

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

CASE NO: 42766/2013

DATE: 2/4/2014

In the matter between:

AMANDEBELE-BA-LEBELO

TRADITIONAL COUNCIL

First

applicant

KGOSI KGOMOTSO CORNELIUS KEKANA

Second

Applicant

and

LLEKA JACOB KEKANA

First respondent

LAWRENCE TSOTETSI

Second Respondent

JOHN MATHABATE

Third Respondent

LENNOX MOGOLLA

Fourth Respondent

JAKES MALEKA

Fifth Respondent

ROBERT MASHIGO

Sixth Respondent

SAMUEL CHAUKE

Seventh Respondent

THE TRESPASSERS ON PORTION 2 OF THE

FARM TWEEFONTEIN 94JR	Eighth Respondent
THE REGISTRAR OF DEEDS: PRETORIA	Ninth Respondent
AMANDEBELE-A-MOLETLANE TRIBAL COUNCIL	Tenth Respondent
SETSOALO MABUSELA INC ATTORNEYS	Eleventh Respondent
R R MABUSELA	Twelfth Respondent
VICTOR MABE	Thirteenth Respondent
THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Fourteenth Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Fifteenth Respondent
ABSA BANK LIMITED	Sixteenth Respondent
LLEKA JACOB KEKANE N.O. (in his capacity as Trustee of the Trust) (Registration number IT3083/02)	Seventeenth Respondent
DAVID LETHAMAGA KEKANA N.O. (in his capacity as Trustee of the Trust) (Registration number IT3083/02)	Eighteenth Respondent

J U D G M E N T

AVVAKOUMIDES, AJ

INTRODUCTION AND BACKGROUND

1. The first applicant is a Traditional Council established and recognised in terms of section 5 of the

Gauteng Traditional Leadership and Governance Act, Act 4 of 2010 ('the Gauteng Act'). The second applicant is the senior traditional leader of the Amandebele-Ba-Lebelo Traditional Community and the chairperson of the first applicant.

2. On 17 July 2013 a rule nisi returnable on 3 September 2013 was issued ex parte and on an urgent basis in terms of Portion A of the Notice of Motion brought against the first to seventh respondents, the eighth respondent, the tenth respondent and the sixteenth respondent relating to a property known as Portion 2 of Tweefontein 94 JR (held under Deed of Transfer T4563/1924).

3. The rule nisi was extended on three separate occasions thereafter to the date of this hearing. This is the return date.

4. The applicants seek confirmation of the rule nisi as well as the relief contained in Portion B of the Notice of Motion, namely cancellation of endorsement No BC002256/10 on Deed of Transfer No 7775/1916 and endorsement No BC002256/10 on Deed of Transfer No 4563/1924 together with consequential and declaratory relief.

5. The first respondent claims to be the Paramount Chief of the Amandebele-A-Moletlane Tribal Council (the tenth respondent). The first respondent acts in his personal capacity, on behalf of the tenth respondent and (as the seventeenth respondent) in his capacity as Trustee of the Ingwenyama Royal Trust ("the Trust"). He opposes both the confirmation of the interim order as well as the granting of the relief sought in Portion B of the Notice of Motion.

6. The tenth respondent is an association known as the Amandebele-A-Moletlane Traditional Council or the Amandebele-A-Moletlane Tribal Council or the Kekana Royal Executive Council Amandebele-A-Moletlane Traditional Authority. The tenth respondent purports to function under the control and the leadership of the first respondent.

7. The seventeenth and eighteenth respondents are cited in their capacities as Trustees of the Trust. The Trust appears to be the holder of the bank account into which the respondents and the Trustees deposited monies, which the applicants say was unlawful. This is dealt with hereunder.

8. At the commencement of this application it was pointed out by Mr Van Wyk SC, who appeared for the applicants with Mr Stoop, that the eighteenth respondent also filed an answering affidavit, but in his personal capacity. The eighteenth respondent had previously resigned as a trustee but felt that he could file an affidavit in his personal capacity, this notwithstanding. Ms Molema, an attorney of this court, appeared for the eighteenth respondent and submitted that her client had deposed to his answering affidavit in his personal capacity and not in any other capacity.

9. After hearing argument from the parties on the admissibility of the affidavit, I disallowed the affidavit on the basis that the eighteenth respondent was not before court as party *personally* and he could not participate in the hearing as a result. Apparently pursuant to his resignation as a trustee the person to whom he had entrusted the registration of his resignation with the Master of the High Court, failed to do so hence the current citation of the eighteenth respondent. I deal with this aspect in more detail hereunder.

10. The second to ninth and the eleventh to sixteenth respondents did not oppose the relief sought by the applicants and played no part in the proceedings. The relevant respondents are thus the first and tenth respondents.

PROCEDURAL ISSUES AND POINTS IN LIMINE

11. Mr Sebola, an attorney of this court, who appeared for the first respondent raised two procedural objections to the application and in particular disputed the following:

Whether the Applicants were entitled to bring the application for interim relief ex parte and on an urgent basis

11.1 The grounds upon which the applicants relied for the hearing of the application ex parte and on an urgent basis are set out in the founding affidavit and were not disputed. The interim relief was granted by Mr Justice Jordaan after he exercised his discretion on urgency and by necessary implication, that the application for interim relief should be heard on an ex parte basis. Furthermore, and in terms of Rule 6 (12) (c), the respondents were entitled thereafter to set the matter down for reconsideration of the order. This the respondents did not do and the first respondent's point *in limine* cannot succeed, and is accordingly dismissed with costs. The applicants' allegations in the founding affidavit stand uncontested and the first respondent did not advance any facts or grounds upon which the granting of the interim relief could or should be reconsidered.

That the application cannot be decided on the papers and that there are factual disputes which cannot be decided without the hearing of oral evidence

11.2 The first respondent submitted that the facts contained in the founding affidavit relate to a dispute about chieftainship, ownership and control of Portion 2 and 11 of the farm Leeukraal 92JR and Portion 2 of the farm Tweefontein 94JR ("the land" or "the properties"). The first respondent argued that due to the nature of the dispute, this application requires the hearing of oral evidence.

11.3 The disputes which the first respondent submits require the hearing of oral evidence are identified in the answering affidavit. These are:

11.3.1 who is the legitimate chief of the Amandebele-A-Moletlane, second applicant or first respondent?

11.3.2 was there a tribe known as Amandebele-Ba-Lebelo?

11.3.3 was there a chief for the Amandebele-Ba-Lebelo and if such chief has been appointed properly in accordance with the customs and culture of such tribe?

11.3.4 whether the Amandebele-Ba-Lebelo tribe owned any land and if so if they purchased such land?

11.3.5 the difference between Chief and Regent Chief; and

11.3.6 whether the manner in which the land belonging to Amandebele-A-Moletlane tribe was transferred to the Bophuthatswana Government was fair, justified and lawful.

11.4 The applicants submitted that first three alleged disputes can be decided on the papers without the hearing of any oral evidence by virtue of facts which are common cause and on the basis of the official recognition of the applicants and the Amandebele-Ba-Lebelo traditional community in terms of the applicable legislation.

11.5 The alleged dispute whether the Amandebele-Ba-Lebelo owned land and if they purchased it is not relevant as it is not the case of the applicants that they owned any land or that they purchased it.

11.6 There is no dispute as to the difference between Chief and Regent Chief and such alleged dispute is not relevant to any of the relief sought in the application.

11.7 The alleged dispute as to whether the land which belonged to the Amandebele-A-Moletlane tribe was transferred to the Bophuthatswana Government in a manner that was fair, justified and lawful is also irrelevant. The applicants pointed out that the land never belonged to the Amandebele-A-Moletlane but was held in trust for the use by the Ndebele tribe. The Ndebele tribe was renamed and became known as the Amandebele-Ba-Lebelo traditional Community since 1990. The transfer of the land to the Bophuthatswana Government as trustee and in trust for the Ndebele tribe has not affected the use of the land by the Ndebele tribe.

11.8 The first respondent's application for recognition as Senior Traditional Leader is pending

before the Commission on Traditional Leadership Disputes and Claims.

12. The applicants, in submitting that the application can be decided without the hearing of oral evidence, advanced the following argument:

12.1 The main dispute between the applicants and respondents is whether the control of the beneficial occupation and use of the land vests exclusively in the applicants in terms of the Traditional Leadership and Governance Framework Act, Act 41 of 2003 ('the Framework Act') and the Gauteng Act to the exclusion of first and tenth respondents. This issue can be decided on the papers without oral evidence and on facts which are common cause.

12.2 On 16 August 1990 the President of the then Bophuthatswana renamed the Amandebele Tribe and the Amandebele Tribal Authority to the Amandebele-Ba-Lebelo Tribe and the Amandebele-Ba-Lebelo Tribal Authority respectively. The tribal area of the Amandebele-Ba-Lebelo Tribe and of the Amandebele-Ba-Lebelo Tribal Authority was defined by this notice as Portions 2 and 11 of Leeuwkraal 92JR and Portion 2 of Tweefontein 94JR.

12.3 The Amandebele-Ba-Lebelo tribe and the Amandebele-Ba-Lebelo Tribal Authority which had been recognised as such with its tribal area and area of jurisdiction as portions 2 and 11 of Leeuwkraal 92JR and portion 2 of Tweefontein 94JR since 16 August 1990 in terms of Government Notice 172 of 1990, was deemed to be a traditional community and a traditional council on the date of commencement of the Framework Act (on 24 September 2004) in terms of section 28(3) and 28(4) of the Framework Act.

12.4 The Amandebele-Ba-Lebelo traditional community was therefore a traditional community recognised in terms of the Gauteng Act and the Amandebele-Ba-Lebelo traditional authority was therefore recognised in terms of the Gauteng Act as a traditional council.

12.5 By virtue of Notice 3259 of 2012 dated 18 November 2012 published in terms of section 5(8) of the Gauteng Act, the MEC responsible for Local Government, Gauteng Province recognised the Amandebele-Ba-Lebelo Traditional Council.

12.6 It is common cause on the papers that the "tribe" renamed by the President of Bophuthatswana, was the Ndebele tribe which was formerly known as the

Amandebele-A-Ba-Ka-Moletlane and which is now known as the Amandebele-Ba-Lebelo Traditional Community.

12.7 Section 211(2) of the Constitution provides as follows:

“(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.”

12.8 The Framework Act and the Gauteng Act comprise the applicable legislation referred to in section 211(2) of the Constitution. The purpose of these acts is, inter alia, to recognise traditional communities and to provide a statutory framework for leadership positions within the institution of traditional leadership.

12.9 The second applicant was appointed in 2000 as acting Kgosi of the Amandebele-Ba-Lebelo traditional community and is deemed to be the traditional leader on the date of commencement of the Framework Act (on 24 September 2004) in terms of section 28(1) of the Framework Act.

12.10 The second applicant was recognised as Senior Traditional Leader of the Amandebele-Ba-Lebelo Traditional Community in terms of Notice 296 of 2013 published in the Provincial Gazette dated 17 January 2013.

12.11 The respondents’ contention that a dispute of fact has arisen is clearly premised on the erroneous assumption that the court would be entitled to disregard the validity of the administrative actions and the notices published on the strength thereof in terms of the Gauteng Act and the other legislation (in respect of the official recognition and appointment of the applicants) and to arrogate to itself the power to recognise the first respondent as Traditional Leader and the tenth respondent as the Traditional Council of the Amandebele-A-Moletlane Traditional Council instead.

12.12 The applicants submitted that the court has no such power. I agree. Until set aside, the above notices (and the administrative decisions that preceded the publication thereof in each case), are valid and binding on the applicants and the respondents alike.

12.13 These recognitions can also not be challenged before this court because the parties, who have a real and substantial interest therein, are not before this court: the MEC responsible for Local Government, Gauteng Province and the Premier, Gauteng

Province. Mr Sebola conceded that the Premier and the MEC would have had to be joined in this application in order for the court to consider this argument.

13. It is the applicants' case that in terms of sections 4(1)(a) and (l), and 19 of the Framework Act, sections 7(1)(a), 52(1), 52(a) and (b), and 54(1)(c) of the Gauteng Act read with the definitions of "traditional leader", "traditional council" and "traditional community" in section 1 of the Framework Act and in section 1 of the Gauteng Act, only a traditional council and a traditional leader who are recognised in terms of the Framework Act and the Gauteng Act as the traditional council and traditional leader of a recognised traditional community may manage the affairs of the recognised traditional community in accordance with the customary law and customs of the community concerned.

14. The applicants, in order to illustrate the severity of the first respondent's conduct, drew my attention to section 77 of the Gauteng Act which reads as follows:

"77. Offences and penalties

(1) A person who-

(a) purports to be a traditional leader in terms of this Act without having been recognised as contemplated in this Act.

(b) wilfully obstructs the performance of any function by any traditional leader, any traditional council, the Provincial House, any Local House as contemplated in this Act or any other law is guilty of an offence.

(2) A person convicted of an offence contemplated in subsection (1) is liable to a fine of R12 000 or imprisonment not exceeding 12 months, or, in serious cases, both such fine and imprisonment."

15. In terms of section 24 of the Gauteng Act the funds of traditional councils consist of:

"(a) all monies which, in accordance with the customary law of the traditional community concerned, are payable to the traditional council;

(b) fines collected by the traditional leader or council in accordance with the traditional community's laws and customs;

(c) all monies derived from any property in possession of the traditional community concerned;

(d) any donations made by any person for the benefit of the traditional community

concerned;

(e) any monies paid to the traditional council under any law; and

(f) any monies allocated by the Provincial Government as a direct charge to the Provincial Revenue Fund.”

16. In terms of section 25 of the Gauteng Act:

“(1) The MEC must open or cause to be opened for each traditional council a trust account from which all expenditure incurred in connection with any matter specified within the duties and functions of the traditional community concerned must be met.

(2) In addition, the MEC may on good cause shown by a traditional council and being satisfied that there are sufficient controls and financial systems, permit such a traditional council to open another trust account, into which must be paid such amounts and from which all expenditure incurred in connection with any matter specified in subsection (3) within the duties and functions of the traditional community concerned must be met.

(3) There must be paid into an account opened as referred to in subsection (2)-

(a) all fees, charges and voluntary contributions which are payable to the traditional community;

(b) all cash proceeds derived from any property or right to title of the traditional community;

(c) any donation or gift made by any person, institution or organisation to and for the benefit of the traditional community; and

(d) any other amounts derived from any source whatsoever for the benefit of a traditional community.

(4) Subject to the approval of the MEC, a traditional council may invest any surplus funds from a traditional community's account with any financial institution or body corporate: Provided that the Premier may prescribe conditions as he or she may deem fit in connection with such investment.”

17. It is clear from sections 24 and 25 of the Gauteng Act that:

17.1 all moneys which are payable in accordance with the customary law of the

recognised traditional community to the recognised traditional community are payable to the traditional council which is recognised for such community in terms of the Gauteng Act; and

17.2 all monies derived from any property in possession of the recognised traditional community forms part of the funds of the recognised traditional council and must be paid into the trust account of the recognised traditional council.

17.3 the recognised traditional council administers the trust account of the traditional council in terms of the Gauteng Act.

17.4 a purported traditional leader and traditional council such as first and tenth respondent who have not been recognised as a traditional council in terms of the Act and who purport to administer the use and occupation of property occupied by a recognised traditional community and within the area of jurisdiction of the recognised traditional community, by subdividing, developing and disposing the property and by paying the proceeds thereof into bank accounts held or controlled by first and/or tenth respondent or the Ingwenyama Royal Trust, are contravening section 77 of the Gauteng Act.

18. The first respondent, as submitted by the applicants, purports to be a traditional leader recognised by the Gauteng Act because he purports to fulfil functions which are bestowed upon second applicant as the recognised senior traditional leader of the recognised Amandebele-Ba-Lebelo Traditional Community for the area of jurisdiction of the recognised Amandebele Traditional Community.

19. The applicants submitted that the first and tenth respondents are wilfully obstructing the performance of the functions of first and second applicant (the administration of the affairs of the recognised Amandebele-Ba-Lebelo Traditional Community within its area of jurisdiction) by purporting to manage the use and occupation of the property occupied by the recognised Amandebele-Ba-Lebelo traditional community and within the area of jurisdiction of the recognised traditional community by subdividing, developing and disposing thereof and by paying the proceeds thereof into bank accounts held or controlled by first and or tenth respondent or the Ingwenyama Royal Trust.

20. Under these circumstances the applicants submitted that it stands undisputed that the applicants and the Amandebele-Ba-Lebelo traditional community are recognised in terms of the Gauteng Act, the validity of which cannot now be challenged. The first respondent, the tenth respondent and the Amandebele-A-Moletlane tribe are not recognised as traditional leader, traditional council or traditional

community respectively in terms of the Gauteng Act or any other Act.

21. The applicants submitted further that because the first respondent is not recognised as a traditional leader and because the tenth respondent is similarly not recognised in terms of either the Framework Act or the Gauteng Act the respondents are bound by the notices and decisions referred to above and no dispute of fact has arisen on the papers which should be referred to oral evidence. I am inclined to agree.

Whether First respondent's application is pending before Commission on Traditional Leadership Disputes and Claims

22. The first respondent submitted that an application to have him recognised as the Principal Leader of the Amandebele-A-Moletlane Traditional Community is pending before the Commission and that the present application is premature and that the court cannot as a result adjudicate the matter. I found the submission strange in the light of the Tolo Commission having made its decision already. I deal with this aspect hereunder.

23. In response the applicants contended that the first respondent's submissions are without merit. The first respondent relies upon a letter dated 15 November 2012 written on his behalf recording his objection to the recommendation of the Tolo Commission. A follow up letter was written dated 10 July 2013, approximately eight months later requesting a response. During this period the respondents failed to take any steps.

24. The Tolo Commission investigated the senior traditional leadership dispute of the Kekana claimants which included the second applicant and the first respondent and recommended that the second applicant be confirmed as permanent senior traditional leader of the Amandebele-Ba-Lebelo traditional community. The MEC Responsible for Local Government, Gauteng Province accepted the findings of the Tolo Commission and appointed the second applicant as Senior Traditional Leader of the Amandebele-Ba-Lebelo traditional community.

25. The first respondent did not take the Commission on review neither did he challenge the decision of the MEC Responsible for Local Government, Gauteng Province to recognise the second applicant as Kgosi of the Amandebele-Ba-Lebelo traditional community.

26. Accordingly in my view the first respondent cannot now challenge the findings and recommendation of the Tolo Commission and decision by the MEC Responsible for Local Government, Gauteng Province because the Commission and the MEC who are interested parties are not before the court neither is this court a court sitting in a review application.

27. The first respondent's submission that his application before the Commission is pending and that this application should be stayed pending finalisation of the dispute is clearly without any substance or merit. Moreover, at the commencement of the application I was advised by the parties, and this is confirmed in a letter from the Deputy Judge President, that the parties agreed to the time limits for the exchange of affidavits in respect of this application and had agreed to the date for the hearing of this application. This was done pursuant to a meeting with the Deputy Judge President. The respondents could and should have advised the Deputy Judge President if their contention was indeed that this application was pre-mature instead of agreeing to the application being heard as a special motion.

28. The applicants argued that the first respondent is also not authorised to act on behalf of the Trust. The first respondent opposed the application in his capacity as trustee of the Trust and in support hereof refers to a resolution apparently attached to the answering affidavit. This resolution was not annexed to the answering affidavit and the applicants consequently disputed the authority of the first respondent to act on behalf of the Ingwenyama Royal Trust.

29. Furthermore, clause 10.4 of the Trust Deed provides that there shall at all times be not less than three no more than five trustees acting under the Trust Deed. In the light of the resignation of the eighteenth respondent it is highly unlikely that the resolution could have been passed in terms of the Trust Deed.

30. The first respondent was silent on the fact that one of the three trustees named in the letters of authority of the Trust, one SB Kekana, is deceased. The first respondent also confirmed that the eighteenth respondent had resigned as Trustee.

31. The provision contained in the Trust Deed requiring that at least three trustees must hold office is a capacity-defining condition and under circumstances where the first respondent is the only Trustee, the Trust suffers from an incapacity that precludes the first respondent from acting on its behalf. Consequently I must find that the first respondent cannot be authorised to act for the Trust.

THE RELEVANT LEGISLATION

32. The applicants submitted that both the confirmation of the rule nisi as well as the granting of the final relief set out in prayers 7.4 to 7.6 of Portion B of the Notice of Motion, depend on the interpretation and application of the following legislation which should serve as background against which the relevant facts should be evaluated:

32.3 The Constitution of the Republic of South Africa.

32.4 The Framework Act.

32.5 The Gauteng Act.

33. The institutional status and role of traditional leadership, according to customary law, is recognised in terms of section 211 of the Constitution of the Republic of South Africa, subject to the Constitution.

34. In terms of section 211 of the Constitution a traditional authority that observes a system of customary law may function subject to applicable legislation and customs, including amendments to or repeal of that legislation and those customs, and courts must apply customary law where it is applicable, subject to the Constitution and relevant legislation.

35. The legislation subject to which customary law must be applied and subject to which a person and authority may act as traditional leader and as traditional council are the Framework Act and the Gauteng Act.

36. Both Acts provide for the recognition of traditional communities; the establishment and recognition of traditional councils; a statutory framework for leadership positions within the institution of traditional leadership; the recognition and removal from office of traditional leaders; define the functions and roles of traditional leaders and traditional councils; and provide for dispute resolution and the establishment of the Commission on Traditional Leadership Disputes and Claims.

The Constitution:

37. Chapter 12 of the Constitution of Republic of South Africa deals with Traditional Leaders. Sections 211 and 212 of the Constitution provide as follows:

“211. Recognition

(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.

212. Role of traditional leaders

(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.”

The Framework Act and the Gauteng Act comprise the national and provincial legislation referred to in section 212 of the Constitution

The Framework Act

38. The Framework Act came into operation on 24 September 2004. The Act provides for the recognition of traditional communities, the establishment, the recognition of traditional councils and the recognition of traditional leaders and the roles and functions of the latter.

39. The Framework Act states the following in its preamble as its purpose:

“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;”

“the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that-

democratic governance and the values of an open and democratic society may be promoted; and gender equality within the institution of traditional leadership may progressively be advanced.”

40. Section 2 of the Framework Act makes provision for the recognition of traditional communities. In terms of Section 2(2)(a) it authorises the Premier of a province to, by notice in the Provincial Gazette, recognise a community as a traditional community.

41. Once the Premier has recognised a traditional community that traditional community must establish a traditional council in line with the principles set out in provincial legislation.

42. The Framework Act defines ‘senior traditional leader’ to mean a traditional leader of a specific traditional community who exercises authority over a number of headmen or headwomen in

accordance with customary law, or within whose area of jurisdiction a number of headmen or headwomen exercise authority.

43. The term 'traditional leader' is defined in the Framework Act as any person who, in terms of Customary Law of the traditional community concerned, holds a traditional leadership position and is recognised in terms of the Framework Act. A traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned and in applicable legislation.

44. In terms of section 11 of the Framework Act the Premier of a province must recognise a person as a senior traditional leader, headman or headwoman by publication of a notice to that effect in the Provincial Gazette after the latter has been identified as such in accordance with provincial legislation by the royal family of that traditional community.

45. 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 the Framework Act which cannot be resolved as provided for in the Act, the dispute must be referred to the Commission on Traditional Leadership Disputes and Claims established in terms of section 22(1) of the Framework Act (hereinafter 'the National Commission').

46. The National Commission has authority to investigate and make recommendations on a case where there is doubt as to whether a kingship or principal traditional leadership, senior traditional leadership or headman ship was established in accordance with customary law and customs.

47. Section 28 of the Framework Act provides for the recognition and continued existence of traditional leaders, tribes and tribal authorities who were appointed and recognised as such prior to 24 September 2004 (the date of commencement the Act):

47.1. 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 the Act, is deemed to have been recognised as such (section 28(1);

47.2 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 the Act subject to the withdrawal of its recognition in accordance with the provisions of section 7 of the Act or a decision of the National Commission (section 28(3);

47.3 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 the Act and must perform the functions referred to in section of the Act (section 28(4)).

48. The functions of a traditional council are set out in section 7 of the Framework Act and include administering the affairs of the traditional community in accordance with customs and tradition and performing the functions conferred by customary law, customs and statutory law consistent with the Constitution.

The Gauteng Act

49. The Gauteng Act came into operation on 6 June 2011. Section 2 of the Act empowers the Premier to recognise a community as a traditional community by notice in the Provincial Gazette under certain circumstances.

50. The Gauteng Act further states in its preamble: “that the Province of Gauteng, in accordance with the Constitution, National Policy Framework and the Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003), acknowledges the existence of traditional communities in the Province, and seeks to-

“recognise, protect, preserve, transform, as well as to provide an enabling environment for the development of, traditional communities, traditional institutions, customary law and customs;

“define a place and role for traditional leadership within the system of democratic governance in South Africa”.

51. In terms of section 52 read with 54 of the Gauteng Act, a traditional leader performs any function provided for in terms of customary law (subject to section 20 of the Framework Act) and has to promote the interests of the traditional community concerned in consultation with the traditional council.

52. A traditional leader is bound by the decisions of a traditional council for the development and general socio-economic upliftment of the traditional community concerned.

53. The functions of recognised traditional councils are set out in section 7 of the Gauteng Act and include managing the affairs of the traditional community in accordance with the customary law and customs of the community.

54. The funds of a traditional council consists of all monies which, in accordance with the customary

law of the traditional community, are payable to the traditional council. In terms of section 25(1), the MEC must open or cause to be opened a trust account for each traditional council from which all expenses of the council should be met.

55. Any person who purports to act as a traditional leader in terms of the Gauteng Act without being recognised as such in terms of that Act or who obstructs the performance of functions by any traditional leader or traditional council which has been recognised as such in terms of the Gauteng Act, is guilty of an offence and liable on conviction to a fine or imprisonment or both in terms of section 77 of the Gauteng Act.

56. The applicants submitted that the effect of the Constitution, the Framework Act and the Gauteng Act on traditional leadership in terms of customary law in Gauteng is that:

56.1 traditional leadership is transformed, established and recognised in accordance with the Constitution;

56.2 the composition of traditional councils was transformed to provide for elements of democracy (40% of members must be elected) and gender representation (a third must be women);

56.3 traditional leadership in terms of customary law may not:

56.3.1 purport to be a traditional leader in terms of the Gauteng Act without being recognised as such in terms that Act;

56.3.2 obstruct the performance of functions by any traditional leader or traditional council which has been established and recognised in terms of the Gauteng Act.

THE ISSUES ON THE MERITS IN RESPECT OF THE RELIEF CLAIMED IN PRAYERS 7.4 TO 7.6 OF PORTION B OF THE NOTICE OF MOTION

57. The main issues on the merits between applicants and first respondent are:

57.1 whether the Amandebele-Ba-Lebelo Traditional community is the successor in name of the Ndebele Tribe under Chief Johannes Kekana and is entitled to beneficial occupation and ownership in respect of Portions 2 and 11 of Leeuwkraal 92 JR in terms of Deed of Transfer T7775/1916 and in respect of Portion 2 of Tweefontein 94 JR in terms of Deed of Transfer T4563/1924;

57.2 whether the control of the beneficial occupation and use of the Portions 2 and 11 of Leeuwkraal 92 JR and of Portion 2 of Tweefontein 94 JR vests exclusively in the applicants in terms of the Framework Act and the Gauteng Act (and in terms of custom);

57.3 what the name of the tribe or traditional community is which resides and occupies the aforesaid properties;

57.4 who the owner of the land is which were held in trust for the Ndebele tribe by the fourteenth respondent;

57.5 whether first and tenth respondents together with eleventh to thirteenth respondents unlawfully and illegally transferred the beneficial use and or occupation of the land from the fourteenth respondent to tenth respondent.

58. These disputes relate to the same tribe and/or traditional community, with the same area of jurisdiction and for whose benefit and occupation the same land had been held in trust by the fourteenth respondent until 2010. During 2010 first and tenth respondents together with eleventh to thirteenth respondents unlawfully and without permission or knowledge of the fourteenth respondent caused the unlawful endorsements of the title deeds of the land which resulted in the transfer of management or control of the use and occupation of the land from the Ndebele Tribe to the tenth respondent.

59. The first respondent contended that he as the paramount Chief of the Amandebele-A-Moletlane tribe and second to seventh respondents as members of the tenth respondent were entitled to subdivide, develop, occupy, dispose or move onto or use portion 2 of Leeuwkraal 92JR and the southern portion of Portion 2 of Tweefontein 94JR (“the land”) because the Amandebele-A-Moletlane tribe owns this land.

60. The grounds upon which the first respondent opposes this application, are as follows:

60.1 The Amandebele-A-Moletlane traditional community resided on the land since 1916.

60.2 The change of the name from the Amandebele-A- Moletlane traditional community to Amandebele-Ba-Lebelo was unlawful.

60.3 Any reference to the Amandebele-Ba-Lebelo traditional community is a reference to the Amandebele-A-Moletlane traditional community and it is the latter community that resides on the land;

60.4 The first respondent is, as legitimate direct descendant of Chief Johannes

Mokonyama Kekana, the paramount chief of the Amandebele-A-Moetlane and by necessary implication therefore also the tribe that now resides on the land and which is (unlawfully according to the first respondent) known as the Amandebele-Ba-Lebelo;

60.5 The Amandebele-A-Moetlane tribe does not recognise the second applicant as their Chief despite the MEC for Local Government of Gauteng having recognised him as such;

60.6 The second applicant was therefore appointed as senior traditional leader of a tribe that does not exist and which cannot and does not own any land and the first applicant was appointed as the traditional council of a tribe which does not exist and applicants can therefore not exercise any control over the land;

60.7 The first respondent is recognised as the paramount traditional leader of the Amandebele-A-Moetlane tribe in terms of customary law and the customs of the Amandebele-A-Moetlane tribe and that he has the status of principal traditional leader.

61. The applicants submitted that the crux of the matter is not what the name of the tribe or traditional community should be or whether the tribe or community owns the land but what traditional leader and which traditional council is entitled to control and dispose of the land which was set aside for the occupation and use of the tribe or traditional community and which is situated within the area of jurisdiction of the first applicant.

62. The applicants submitted further that nothing turns on the issue of what the name of the tribe or traditional community is, or should be, as all other disputes relate to the same tribe and traditional community with the same area of jurisdiction and control of the same land.

63. The first respondent's contention that the Amandebele-Ba-Lebelo tribe or traditional community does not exist because its name is not the Amandebele-Ba-Lebelo tribe but the Amandebele-A-Moetlane tribe appears does not make any sense. The applicants submitted that the existence of this tribe or traditional community is not dependant on what name is assigned to it by the traditional community or by the Government. It has officially been recognised as a traditional community in terms of the Gauteng Act with an area of jurisdiction.

64. The first respondent's contention that because the Amandebele-Ba-Lebelo Tribe's name should be the Amandebele-A-Moetlane tribe and that the applicants are not able to act as traditional leader or as traditional council of this tribe or traditional community in respect of the land occupied by them and which is held for their benefit and occupation also appears to without substance.

65. The Amandebele-Ba-Lebelo tribe has been recognised as a traditional community, the first applicant as traditional council, and the second applicant as senior traditional leader of the Amandebele-Ba-Lebelo traditional community in terms of the Gauteng Act.

66. The applicants' power to control the land stems from:

66.1 the Amandebele-Ba-Lebelo traditional community being the successor in name of the Ndebele tribe for which the land has been held in trust by the Minister of Native Affairs and his successors since 1916 and 1924; and

66.2 the Framework Act and the Gauteng Act and their establishment and recognition in terms of these Acts as traditional council and senior traditional leader of this Amandebele-Ba-Lebelo community (which is also recognised in terms of the Gauteng Act) for this land which constitutes their area of jurisdiction since 1990.

67. As a result of the unlawful endorsements to the Title deeds of the land caused by first, and tenth to thirteen respondents during 2010, the tenth respondent is at present indicated in the title deeds as the beneficiary for whom the properties are being held in trust. The certificates issued by the ninth respondent further indicate the tenth respondent as the owner of the two farms. This important aspect was not denied by the first respondent in argument.

68. The applicants thus submitted that the unlawful endorsements of Title Deeds T7775/1916 and T4563/1924 should be set aside in view thereof that it cannot be disputed (and it is in fact not disputed by any of the respondents) that the endorsements were effected and based on perjurious affidavits and without the knowledge of fourteenth respondent as the Trustee of the properties.

69. By virtue of Deed of Transfer T7775/1916, a portion of the farm Leeuwkraal No 396 called Michielskraal situated in the district of Pretoria was registered in 1916 in the name of the Minister of Native Affairs in trust for the Ndebele Tribe under Chief Johannes Kekana. In terms of the Trust Deed, the Ndebele Tribe was entitled to this land in accordance with local custom.

70. On 26 May 1924 by virtue of Deed of Transfer T4563/1924, a portion of the farm Tweefontein No 275 was registered in the name of the Minister of Native Affairs in trust for the Ndebele Tribe under Chief Regent Abraham Kekana. The Trust Deed states that the Ndebele Tribe was entitled to this land in accordance with local custom.

71. In view of the facts hereunder, which are common cause, the applicants submit that the Amandebele-Ba-Lebelo traditional community is the successor in name and title of the Ndebele tribe

for which the land has been held in trust by the Minister of Native Affairs and his successors since 1916 and 1924. These facts are the following:

71.1. In a Proclamation dated 14 January 1927 and in a Proclamation dated 6 April 1939 reference is made to the Ndebele Tribe occupying the above two properties as to the Amandebele-A-Ba-Ka-Moletlane and the Amandebele-A-Ba-Ka-Moletlane Tribe of Natives, respectively.

71.2. In Government Notice 755 dated 29 May 1957, the State President defined the area of the Amandebele Tribe under Chief Hans John Carl Kekana and of the Amandebele Tribal Authority as the area in the Pretoria District consisting of the farms Leeuwkraal No 396 and Tweefontein No 275.

71.3. The land on which the above farms are situate was transferred to the former Republic of Bophuthatswana and on 16 August 1990 the President of Bophuthatswana renamed the Amandebele Tribe and the Amandebele Tribal Authority to the Amandebele-Ba-Lebelo Tribe and the Amandebele-Ba-Lebelo Tribal Authority respectively. The tribal area of the Amandebele-Ba-Lebelo Tribe and of the Amandebele-Ba-Lebelo Tribal Authority was defined by this notice as Portions 2 and 11 of Leeuwkraal 92JR and Portion 2 of Tweefontein 94JR.

71.4. The property known as Tweefontein No 275 was renamed as Portion 2 of Tweefontein 94JR. The property known as Leeuwkraal 396 was renamed to Portion 2 of Leeuwkraal 92JR.

71.5. After the re-incorporation of Bophuthatswana into the Republic of South Africa in 1994, the Amandebele-Ba-Lebelo Tribal area formed part of the North West Province until 2005 when it was incorporated as part of Gauteng Province.

71.6. The authority and control of the Amandebele-Ba-Lebelo Traditional Council over the property is further evidenced by the fact that on 26 August 2003 the Premier, North West Province, approved a by-law made by the Amandebele-Ba-Lebelo Tribal Authority relating to the payment of affiliation fees within the tribal area.

72. In terms of the two title deeds of 1916 and 1924 the properties were held by the Minister of Native Affairs and his successors, which include the fourteenth respondent, in trust for the Ndebele tribe. The Minister of Native Affairs was the trustee and registered owner of the properties and the fourteenth respondent is now the trustee and registered owner of the properties.

73. The certificate issued by the ninth respondent setting out that the tenth respondent is the owner of the properties, is therefore clearly incorrect.

74. The remaining and main issue between applicants and first and tenth respondents is whether first and tenth respondents have been, and are, entitled to regulate the subdivision, development, occupation, disposal or use of the land held in trust for the traditional community and whether such right vests exclusively in the applicants in terms of the Gauteng Act as the officially recognised and appointed traditional leader and traditional council for this recognised traditional community.

75. The applicants submitted that the right or entitlement to regulate the subdivision, development, occupation, disposal or use of the land held in trust for the traditional community vests exclusively in the applicants as the officially recognised and appointed traditional leader and traditional council for this recognised traditional community for the following reasons:

75.1 The MEC responsible for Local Government, Gauteng Province recognised the Amandebele-Ba-Lebelo Traditional Council;

75.2 The Tolo Commission investigated the dispute between the second applicant and amongst others the first respondent concerning the chieftainship of the first applicant and recommended that the second applicant's claim to the chieftainship of the Amandebele-Ba-Lebelo Traditional Community be confirmed; the MEC: Co-Operative Government and Traditional Affairs: Gauteng Province accepted the findings of the Tolo Commission and on 10 October 2012 the second applicant's appointment as Senior Traditional Leader of the first applicant was confirmed in line with the provisions of section 61(3) of the Framework Act;

75.3 On 12 December 2012 the MEC issued a Certificate of Recognition, recognising the Second Applicant as the Kgosi of the Amandebele-Ba-Lebelo community;

75.4 The second applicant was recognised as Senior Traditional Leader of the Amandebele-Ba-Lebelo Traditional Community in terms of Notice 296 of 2013 published in the Provincial Gazette dated 17 January 2013;

75.5 It appears to be common cause between applicants and first and tenth respondents that:

75.5.1 the traditional community residing on the land is officially recognised as the Amandebele-Ba-Lebelo traditional community;

75.5.2 the first applicant is officially recognised as the Traditional Council of this traditional community in terms of the Gauteng Act;

75.5.3 Second applicant is officially recognised as the senior traditional leader of this traditional community in terms of the Gauteng Act;

75.5.4 portions 2 and 11 of Leeuwkraal 92JR (previously Leeuwkraal 396) and portion 2 of Tweefontein 94JR (previously Tweefontein 275) have been designated and recognised as the tribal area of the Amandebele-Ba-Lebelo tribe and of the Amandebele-Ba-Lebelo Tribal Authority since 16 August 1990;

75.5.5 the Amandebele-A-Moletlane Tribe was not established or recognised as a tribe in terms of legislation which was in force before the commencement of the Framework Act;

75.5.6 the Amandebele-A-Moletlane Tribe has not been recognised as a traditional community or principal traditional community in terms of the Framework Act or the Gauteng Act;

75.5.7 no traditional community with the name Amandebele-A-Moletlane has been recognised as a traditional community or principal traditional community in terms of the Framework Act, in terms of the Gauteng Act or in terms of any other Act before or after 1990;

75.5.8 the tenth respondent has not been established or recognised as a principal traditional council or a traditional council in terms of the Framework Act or the Gauteng Act or in terms of any other Act which were in force before the commencement of the Framework Act;

75.5.9 the first respondent has not been recognised as a king, principal traditional leader, senior traditional leader, traditional leader, or headman in terms of the Framework Act, the Gauteng Act or in terms of any other Act which were in force before the commencement of the Framework Act;

75.5.10 the first respondent has not been appointed or recognised as chief or paramount chief of the Amandebele-A-Moletlane Tribal Council or tribe in terms of any Act of Parliament or by the National Government of South

Africa, the Provincial Government of Northwest, The Provincial Government of Gauteng or the Government of Bophuthatswana;

75.5.11 Portions 2 and 11 of Leeuwkraal 92JR (previously Leeuwkraal 396) and portion 2 of Tweefontein 94JR (previously Tweefontein 275) have not been designated as the area of jurisdiction of the Amandebele-A-Moetlane Tribal Council in terms of the Framework Act, the Gauteng Act or in terms of any other act which were in force before the commencement of the Framework Act or the Gauteng Act.

76. It was argued, based on the foregoing, that the second applicant is entitled to exercise exclusive control over the allocation, subdivision, development and use of the properties on behalf of the Amandebele-Ba-Lebelo Traditional Community who is the beneficial owner of the property, for the following reasons:

76.1 The functions bestowed on applicants as traditional leader and traditional council which had been recognised in Framework Act and by Gauteng Act include managing the affairs of the Amandebele-Ba-Lebelo traditional community on Portions 2 and 11 of Leeuwkraal 92JR (previously Leeuwkraal 396) and portion 2 of Tweefontein 94JR (previously Tweefontein 275).

76.2 The first, and tenth respondents (and second to seventh respondents) are obstructing the performance of these functions by the applicants as the recognised traditional Council and as traditional leader recognised in terms of the Framework Act and the Gauteng Act by changing the identity of the persons or entity who is entitled to the beneficial use and enjoyment of the property and by purporting to subdivide and or to dispose of portions thereof and they are therefore committing an offence in terms of section 77 of the Gauteng Act.

77. The applicants submitted that as a result they are entitled to the declaratory orders prayed for in Prayers 7.4 to 7.6 of Portion B of the Notice of motion.

RELIEF SOUGHT IN PRAYERS 7.2 AND 7.3 OF PORTION B OF THE NOTICE OF MOTION

78. The respondents admit that on or about 20 January 2010, the tenth to thirteenth respondents and the first respondent, unlawfully and without having any permission to do so, caused the name of the “Ndebele Tribe” to be changed to “Amandebele-A-Moetlane Tribal Council” on:

78.1. Deed of Transfer T7775/1916 by virtue of endorsement BC002256/10; and

78.2. Deed of Transfer T4563/1924 by virtue of endorsement BC002256/10.

79. In order to effect the aforesaid endorsements, the tenth respondent's attorney (Mr Mabe) on 14 January 2010 applied to the Registrar of Deeds for certified copies of the aforesaid Title Deeds. On the same day, Mr Mabe also filed an affidavit to effect a name change in terms of section 3(1)(v) of the Deeds Registries Act, Act 47 of 1937.

80. The respondents do not dispute that the entire contents of the affidavit by their attorney deposed to in support for their application for certified copies of the Title Deeds was incorrect (including the allegation that the original two deeds of transfer were lost).

81. The respondents also admit that the entire contents of the affidavit by their attorney deposed to in support for the application for a name change was incorrect in that (amongst others):

81.1. the Ndebele Tribe was not the registered holder of the Deeds of Transfer T 7775/1916 or T 4365/1924. The Minister of Native Affairs (now the Minister of Rural Development and Land Reform) was the registered holder in his capacity as trustee for the Ndebele Tribe;

81.2. the name of the Ndebele Tribe was not changed to the Amandebele-A-Moletlane Tribal Council or Traditional Authority but to the Amandebele-Ba-Lebelo Traditional Community or Traditional Authority;

81.3. there existed no evidence that the name of the Ndebele Tribe was changed to the Amandebele-A-Moletlane Traditional Authority;

81.4. there existed no evidence that any Amandebele-A-Moletlane Traditional Authority or Amandebele-A-Moletlane Traditional Council situated at or near Hammanskraal had been established or was officially recognised in terms of any legislation or otherwise;

81.5. there exists ample authority that the name of the Ndebele Tribe was changed to the Amandebele-Ba-Lebelo traditional Authority with the second respondent as traditional authority and that the Ndebele Tribe has officially been renamed and recognised as such since 1990;

81.6. the change of the name of the Ndebele Tribe to the Amandebele-A-Moletlane Traditional Council in the two deeds of transfer resulted in a change of legal personality of the traditional authority for whom the two farms were registered in trust, meaning

from the Ndebele Tribe (now the Amandebele-Ba-Lebelo Traditional Community) to the Amandebele-A-Moletlane Traditional Authority.

82. The effect of the endorsements on the Title Deeds of the properties is that these properties are no longer held by the Minister in trust for and on behalf of the Ndebele Tribe (and for the Amandebele-Ba-Lebelo Traditional community).

83. According to certificates issued by the Deeds Registry Pretoria, the Amandebele-A-Moletlane Traditional Authority is now indicated as the registered owner of the properties.

84. It was submitted that these certificates issued by the Deeds Registry are incorrect. In terms of the endorsed title deeds the fourteenth respondent remained the registered owner and trustee of the properties held on behalf of the Amandebele-A-Moletlane Traditional Authority.

85. It was submitted that endorsement BC002256/10 of Deeds of Transfer T7775/1916 and T4563/1926 dated 20 January 2010, which changed the name of the beneficiary on behalf of which the properties were held in trust, from the “Ndebele Tribe to the “Amandebele-A-Moletlane Tribal Council” should be set aside and be declared invalid on the following grounds:

85.1. the name of the “Ndebele Tribe” on behalf of which these properties were registered in these Deeds of Transfer in the name of the Minister of Native Affairs in trust and for the benefit of this tribe was changed to the Amandebele-Ba-Lebelo Traditional Authority in 1990;

85.2. this name was changed to and officially recognised in terms of the Framework Act and the Gauteng Traditional Act as the Amandebele-Ba-Lebelo Traditional Community with the first applicant as its council and governing body and with second applicant as its Senior Traditional Leader;

85.3. the name of the Ndebele tribe on behalf of which these properties were registered in these Deeds of Transfer in the name of the Minister of Native Affairs in trust and for the benefit of the Ndebele tribe has since 1959 to date not been changed to or recognised in terms of any law as the Amandebele-A-Moletlane Tribe or the Amandebele-A-Moletlane Traditional Authority or the Amandebele-A-Moletlane Tribal Council;

85.4. the tenth respondent, the Amandebele-A-Moletlane Traditional Authority, or the first respondent has not been appointed or recognised as such in terms of the Framework

Act or in terms of any other Act to date;

85.5. the tenth respondent did not have any power or entitlement to resolve that the name of the “Ndebele Tribe” in these deeds of transfer be changed to the “Amandebele-A-Moletlane Traditional Authority” or to cause that the name of the “Ndebele Tribe” in these deeds of transfer be changed to the “Amandebele-A-Moletlane Tribal Council”;

85.6. the effect of the name changes on these deeds of transfer caused by tenth and first respondents is, that the beneficial use of these properties was changed unlawfully from the “Ndebele tribe” to the Amandebele-A-Moletlane Tribal Council without the knowledge or permission of the:

85.6.1 applicants; and

85.6.2 the “Ndebele Tribe”; and

85.6.3 the Minister of Rural Development and Land Reform as the Trustee and registered owner of these properties;

85.7. The tenth respondent’s name was inserted unlawfully into the title deeds of the two properties;

85.8. The first respondent admitted that the transfer of the land to the name of Amandebele-A-Moletlane was unlawful because it was done without consulting the Minister of Rural Development and Land Reform as Trustee of the land;

85.9. The endorsements were the result of an unlawful scheme devised and put into operation by the first and the tenth respondents to take away the first applicant’s beneficial use and control over the properties without the knowledge or permission of the first applicant and the Minister who is the Trustee and Registered owner thereof;

85.10. The Registrar of Deeds was in terms of section 93(1) of the Deeds Registries Act entitled to register a change of name if he was satisfied that no change of legal personality was implied in such change of name. The change of name did imply a change of legal personality and the Registrar was intentionally and unlawfully misled by the false affidavit deposed to by Mr Mabe on behalf of the tenth respondent, to effect the change of name;

85.11. The Amandebele-A-Moletlane Traditional Authority or the tenth respondent have

not been appointed or recognised as such in terms of the Framework Act or the Gauteng Act and the tenth respondent had no power or entitlement to apply to the Registrar of Deeds for the name change;

86. The applicants submitted that they have made out a case for the granting of the final relief in prayers 7.2 and 7.3 of Part B of the Notice of Motion. I am inclined to agree.

THE RELIEF SOUGHT IN PRAYER 7.1 OF PORTION B OF THE NOTICE OF MOTION

87. Section 98 of the Deeds Registries Act, Act 47 of 1937 provides that if a copy of a registered deed or other document has been issued, in manner prescribed by regulation, in substitution of a deed or other document which has been lost or is believed to have been destroyed, the original deed or other document, if still in existence, shall thereupon become void.

88. It was submitted that, because the two original deeds of transfer are still kept in safe custody by the Department of Rural Development and Land Reform on behalf of the Minister, the applicants are also entitled to an order:

88.1 declaring the original deeds of transfer to be the valid deeds of transfer of the properties;

88.2 declaring that the original certificated copies of the deeds of transfer which had been issued by the ninth respondent to first and/or tenth respondents be declared of no force and effect;

88.3. that the respondents be ordered to forthwith surrender the original certificated copy of the aforesaid deeds of transfer; alternatively to state under oath the whereabouts of such copies if known to them.

CONFIRMATION OF THE RULE NISI

89. The applicants submitted that the following facts have not been disputed by the respondents:

89.1. The first applicant and the Amandebele-Ba-Lebelo Traditional Community on 24 July 2005 resolved unanimously that the existing settlements on the properties be redeveloped. The Minister of Land Affairs as Trustee of the Amandebele-Ba-Lebelo Traditional Community on 17 July 2006 approved of this resolution and in terms of section 19(1)(b)(iii), 10(1)(b)(vi), 10(1)(3) and section 10(1)(ii) of the Provision of Land and Assistance Act, Act 126 of 1993, for the securing, upgrading and registering of tenure rights.

89.2. In terms of the approval granted, the first applicant intends to develop the southern portion of Portion 2 of Tweefontein 94JR situated south of Lucas Mangope Drive by dividing the property into 6341 residential stands and 18 business stands. It also intends to erect 3 primary schools, 1 secondary school, 3 community facilities, 5 crèches, 4 churches, 6 clinics and 6 taxi stands on the vacant portion of Tweefontein.

89.3. The first applicant has not since obtaining approval for the development, permitted any person to occupy, subdivide, demarcate stands or allocate or sell stands thereon.

90. The first respondent maintains that the Amandebele-Ba-Lebelo Traditional Community does not exist. This argument I find difficult to accept in the light of the applicants' submissions, the facts admitted by the first respondent and the applicable legislation. According to the first respondent the community that resides on the properties is the Amandebele-A-Moletlane Traditional Community and that he, and not the second applicant, is the Senior Traditional leader of the Amandebele-A-Moletlane Traditional Community, and is entitled to develop the land.

91. The respondents admit that the first respondent during a meeting held on Monday 27 May 2013 made it clear to (amongst others) the first applicant, representatives of the Municipality, the second to eighth respondents and members of the Amandebele-Ba-Lebelo traditional community that he was the paramount chief of the Amandebele-A-Moletlane, that he has the title deed to the land and that he will allocate the land.

92. The respondents do not deny that:

92.1 during a radio interview on 10 June 2013, the fifth respondent stated that they (the fourth, fifth and sixth respondents) were appointed by the first respondent who was the owner and title holder of Tweefontein 94JR and that the first respondent instructed them and gave them permission to start the process of allocating stands thereon to the community;

92.2 during a radio interview on 25 June 2013, the First respondent again affirmed that he was the owner and title holder of the properties and the King of the Amandebele-A-Moletlane and that he was entitled to allocate stands on this land;

92.3 after 25 June 2013, first to seventh respondents started to subdivide the vacant portion of Portion 2 of Tweefontein 94JR south of Lucas Mangope Drive into stands which they are allocating and selling to members of the local community including the ninth respondent at R700 per stand; they utilise 3 show houses erected on the property

for the allocation and selling of stands and some 425 people have already registered with the respondents for the allocation of sites;

92.4 the eighth respondent has after 25 June 2013 moved onto the southern portion of the Farm Tweefontein, which was vacant, during daytime, and started to mark out stands and to clear the vegetation thereon; on Sunday 7 July 2013 the eighth respondent commenced to erect temporary structures on that portion of the property;

92.5 six incomplete structures have been erected by the respondents on the property and as soon as these are completed, the eighth respondent will move into these temporary structures and commence to reside therein; this is likely to lead to a chaotic and uncontrolled invasion of the vacant southern portion of the Farm Tweefontein by eighth respondent and others which are likely to become permanent;

92.6 the respondents paid the proceeds they obtained from the sale of the stands into ABSA bank account no 4[...] kept by the Trust at Temba City Centre Hammanskraal.

93. The applicants submitted that they, as the duly appointed and recognised traditional council and senior traditional leader of the Amandebele-Ba-Lebelo traditional community respectively, are responsible (amongst others) to manage the affairs of the Amandebele-Ba-Lebelo traditional community on the land described as Portions 2 and 11 of Leeuwkraal 92JR (previously Leeuwkraal 396) and portion 2 of Tweefontein 94JR (previously Tweefontein 275).

94. The second applicant is bound by the decisions of the first applicant including the first applicant's decision for the development and general socio-economic upliftment of the traditional community concerned.

95. The first respondent is not recognised as traditional leader in terms of the Gauteng Act and by wilfully obstructing the performance of the functions of the first and the second applicant (by purporting to deal with the land), he committed a criminal offence which is punishable by a fine of R12 000.00 or imprisonment not exceeding 12 months, or, in serious cases, both such fine and imprisonment.

96. As a result and in the premises, the applicants have demonstrated:

96.1. they have a clear right to the relief set out in Part A of the Notice of Motion;

96.2. the existence of an injury actually committed or reasonably apprehended;

96.3. that they have no satisfactory alternative remedy.

97. It was submitted that based on the foregoing the applicants:

97.1. have made out a case for the confirmation of the rule nisi; and

97.2. are also entitled to an order that account no 6232330875 opened and/or operated in the name of the first respondent and/or tenth respondent and/or seventeenth and eighteenth respondents be frozen pending the outcome of an action to be instituted against the first, tenth and seventeenth respondents by the first applicant for the following relief:

97.2.1 an account setting out full particulars of all amounts obtained from any respondent in respect of the purported subdivision and/or sale of stands on the land described as Portions 2 and 11 of Leeuwkraal 92JR (previously Leeuwkraal 396) and portion 2 of Tweefontein 94JR (previously Tweefontein 275);

97.2.2 payment to the first applicant of any amount obtained from any respondent in respect of the purported subdivision and/or sale of stands on the aforesaid land;

97.2.3 first applicant is ordered to return all monies so paid over to it by the first and/or tenth and/or seventeenth respondent to the person(s) who originally paid such monies over to the said respondent(s) and to report under oath back to the Honourable Court what the first applicant has done.

97.3. The applicants submitted that they are entitled to the relief set out in paragraph 2 of the draft order handed up to me. I deal with this hereunder.

THE FIRST RESPONDENT'S ATTEMPT TO FILE A SUPPLEMENTARY ANSWERING AFFIDAVIT

98. The first respondent attempted to file a supplementary answering affidavit on 18 February 2014 but was informed by the Deputy Judge President Judge that he is not entitled to do so and must apply for leave to do so from the Court at the hearing of this application.

99. No such formal application was made before me other than submission from the bar and it is unnecessary to deal with this aspect any further save that the first respondent's supplementary answering affidavit was disallowed.

CONCLUSION

100. Consequently I am of the view that the applicants have made out a proper case for the relief sought and under the circumstances I make the following order:

1. The rule *nisi* issued on 17 July 2013 is confirmed.
2. The ABSA account no 4[...] at Temba City Centre Hammanskraal opened and/or operated in the name of the first respondent and/or tenth respondent and/or seventeenth and/or eighteenth respondents or in the name of the Ingwenyama Royal Trust shall remain frozen pending the outcome of an action to be instituted against the first, tenth and seventeenth respondents by the first applicant within 30 days from the date of this order, for the following relief:
 - 2.1 An account setting out full particulars of all amounts obtained from any of the respondents in respect of the purported subdivision and/or sale of stands on the land described as portions 2 and 11 of Leeuwkraal 92 JR (previously Leeuwkraal 396) and portion 2 of Tweefontein 94 JR (previously Tweefontein 275);
 - 2.2 Payment to the first applicant of any amount obtained from any of the respondents in respect of the purported subdivision and/or sale of stands on the aforesaid land;
 - 2.3 The first applicant is ordered to return all monies so paid over to it by the first and/or tenth and/or seventeenth respondent to the person(s) who originally paid such monies over to the said respondent (s) and to report under oath to the above Honourable Court on what the first applicant has done
3. The certification by the Registrar of Deeds of the copies of Title Deeds T7775/1916 and T4563/1924 in terms of regulation 68 under the Deeds Registrations Act, Act 47 of 1937 dated 20 January 2010 is hereby set aside.
4. The respondents are ordered to forthwith surrender the original certificated copies of the deeds of transfer referred to in paragraph 3; alternatively to state under oath the whereabouts of such copies if known to them.
5. The ninth respondent is ordered to cancel the endorsement No BC002256/10 dated 20 January 2010 on the Deed of Transfer no 7775/1916 in respect of Portion 2 of the farm Leeuwkraal 92JR
6. The ninth respondent is ordered to cancel the endorsement No BC002256/10 dated 20 January 2010 on the Deed of Transfer No 4563/1924 in respect of Portion 2 of the farm Tweefontein 94JR.

7. It is declared that the Amandebele-Ba-Lebelo Traditional Community is the successor in name and title of the Ndebele Tribe under Chief Johannes Kekana and is entitled to the beneficial occupation and use of Portions 2 and 11 of Leeuwkraal 92JR in terms of Deed of Transfer T7775/1916.

8. It is declared that the Amandebele-Ba-Lebelo Traditional Community is the successor in name and title of the Ndebele Tribe under Chief Johannes Kekana and is entitled to the beneficial occupation and use of Portion 2 of Tweefontein 94JR in terms of Deed of Transfer T4563/1924.

9. It is declared that the control of the beneficial occupation and use of Portions 2 and 11 of Leeuwkraal 92JR and Portion 2 of Tweefontein 94JR vest exclusively in the Applicants in terms of the Traditional Leadership and Governance Framework Act, Act 41 of 2003 and the Gauteng Traditional Leadership and Governance Act, Act 4 of 2010 in terms of custom.

10. It is declared that the original Deed of Transfer No T7775/1916 in respect of Portions 2 and 11 of the farm Leeuwkraal 92JR currently in the possession of the Fourteenth Respondent (a copy whereof is attached as Annexure 'KC32.1' to the Founding Affidavit filed under the above case number) is the valid Deed of Transfer in respect of the said property.

11. It is declared that the original Deed of Transfer No T4563/1924 in respect of Portion 2 of the farm Tweefontein 94JR currently in the possession of the fourteenth respondent (a copy whereof is attached as Annexure 'KC32.2' to the founding affidavit filed under the above case number) is the valid Deed of Transfer in respect of the said property.

12. The first, tenth and seventeenth respondents are ordered to pay the costs of the application, jointly and severally the one to pay the other to be absolved, which costs shall include the costs consequent upon the employment of two counsel and the costs of all previous postponements of this application.

AVVAKOUMIDES, AJ

JUDGE OF THE HIGH COURT

Representation for the Applicants:

Counsel: Adv L Van Wyk SC

Adv B Stoop

Instructed by: Bernhard Van Der Hoven

Representation for First and Tenth Respondents:

Counsel: Attorney Sebola

Instructed by: P Sebola Inc.