is reviewed and set aside.

2 The matter is remitted to the first respondent to take a decision and deal with the identification of the applicant in terms of s 18 of the Act within 30 days of the service of this order.

3 The first respondent is ordered to pay the costs of the applicants which include the costs of two counsel, where so employed, on scale C.

JUDGMENT

Molitsoane J (Reinders J concurring):

[1] In this review application, the applicant seeks to review and set aside the decision of the first respondent (the Premier) to recognise the first applicant (the applicant), currently recognised as Motshwaredi (Regent) as the senior traditional leader (*Kgosi*) of the Barolong Boo Seleka Traditional Community. The recognition is sought in terms of s 18(2)(b) and 18(3) of the Free State Traditional Leadership and Governance Act 8 of 2008 (the Free State Act). The applicant further seeks that this Court compel the Premier

to take action to issue the certificate of recognition; publish the recognition in the *Provincial Gazette* and inform the Provincial House of Traditional Leaders of the recognition.

[2] The Supreme Court of Appeal (SCA) in *Moroka v Premier of the Free State Province and Others*¹ (*Moroka*) sets out the background of the dispute of the Barolong Boo Seleka traditional leadership as follows:

'There appears to be a lengthy history of leadership contestation between the Barolong Boo Seleka Royal Family and the Barolong Boo Seleka Royal Khuduthamaga. This contestation dates back to the 1880s when the traditional leadership moved from one lineage to another. During the 1880s, Kgosi Moroka II married a woman by the name of Nkhabele who came with a child named Tshipinare. Therefore, Tshipinare became the stepson to Kgosi Moroka II. Tshipinare grew up to be a brave warrior and saved his stepfather Kgosi Moroka's life in the war against the BaSotho. As a result, Kgosi Moroka II decided that Tshipinare should be his successor. It is from this time that the traditional leadership of the Barolong Boo Seleka vested in the Tshipinare's lineage until the passing on of Kgosi Ramokgopa Moroka in 2011.

After the passing of Kgosi Ramokgopa, the royal family identified Kgosana Gaopalelwe Moroka, the appellant's brother, as a successor. However, Kgosana Gaopalelwe had, at that stage, not yet reached maturity and his mother, Kgosigadi AGG Moroka, the applicant's mother, was identified as the Regent. It seems that the other faction, led by the late Kingsley Sehunelo Moroka, objected to this and wrote a letter to the Premier in pursuit of its objection. The Premier responded in a letter dated 18 October 2011 as follows:

"4. Regarding the matter at hand I wish to respond as follows:

The Act (the Free State Traditional Act of 2005) defines the "Royal Family" as "the core customary institution or structure consisting of immediate relatives of the ruling family within the traditional community who have been identified in terms of custom, and includes, where applicable, other family members "who are close relatives of the ruling family". According to section 18 therefore only immediate relatives of the ruling Moroka Family of the late Kgosi Ramokgopa Moroka are entitled to identify the successor of the Chieftaincy. The Royal Family of Moroka has identified Kgosana Gaopalelwe Moroka as the successor to the Chieftaincy of the Barolong Boo Seleka, however according to the Royal Family Kgosana Gaopalelwe Moroka has not yet reached a matured age and is not yet ready to be installed as Kgosi. The Royal

¹ *Moroka v Premier of the Free State Province and Others* (295/20) [2022] ZASCA 34 (31 March 2022) (*Moroka*).

Family will inform the Premier when Kgosana Gaopalelwe Moroka is ready to take over. The Premier will recognize Kgosana Gaopalelwe Moroka as Kgosi by way of a notice in the Provincial Gazette and by issuing of a certificate of recognition to him.

5. In the light of the above, it would appear that your resolution of 25 August 2010 in which you resolved to relieve Kgosigadi AGG Moroka of all her responsibilities and duties in Barolong Boo Seleka is in conflict with the Free State Traditional Leadership and Governance Act No.8 of 2005. This also applies to your decision of 21 November 2010 to recognize SK Moroka (sixth respondent) as the rightful leader of Barolong Boo Seleka Tribe. Both these resolutions can only be taken by the Royal Family as defined in the Act."

It is not clear as to what happened after the Premier's letter of 18 October 2011 but ultimately, Kgosi Gaopalelwe Moroka ascended the throne until his demise in July 2013, after which the dispute resurfaced. It is this dispute that the Premier referred to the Commission for investigation and this was done without affording the House an opportunity from the outset to deal with the dispute in terms of s 21 of the Act. This is evident from the minutes of the meeting of the Free State House of Traditional Leaders held on 30-31 January 2014, which records the following:

"It was unanimous that it was wrong that the House was not included in the initial stages of the dispute but appreciated that there are moves by the department to advise Premier to establish the commission or to refer the matter to the Commission on traditional leadership disputes and claims to investigate and recommend. . . . The House was unanimous that the only known royal leaders of Barolong boo Seleka to them has been the current royal family until this dispute. The House is in agreement that the matter will best be resolved by the neutral body which is the commission. . . . The House recognises the current royal family and will abide by findings and determination as recommended by the commission".

However, once the Free State House of Traditional Leaders was consulted, it endorsed the proposed referral of the dispute to the Commission by the Premier as is apparent from the excerpt from its minutes quoted above.²

[3] It is common cause that the Premier, acting on the recommendation of the Tolo Commission, recognised Kgosana Sehunelo Kingsley Moroka as *Kgosi*. Kgosatsana Moipone Moroka acting on behalf of the Royal Family challenged this decision of the Premier. She was unsuccessful in the High Court and appealed the judgment. It would seem that Kgosana Kingsley Moroka, in the meantime, passed away. While the appeal

² Ibid paras 11-13.

was still pending, the then-Premier recognised his wife Ntsoaki Julia as *Kgosi*. This recognition was short-lived as the SCA in *Moroka* set aside the findings and recommendations of the Tolo Commission and their acceptance by the Premier.

[4] Shortly thereafter, the applicant was identified by the Premier as Regent. The Premier refused to endorse the identification of the applicant as the Regent. This prompted an urgent application in this Court under case number 2550/2022 to review and set aside the recognition of Ntsoaki Moroka as *Kgosi* and the failure of the Premier to recognise the applicant as Regent. In her affidavit in support of the application, the applicant averred as follows: 'I have been identified by the Royal Family as Motshwaredi (until the identified heir, in respect of whom I consider myself to have particular responsibility to is of age to assume the role of Senior Traditional Leader) of Barolong Boo Seleka.' The Premier and the House of Maramantsi did not oppose the application.

[5] On 10 June 2022, the Premier recognised the first applicant as Regent in terms of s 24 of the Free State Act and such recognition was also published in the *Provincial Gazette*. In terms of the recognition and appointment of Regent, the decision to appoint her was reviewable after every three years 'to determine whether the appointment [was] still necessary.'

[6] It is the case of the applicant that on 22 August 2022 she was identified as the successor to the position of *Kgosi* by the Royal Family. This was the first identification which did not lead to an application for recognition. According to the applicant, the formal application was held back 'until the time was right'. On 10 September 2022, a customary law coronation as *Kgosi* took place. The coronation was a formal ceremonial event attended by Free State Provincial Government officials.

[7] It is the case of the applicant that on 24 April 2024 in a duly constituted meeting of the Royal Family Council, a decision was taken to identify her as *Kgosi*. A formal letter of request was then forwarded to the Premier on 26 April 2024. In the letter, the Premier was, *inter alia*, informed as follows:

'Kgosi Gaboilelwe Moroka is identified as Kgosi (Senior Traditional Leader) of the Barolong Boo Seleka of Thaba Nchu as contemplated in Section 18(2) of the FSTLGA [Free State Traditional Leadership and Governance Act 8 of 2005] and Section 8(2) of the TKSLA [Traditional and Khoi-San Leadership Act 3 of 2019].

The Royal Council, as the relevant customary structure as contemplated in Section 18(1)(ii) of the FSTLGA and Section 18(2)(c) of the TKSLA, shall apply to the Premier for the recognition of Kgosi Gaboilelwe Moroka by informing the Premier of the identification and reasons therefore and request the Premier to take the required steps to recognise Kgosi Gaboilelwe Moroka as Kgosi (Senior Traditional Leader) as contemplated in section 18(3) of the FSTLGA and Section 8(3) of the TKSLA.'

[8] In that letter, the secretary of the Barolong Boo Seleka Royal Family Council, Mr Motlhale describes the applicant thus: 'Kgosi Gaboilelwe Moroka is a sister of the late Kgosi Gaopalelwe Moroka and Kgosi Setlogelo Albert Victor Leopold Moroka, she is also the daughter of Kgosi Mokgopa Robert Tawana Moroka and a direct descendant of Kgosi Tshipinare Moroka, son of Moroka ii and his ancestors.'

[9] The applicant has set out the genealogy of *Bogosi* (kingship) of the Barolong Boo Seleka in her founding affidavit from *Kgosi* Seleka, the son of *Kgosi* Tau down to her. According to this genealogy, *Kgosi* Tshipinare is the son of Kgosi Moroka II. She contends that her right to be recognised as a *Kgosi* derives from the fact that she is a direct descendent of *Kgosi* Tshipinare.

[10] This genealogy is disputed by the fifth respondent, *Kgosana* Archibald Letshego Moroka. According to the fifth respondent, his late father, *Kgosi* Sehunelo Kingsley Moroka, was appointed as *Kgosi* of the Barolong Boo Seleka in terms of the recognition certificate issued by the Premier on 13 December 2019. According to him, he and his father are direct descendants of the Late Kgosi Moroka II who founded Thaba Nchu in 1833 and was the *Kgosi* of the Barolong Boo Seleka until 1880. It is his contention that *Kgosi* Tshipinare was not the son of *Kgosi* Moroka II. It follows on this contention that according to the fifth respondent, the applicant does not qualify to be recognised by the Premier as *Kgosi* as she is not a descendant of *Kgosi* Moroka II. The fifth respondent further contends that in terms of the customary law of succession of the Barolong Boo

Seleka, succession to chieftainship is based on the male primogeniture and thus only male sons who are direct descendants of the Royal Family can be recognised as *Kgosi*.

[11] Returning to the letter of 24 April 2024, it was delivered to the Office of the Premier on 26 April 2024. The Premier was requested to respond by 13 May 2024. The Premier's office acknowledged receipt of the letter but did not respond as requested by the date requested. A follow up letter was sent to the Premier's Office on 16 May 2024 in which the secretary of the Royal Family indicated that nothing stood in the way of the premier to grant the request to recognise the applicant as *Kgosi*; and that the applicant had complied with all the requirements of the applicable legislation, customs and customary laws relating to the recognition; and further that the Premier was fully empowered statutorily to grant the request. This time the Premier was requested to respond on or before 24 May 2024.

[12] On 17 May 2024, the Premier responded as requested and in relevant part, her response came in the form of a clarity seeking question posed as follows:

'The Royal Council communicated their identification of a Regent (Motshwaredi) for successor(heir) who is a minor whose particulars were not disclosed hence the resolution to appoint a regent until the heir is of age to assume the throne.

(Resolution dated 03/04/2022).

In view of the current application may you please advise on the position and status of the identified heir.'

[13] On 20 May 2024, a response was sent to the Premier which purported to answer the question raised in the letter of 17 May 2024. The response only seems to explain the reasons for the identification of the applicant as *Kgosi* and further that all prescripts for such identification had been complied with. The letter does not respond to the pertinent question and 'advise on the position and status of the identified heir'. Instead, the letter goes at length to set out the statutory framework for the recognition of a *Kgosi*.

[14] In relevant parts, the following is stated in the letter:

- i. We, The Royal Family Council off the Barolong Boo Seleka, adopted a resolution on 24 April 2024 and we are acting upon this resolution.
- ii. Our resolution dated 3 May 2022 of more than two years ago, [is]sic not applicable to our application for recognition.
- iii. We were requested to 'advise on the position and status of the identified heir.' Our application is clear on the person identified as Kgosi (Senior Traditional Leader) and the position and status of this person, Kgosi Gaboilelwe Moroka.
- iv. Royal family matters are private and sacred and is handled in confidentiality and in compliance with customary law, customs and traditions. There are no legal or other requirements for the Royal Family to divulge any such private and sacred matters or information to any person who is not a member of the Royal Family.
- v. It is the responsibility and duty of the Royal family to prevent interference of any kind in this private and sacred cultural, customary and traditional matters of which Bogosi and all matters relating to it is an example.
- vi. During our previous, very unpleasant, application for recognition government officials disrespectfully and in contravention of our customary law, customs and traditions plus us for information without it being a legal requirement.
- vii. We, in compliance with our customary law, customs and traditions and in compliance with relevant legislation did not divulge such information then, we acted and will continue to act in accordance with our customary law, customs and traditions and in compliance with relevant legislation under the current circumstances.
- viii. Our decisions and actions are not only guided by customary law, customs, traditions and applicable legislation but also by wisdom and experience that were gained through leading our community for centuries as well as much suffering and tears.
- ix. We find it prudent to bring to your attention that two royal family members, both who served as Kgosi, died unexpectedly under suspicious circumstances at a very young age and the Royal family lives with this hurt and unanswered questions in this day.'

[15] In the founding affidavit the applicant expands with this issue raised by the Premier in the query as follows:

'I should immediately point out that the resolution that the first respondent referred to did not identify any heir. The decision of the Royal Family of 3 April 2022 to have me recognized at that stage as legend, was a strategic one and taken against the background that two members of

the Royal Family, both of whom served as Kgosi died at a very young age under suspicious circumstances which have still not been explained.'

[16] On 22 July 2024, the then-Director General of the Free State Provincial Government sought to convene a meeting with the Royal Family Council. The meeting was on short notice as it was proposed to be held three days later, on 25 July 2024. The purpose of the meeting was simply stated as follows:

'The purpose of the meeting is to address the request from the Royal Council, forwarded to the office of the premier by email, requesting the premier to recognise Kgosi Gaboilelwe Moroka as a Senior Traditional Leader of Barolong Boo Seleka as per the Royal Council resolution of 24 April 2024.'

[17] The Royal Family Council responded to the request on 25 July 2024 and sent the letter to Premier, *inter alia*, stating the following;

'We are already engaged with the Dikopano Programme by the Government Communication and Information System (GCIS) on that date and time, which Kgosi was briefed that the premier will be in attendance, that only conflicts with the request from your office to meet with us but also makes an engagement difficult.

A notice period of three days for a meeting is very short for a Royal Family Council consisting of a number of individuals with various obligations and responsibilities.'

[18] Further in the letter, the following was said:

'i Letter is a response to a letter we received from your office under the signature of Director General K Radikontsane(dated 22 July 2024 the day before yesterday).

The following correspondence serve as correspondence:

- i. Our letter sent on 26 April 2024 requesting the recognition of Kgosi Gaboilelwe Moroka(Attached as Annexure A).
- ii. An e-mail of 26th April 2024 confirming that our letter sent on 26th April 2024 was received (Attached as Annexure B).
- iii. Our follow up letter dated 16 May 2024.(Attached as Annexure C)
- iv. A letter under the signature of the Premier of the Free State (your predecessor) dated 10 May 2024 but received by us on 17 May 2024. (Attached as Annexure D).
- v. Our letter dated 20 May 2024 in answer to the letter under the signature of the Premier of the Free State dated 17 May 2024.(Attached as Annexure E)

- vi. Our follow up letter dated 27 May 2024.(Attached as Annexure F)
- vii. Follow up letter dated for June 2024. (Attached as Annexure G
- viii. An email of 5 June 2024 confirming that our letter of 4 June 2024 was received (Attached as Annexure H)
- ix. A letter received from your office under the signature of Director General K Ralikontsane dated 24 July 2024 (Attached as Annexure I)
- x. A chain of email messages between our attorneys and the Assistant State Attorney between 12 June 2024 and 16 July 2024. (Attached Annexure J)
- xi. Our letter to the Premier of the Free State dated 5 August 2023 relating to information of Bogosi of Barolong Boo Seleka and complaints against Ms MA Buthelezi and Advocate Nong.(Attached as Annexure K).'

The letter also implored the Premier to thoroughly consider the correspondence in order 'to understand events that led up to the current and . . . resulting approach.'

[19] The meeting did not eventuate and there was no response from the Premier to the letter of 24 July 2024. Further correspondence was sent to the Premier with no response.

[20] The Premier did not furnish her reasons before the service of this review application. Such reasons were only forwarded during the cause of this litigation. The Premier, however, opposes this application on a number of grounds which will appear later in the judgment.

[21] The fifth respondent opposes the application on the basis that the customary law of succession of the Barolong has always been based on the system of male primogeniture which entailed that only male persons who are direct descendants of the Royal Family can be recognised as *Kgosi*. In essence, the fifth respondent asserts that the applicant is not a male and a direct descendant of the Royal Family and as such is ineligible to be recognised as *Kgosi*. The first respondent further opposes the application on the basis that the applicant was recognised as a Regent for a limited period.

[22] On the basis of the definition of a Regent above, he contends that at the time the applicant was recognised as Regent for an heir, she had already attained majority and

could not have held the position for herself. He questioned why at that stage, and if the applicant was of the view that she was entitled to be recognised as *Kgosi*, why such recognition was not sought. He submits that the appointment of the applicant as *Kgosi* did not afford her any right or legitimate expectation to be so appointed. Lastly, he contended that in terms of custom and customary law, as the only son of the late *Kgosi* Kingsley Sehunelo Moroka and a direct descendant of *Kgosi* Moroka II, he is the one entitled to be appointed as *Kgosi*.

[23] The following issues call for determination:

- i. Whether the applicant has the *locus standi* to bring this application;
- ii. Whether the applicants ought to have joined the Houses of Maramantsi and Setilo in these proceedings;
- iii. Whether the judgment of this Court in *Kgosatsana Gaboilelwe Moroka v The Royal Family of the Late Mokgopa Robert Tawana Moroka of the Barolong Boo Seleka Traditional Community (KG Moroka)* (case number 2550/2022) and the one of *Moroka* in the SCA finally restored the House of Tshipinare as the only Royal Family of the Barolong Boo Seleka.
- iv. Whether the Premier failed to take a decision to recognise the applicant as *Kgosi*, and if so;
- v. What is the just and equitable remedy to be afforded the applicant.

[24] Chapter 12 of the Constitution recognises the institution, status and role of traditional leadership. The Traditional and Khoi-San Leadership Act 3 of 2019 (TKLA) deals with traditional leadership. However, it needs to be mentioned that the Constitutional Court in *Mogale and Others v Speaker of the National Assembly and Others*³ has declared the TKLA unconstitutional. The declaration of unconstitutionality was suspended for a period of two years. On 29 May 2025, the order of unconstitutionality was further suspended from 29 May 2025 to 29 May 2027. The end result was that the TKLA is still in force. Section 8 of the TKLA, *inter alia*, deals with the

³ *Mogale and Others v Speaker of the National Assembly and Others* [2023] ZACC 14; 2023 (6) SA (CC).

identification of a king or queen. It also mirrors s 18 of the Free State Act which in relevant part provides:

'(2) Whenever the position of a Kgosi or Morena is to be filled, the following process must be followed:

(a) The royal family must, within three months after the need arises for the position of a horse or Marina 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 of Kgosi or Morena, after taking into account whether any of the grounds referred to in section 22(1), (b) or (d) apply to that person; and

ii. through the relevant customary structure –

(aa) Inform the Premier of the particulars of the person so identified to feel the position of a Kgosi or Morena; and

(bb) Provide the Premier with the reasons for the identification of that person as a Kgosi or Morena; and

(b) The Premier must subject to subsection (6), recognize a person so identified in terms of subsection(1)(a)(i) as a Kgosi or Morena.

(3) The recognition of a person as a cozy or Marina in terms of subsection 1B must be done by way of –

(a) A notice in the Provincial Gazette recognizing the person identified as a Kgosi or Morena;

(b) The issuing of a certificate of recognition to the identified person.

(4) The Provincial House of Traditional Leaders must be informed of the recognition of a Kgosi or Morena.

(5) ...

(6) Where there is evidence or an allegation that their identification of a person to be appointed as Kgosi or Morena was not done in accordance with customary law, customs or processes the Premier-

(a) must refer the matter to the Provincial House of Traditional Leaders for its recommendation; or

(a) 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.

(7) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection 6 has been reconsidered and resolved, the Premier must

recognize the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the Royal Family has been done in accordance with customary law’.

[25] The following remarks are applicable to an appointment of a Senior Traditional leader or *Kgosi* as held in *The President of the Republic of South Africa and Others v Prince Mbonisi and Others*:⁴

‘The identification of a king or queen must be considered in terms of customary law and customs subject to the Constitution and any legislation that specifically deals with it. This is so because traditional leadership is governed by customary law. The power to choose a king or queen resides in the Royal Family, which is one of the traditional structures established by the Leadership Act. The President has no role in the identification of a king or queen. His role is to recognize the identified king or queen and thus he does upon a request by the royal family.’

[26] The Premier plays the same role as the President in the appointment of a *Kgosi*. In this case, what the Premier was called upon to do was simply to recognise the person appointed by the Royal Family and upon such recognition, to perform certain duties as prescribed in the Free State Act.

[27] The first and second respondents attack the *locus standi* of the applicant on the basis that she does not have the necessary *locus standi* or authority to depose to an affidavit on behalf the Royal Family Council. This point must be rejected outright. The applicant acts in her personal capacity. There is no doubt that she has the necessary legal capacity to act as a major person. It has not been suggested that there is a defect in acting for herself. In so far as her authority may be challenged in respect of acting for the Royal Family, there is nothing which requires her to have a written resolution from the said Family to act on its behalf. She is its member. It has not been suggested that a person who acts for the Royal Family in terms of customs and customary law, needs written authorization. In any case, it appears that members of the Royal Family signed a resolution confirming their intent to bring this review application. The applicant never

⁴ *The President of the Republic of South Africa and Others v Prince Mbonisi and Others* (147/2024;148/2024;217/2024; 250/2025; 38670/2022) [2025] ZASCA 143 (6 October 2025) para 74.

averred that she acted for the Royal Council, although she stated that she was its chairperson. The Royal Council mandated Mr Letseke Lazarus Motlhale, as its secretary to act for it. This point must accordingly fail.

[28] The second point in *limine* deals with the non-joinder of the three alleged Royal Family Houses. This point was not pursued as it is clear in the heads of argument filed on behalf of the second and third respondent. In respect of the fifth respondent, he opposed the application and thus his non-joinder has become moot.

[29] The next question to consider is whether the judgment of this Court in *the KG Moroka* and the one of *Moroka* in the SCA finally restored the House of Tshipinare as the only Royal Family of the Barolong Boo Seleka. The case of *KG Moroka* does not assist the applicant. It dealt with the recognition of *Motshwaredi*. I agree with the contention of the fifth respondent that the recognition of *Motshwaredi* does not confer a legitimate expectation on the appointee to ascend the throne. The Free State Act defines *Motshwaredi* to mean '... any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position in a temporary capacity until a successor of that position, who is a minor, is recognised as contemplated in section 24 of this Act'.

[30] The position of *Motshwaredi* is distinct from the position of a *Kgosi*. It seems in this case, the appointment of female persons as Regents, or *Motshwaredi*, has never been an issue, like in the case of Kgosiagadi AGG Moroka, Kgosiagadi *Ntswaki* Moroka and the applicant. The attack on the identification on Kgosiagadi Ntswaki Moroka was not on the basis of gender. It was predicated on the identification of the applicant as Regent by the Royal Family on 22 April 2022. Without considering whether a woman may or may not be appointed as *Kgosi* of the Barolong Boo Seleka, it is not in dispute that only male persons have in the past been appointed to the throne. I must, however, add that this notion, on the face of it, appears not to accord with the development of customary law on the very system of primogeniture. For instance, in *Bhe v Magistrate, Khayelitsha*:

*Shibi v Sithole*⁵ the Constitutional Court declared the customary principle of male primogeniture unconstitutional. In my view, the recognition of *Motshwaredi* cannot assist the applicant that she is entitled to the appointment of *Kgosi*. Her case in *KG Moroka* has little or no effect on the recognition decision.

[31] The court in *Moroka* stated the issue before it as follows:

'The issue in this appeal concerns the lawfulness of the decision taken by the first respondent, Premier of the Free State (the Premier) to refer the dispute regarding the senior traditional leadership of Barolong Boo Seleka to the second respondent, Commission of Traditional Leadership Disputes and Claims (the Commission) before affording the Free State House of Traditional Leaders (the House) an opportunity to deal with the dispute in terms of s 21(2)(b) of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Act).⁶

[32] In my view, the court in *Moroka*, although recognising that the issue in respect of the house or the bloodline in the traditional leadership of Barolong Boo Seleka was still alive and had to be dealt with, the SCA did not deal with it. It is clear from reading the judgment that the court dealt with the point that the Tolo Commission did not have the authority to deal with the dispute, as the dispute was referred to it after six months of coming into operation of the applicable Act.

[33] It is so that the SCA referred to the fact that the Commission's recommendation had the far-reaching effect of wrestling the traditional leadership from the House of Tshipinare which had ruled from the 1880's. The court said the following:

'Of importance in this regard is the question posed by the Commission itself: can the chieftainship be reversed and, if so, after how long? Curiously, the Commission refrained from answering this question and instead left it to the Premier to answer. Based on this report, the Premier, without answering the question posed by the Commission, advised the royal family that he recognises the sixth respondent as the senior traditional leader of Barolong Boo Seleka.⁷

⁵ 2005(1) SA 580(CC).

⁶ *Moroka* fn 1 para 1.

⁷ *Ibid* para 17.

[34] What the *Moroka* judgment did was simply to nullify the findings and recommendations of the Tolo Commission and that had the effect of restoring the chieftainship to the House of Tshipinare which had been ruling for over 140 years. The decision did not pronounce on the important issue left unanswered by the Tolo Commission as posed above.

[35] In my view the issue of the chieftainship is still alive. As much as the fifth respondent claims the right to be Kgosi, he has not filed any application to declare him as such. Worse still, he has not dealt, at all, with the entrenched lineage of the Barolong Boo Seleka from 1880 to at least 1911. I agree that the appointment of *Kgosi* Kingsley Sehunelo Moroka was never contested but the question can rightly be posed why, over 145 years, the right of the House of Tshipinare is only sought to be impugned now. The mere allegation that the fifth applicant asserts entitlement to be *Kgosi* on the allegation that he is the direct descendant of Moroka II, cannot be enough in the circumstances of this case. I have not heard any argument that *Kgosi* Moroka II did not follow the custom and customary law of Barolong when he appointed *Kgosi* Tshipinare as his successor.

[36] The applicant seeks to review the decision of the Premier on the basis that he has failed to take a decision. The applicant relies on s 6(2)(g) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which provides '[a] court or tribunal has the power to judicially review an administrative action if the action concerned consists of a failure to take a decision.' On the other hand, s 6(3)(a)((iii) with reference to s 6(2)(g) of PAJA provides as follows:

'If any person relies on the ground of review referred to in subsection 2(g), he or she may in respect of a failure to take a decision, where the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision.'

[37] The SCA in *Offit Enterprises (Pty) and Another v Coega Development Corporation and Others*⁸ held that a failure that would be relevant under PAJA 'refers to

⁸ *Offit Enterprises (Pty) and Another v Coega Development Corporation (Pty) Ltd and Others* [2010] ZASCA 1; 2010 (4) SA 242 (SCA) para 43.

a decision that the administrator in question is under some obligation to take, not simply to indecisiveness in planning on policy issues. It is directed at dialer dilatoriness in taking decisions that the administrator is supposed to take . . . ⁹ In this case the Premier is obliged to take a decision to recognise the applicant as *Kgosi* upon identification unless the Premier holds that she/he ought to act in terms of s 6 of the Free State Act. She/he cannot just decide to remain silent, even in the face of follow-up requests for progress by the Royal Family.

[38] In my view there can be no dispute that the Royal Family took a decision and identified the applicant as *Kgosi*. The identification was communicated to the Premier as contemplated in s 18 of the Free State Act on 24 April 2024. A flurry of correspondence then followed as set out especially in the latter dated 24 July 2024 referred to above. There was no response. Before formal recognition, although I express no opinion on the status and legality thereof, the applicant was coronated as *Kgosi*. Officials in the Provincial Government, which included the then-Director General attended the ceremony. This, in my view, irrefutably confirms that the applicant was identified to ascend the throne as *Kgosi*. The history of non-engagement by the Premier in respect of her statutory duty upon receiving the application for recognition impacted the applicant and the community.

[39] The failure of the Premier to deal with the application in terms of s 18 of the Free State Act is unlawful and has to be reviewed and set aside. The reasons upon which the Premier relies have always been there for her to consider. Since its inception, the underlying dispute regarding which faction constitutes the rightful royal family mandated to identify the *Kgosi* was already present when the application was filed. The court in *Moroka* crystallised it. It is not up to the Premier to decide who must or must not be recognised as *Kgosi*, that being the prerogative of the Royal Family which is exercised by way of a customary identification process.

⁹ Ibid para 43.

[40] The Premier's role only relates to considering an application for recognition where the Royal Family has submitted an application after identification. Where the Premier is of the view that the identification was not done in accordance with custom and customary law, she has s 18(6) of the Free State Act to invoke. The issues raised by the second, third and fifth respondents are geared at justifying why the applicant should not be recognised as *Kgosi* and do not address the reasons for the failure to take a decision.

[41] The applicant has established her right to the ground of review under s 6(2)(g) of PAJA. She is entitled to relief for this infringement of her fundamental right to lawful administrative action.

[42] The court is obliged to consider what a just and equitable remedy would be under these circumstances. The applicant has urged us to make an order which ordinarily has to be made by an administrator. Such an order can only be made in exceptional circumstances. In view of the live dispute of the chieftainship, it would be best to remit the matter to the Premier. I, accordingly, find that the applicants' application must succeed. There is no reason why she should not be entitled to her costs.

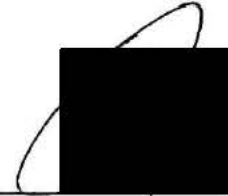
Order

[43] I accordingly make this order:

1 The administrative action of the first respondent in failing to take a decision to recognise the first applicant as *Kgosi* of the Barolong Boo Seleka Traditional Community in terms of s 18(3) of the Free State Traditional Leadership and Governance Act 8 of 2005 (the Act), as requested in writing by the Barolong Boo Seleka Royal Family Council in terms of s 18(2)(a)(ii) of the Act on 26 April 2024 following the identification by the Barolong Boo Seleka Royal Family of the first applicant as the person who should be recognised as *Kgosi* in terms of s 18(2)(a)(i) of the Act, alternatively the refusal by the first respondent to comply with this request, is reviewed and set aside.

2 The matter is remitted to the first respondent to take a decision and deal with the identification of the applicant in terms of s 18 of the Act within 30 days of the service of this order.

3 The first respondent is ordered to pay the costs of the applicants which include the costs of two counsel, where so employed, on scale C.



P E MOLITSOANE
JUDGE OF THE HIGH COURT

I concur:



C REINDERS
JUDGE OF THE HIGH COURT

Appearances

For the Applicants:

H S Havenga SC,
P Eliers

Instructed by:

Hurter Spies Incorporated,
Pretoria
Hendre Conradie,
Bloemfontein

For the 1st and 2nd Respondents:

B S Mene SC,
L Manye

Instructed by:

State Attorney
Bloemfontein

For the 5th Respondent:

W Groenewald

Instructed by:

Bezuidenhouts Inc
Bloemfontein