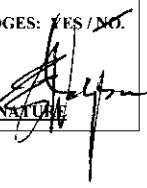




IN THE NORTH GAUTENG HIGH COURT, PRETORIA /ES

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO .	
(2) OF INTEREST TO OTHER JUDGES: YES / NO .	
(3) REVISED.	
DATE 21.09.2012	SIGNATURE 

CASE NO: 40404/2008

DATE: 21/9/12

IN THE MATTER BETWEEN

BAPEDI MAROTA MAMONE

APPLICANT

AND

THE COMMISSION ON TRADITIONAL
LEADERSHIP DISPUTES AND CLAIMS

1ST RESPONDENT

THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA

2ND RESPONDENT

THE MINISTER OF PROVINCIAL AFFAIRS
AND LOCAL GOVERNMENT

3RD RESPONDENT

MOHLALETSI TRADITIONAL AUTHORITY

4TH RESPONDENT

ACTING KGOSHIKGOLO
KGAGUDI KENNETH SEKHUKHUNE

5TH RESPONDENT

JUDGMENTMAKGOBA, JINTRODUCTION

[1] Over the years the institution of traditional leadership has been undermined, distorted and eroded. Some of the main causes of this distortion are imperialism, colonization and repressive laws of the past.

Chapter 12 (sections 211 and 212) of the Constitution of the Republic of South Africa provides for the recognition of the institution of traditional leadership, its status and role according to customary law, subject to democratic principles.

[2] In order to restore the dignity of this institution, the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims. This Commission is mandated to regularise and restore the dignity of the institution of traditional leadership. The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act, 41 of 2003 ("**the Framework Act**").

[3] In terms of section 25(2)(a) of the Framework Act the Commission has authority to investigate, either on request or of its own accord, amongst others, a case where there is doubt as to whether a kingship, senior traditional leadership or headmanship was established in accordance with customary law and customs and also a traditional leadership position where the title or right of the incumbent is contested. Section 28(7) of the Framework Act enjoins the Commission to investigate, in terms of section 25(2), the position of paramountcies and paramount chiefs that had been established and recognised, and which were still in existence and recognised, before the commencement of this Act, before the Commission commences with any other investigation in terms of section 25(2).

[4] In the present case the Commission's investigation was to determine whether the paramountcy of Bapedi was established in accordance with customary law and custom. The Commission made a finding that the institution of kingship of Bapedi resorts under the lineage of Sekhukhune Royal House and not Mampuru/Mamone Royal House.

It is this finding of the Commission that triggered the present application before this Court.

THE APPLICATION

[5] The applicant brought an application against the respondents seeking an order in the following terms:

- 5.1 That the decision of the first respondent to the effect that the kingship of Bapedi resorts under the lineage of Sekhukhune Royal House, be reviewed and set aside;
- 5.2 The investigation and report of the first respondent concerning the kingdom of Bapedi be referred back to the first respondent for reconsideration; alternatively
- 5.3 That this Court should declare that the kingdom of Bapedi resorts in the lineage of Bapedi Marota Mamone Royal House;
- 5.4 Directing the second and third respondents to refrain from recognising any appointment regarding the kingship of Bapedi pending full prosecution (including any possible appeal) of these review proceedings.

- [6] The applicant has since brought an amendment to its prayers in the notice of motion to read, in addition to the relief sought above, the following:

"That His Majesty King Mampuru Mampuru be declared the King of Bapedi – Lekwebepe Kingdom (formerly known as Transvaal) for all intents and purposes."

- [7] There were initially four respondents in these proceedings. The fifth respondent has since been joined as such. The first, fourth and fifth respondent oppose this application. The second and third respondents do not oppose the application, they apparently abide the decision of the Court.

- [8] In a nutshell the purpose of this application is to seek an order reviewing and setting aside the decision of the Commission on Traditional Leadership Disputes and Claims to the effect that the institution of the Kingship of Bapedi resorts under the lineage of the Sekhukhune Royal House to the exclusion of Mampuru/Mamone Royal House.

GROUND FOR REVIEW

[9] The application is brought in terms of the provisions of section 6 of the Promotion of Administrative Justice Act no 3 of 2000 ("PAJA"). The declaratory order referred to in 5.3 above is sought in terms of section 8(1)(c) of the Act.

The Commission is an organ of State as defined in section 239 of the Constitution in that in conducting its investigation and taking decisions, it is exercising a public power and performing a public function in terms of the Framework Act. Its decisions are therefore reviewable and this Court has jurisdiction to do so.

[10] The relevant provisions of section 6 of PAJA are set out hereunder.

"6. Judicial review of administrative action

(1) *Any person may institute proceedings in a Court or a tribunal for the judicial review of an administrative action.*

(2) *A Court or tribunal has the power to judicially review an administrative action if—*

(a) *the administrator who took it –*

- (i) *was not authorised to do so by the empowering provision;*
 - (ii) *acted under a delegation of power which was not authorised by the empowering provision; or*
 - (iii) *was biased or reasonably suspected of bias;*
- (b) *a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*
- (c) *the action was procedurally unfair;*
- (d) *the action was materially influenced by an error of law;*
- (e) *the action was taken –*
 - (i) *for a reason not authorised by the empowering provision;*
 - (ii) *for an ulterior purpose or motive;*
 - (iii) *because irrelevant considerations were taken into account or relevant considerations were not considered;*

- (iv) *because of the unauthorised or unwarranted dictates of another person or body;*
- (v) *in bad faith; or*
- (vi) *arbitrarily or capriciously;*
- (f) *the action itself –*
 - (i) *contravenes a law or is not authorised by the empowering provision; or*
 - (ii) *is not rationally connected to –*
 - (aa) *the purpose for which it was taken;*
 - (bb) *the purpose of the empowering provision;*
 - (cc) *the information before the administrator; or*
 - (dd) *the reasons given for it by the administrator."*

(My underlining.)

[11] There are basically two grounds upon which this application is brought.

First, the applicant contends that the decision of the first respondent falls to be reviewed and set aside on the basis that in deciding the question as to where the lineage in which the Bapedi kingship resorts, the first respondent ignored relevant facts and evidence placed before it or to which it had access – **section 6(2)(e)(iii)**.

In the case of **Pepcor Retirement Fund and Another v Financial Services Board and Another 2003(6) SA 38 (SCA) at 58H-59A** Cloete JA noted that

*"If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in paragraph [10] above) be reviewable at the suit of, **inter alia**, the functionary who made it – even although the functionary may have been guilty of negligence*

and even where a person who is not guilty of fraudulent conduct has benefited by the decision."

- [12] Secondly, that the first respondent's decision in that regard was neither rationally connected to the information placed before it nor the reasons given by it for the decision – **section 6(2)(f)(ii)(cc) and (dd)**.

In Trinity Broadcasting (Ciskei) v Independent Communication Authority of South Africa 2004(3) SA 346 (SCA) at 354H-355A the Court set out the test for rationality for the purpose of section 6(2)(f)(ii) of PAJA as follows:

*"In the application of that test, the reviewing Court will ask:
Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?"*

- [13] The grounds for review raised by the applicant in this matter are in principle, good grounds for a review of an administrative action. However the question remains whether on the facts of this case the applicant has made out a case for the review of the first respondent's decision. The factual matrix of the case are outlined below.

FACTS: EVIDENCE SUBMITTED BEFORE THE COMMISSION

[14] The first respondent (the Commission) conducted public hearings and heard evidence from interested parties. The Commission duly conducted hearings and conducted its own research and the parties were granted a further opportunity during the second stage of the hearing to state their case.

[15] What follows is the historical background of Bapedi kingship as outlined by the Commission upon hearing evidence and doing its own research.

[16] Thobela, the son of Diale, founded the Bapedi traditional community round about 1650. He settled at Mohlake, at the foot of Leolo Mountains. His royal palace was at Tšate.

[17] Thobela was succeeded by his son Kabu. Kabu was succeeded by his son Thobejane and the latter was in turn succeeded by Monkangwe.

[18] The eldest son of Monkangwe, Leseilane, pre-deceased him and his younger son, Mohube, became regent.

When Mohube died his younger brother Mampuru I became regent for Morwamoche I, the son of Mohube.

[19] A succession struggle ensued between Mampuru I and Morwamoche I. Mampuru I was defeated and fled with his followers. Morwamoche I rebuilt his village along the Steelpoort River, where he died.

[20] Morwamoche I was succeeded by his son, Dikotope. Thulare I, the younger brother to Dikotope, assisted by Mampuru I, fought and killed Dikotope. Thus Thulare I usurped the kingship.

[21] Thulare I was succeeded by Molekutu I who ruled for two years and died without an heir. He was succeeded by his brother Phetedi.

[22] Phetedi, together with his followers and other sons of Thulare I were killed by Matebele of Mzilikazi during the Difaqane war. Sekwati I

was the only surviving son of Thulare I after the Mzilikazi invasion. He hid in the Leolo Mountains with a number of his followers.

[23] Sekwati I thereafter expanded and consolidated the efforts initiated by Thulare I of establishing the Bapedi kingship. He died in 1861.

[24] After the death of Sekwati I, his son Sekhukhune I made his intention to succeed him. Sekhukhune I challenged his half-brother and claimant to the title, Mampuru II, to a fight by throwing a spear towards him. Mampuru II declined the challenge. Instead he cowered and fled, taking the royal accessories/*insignia* with him.

[25] Sekhukhune I went on to bury his father, Sekwati I. He forcefully claimed the kingship. He killed all the supporters of Mampuru II. He gathered all the various traditional leaders who were under his father and challenged them. They all cowered. He then ascended the throne. He further consolidated the Bapedi kingship initially established by Thulare I and Sekwati I.

[26] Mampuru II later returned and killed Sekhukhune I on 13 August 1882 at his Great Place, Manoge. However, Mampuru II could not rule as he was hanged for the murder of Sekhukhune I on 21 November 1883.

[27] After the death of Sekhukhune I the history of Bapedi kingship is characterised by successive regencies.

Kgoloko, the half-brother of Sekhukhune I became regent as Sekhukhune II was still a minor. When Sekhukhune II became of age he ascended the throne.

[28] Sekhukhune II was pre-deceased by his son and heir, Thulare II. The latter had no heir from his timamollo, (candle wife) Lekgolane.

After the death of Sekhukhune II, Morwamoche III, a brother to Thulare II, was appointed regent until his death in 1965.

DIFFERENT VERSIONS

[29] There are different versions in relation to the status of Mampuru II and Sekhukhune I following the deaths of Malekutu I and the rest of his brothers.

[30] According to the Mampuru royal family:

30.1 Thulare I was the first kgoši of Marota a Mamone and was succeeded by Malekutu I. Malekutu I died without issue therefore Sekwati I became regent.

30.2 Sekwati I was a regent and as such he was expected to raise seed for Malekutu I.

30.3 Sekwati I had a wife called Thorometsane who gave birth to a son, Sekhukhune I.

Sekwati later married Kgomomakatane (Lekgolane) as a timamollo to the late Malekutu I. She gave birth to a son, Mampuru II who was to succeed Malekutu I.

30.4 According to the custom of Bapedi it is irrelevant who fathers the heir, so long as he is born of timamollo (candle wife). The power to decide on the marriage of timamollo for a deceased kgoši rests with Bakgoma and Bakgomana not the regent.

30.5 Sekwati I recognised Mampuru II and gave him the royal *insignia* including sefoka (royal emblem) and pheta ya thaga (royal beads).

30.6 When Sekwati I died, Sekhukhune I usurped the kingship. Mampuru II fled with his followers.

Later Mampuru II returned to kill Sekhukhune I. Mampuru II was hanged in Pretoria for the murder of Sekhukhune I.

30.7 Malekutu II succeeded Mampuru II. He died in 1905 and was succeeded by his son Malekutu III who died in 1958. He was succeeded by Mampuru III the current kgoši of Marota a Mamone.

[31] On the other hand the Sekhukhune Royal House states the following-

31.1 They do not dispute that Malekutu I died without issue and was followed by Sekwati I as regent.

31.2 They maintain that when Sekwati I became regent he already had a wife Thorometsane, the mother of Sekhukhune I.

31.3 When Bakgoma and Bakgomana suggested that Sekwati I should marry a candle wife to raise seed for Malekutu I, he refused and pointed out that he already had a son Sekhukhune I, whom he had identified as his successor.

- 31.4 Bakgoma and Bakgomana went on to marry a timamollo, Kgomomakatane, the mother of Mampuru II, despite the refusal of Sekwati I.
- 31.5 According to Sekhukhune royal family, Sekwati I could not have fathered Mampuru II as he was too old at the time Mampuru was conceived. In other words they contend that Mampuru II was a "hlaba" (illegitimate child).
- 31.6 Upon the death of Sekwati I, a succession war ensued between Sekhukhune I and Mampuru II until the latter fled. Sekhukhune I succeeded Sekwati I.

COMMON CAUSE FACTS

[32] It is common cause that:

- 32.1 Malekutu I as the son of timamollo (candle wife) was the rightful heir and successor in title to the kingship of Bapedi after the death of Thulare I.
- 32.2 Sekwati I became the only surviving son of Thulare I after the fratricide and attack by Mzilikazi.
- 32.3 Sekwati I was a regent for the successor of Malekutu I. Thus as a regent he had no kingship to pass to Sekhukhune I.

32.4 The possession of royal *insignia* alone does not bestow kingship.

32.5 In African customary law and practice it was not unusual for the kingship to be obtained through might and bloodshed.

32.6 The Mampuru royal family contends that Mampuru II as the son of timamollo, Kgomomakatane was the rightful successor to Malekutu I. However, the Sekhukhune royal family contends that Mampuru II was not the rightful heir as he was not born of timamollo recognised by Sekwati I, furthermore that Mampuru II was not fathered by Sekwati.

ISSUES

[33] The factual issue to be determined is whether by virtue of forcefully driving Mampuru II away Sekhukhune I legitimately usurped kingship. Furthermore, whether by killing Sekhukhune I Mampuru II did in fact assume kingship, and if so, did he do that legitimately.

[34] The legal issue to be determined by the Court is whether the decision of the Commission in determining that the kingship of Bapedi resorts in the lineage of Sekhukhune, was rationally connected to the

information before it or the reasons given by it; and whether it ignored relevant facts and evidence placed before it, to which it had access.

SUBMISSIONS AND FINDINGS

[35] The version of the Mampuru royal family that maternity and not paternity is the overriding consideration in determining succession to bogoši is correct, as this is the case in many African communities including the Bapedi. Therefore the contention by the Sekhukhune royal family that Mampuru II could not be king because he was not fathered by Sekhukhune I cannot hold water.

[36] However in the present case the determination of the lineage of kingship was not necessarily based on birth but on the fact that it was not unusual for the kingship to be obtained through might and bloodshed, hence it was found that Sekhukhune I legitimately usurped kingship by forcefully driving Mampuru II away. Mampuru II fled with his followers, without kingship. Even after returning to kill Sekhukhune I, Mampuru II did not ascend the throne. Malekutu III succeeded Mampuru II as leader of the followers of Mampuru II and not as king of Bapedi.

[37] The applicant contends that the Commission ignored the following facts:

37.1 While Sekhukhune I was deposed and in 1879 incarcerated by the British Mampuru II took over and was king of the Bapedi crowned by the British Government.

37.2 That when Sekhukhune I returned to claim the position of the king, he was defeated and killed by Mampuru II. The applicant further contends that the lineage of kingship of Sekhukhune I, if ever there is argument that it existed after his incarceration, ended there and then when he was killed by Mampuru II on 13 August 1882.

[38] There are no merits in the aforesaid contention made by the applicant for the following reasons:

38.1 The coronation of Mampuru II by the British after the incarceration of Sekhukhune I cannot be said to be consistent with the customary law of the Bapedi. There is no evidence that the Bakgoma, Bakgomana and Dikgadi sanctioned or were part of the alleged coronation. The deposition of Sekhukhune I

and the subsequent coronation of Mampuru II by the British Government can simply be seen as a unilateral act of a colonial master who disregarded the laws and practices of the indigenous Bapedi nation.

- 38.2 The killing of Sekhukhune I by Mampuru II cannot be said to constitute conquest by might and bloodshed as was the common practice in customary law. The evidence shows that when Mampuru II surfaced from where he had fled he was in the company of Nyabela who had given him sanctuary. With the assistance of Nyabela he killed Sekhukhune I, fled again to Nyabela's place where he was eventually captured, convicted by a court of law and eventually executed.

The conduct of Mampuru II in killing Sekhukhune I and fleeing to Nyabela is not consistent with the conduct of a person who had come to conquer and take over kingship. With respect, this is the conduct of a common criminal. It is a fact that he paid the ultimate price for the crime he committed.

[39] Mampuru II did not kill Sekhukhune I in the context of a challenge between them for kingship as was the case upon Sekwati I's death in 1861 when Mampuru II fled with his followers and Sekhukhune subsequently usurped kingship.

[40] On the basis of the facts before me I make a finding that there is a rational connection between the determination or decision of the first respondent and the material facts presented before it. That is that Sekhukhune I had won the succession battle against Mampuru II upon the death of Sekwati I in 1861, and ascended the throne, as it was not unusual for the kingship to be obtained through might and bloodshed as it was in line with common practice at the time.

The decision of the first respondent in this regard cannot be faulted.

[41] Members of the Commission on Traditional Leadership Disputes and Claims (the first respondent *in casu*) are appointed in terms of section 23(1)(a) of the Framework Act. The qualification for appointment of such members is that they should be knowledgeable regarding customary law, customs and the institution of traditional leadership.

[42] Judging by the methodology employed by the first respondent in the present case it cannot be found that its functions were not carried out in a manner that is fair, objective and impartial as required by section 22(2) of the Framework Act. In its determination, the issues to be determined by the first respondent were outlined and thereafter analysed, whereafter the evidence was analysed to arrive at its conclusion that in terms of customary law and customs of the Bapedi and the Framework Act, the lineage of the Bapedi kingship resorts to Sekhukhune Royal House.

[43] There is no merit in the applicant's contention that the first respondent failed to consider all the evidence put before it by the parties to the dispute. In any event the applicant failed to produce any evidence to that effect save for the bear allegations.

[44] Counsel for the first, fourth and fifth respondents correctly emphasised that the Court was requested to review the first respondent's decision. It was not an appeal against the first respondent's decision.

In Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management and Others 2006(2) SA 191 (SCA) at 191F-H
 Harms JA (as he then was) said the following:

"The distinction between appeals and reviews must be maintained since in a review the Court is not entitled to reconsider the matter and impose its view on the administrative functionary. In exercising its review a Court must treat administrative decisions with 'deference' by taking into account and respecting the division of powers inherent in the Constitution. This does not 'imply judicial timidity or an unreadiness to perform the judicial function'. ... PAJA, requires a simple test, namely whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently a decision-maker could not reasonably have reached."

[45] On the concept of "*deference*" in particular, the Court was referred to, *inter alia*, the following decisions:

Logbro Properties CC v Bedderson NO and Others 2003(2) SA 460 (SCA) at 471A-D;

Bel Porto School Governing Body and Others v Premier Western Cape and Another 2002(3) SA 265 (CC);

Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003(6) SA 406 (SCA) paragraphs [47] – [53];

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004(4) SA 490 (CC) paragraphs [46], [48], [49], [50] and [52];

Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd 2005(6) SA 182 at 202J-203A.

[46] In the light of those principles set out in the abovementioned authorities this Court can justifiably defer the issues canvassed in the Commission's report and determination thereof to the first respondent as the suitable administrative functionary in that regard.

CONCLUSION

[47] It can safely be stated that the methodology applied by the first respondent in arriving at its conclusion was lawful, reasonable and procedurally fair and in accordance with section 33(1) of the Constitution of the Republic of South Africa Act, 1996 as well as section 3(1) of PAJA. In the end the first respondent provided comprehensive written reasons for its conclusion, thereby complying with the dictates of section 33(2) of the Constitution.

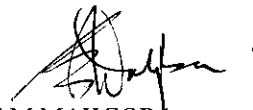
[48] It is clear from an overview of the whole record of proceedings of the first respondent's investigation into the Bapedi kingship dispute that the first respondent in its determination did not fail to take all relevant evidence into account as argued by the applicant. Still less can it be said that its decision was irrational. It thoroughly dealt with all the evidence and submissions, both oral and in writing, presented to it both at the hearings and afterwards in writing.

[49] The first respondent acted in accordance with its mandate, within the parameters of the Framework Act and did not contravene any provision of PAJA.

In the circumstances the applicant's application falls to be dismissed.

[50] I accordingly grant the following order:

- (a) The application is dismissed with costs.
- (b) The applicant to pay the costs of the first, fourth and fifth respondents, such costs to include the costs occasioned by the employment of two counsel.



E M MAKGOBA

JUDGE OF THE NORTH GAUTENG HIGH COURT

40404-2008

HEARD ON: 12 SEPTEMBER 2012

FOR THE APPLICANT: ADV K L SELALA

INSTRUCTED BY: T P MOLOTO & COMPANY INC
c/o MOLEFE ATTORNEYS

FOR THE 1ST RESPONDENT: ADV G BOFILATOS SC
ADV L MOLOISANE SC

INSTRUCTED BY: BHADRISH DAYA ATTORNEYS

FOR 4TH AND 5TH RESPONDENTS: ADV A M M MOTIMELE SC
ADV F I BALOYI
ADV N MTHEMBU

INSTRUCTED BY: RAPHELA INCORPORATED