IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 659/2018

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

DATE:

SIGNATURE:

In the matter between:

PHAHLELA JUTAS MUGAKULA	**1st APPLICANT**
MAKULEKE COMMUNITY	**2nd APPLICANT**
and	
THE PREMIER, LIMPOPO	**1st RESPONDENT**
PROVINCIAL COMMITTEE ON TRADITIONAL LEADERSHIP DISPUTE & CLAIMS, LIMPOPO	**2nd RESPONDENT**
ACTING SENIOR TRADITIONAL LEADER SHILUNGA CEDRICK MHINGA	**3rd RESPONDENT**
MHINGA TRADITIONAL COUNCIL	**4th RESPONDENT**
HOUSE OF TRADITIONAL LEADERS, LIMPOPO	**5th RESPONDENT**

JUDGMENT

NAUDÈ-ODENDAAL J:

INTRODUCTION:

[1] The Applicants launched an application for review. The pursuit of independence and self-actualisation lies at the heart of the dispute in this matter. A right so firmly entrenched by our Constitution, Act 108 of 1996, has evoked opposition, so fierce, all seemingly determined, wittingly or unwittingly, to cling to a pre-constitutional era and a consequence of arbitrary and oppressive government intervention.

[2] Determined to break away from that past, the Applicants resolved to launch a claim with the current government for –

(a) the restoration to the 1st Applicant, of his senior traditional leadership position in respect of the 2nd Applicant; and

(b) the recognition of the Makuleke Community as an independent traditional community, separate from the Mhinga tribe.

[3] The present matter is therefore not a claim for a traditional leadership position occupied by someone else. It is a claim simply for the recognition and restoration of independence and self-governance of a traditional community. The 2nd Applicant has already successfully pursued a land restitution claim in its own right, under the leadership of the 1st Applicant.

[4] The current claim was lodged during or about September 2012. The applicable legislation at national level, is the Traditional Leadership and Governance Framework Act, 41 of 2003 ("the Framework Act") and at provincial level, the Limpopo Traditional Leadership and Institutions Act, 6 of 2005 ("the Limpopo Traditional Leaderships Act"). The claim was investigated by the 2nd

Respondent ("the Limpopo Provincial Committee"), appointed by the 1st Respondent ("the Premier").

[5] In terms of the Traditional Leadership and Governance Framework Act, read with the Limpopo Traditional Leadership Act, the 2nd Respondent is empowered to investigate the claim, to hold public hearings and, thereafter, make recommendations to the 1st Respondent. The 2nd Respondent discharged those functions in respect of the claim and issued a report dated 28 February 2017, in which it made findings adverse to the Applicants and recommended that the claim be declined.

[6] The Premier, in writing on the 17th of March 2017, advised of the 2nd Respondent's report and of his decision to decline the Applicants' claim. It is clear that the 1st Respondent's decision was based on the findings and recommendations of the 2nd Respondent.

[7] It is against the Premier's decision (1st Respondent) that this review application has been launched in which the Applicants apply for an order reviewing and setting aside the 1st Respondent's decision to decline Mugakula's claim, an order reviewing and setting aside the Premier's acceptance of the Committee's report, an order reviewing and setting aside the Committee's findings and recommendation to the 1st Respondent, an order declaring the 2nd Applicant an independent traditional community separate from the Mhinga tribe, an order declaring the 1st Applicant the senior traditional leader of the Makuleke Traditional Community and costs against those Respondents who oppose the application. The application was opposed by the 1st to 5th Respondents.

[8] The Applicants submitted that it is significant to bear in mind that the 3rd and 4th Respondents are not the decision-makers in respect of the impugned decision. They did not make the decision, only the 1st Respondent did, based on the findings and recommendations of the 2nd Respondent, therefore, the views of

the 3rd and 4th Respondents are, strictly speaking, irrelevant to the Court's consideration of the reasons given for the impugned decision.

THE APPLICANTS' BACKGROUND FACTS:

[9] The Applicants submitted that the Makulekes were independent since their arrival at the Pafuri Triangle, also known as Crook's Corner, from the 1820's. The Makuleke people had occupied the Pafuri Triangle on their arrival around 1820 independently and in accordance with their traditions and customary laws.

[10] The Applicants attached to their founding affidavit as Annexure "FA6", a map by Henri Berthoud (a Swiss missionary) dated 1903, which depicts three separate areas, i.e. the Makuleke area, the Mhinga area and the Shikundu area amongst others.

[11] The Applicants submitted that they have been separate communities since the time of Maxakadzi. They were however forced by the Apartheid Government to move to an area falling within the boundaries of the Mhinga Tribal Authority.

[12] According to the Applicants, the Ralushai Committee confirmed the 1st Applicant's status as a chief and not a headman and recommended that his chieftainship should be recognised after the Ralushai Committee had hearings and evidence was led in respect of the restoration of the 1st Applicant's chieftainship. The 1st Applicant submits that he is recognised by his people in accordance with their laws and customs, as well as by other chiefs of the Tsonga people, including Chief Shikundu, as a chief.

[13] It was submitted by the Applicant that in addition, the Commissioner for Native Affairs (Transvaal) wrote a letter dated 27 February 1907 to the (then) Governor, recommending that land be set apart under the rule of the 1st Applicant's grandfather, Chief Makuleke.

[14] The Governor approved this recommendation in a letter dated 1 March 1907 to the Commissioner of Native Affairs and set aside the recommended land for the tribe under Chief Makuleke. This approval is also confirmed in the Schedule of Native Areas attached to the Natives Land Act 27 of 1913, where the Makuleke tribe is listed as an independent entity and not under the rule of the Mhinga tribe.

[15] The Applicants submitted that this shows that the Makuleke tribe was independent from the Mhinga tribe and the only reason they are not independent now is because the South African Government forcefully removed the Makuleke tribe from the Pafuri area into the Ntlhaveni area whereafter they were incorporated into the Mhinga Traditional Authority within the area of jurisdiction of the now defunct Gazankulu Homeland Government, as part of the consolidation of the system of apartheid.

[16] It was during 1936 that the Makuleke's were essentially deprived of their independence by the then Government. This took place in terms of a government notice 1818 of 4 December 1936, in which the area of Chief Mhinga was amended to include, for the first time, the Makuleke location as part of Mhinga's area of jurisdiction. This turn of events essentially marked the formal loss of the Makuleke Chieftainship under statutory law.

[17] Despite the loss of the Makuleke Chieftainship, the Makuleke Community continued, to date hereof, to function as an independent Chieftainship separate from Mhinga.

[18] The 1st Applicant submitted that he is being referred to as Chief by various Hosi, who wrote letters in support of his claim, namely:-

(i) Hosi Xikundu;

(ii) Hosi Hlaneki;

(iii) Hosi Mulamula;

(iv) Hosi Xigalo;

(v) Hosi Nkuri;

(vi) Hosi Majeje.

The 1st Applicant therefore submits that he has the support of the *thihosi ta va Van'wanati ("the chiefs of the Van'wanati people")*

[19] In addition to the aforementioned, the 1st Applicant submitted, that other traditional leaders that are not from the Makuleke clan, but other clans also support his claim for chieftainship. These are as follows:-

(i) Hosi Madonsi;

(ii) Hosi Mavambe;

(iii) Hosi Tshikonelo;

(iv) Chauke H.P of Mapindani Family.

[20] The 1st Applicant submitted, referring to the letters of other Senior Traditional Leaders, confirming the 1st Applicant's status as Senior Traditional Leader, who have no stake in the outcome of this claim, the 1905 Commission's findings, the recommendation of the Commissioner of Native Affairs (1907), the approval of the recommendation by the Governor (1907), the findings of the

Ralushai Commission, and the 1st Applicant's people recognizing him as Senior Traditional Leader, it is highly improbable that he is merely a headman.

HISTORY OF THE MAXAKADZI BLOODLINE:

[21] Maxakadzi married the eldest and the youngest daughters of Nwabungu. Maxakadzi had two wives (which were two sisters). The first wife, having been the younger sister to the second wife, had three sons. The sons were Guyu, Makahlule and Jewula. The 1st Applicant's recognition originates from the Makahlule descendants, being the second son of Maxakadzi. Maxakadxi then had five sons with his second wife (the older sister). These sons were Dlamani, Manyunyu, Xikama, Majeje and Bengu. The 3rd Respondent is a descendent from the Dlamani bloodline.

[22] Maxakadzi's first wife became the *risati lonkulu ("the principle wife")* who was the mother of three sons. His second wife, who was the secondary wife, was the mother of five sons. One of the five sons from the secondary wife was Dlamani, who later became a *hosi* for the Mhingas.

[23] Makakhlule had six sons. The eldest was Mlati and the second was Khamba (Phele). Mlati as the eldest took the role of being the Chief. When he died, his son Hlaniki, the successor was however too young to become Chief. Therefore Mlati's brother, Khamba (Phele) had to step in as regent. Upon the death of Khamba (Phele), Hlaniki was still too young to succeed as Chief, thus Khamba's eldest son Nwaximgomana also known as Makuleke, became the acting Chief or Regent. The Chieftainship then went back to the rightful heritor, specifically, Hlaniki, who was the grandson of Makahlule, upon him reaching the suitable age.

[24] The name of Makuleke means "the collector". At the time when Khamba was Regent, his son Makuleke acted as the collector of ivory in the area. At the time when Khamba was Regent, his son Makuleke acted as the collector of ivory

in the area. The ivory trade went through the Makuleke region, thus outsiders came to regard the area as Makuleke, as Makuleke was the collector of the ivory. This is how the name of Makuleke came into being. The name Makuleke refers to the area from which the Applicants originate as opposed to their Royal Family.

[25] The Chieftainship then passed from Hlaniki to Nkuzana. Thereafter it passed from Nkuzana to Mugakula and from Mugakula to Phahlela (the 1st Applicant's father). Mugakula is also known as Shandlale. It was submitted by the 1st Applicant that it is by descent from Makahlule that he is the true heir of the chieftaincy.

[26] From Maxakadzi's eight sons, five became chiefs or the ascendants of separate chiefly lines. Firstly, Maxakadzi's son Guyu had three sons namely Xihembu, Gamba and Dyambu. From Xihembu came the separate chieftaincies of Nkhapuri, Hahleki and Hlaniki. Further, it appears that Dlamani's grandsons through his son Nkuri established the Mhinga and Xigalo Chieftainships. It further appears that Maxakadzi's son Majeje established the Majeje Chieftainship. Makhahlule established the Makuleke Chieftainship.

[27] Maxakadzi's older brother Celwa had two sons, namely, Ncembe and Dududu whose line established the Xikundu Chieftainship. It is noteworthy that Chief Xikundu supported the 1st Applicant's claim to Senior Traditional Leadership status in both the Ralushai Commission proceedings, as well as in these proceedings.

THE IMPUGNED DECISION:

[28] The Applicants submitted that the Premier's decision to decline Mugakula's claim for restoration of his position as Senior Traditional Leader of the Makuleke Traditional Community, is impugned.

[29] The decision is premised on the 2nd Respondent's findings that-

(a) The Makulekes existed as headmanship under the Mhinga Senior Traditional Authority;

(b) The Claimant, Mugakula, belongs to the junior house of Makahlule, the junior son of Maxakadzi;

(c) Mugakula is a recognised headman at Makuleke Village, Block H, I and J under the jurisdiction of Hosi Mhinga.

[30] These findings were predicated upon the 2nd Respondent's view on, primarily, two factual aspects of the evidence before it, namely:-

(i) which of the two wives of Maxakadzi was the principal wife, the older or younger daughter of Nwa'Bungu; and

(ii) who was Maxakadzi's elder son, Makahlule (Mugakula) or Dlamane (Mhingas).

[31] The Applicants submitted that in making these findings, the 2nd Respondent failed to take into account relevant information placed before it by the Applicants and, thereby, committed a reviewable act.

[32] The Applicants further submitted that the 2nd Respondent failed to take into account the Ralushai Commission's report that the Makuleke Chieftainship be restored. This is significant particularly because the 2nd Respondent did not reject the findings and recommendation made in that report and thus the 2nd Respondent's failure in this regard is irrational and unreasonable.

FAILURE TO TAKE INTO ACCOUNT RELEVANT INFORMATION ON GENEALOGY:

[33] The Applicants submitted that it was the Applicant's evidence that Maxakadzi's principal wife was the younger daughter of Bungu, as she was the first woman to be married by Maxakadzi. The older daughter was married second, and thus became the junior wife of Maxakadzi.

[34] According to the Applicants the 2nd Respondent simply ran roughshod over this evidence by stating, without any reason, that it was not convincing. Its rejection of the evidence is therefore manifestly unreasonable and arbitrary.

[35] It was further submitted by the Applicants that the 2nd Respondent immediately went on to the second and related aspect, by stating in a rather skeptical manner that *"the very principal wife (the youngest) begot Makahlule, the junior wife (the eldest) begot Dlamane."*

[36] It was submitted by the Applicants that the 2nd Respondent seemingly acted capriciously and, for no apparent reason, entertained doubt in regard to the Applicant's evidence on this point. It was further submitted that the 2nd Respondent's approach is indicative of a predisposition on its part to arrive at a particular outcome. According to the Applicants, the 2nd Respondent failed to take into account the following relevant information that was placed and presented before it:

36.1 that the Applicants (Makulekes) descend from the line of Malenga, the first born of Gunyule

36.2 that Malenga, credited as the progenitor of the Mluleke dynasty, had three sons, namely Moswane (Mohlwane), Ncelwa and Maxakadzi.

36.3 that it was Maxakadzi, the youngest of the three sons, who succeeded his father to the throne. He was a brave warrior and looked well after his brother's sons. He was credited with the equitable

distribution of traditional leadership amongst his sons and his brother's sons, who, as a result, all became independent traditional leaders.

36.4 that Mohlwane married the senior daughter of Nwa'Bunghu, but died young without an issue;

36.5 that the younger daughter of Nwa' Bunghu was married to Maxakadzi;

36.6 that, as a result of Mohlwane's untimely death, Maxakadzi, the youngest son of Malenga, took over the responsibility of giving rise to his brother's lineage, by marrying the senior daughter who became his second and junior wife;

36.7 that with his first wife, Maxakadxi had three sons, namely Guyu, Makahlule and Jewula. The Applicants are the descendants of Makahlule, the second son of the principal wife;

36.8 that with his second wife, customarily a "junior" wife, Maxakadzi had five sons, namely Dlamane, Manyunyu, Xikama, Majeje and Bengu. Mhinga is a descendant of the Dlamane bloodline.

36.9 That the following descendants of Makahlule became chiefs after him, namely Mlati (his first son form the principal wife), Hlaniki, Nkuzana, Shandlale Mugakula, Reuben Phahlela and Phahlela Jutas Mugakula (the 1st Applicant).

[37] It was submitted by the Applicants that the 2nd Respondent's finding that Mugakula, the 1st Applicant belongs to the junior house of Makahlule is therefore inconsistent with the evidence that was placed before the 2nd Respondent and clearly wrong.

[38] The Applicants further submitted that the 2nd Respondent placed reliance, without more, on the testimony of Mhinga and the so-called Makuleke Royal Family, who said that the 1st Applicant belongs to the most junior house of Mlati, the youngest son of Makahlule and that Dlamini was the elder brother to Makahlule. The 2nd Respondent, faced with contrasting versions before it, failed to explain the basis on which it rejected the Applicant's evidence in preference to the version of Mhinga and the so –called Makuleke Royal Family.

[39] The Applicant's further submitted that the 2nd Respondent failed, in its analysis of the evidence, to meaningfully deal with the information provided. It failed to properly apply its mind to the relevant information and, thereby, rendered an unreasonable report that is unsupported by the evidence before the Committee.

FURTHER *INDICIA* OF 2nd RESPONDENT'S DISREGARD OF RELEVANT INFORMATION:

[40] According to the Applicants, there are at least two further indications of the 2nd Respondent's failure to take into account relevant information which they submit, shows bias on the part of the 2nd Respondent, or, at the very least a harboured intention to arrive at a particular outcome. In this regard, the Applicants referred to the report of the Ralushai Commission and the issue about the founder of the Makuleke tribe.

[41] The Applicants submitted that the 2nd Respondent leveled criticism at an aspect of the Applicants' evidence which it perceived to be contradictory and inconsistent. That was the evidence in regard to the founder of the Makuleke tribe. The Applicants submitted in their written submissions that the founder of the Makuleke dynasty is Malenga. However, in its report the 2nd Respondent erroneously records that Malenga is said to be the founder of the Mugagula

Senior Traditional Leadership, when this is not what is stated in the written submissions.

[42] The Applicants further submitted that the 2nd Respondent went on to say that under oath the claimant cited Maxakadzi as the founder of the Mugagula Senior Traditional Leadership, whereas Humphrey stated that Makahlule was the founder. The 2nd Respondent clearly failed to appreciate and understand the evidence before it. Nowhere in the written submissions is Malenga alleged to be the founder of the Mugagula Senior Traditional Leadership. The submission is that he is credited as the founder of the Maluleke dynasty.

[43] The Applicants submitted that the recognition of Maxakadzi as the direct founder of the Mugagules is in fact correct, and not contradictory or inconsistent, as Maxakadzi is the father of Makahlule, the ancestor of Mugagule, from Maxakadzi's principal wife.

[44] The Applicants submitted that the 2nd Respondent's error on such a straightforward point shows that the 2nd Respondent was predisposed into deciding the claim against the Applicants and in favour of Mhinga, regardless of the evidence before it and accordingly this conduct is susceptible to review, as envisaged in Section 6(2)(a)(iii) of PAJA.

[45] In respect of the 2nd Respondent's failure to take into account the Ralushai report, the Applicants submitted that it is significant that the 2nd Respondent also failed to have regard to the findings and recommendations of the Ralushai Commission that had been appointed during 1996, by the then Premier of Limpopo, to investigate disputes in relation to the appointment of certain traditional leaders in the Limpopo Province, then the Northern Province (specifically in the former homelands of Venda, Lebowa and Gazankulu). The Applicants fall under Gazankulu.

[46] It was submitted that pursuant to that appointment, the 1st Applicant lodged a claim with the Ralushai Commission for, similarly, the restoration of his Chieftainship in respect of the Makuleke Community. The Ralushai Commission produced a final report, to which access was only obtained by a Court Order in the Pretoria High Court and which order was subsequently confirmed on appeal by the SCA during September 2004.

[47] In the Ralushai report, the Ralushai Commission refers to the evidence presented by both Mugakula and Mhinga, as well as the research conducted by the Commission itself, which, according to the Commission, revealed the following:

(a) that prior to 1945, Makuleke, Mhinga and Shikundu were allocated separate areas by the government;

(b) that after 1945, during the regime of Chief Adolph Mhinga, Makuleke was effectively made Mhinga's headman, and this was the time when Makuleke lost his status as Chief;

(c) that Van Warmelo's work is unreliable, as it partly supports Mhinga's version and partly the version of Makuleke;

(d) that the original Makuleke area (in the Pafuri triangle, between the Limpopo river and Levuvhu river, has been restored to the Makuleke Community; and

(e) that Makuleke (Mugakule) is regarded as Chief by his own people and some of the neighbouring chiefs.

[48] Based on this information, the Ralushai Commission recommended that the 1st Applicant's chieftainship be restored. The Ralushai report was placed before the 2nd Respondent and submissions in respect thereof was made before

it. However, nowhere in its analysis of the evidence does the 2nd Respondent deal with the findings and recommendation of the Ralushai Commission. The 2nd Respondent simply ignored the Ralushai report and thereby failed to take into account relevant information placed before it.

[49] The Applicants submitted further that it is significant to note that in the Ralushai report, the Ralushai Commission refers to records produced by Mugakula showing that during 1905 and 1906 a Commission of Enquiry reported that Makuleke was an area which existed independently of the Mhinga area and that Chief Mhinga and Chief Makuleke were equals. This information was also placed before the 2nd Respondent, but once again, the 2nd Respondent ignored this relevant information.

[50] On the issue of land and forceful removal, the Applicants submitted that the 2nd Respondent simply states that Mugakula's predecessors were rightfully placed under Mhinga traditional authority as Headman, as Hosi Mhinga's agnates, and that even the forceful removal by the former regimes did not affect their status. The Applicants submitted that this is an extraordinary statement, without any showing on how the 2nd Respondent arrived at this conclusion and on what information it is based.

HISTORICAL EVIDENCE ON LAND:

[51] The Applicants submitted that the 2nd Respondent made a finding that the 1st Applicant's predecessors were rightfully placed under Mhinga traditional authority as headman and that even the forceful removal by the former regimes did not affect their status. The forceful removal was perpetrated by the apartheid government regime in 1969. This forceful removal was not made by "previous regimes", as the 2nd Respondent seem to believe.

[52] The Applicants further submitted that the independence of the Makuleke Traditional Community requires a consideration of the historical evidence, which

the 2nd Respondent simply ignored in favour of what is said was hard evidence presented by Acting Hosi Shilungwa (Mhinga) and the Makuleke Royal Family thorough their elaborate genealogy. The 2nd Respondent therefore preferred reliance on a seriously disputed and unsubstantiated genealogy over real and historical evidence. The so-called "hard evidence" of Acting Hosi Shilungwa was not even specified in the 2nd Respondent's report and therefore it is unclear which evidence of Acting Hosi Shilungwa (Mhinga) is being referred to.

[53] According to the Applicants' the Makuleke people traced their roots back to Mozambique. They came to South Africa way back in the 18th century, at around 1820, when they arrived and settled in an area called Pafuri, between the Limpopo and Levuvhu rivers, at the confluence of South Africa, Zimbabwe and Mozambique – the most North-Easterly corner of South Africa. They lived there as an independent traditional community under the leadership of Chief Makuleke.

[54] IT was further submitted that their area of location was distinctly referred to in the book: "*A cameo from the past – the pre-history and the early history of the Kruger National Park (KNP)*" by Dr. U De V Pienaar *et all* 2012. A map of 1903 by a Swiss Missionary, Henri Berthoud, also shows the Makuleke area.

[55] The Makuleke area is also recognised in official government documents, such as –

(i) a July 1906 report, by the Commissioner of Native Affairs, recommending a separate location of Makuleke chosen by them some years ago, being the land at Pafuri (the extreme North part of Transvaal), about 1000 morgen in extent.

(ii) the February 1907 recommendation by the Commissioner of Native Affairs, that the Makuleke area, a location of approximately 1000 morgen

in extent, be set apart for the tribe under Chief Makuleke (incorrectly spelled Makwaleka).

(iii) the letter of March 1907, from the office of the Governor, informing the Commissioner of Native Affairs that the Governor has approved a proposal to proclaim 1000 morgen of land for the tribe under Chief Makuleke;

(iv) the proclamation of the Makuleke location surveyed as SG No A1116/12.

(v) the schedule to the Native Land Act, 27 of 1913, recognizing and reflecting the Makuleke area as a distinct and standalone location under Chief Makuleke. The long title of the Act reads: "*To make further provision as to the purchase and leasing of land by Natives and other Persons in the several parts of the Union and for other purposes in connection with the ownership and occupation of Land by Natives and other Persons."* This Act made it a criminal offence for any person, other than a native, to, *inter alia*, purchase or acquire land in a scheduled native area, without the prior approval of the Governor-General. Makuleke was one of the scheduled areas.

[56] The Applicants submitted that it is significant that, in regards to the history of the Makuleke community, the deponent to the answering affidavit of the 1st and 2nd Respondents, i.e. the Director of Traditional Affairs, concedes ignorance. He states that he has no knowledge of the Applicants' history and is therefore unable to dispute the Applicants' evidence. The Applicants further submitted that the Mhinga Respondents (3rd and 4th Respondents) simply concede the schedules and the evidence contained therein. It was submitted that the 2nd Respondent could therefore not have disregarded such undisputed and established evidence in favour of unsubstantiated and disputed genealogy.

[57] The Applicants submitted that all of the above information has been placed before the 2nd Respondent, but the 2nd Respondent completely failed to deal with the information in its analysis of the evidence. Therefore, the statement that the Makulekes were rightfully placed under the Mhinga Traditional Authority, without any reasons to substantiate this statement, is astounding and grossly unreasonable and arbitrary. It was further submitted that the statement is in fact offensive and vitiates against the validity of the 2nd Respondent's report. In addition, it was submitted that, the 2nd Respondent's report is not rationally connected to the information that was placed before it and thus the 1st Respondent's decision falls to be set aside for these reasons.

EROSION OF INDEPENDENCE AND FORCEFUL REMOVAL:

[58] The Applicants submitted that the impact on the Makuleke's status as an independent traditional community and the beginning of the erosion of that independence as a traditional can be traced back to 1936, when by Government Notice 1818 of 4 December 1936, the then government amended the area of Chief Mhinga to include the Makuleke location.

[59] In November 1946, Adolf Mhinga was appointed as Chief of the Amashangane tribe, resident both in Mhinga and Makuleke locations, in the Sibasa area of the Soutpansberg District. That appointment was later approved by the Minister in terms of Section 12 and 20 of the Native Administration Act, 38 of 1927. The appointment subjugated the Makuleke Community to the Mhinga authority. Adolf Mhinga was later elected to be the Deputy Chair of the Vhembe territory and later elected the Chairperson of the Machangaan Territorial Authority. Thereafter, Adolf Mhinga was appointed a Minister in the now defunct Gazankulu Government. It is submitted by the Applicants that Adolf Mhinga's close connections with the government at the time helped to entrench his dominance over the Makuleke people.

[60] Then, in 1969, the Makulekes were forcefully removed at gunpoint from their land at Pafuri and moved to the present location at Ntlhaveni, in Block H, I and J, near the Mhinga area. The dispossession of land was subsequently formalized in 1975 when the apartheid government issued two Government Notices, 129 and 130, in June 1975, under the Development Trust and Land Act of 1936, incorporating the Pafuri triangle into the Kruger National Park, as a Schedule 1 park in terms of the National Parks Act 57 of 1976.

[61] The Applicants further submitted that an interview by the Tomlinson Commission recorded in the book: "*A forgotten corner of the Transvaal: Reconstructing the history of a relocated community through oral testimony and song",* gives some significant insight into the forceful removal:

> "*Mhinga: if the government removed the boundaries of the park near my place and brought them (the Makulekes) down to the Makuleke location (sic) – if the government brought these people to me it will be alright.*
>
> *Mr. Young: You mean if the government brought these people from the Mkauleke's location to other land near you…then the government could take the Makuleke for the park?*
>
> *Mhinga: Yes, it would be alright if the government would do that. It would be alright if I were compensated by giving me other land outside."*

[62] The removal of the Makuleke people from their own land appeared to be such an unfair situation, that the secretary of the National Parks Board, Van Graan, pleaded with the Board members to be careful about this removal. He said, "*Is it wise to take this step in view of the reputation of the alleged suppression of nature race? It is obvious that Pafuri is better agriculturally than a dry piece of grazing land that we offer in exchange – frankly I foresee in this gain*

of today. If we acquire the Pafuri, the future germ of destruction of the whole park."

[63] The Makuleke people were eventually removed forcefully at gun point and were given matches to burn their own huts in 1969 and were resettled.

[64] With the advent of constitutional democracy, the Applicants instituted a claim for restoration of their land in the Pafuri triangle. The claim was successful, and pursuant thereto, a settlement agreement was reached between the Applicants and the State, represented by *inter alia,* the South African National Parks and the Minister of Land Affairs, to restore the land to the Applicants. The settlement agreement was concluded in 1999 and transfer of the land to the Applicants were effected on 16 November 1999 by registration in the Deeds Office. (A court order by the Land Claims Court under the hand of Dodson J under case number 90/98, ordering restoration of the Pafuri area tot the Applicants, to be held in trust by the Makuleke Communal Property Association, is contained in the supplementary record.)

[65] It was submitted by the Applicants that Mhinga and his traditional council had opposed the Applicants' claim for restoration of the land on the ground, essentially, that the land belonged to the Mhinga people. However, their objection and claim were dismissed as baseless.

[66] The Applicants submitted that all this information was also placed before the 2nd Respondent, but it, once again, failed to take it into account and deal with it in its analysis of the evidence. Therefore, even on this point, it was submitted, the 2nd Respondent disregarded relevant information and made conclusive statements and findings that are not supported by any evidence or information before it. The 2nd Respondent's findings and recommendations bear no rational connection to the information placed before the 2nd Respondent, and are unreasonable and arbitrary and accordingly fall to be set aside.

[67] It was submitted that the 1st Respondent's decision to accept the 2nd Respondent's recommendation and report, and to decline the Applicants' claim, similarly, fall to be reviewed and set aside for the same reasons.

[68] The Applicants argued that the court is empowered to give an order that is just and equitable, including, in exceptional cases, an order substituting the Court's decision for that of the administrator.

THE 1st, 2nd AND 5th RESPONDENT'S SUBMISSIONS ("STATE RESPONDENTS"):

[69] The State Respondents submitted that the 1st Applicant, in seeking the restoration of the Makuleke Senior Traditional Leadership allegedly lost around 1936 and disputing the headmanship, submitted a claim referred to in Section 25(2)(ii), alternatively (iii) of the Framework Act, 41 of 2003, to the 2nd Respondent.

[70] It was further submitted that the 1st Applicant, without submitting the written application referred to in Section 3(1) and (2) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005, read with Section 2 of the Framework Act, 41 of 2003 to the 1st Respondent, the 1st Applicant submitted to the 2nd Respondent the claim referred to in Section 25(2)(iv) of the Framework Act for the 2nd Applicant to be recognised as a traditional community.

[71] The Respondents submitted that the 2nd Respondent investigated issues through analysis of written submissions and literatures, public hearings and interviews, pertaining to the following:-

71.1 To establish if Senior Traditional Leadership ever existed in the history of the Mugakulas, if it did, when and how it was lost;

71.2 To determine the legitimate lineage for chieftainship between the Mugakulas and Mhingas;

71.3 To determine if the claimant qualifies as an heir in terms of the Mugakula's customary law of succession should the request be granted;

71.4 To investigate the circumstances that led to the demotion of the Mugakulas from headmanship status to ordinary residents of Makuleke Village;

71.5 To establish the relationship between Mugakula Phahlela Jutas and Hosi Mhinga Shilungwa Cedric.

[72] It was submitted that in terms of the 2nd Respondent's report, that the 1st Applicant alleged that his senior traditional leadership status has been diverted to the junior status after the death of the last undisputed *hosi* Maxakadzi, the father to Dlamane and Makahlule. It was further submitted that the Applicants alleged that Dlamane (Mhingas) allegedly usurped from Makahlule (Magukulas) senior traditional leadership status, with Makahlule demoted to the headmanship status. The submission was that Dlamane was from the junior house while Makahule was from the senior house.

[73] The State Respondents further submitted that the report reflects that the 3rd Respondent's version is that the 1st Applicant does not belong to the Makuleke Royal Family. The 1st Applicant is allegedly a descendent of the most junior house, is not a descendent of Phele, the father to Makuleke, who is the founder of the Makulekes. The Mugakulas allegedly usurped the traditional leadership position from the Makulekes.

[74] The State Respondents further submitted that while it appears to be common cause that *hosi* Maxakadzi married two sisters as his wives, there is a dispute as to which of them was married as *insati lonkulu (*senior wife) to bear

the senior traditional leadership. The eldest sister was Dlamane's mother while the younger sister was Makahlule's mother.

[75] The State Respondents submitted further that the 2nd Respondent found that:

(a) the 1st Applicant's version that *hosi* Maxakadzi married Nwabungu's youngest daughter as the senior wife before marrying the elder sister as "not convincing" and the 1st Applicant was deliberately twisting the events.

(b) the evidence provided by the 3rd Respondent and the Makuleke Royal Family proves that the 1st Applicant does not qualify as the heir apparent of the Makuleke headmanship;

(c) the Makulekes existed as headmanship under the Mhinga Senior Traditional Authority and that the 1st Applicant belongs to the junior house of Makahlule, the son of Maxakadzi, and

(d) the 1st Applicant is a regcognised headman at Makuleke Village, Block H, I and J under the jurisdiction of Hosi Mhinga Shilungwa Cedrick.

[76] The State Respondents submitted that the 2nd Respondent recommended to the 1st Respondent that the 1st Applicant's claim for the restoration of the Makuleke Senior Traditional Leadership be declined.

[77] The State Respondents submitted that the dispute is about the recognition of the 2nd Applicant as a traditional community and the 1st Applicant as its senior traditional leader, both as defined by the Limpopo Traditional Leadership and Institutions Act.

[78] According to the State Respondents, there is a serious dispute of facts as to the alleged prior existence of the 2nd Applicant as separate traditional community. It is not the 2nd Applicant's case that it existed as a traditional community under any law and is deemed to be a traditional community established as envisaged in Section 33(4) of the Limpopo Traditional Leadership and Institutions Act, read with Section 28(3) of the Framework Act. It is submitted that before the 1st Applicant can be a Senior Traditional Leader, there must be a traditional community with its area of residence as envisaged in Section 3(1)(g) of the Limpopo Traditional Leadership and Institutions Act.

[79] The State Respondents submitted that the main issue is whether the Makulekes existed in their own area as a separate and independent community from the Mhingas. The Applicants' version is that having been forcefully removed from the old Makuleke location between the Limpopo and Levuvu rivers (an area coinciding with what is now the Phafuri Triangle in the Kruger National Park) in 1969, they currently occupy the villages of Makahlule (Block H), Makuleke (Block I) and Mabiligwe (Block J) in Ntlhaveni 2 MU. The 3rd and 4th Respondents' version is that the said area was ruled by and fell under Hosi Mhinga.

[80] The State Respondents further submitted that the 3rd and 4th Respondents' case is that at the time of the forceful removal and relocation of the Applicants, these areas fell under the 3rd Respondent's jurisdiction and that the 2nd Applicant is a sub-division and not independent community separate from the Mhingas. According to the State Respondents this does not appear to be disputed and if this is accepted as a matter of fact, the Applicants cannot have an area of residence within the jurisdiction of the 3rd Respondent and retain the status of a traditional community separate from the 4th Respondent and with a Senior Traditional Leader. The 2nd Respondent accepted Makuleke Villages, Block H, I and J under the jurisdiction of the 3rd Respondent as the place of residence of the members of the Second Applicant.

[81] The State Respondents submitted that as a matter of law, the recognition of tribal communities is done in terms of the Framework Act read with the Limpopo Traditional Leadership and Institutions Act 6 of 2005. There must be a prescribed written application submitted to the 1st Respondent. One of the particulars to be included in the application is the area within which the community generally resides. There is no application before this court to enable it to declare the recognition and direct the 1st Respondent to register the Makuleke Community.

[82] It was submitted by the State Respondents that it is not the Applicants' case that Makuleke is a tribe that was established or recognised under legislation in force before their commencement as required by the Limpopo Traditional Leadership and Institutions Act and the Framework Act. It is also not the Applicants' case that Makuleke is a traditional community referred to in the definition parts of the Limpopo Traditional Leadership and Institutions Act and/or the Framework Act. It is submitted that if the declaration is done, the 2nd Applicant will be declared a community within the area of the jurisdiction of the 3rd Respondent.

[83] The State Respondents submitted that the Applicants had choices between approaching the 2nd Respondent in terms of the Framework Act or the 1st Respondent in terms of the Limpopo Traditional Leadership and Institutions Act for their recognition as a traditional community and as traditional leader. The Applicants elected to approach the 2nd Respondent with the full knowledge that it had limited authority of making the recommendation to the very same 1st Respondent. The 2nd Respondent declined the applications and made the same recommendation to the 1st Respondent, which accepted the recommendation.

[84] It was submitted further that the 1st Respondent can only deal with the Applicants' application in terms of the Limpopo Traditional Leadership and

Institutions Act, using the criteria set out in the said Act. Among the criteria are that there must be written application proving the existence of the community as envisaged in Section 33(4) of the Limpopo Traditional Leadership and Institutions Act read with section 28(3) of the Framework Act, before there can be talk of the traditional leader.

[85] The State Respondents submitted that the Applicants elected not to approach the 1st Respondent because they would have to prove that the 2nd Applicant existed as a traditional community established as envisaged in Section 33(4) of the Limpopo Traditional Leadership and Institutions Act read with Section 28(3) of the Framework Act, within its area of residence.

[86] The State Respondents further submitted that the process of appointing and recognizing a senior traditional leader is legally regulated. The qualifying person is identified and appointed by the royal family. The 1st Respondent is advised about the appointment and if satisfied that there has been proper compliance, he makes the recognition and advises the house of traditional leaders.

[87] According to the State Respondents there are members of the Makuleke community who claim to be from the Royal Family who are against the 1st Applicant's claim for Senior Traditional Leadership status and declaring him to be their Senior Traditional Leader could be to impose him on them.

[88] The State Respondents further submitted that the 1st Applicant does not even qualify to be a Senior Traditional Leader as defined by the Limpopo Traditional Leadership and Institutions Act and the Framework Act. It is not his case that he exercises authority over a number of headman or headwoman. It is common cause that he was appointed as headman in 1976. He is not applying that this status be reversed. It was submitted that the 1st Applicant's papers reveal that there are other government appointed headmen in the other sections

of the area. The 2nd Respondent therefore found that he is recognised as headman.

[89] The State Respondents submitted further that by declaring the recognition of the Applicants as traditional community and senior traditional leader, the court will not only be crossing the boundary line of legislation, it will also be usurping the authority of the Respondents. It will unilaterally be nullifying the recognition of the 1st Applicant as the headman recognised by the previous Gazankulu government.

[90] It was further submitted that the Applicants rely on oral submissions, the Ralushai Commission's report and other documents such as letter of support from other traditional leaders. The 3rd and 4th Respondents submit that some of the documents constitute inadmissible opinion evidence. It was submitted that, unlike this court, the 2nd Respondent was in a better position to listen to the authenticity of the two versions being tested during oral submissions.

[91] There is a dispute as to whether the Ralushai Commission's recommendations are relevant. The Applicants' complaint is that by omitting to take the recommendations into account, which is in the Applicants' favour, the 2nd Respondent failed to take into account what they regard as relevant information. The submission is that because contradictory evidence was given at the Ralushai Commission and at the hearing before the 2nd Respondent, this is relevant to assess the correctness and veracity of the Makuleke's claim. It was submitted that the 3rd and 4th Respondents' version was that the Ralushai Commission was established as a non-statutory commission of inquiry by former Premier Ramatlhodi in May 1996 in terms of Section 147(1)(d) of the Interim Constitution Act 200 of 1993 to inquire into traditional matters. It is therefore not within the mandate of the 2nd Respondent to consider the reports of commissions such as the Ralushai Commission.

[92] The 2nd Respondent submitted that it was not a party to those proceedings to adopt and to be bound by the results. There is no evidence that the report was submitted to the 1st Respondent and for whatever reasons, the Ralushai Commission report was not acted upon by the 1st Respondent and it is not legally binding on the 2nd Respondent. The Applicants cannot expect the 2nd Respondent to accept this report and cannot expect this court to direct the 2nd Respondent to do so, as the court is not in a position, without hearing oral evidence, to confirm or reject Ralushai's finding.

[93] The State Respondents submitted that the Applicants grounds of review are stated as being that the 2nd Respondent's decision is biased, has been taken for an ulterior purpose or motive, is not authorized by empowering legislation, is not rationally connected to the purpose for which it was taken and is unreasonable. It was submitted by the State Respondents that apart from the fact that these grounds are not substantiated, they do not comply with the requirement that a review applicant is required to identify the ground of review relied on under Section 6 of PAJA.

[94] It was submitted that Section 6 of PAJA does not mention irregularity as a ground of review. The complaint relating to the alleged failure to take relevant information into account relates to rationality review. The State Respondents submitted that the fact that the 2nd Respondent did not agree and accept the Applicants' version does not mean that the version was not considered.

[95] The Respondents submitted that the 2nd Respondent is required to expressly mention all information taken into account. The 2nd Respondent submitted that both versions of the parties about the genealogy were taken into account by the 2nd Respondent and the fact that the 2nd Respondent found the Applicants' version to be unconvincing does not translate into not taking that into account.

[96] The State Respondents submitted that Section 8 of PAJA gives a reviewing court the discretion to grant any remedy that is just and equitable, including those listed under subsections 1 and 2. It was submitted that the Applicants were wrongly praying for the setting aside of the decisions as provided by Section 8(1)(c) of PAJA and the declaratory order as envisaged in Section 8(1)(d) of PAJA. Given the facts and the circumstances of this matter, it was submitted that this court has not authority, having set aside the 1st and 2nd Respondents' decision, to declare the 1st Applicant the Senior Traditional Leader and declare the Second Applicant a traditional community.

[97] It was further submitted that it is not part of the Applicants' prayers for the remittal of the matter to be reconsidered by the relevant administrative bodies. Without proving them, it was submitted, the Applicants are praying for declaratory and substituted orders, which are the remedies granted only in exceptional circumstances and provided they are just and equitable.

[98] The State Respondents submitted that it did not make reviewable decisions. It was submitted that based on the provided facts and applying the Framework Act to them, the 2nd Respondent found that the Makulekes existed as headmanship under Mhinga Senior Traditional Authority and that although the 1st Applicant belongs to the junior house of Makahlule, he is recognised as headman at Makuleke Village, Block H, I and J under the jurisdiction of Hosi Mhinga.

[99] Based on its findings, the 2nd Respondent recommended to the 1st Respondent that the 1st Applicant's application for the restoration of the Makuleke Senior Traditional Leadership be declined. The 1st Respondent "approved" the recommendation and by way of the letter dated the 17th of March 2017 addressed to the 1st Applicant, the 1st Respondent advised him that "the claim is declined."

[100] The State Respondents submitted that although the application related to both senior traditional leadership and traditional community, and although the 2nd Respondent's findings relate to both issues, the recommendation made is only in respect of the Senior Traditional Leadership. It was submitted further that it is assumed that it is accepted by all the parties that the 1st Respondent's rejection is in respect of both the Senior Traditional Leadership as well as the traditional community.

[101] The State Respondents submitted that the Respondents' decision must be understood against the following:-

(a) It is common cause that in 1936, the jurisdiction of the old Makuleke location was placed under the jurisdiction of Hos Mhinga;

(b) The Applicants' version is that when the relocation following the forced removal of the Makulekes in 1969 from the old to the new Makuleke location occurred, Hosi Mhinga had the jurisdiction of the new Makuleke location, including Blocks H, I and J of Ntlhaveni 2 MU. The Makulekes were apparently received and accepted under the headmanship status, as confirmed by the former Gazankulu Government. Under the Community Property Association, the Applicants lodged a successful land claim in respect of the old Makuleke location and,

(c) Even if it is accepted that the Makulekes had independence and Senior Traditional Leadership status before and when they settled at the old Makuleke area from Mozambique which they lost in 1936, they could not have regained it in 1969 when they moved into the new Makuleke Village which was under the jurisdiction of Hosi Mhinga.

[102] The State Respondents submitted that given the above mentioned facts, the Respondents' decisions are not reviewable decisions. They are not

decisions which are disconnected to the provided information and are in fact rationally connected to the presented evidence. The State further submitted that the remedy sought by the Applicants' is therefore not just and equitable and they have failed to make out a case for the review and setting aside of the 1st and 2nd Respondents' administrative decisions.

THE 3rd AND 4th RESPONDENTS' SUBMISSIONS:

[103] The 3rd Respondent submitted that as Acting Senior Traditional Leader of the Mhinga Traditional Community, he opposes the relief sought by the Applicants on the same basis that he opposed the 1st Applicant's claim when it served before the 2nd Respondent in October 2015, namely:-

(a) The Makuleke Community does not and never existed as a traditional community separate from the Mhinga Tribe. It is a subset of the Mhinga Tribe, ruled by a headman under the authority of the Mhinga Chieftaincy.

(b) The account given by the 1st Applicant of his ancestry is false. The 1st Applicant is, in fact, not even entitled to the hereditary status of headman of the Makuleke Community.

[104] The 3rd and 4th Respondents submitted that the Traditional Leadership and Governance Framework Act 41 of 2003 was enacted in September 2004. The preamble states its legislative rationale as being *inter alia* to provide a statutory framework for leadership positions within the institution of traditional leadership, and to provide for dispute resolution and the establishment of the Commission of Traditional Leadership Disputes and Claims.

[105] The Applicants lodged a claim with the Commission in December 2005, but it does not appear that it conducted any investigations or took any action in this connection. In 2009, the Traditional Leadership and Governance Framework

Act, 41 of 2003 was amended by Act 23 of 2009. The amendments *inter alia* provided for the establishment of provincial committees of the Commission in Section 26A(1) and introduced a provision directing the Commission to undertake a review of all claims and disputes that had not been disposed of as at the commencement of Act 23 of 2009 and to refer where appropriate outstanding disputes to the relevant provincial committee in terms of Section 28(10) thereof.

[106] The categories of disputes that may be investigated and determined by the Commission are set out in Section 25(2)(a) of the Traditional Leadership and Governance Framework Act. It is competent for the Commission to delegate any of its powers to a provincial committee and the provincial committee may make a final recommendation on any claim or dispute so delegated to it.

[107] In terms of Section 26(3) read with Section 26A(6) of the Traditional Leadership and Governance Framework Act, a recommendation formulated by the Committee must be referred to the provincial government for a final decision.

[108] The 3rd and 4th Respondents submitted that the 1st Applicant relodged the Claim with the Limpopo Committee on Traditional Leadership Disputes and Claims (the 2nd Respondent) in September 2012. This was prompted, presumably, by a delegation of functions to the Committee.

[109] The 2nd Respondent's written report did not categorize the Mugakula claim by reference to the provisions of Section 25(2)(a), however it is apparent that the dispute is one contemplated in Section 25(2)(a) of the Traditional Leadership and Governance Framework Act because it can be characterized as:

> (i) a case where there is doubt as to whether a headmanship was established in accordance with customary law and customs as provided for in Section 25(2)(a)(ii);

(ii) a claim by a community to be recognised as a traditional community as provided for in Section 25(2)(a)(iv); and

(iii) the legitimacy of the establishment or disestablishment of 'tribes' or headmanships as provided for in Section 25(2)(a)(v).

[110] The 3rd and 4th Respondents submitted that a traditional leadership claim must be brought and investigated within the framework of traditional leadership roles and institutions provided for in the Act. The Traditional Leadership and Governance Framework Act in Section 8, recognizes four levels of traditional leadership, namely, kingships or queenships, principal traditional leadership, senior traditional leadership and headmanship.

[111] According to the 3rd and 4th Respondents this dispute implicates the positions of Senior Traditional Leadership and Headmanship. It was submitted that in terms of the definition provided in Section 1 of the Traditional Leadership and Governance Framework Act, a senior traditional leader is a leader of a specific traditional community who exercises authority over a number of headman or headwoman in accordance with customary law, or within whose area of jurisdiction a number of headmen or headwoman exercise authority. A community constitutes a "traditional community" within the meaning of the Act if (a) it is subject to a system of traditional leadership in terms of the community's customs; and (b) it observes a system of customary law.

[112] It was submitted further that a claim concerning a traditional leadership position must be determined according to the customary law and traditions of the particular traditional community as they applied at the time of the events giving rise to the dispute. In evaluating the dispute relating to a principal traditional leadership, senior traditional leadership or headmanship, the Commission is to be guided by the customary law and customs and criteria relevant to the establishment of the particular title (Section 25(3)(b)(ii)).

[113] The 3rd and 4th Respondents submitted that the fist applicant sought a recommendation from the 2nd Respondent to the effect that the Makuleke Community should be recognised as a traditional community, the Makuleke Community should be given its own traditional authority with exclusive jurisdiction over blocks H, I and J, Nthlaveni, independently and separately of the Mhinga Traditional Authority, the 1st Applicant should be recognised as the Traditional Leader of the Makulekes with the status of chief, and the Mhinga Traditional Authority and Chief should be divested of all authority in respect of the Makuleke Community and in respect of blocks H, I and J, Nthlaveni.

[114] The 3rd and 4th Respondents submitted that in regards to the historical evidence of the Makuleke's autonomous status, the 1st Applicant relies upon two items of correspondence, namely, a letter addressed to the Governor of the Transvaal dated 27 November 1907 by the Transvaal Commissioner for Native Affairs recommending that a location of 1000 morgen be set aside for "the tribe under Chief Makwaleka in the Zoutpansberg District", and a response dated 1 March 1907 in which the Transvaal Commissioner for Native Affairs approved the allocation of the location.

[115] The 3rd Respondent submitted that these documents simply reflect the impressions formed by particular functionaries within the colonial administration at the relevant time and pertain to a process that was concerned only with the allocation of land to particular groupings. It was submitted that by the same token, there is documentation that would refute the impression that the Applicants seek to create. In this regard there is a notice published by the Governor-General, conferring on Chief Mashao Ezekiel NKabo Mhinga civil and criminal jurisdiction within the Mhinga and Makuleke Locations in terms of Section 12 and 20 of the Native Administration Act 38 of 1927 (this was with effect from December 1936), a notice published by the Governor-General on 3 April 1946, appointing Mphahlela Rueben (Magakula's grandfather) as Induna

(i.e. headman) of Makuleke's location following the death of his father, as well as a notice published by the Governor-General on 24 February 1950, appointing Adolf Sonduza Mhinga as Chief of the Amashangane tribe resident in Mhinga's and Makuleke's locations with effect from the 1st of November 1949.

[116] It was further submitted by the 3rd and 4th Respondents that the Applicants' reliance on the findings of the Ralushai Commission in connection with the Makuleke Community is misplaced. The Ralushai Commission was an ad hoc body established in 1996 by the then Premier of Limpopo, acting in terms of Section 147(1)(d) of the Interim Constitution, Act 200 of 1993. The report that it produced served to inform policy on the question of traditional leadership, which culminated ultimately in the drafting and enactment of the Traditional Leadership and Governance Framework Act.

[117] It was submitted that there is no feature of the Ralushai Commission that distinguishes it as a body more credible or qualified to determine the 1st Applicant's claim than the 2nd Respondent, a statutory institution set up specifically for this purpose.

[118] The 3rd Respondent submitted that the scope of the inquiry conducted by the Ralushai Commission was co-extensive with that undertaken by the 2nd Respondent. The terms of reference of the Ralushai Commission, published in Proclamation NO 132, published in the Provincial Gazette Extraordinary, 2 February 1996, state the commission's terms of reference as being:-

> (a) to investigate the alleged claims by certain traditional leaders that they were irregularly deposed by the previous government or that they were not duly recognised by the previous government when they were entitled to be so recognised;

(b) to inquire into the alleged disputes and complaints by certain traditional leaders that some traditional leaders have been irregularly appointed;

(c) to investigate malpractices or irregularities, including any non-compliance with any statutory provision regarding the appointment or recognition of traditional leaders, which may have occurred;

(d) to make recommendations regarding steps to be taken to resolve such alleged disputes or to deal with such matters as would permanently address the said problems;

(e) to report from time to time and as this can be conveniently done, using all diligence, the results of the enquiry.

[119] The 3rd Respondent submitted that he participated as a witness in the investigations of the Ralushai Commission relating to the Makuleke community. He is not aware of any significant evidence that was before the Ralushai Commission, which was not also considered by the 2nd Respondent. The 3rd Respondent submitted further that in the circumstances, he believes that the 2nd Respondent acted reasonably by not elevating the findings of the Ralushai Commission to a prominent consideration in its investigation.

[120] In respect of the genealogy of the Mhinga's, the 3rd Respondent submitted that according to the customary law of the Mhingas, the eldest son of the incumbent chief is the direct heir to the chieftaincy. Thus, the hereditary title of chief has passed through the generations from Dhlamani to the 3rd Respondent. The 1st Applicant descends form Makahlule, who was the younger son of Maxakadzi and brother to Dhlamani.

[121] It was submitted by the 3rd and 4th Respondents that the headmanship of the Makuleke Community originated from Makahlule. As with the Mhinga chieftaincy, the rule of succession relating to headman is that the eldest son of the incumbent headman is the heir to the particular headmanship. Following the death of Makahlule, the headmanship of the Makuleke Community passed to Makahlule's eldest son Phele. It was after the death of Phele, that the line of succession was distorted.

[122] This happened because, at the time of Phele's death, the legitimate heir, Makuleke, was too young to assume the headmanship and it was necessary for Menele (son of Mlati) to serve as a regent. However, Menele's regency was not terminated when Makuleke came of age. Instead, Menele assumed the position of headman permanently and on his death, the headmanship passed to his eldest son, NKuzana and subsequently to Nkuzana's direct descendants, the 1st Applicant being Nkuzana's great grandson.

[123] It was submitted by the 3rd Respondent that if his account of his family's ancestry is accepted as correct, it follows that the 1st Applicant has no legitimate title to the office of headman of the Makuleke Community and there cannot possibly be any basis, statute or customary law for the Committee to elevate his position to that of Chief of the Makuleke Community.

[124] The 3rd and 4th Respondents further submitted that from approximately 1820 until their forced removal between 1912 and 1936, the Mhinga Chiefs ruled over an area that coincides with what is now the Pafuri Triangle in the Northern Section of the Kruger National Park. The Mhinga area encompassed the area historically occupied by the Makuleke Community.

[125] It was submitted by the 3rd Respondent that the 2nd Respondent in essence declined the 1st Applicant's claim on the basis of its finding that he had no legitimate claim to the leadership of the Makuleke Community. The 3rd

Respondent further submitted that it appears from the 2nd Respondent's report that the evidence of the 3rd Respondent and that of the Makuleke Royal Family weighed heavily with the Committee and was ultimately determinative of its findings. The 2nd Respondent considered this finding to be dispositive of all of the issues before it, including whether the Makuleke Community should be declared an independent community.

[126] The 3rd and 4th Respondents submitted that the 2nd Respondent's approach was a sensible approach, and indeed the only one that the 2nd Respondent could have adopted and in the circumstances it is disputed that the impugned decisions are irregular or unreasonable.

THE LAW AND APPLICATION OF THE LAW:

[127] The **Traditional Leadership and Governance Framework Act, 41 of 2003 as amended by the Traditional Leadership and Governance Framework Amendment Act 23 of 2009**, has been repealed by the **Traditional and Koi-San Leadership Act, 3 of 2019 on the 28th of November 2019**. However at the time of the institution of the claim by the Applicants and at the time of the investigation and report of the 2nd Respondent, as well as the lodgment of this review application, the applicable statute was still the **Traditional Leadership and Governance Framework Amendment Act, 23 of 2009**.

[128] **Section 25 of the Traditional Leadership and Governance Framework Amendment Act, 23 of 2009** stipulates as follows:-

> "*25 Functions of Commission*
>
> *(1) The Commission operates nationally in plenary and provincially in committees and has authority to investigate and make recommendations*

on any traditional leadership dispute and claim contemplated in subsection (2).

(2)(a) The Commission has authority to investigate and make recommendations on-

(i) a case where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;

(ii) a case where there is doubt as to whether a principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;

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

(iv) claims by communities to be recognised as kingships, queenships, principal traditional communities, traditional communities, or headmanships;

(v) the legitimacy of the establishment or disestablishment of 'tribes' or headmanships;

(vi) disputes resulting from the determination of traditional authority boundaries as a result of merging or division of 'tribes';

(viii) all traditional leadership claims and disputes dating from 1 September 1927 to the coming into operation of provincial legislation dealing with traditional leadership and governance matters; and

(ix) gender-related disputes relating to traditional leadership positions arising after 27 April 1994.
(b) A dispute or claim may be lodged by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information.

(c) The Commission may decide not to consider a dispute or claim on the ground that the person who lodged the dispute or claim has not provided the Commission with relevant or sufficient information or the provisions of section 21 have not been complied with.

(3)(a) When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim.

(b) The Commission must-

(i) in respect of a kingship or queenship, be guided by the criteria set out in section[s] 2A (1) and 9 (1); and

(ii) in respect of a principal traditional leadership, senior traditional leadership or headmanship, be guided by the customary law and customs and criteria relevant to the establishment of a principal traditional leadership, senior traditional leadership or headmanship, as the case may be.

(c) Where the Commission investigates disputes resulting from the determination of traditional authority boundaries and the merging or division of 'tribes', the Commission must, before making a recommendation in terms of section 26, consult with the Municipal

Demarcation Board established by section 2 of the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998) where the traditional council boundaries straddle municipal and or provincial boundaries.

(4) Subject to subsection (5) the Commission-

(a) may only investigate and make recommendations on those disputes and claims that were before the Commission on the date of coming into operation of this chapter; and

(b) must complete the matters contemplated in paragraph (a) within a period of five years, which period commences on the date of appointment of the members of the Commission in terms of section 23, or any such further period as the Minister may determine.

(5) Any claim or dispute contemplated in this Chapter submitted after six months after the date of coming into operation of this chapter may not be dealt with by the Commission.

(6) The Commission-

(a) may delegate any function contemplated in this section excluding a matter related to kingships or queenships to a committee referred to in section 26A; and

(b) must coordinate and advise on the work of the committees referred to in section 26A.

(7) Sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act 8 of 1947), apply, with the necessary changes, to the Commission.

(8) The Commission may adopt rules for the conduct of the business of the Commission as well as committees referred to in section 26A. (9) Provincial legislation must provide for a mechanism to deal with disputes and claims related to traditional leadership: Provided that such a mechanism must not deal with matters to be dealt with by the Commission."

[129] **Section 26 of the Traditional Leadership and Governance Framework Amendment Act, 23 of 2009** stipulates as follows:-

"*26 Recommendations of Commission*

(1) A recommendation of the Commission is taken with the support of at least two thirds of the members of the Commission.

(2) A recommendation of the Commission must, within two weeks of the recommendation having been made, be conveyed to-

(a) the President and the Minister where the position of a king or queen is affected by such a recommendation; and

(b) the relevant provincial government and any other relevant functionary to which the recommendation of the Commission applies in accordance with applicable provincial legislation in so far as the consideration of the recommendation does not relate to the recognition or removal of a king or queen in terms of section 9, 9A or 10.

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

(4) If the President or the relevant functionary takes a decision that differs with [sic] the recommendation conveyed in terms of subsection (2), the President or the relevant functionary as the case may be must provide written reasons for such decision.

(5)(a) The Premiers must, on an annual basis and when requested by the Minister, provide the President and the Minister with a report on the implementation of their decisions on the recommendations of the Commission.

(b) A copy of the report referred to in paragraph (a) must be submitted to the relevant provincial house for noting."

[130] **Section 26A of the Traditional Leadership and Governance Framework Amendment Act, 23 of 2009** stipulates as follows:-

"*26A Committees of Commission*

(1) There is [sic] hereby established provincial committees to deal with disputes and claims relating to traditional leadership.

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

(b) The term of office of committee members must be linked to that of members of the Commission contemplated in section 23(1)(a).

(c) The committee members of the Commission must have the same knowledge as the members of the Commission as contemplated in section 23(1)(a).

(3) Each provincial committee contemplated in subsection (1) must be chaired by a member of the Commission designated by the Minister after consultation with the Premier concerned and the Commission: Provided that a member of the Commission may chair more than one committee.

(4) The provisions of sections 24, 24A, 24B and 25 (2) to (5) and (7) apply, with the necessary changes, to provincial committees.

(5) A provincial committee must perform such functions as delegated to it by the Commission in terms of section 25(6) after a review as contemplated in section 28(10).

(6) A provincial committee may make final recommendations on all matters delegated to it in terms of 25(6): Provided that where a committee is of the view that exceptional circumstances exist it may refer the matter to the Commission for advice.

(7) The provisions of section 26(2)(b) apply, with the necessary changes, to the recommendations of a committee.

(8) Each provincial committee must, on a quarterly basis or when requested by the Commission, submit a report to the Commission on all disputes and claims dealt with by such provincial committee during the period covered by the report."

[131] The 2nd Respondent's report states in paragraph 2 thereof that the 1st Applicant is regarded as the Makuleke community's senior traditional

leader. The 1st Applicant seeks the restoration of the alleged Makuleke senior traditional leadership that was lost in 1969 and further that the 1st Applicant is disputing the senior traditional leadership of Hosi Mhinga Shilungwa Cedric (3rd Respondent) of the Mhinga Traditional Leadership.

[132] The 2nd Respondent stated in paragraph 3 of its report that the issues for consideration are (a) to establish if senior traditional leadership ever existed in the history of the Mugakulas, if it did, when and how it was lost, (b) to determine the legitimate lineage for chieftaincy between the Mugagulas and Mhingas, (c) to determine if the claimant qualifies as an heir in terms of the Mugakula's customary law of succession should the request be granted, (d) to investigate the circumstances that led to the demotion of the Mugakulas from headmanship status to ordinary residents of Makuleke Village and (e) to establish the relationship between Mugakula Phahiela Jutas and Hosi Mhinga Shilungwa Cedric.

[133] It is clear from the aforementioned outline given by the 2nd Respondent that the 2nd Respondent misconstrued the 1st Applicant's claim and did its investigations from the wrong basis being a contestation for senior traditional leadership between the 1st Applicant and the 3rd Respondent over the 4th Respondent.

[134] The Applicants in their claim form submitted to the 2nd Respondent and especially with regard to the Annexures and submissions attached thereto in explanation of their claim (as the form was a standardized form and did not cater for all the needs and requirements), clearly and unequivocally stated that the Applicants submitted a claim for restoration of their recognition as an independent traditional authority with their own independent location and with its traditional leader being the 1st Applicant.

[135] The Applicants in their conclusion in their claim form dated 3 November 2005 stated as follows:-

> *"I accordingly request the following relief:-*
>
> *118.1 that he Makuleke Community be recognised as a traditional community;*
>
> *118.2 that the Makuleke Community have its own traditional authority having exclusive jurisdiction over Blocks H, I and J, Ntlhaveni, independently and separately of the Mhinga Traditional Authority;*
>
> *118.3 that I be recognised as the Traditional Leader of the Makuleke with the status of Chief;*
>
> *118.4 that the Mhinga Traditional Authority and Chief be divested of all authority in respect of the Makuleke Community and in respect of Blocks H, I and J, Ntlhaveni.*
>
> *119.1 I make these submissions in my capacity as the traditional leader of the Makuleke Community. An overwhelming majority of the Makuleke Community strongly supports this claim."*

[136] This claim form dated the 3rd of November 2005 together with the submissions and annexures attached thereto was resubmitted to the 2nd Respondent on 5 September 2012 and the 2nd Respondent acknowledged receipt thereof in a letter dated 5 September 2012.

[137] It needs to be stated that the 1st Applicant never contested the Senior Traditional Leadership position of the 3rd Respondent, nor the authority to act as Senior Traditional Leader of the 4th Respondent, however, regrettably so, this is

the basis from which the 2nd Respondent did its investigations and made its recommendation to the 1st Respondent.

[138] What the 2nd Respondent should have done was first and foremost to do an investigation in order to establish whether the Applicants' claim for restoration and recognition of the Makuleke's as a traditional community fall within the ambit of **Section 2 of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009.**

[139] **Section 2(1) of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009** stipulates as follows:-

> *"Recognition of traditional communities*
>
> *(1) A community may be recognised as a traditional community if it –*
>
> *(a) Is subject to a system of traditional leadership in terms of that community's customs; and*
>
> *(b) Observes a system of customary law."*

[140] Only after having determined whether the 2nd Applicant qualifies to be recognised as a traditional community, and if so, could the 2nd Respondent proceed onto the next step of inquiry in order to determine, recognize and establish a traditional council or authority for the Makuleke Community.

[141] In the present matter, it was only after the 2nd Respondent has found that the Makuleke's should be recognized as a traditional community and only after a traditional council or authority has been recognized and established that the 2nd Respondent could have proceeded with its inquiry as to who the Senior Traditional Leader of the Makuleke Community should be.

[142] In my view, not only did the 2nd Respondent misunderstand the ambit of what they were required to investigate, comment and make a recommendation on to the 1st Respondent, but the 2nd Respondent also in failing to understand the nature of the claim and issues for consideration considered irrelevant issues and information placed before it and totally disregarded relevant information pertaining to the issues the 2nd Respondent was actually tasked with to consider, investigate and recommend on. The 2nd Respondent's report is indeed not rationally connected to the information that was placed before it or the issues for determination.

[143] In order for the Applicants to succeed with this review application in terms of the provisions of the **Promotion of Administrative Justice Act, 3 of 2000 ("PAJA")**, the Applicants must allege and prove the grounds upon which they rely in terms of Section 6 of PAJA.

[144] **Section 6 of PAJA** stipulates as follows:-

> *"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 authorized to do so by the empowering provision;*

(ii) acted under a delegation of power which was not authorized 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 authorized 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 unauthorized 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 authorized 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;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

(3) …"

[145] The 2nd Respondent failed to discharge its function of enquiry as requested. The 2nd Respondent in making its findings on an incorrect enquiry, failed to take into account relevant information before it. In enquiring whether the Applicants should be recognized as a community with its own independent traditional authority, the 2nd Respondent should have taken into account the

report of the Ralushai Commission in which it was recommended that the Makuleke's be restored their chieftainship.

[146] The 2nd Respondent did not even consider the report of the Ralushai Commission or the submissions made by the Applicants, which is confirmed by the State Respondent's answering affidavit in that they submitted that they have no knowledge of the history of the Applicants. Had they considered the Ralushai Report and the evidence presented by the Applicants, they would have had knowledge of the history of the Applicants. The 2nd Respondent did not reject the Ralushai report either – the only conclusion that can be drawn therefore is that it was an irrational failure and indeed unreasonable by the 2nd Respondents.

[147] The 2nd Respondent failed to take into account relevant information on genealogy, the Applicants' historical evidence on land and forceful removal, as well as relevant information on the erosion of independence of the Makuleke traditional community and traditional leadership. The 2nd Respondent failed further to make a relevant recommendation on the issues it was tasked with.

[148] The State Respondents in argument submitted that the Applicants did not submit a proper application. According to the Respondents, one of the requirements the Applicants had to satisfy to qualify as a community was that the 2nd Applicant was a community with its own place of residence.

[149] **Section 25(2)(c) of the Traditional Leadership and Governance Framework Act, as amended**, stipulates that the Commission may decide not to consider a dispute or claim on the ground that the person who lodged the dispute has not provided the Commission with relevant or sufficient information or the provisions of Section 21 have not been complied with.

[150] If the Respondents wish to submit now that the Applicants did not lodge a proper application, they should have rejected the claim from the onset. The

Respondents cannot now come at the review of their decision and submit that a proper application was not submitted. In my view, this is an after-thought after the State Respondents realized that they completely misunderstood the issues for determination and irrationally approached their investigations and recommendation from the wrong basis.

[151] In my view, the Applicants have succeeded to allege and prove that the 2nd Respondent has acted contrary to the provisions of **Section 6(2)(c), 6(2)(d), 6(2)(e)(iii), 6(2)(e)(iv) and 6(2)(f)(ii)(aa) of PAJA**. The Applicants have therefore, in my view succeeded to make a proper case for judicial review of the 2nd Respondent's administrative action and by that then also the 1st Respondent's administrative action.

[152] In terms of **Section 8(1)(c)(ii) of PAJA**, a court is empowered to give an order that is just and equitable, including, in exceptional cases, and order substituting the Court's decision for that of the administrator. Circumstances under which a substitution order may be granted are not defined or identified in statute, however, the Constitutional Court has held in **Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd & another 2015 (5) SA 245 (CC) at para 35** that this is principally an inquiry into what is just and equitable in the circumstances.

[153] In **Gauteng Gambling Board v Silverstar Development Ltd & Others 2005 (4) SA 67 (SCA) at para 28** it was held that where upon a proper consideration of all the facts, a Court is persuaded that a decision to exercise a power should not be left to the designated functionary, the Court should order substitution.

[154] If a Court is in as good a position as the administrator to make the decision, the Court should not hesitate to do so, particularly where the administrator is shown to prefer a particular outcome, and a remittal to it will only

lead to further delay and expense. It was held by the Constitutional Court in **Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd & another 2015 (5) SA 245 (CC) at para 47** that the enquiry entails the following:-

> *"In conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances."*

[155] In my view, this court has all the relevant information before it. All the information is contained in the review record and the founding papers. The Applicants do not seek the removal of anyone from his position, but they simply seek to have their independence recognised and actualised.

[156] I am of the view that it will serve no purpose to refer the matter back to the 1st Respondent or the 2nd Respondent. The very same information before me will be placed before the State Respondents. Therefore, this Court is in as good a position as the 1st and/or the 2nd Respondents to make a decision. A remittal will only cause a further unnecessary delay and expense, especially if one considers the fact that the Applicants have instituted a claim in 2005 already, re-submitted the claim, which is the present issue of contention, in 2012 - only now in 2023 for the matter to be referred back again to the 1st and 2nd Respondents.

[157] It has been more than 18 years since the Applicants submitted their first claim and should the matter be referred back in all probability another 3 to 5 years would lapse before the matter is brought to finality. In my view, this will amount to an injustice. Justice delayed is justice denied. The Applicants have waited 18 years (and even more) for justice to be done.

[158] The decision to be made is not polycentric or policy-laden, falling within the exclusive terrain of the executive. It is a matter of consideration of historical facts and records, and an application of the law. On the evidence before me, especially on the independence and autonomy of the Makuleke people, there can only be one conclusion – historically, the Makuleke people, are a separate traditional community that has existed and functioned under its own traditional leader. Their entitlement and title to a separate territorial land has been recognised by both the past, as well as the present government of the Republic of South Africa and was recently sanctioned by the Land Claims Court.

[159] In considering the question of whether the 2nd Applicant should be recognized and declared a traditional community, **Section 2(1) of the Traditional Leadership and Governance Framework Act, as amended**, stipulates as follows:-

> *"A community may be recognised as a traditional community if it –*
>
> *(a) is subject to a system of traditional leadership in terms of that community's customs; and*
>
> *(b) observes a system of customary law."*

[160] In **Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd (CCT69/06) [2007] ZACC 12; 2007 (10) BCLR 1027 (CC) ;**

2007 (6) SA 199 (CC) (6 June 2007) the Constitutional Court **at para 39-42 held as follows:-**

> *"39. In the case of In Re Kranspoort Community, Dodson J correctly construes section 2(1)(d) of the Restitution Act to require that there must be a community or part of a community that exists at the time the claim is lodged and that the community must have existed some time after 19 June 1913 and must have been victim to racial dispossession of rights in land. I agree with Dodson J that in deciding whether a community exists at the time of the claim there must be: (a) "a sufficiently cohesive group of persons" to show that there is a community or a part of a community, regard being had to the nature and likely impact of the original dispossession on the group; and (b) some element of commonality between the claiming community and the community as it was at the point of dispossession.*
>
> *40. There is no justification for seeking to limit the meaning of the word "community" in section 2(1)(d) by inferring a requirement that the group concerned must show an accepted tribal identity and hierarchy. Where it is appropriate, as was the case in Ndebele-Ndzundza, the "bonds of custom, culture and hierarchical loyalty" may be helpful to establish that the group's shared rules related to access and use of the land. The "bonds" may also demonstrate the cohesiveness of the group and its commonality with the group at the point of dispossession.*
>
> *41. However, what must be kept in mind is that the legislation has set a low threshold as to what constitutes a "community" or any "part of a community". It does not set any pre-ordained qualities of the group of persons or any part of the group in order to qualify as a community. This generous notion of what constitutes a community fits well with the wide scope of the "rights in land" that are capable of restoration. These rights,*

as defined, go well beyond the orthodox common law notions of rights in land. They include any right in land, whether registered or not; the interests of labour tenants and sharecroppers; customary law interests; interests of a beneficiary under a trust; and a beneficial occupation for a continuous period of not less than ten years before the dispossession. The legislative scheme points to a purpose to make good the ample hurt, indignity and injustice of racial dispossession of rights or interests in land that continued to take place after 19 June 1913.

42. The threshold set by section 2(1)(d) is well met if the right or interest in land of the group is derived from shared rules determining access to land that is held in common. This generous understanding of what constitutes a community is consistent with the retroactive reach of the restitution process back to 19 June 1913. With the passage of time, the composition and cohesion of communities who were victims of dispossession would be compromised in that communities would be displaced and alienated from their original homes at huge human and social expense. Also, that interpretation advances the declared purpose of the operative legislation, which is to provide restitution and equitable redress to as many victims of racial dispossession of land rights after 1913 as possible."

[161] **Section 3 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005** stipulates as follows:-

"3. Recognition of traditional communities

(1) A community envisaged by section 2(1) of the Framework Act may apply to the Premier in writing for recognition as a traditional community.

(2) An application referred to in subsection (1) must contain the following particulars:

(a) a description of the community;

(b) the size of the community;

(c) the name of the community;

(d) the name of the senior traditional leader and headmen or headwomen, if any;

(e) names of persons whom the community regards as its leaders in accordance with the community's customary law and their customary designations;

(f) the envisaged number of councillors; and

(g) a description of the area within which the community generally resides"

[162] In the present application, the Applicants elected to apply to the 2nd Respondent in terms of **Section 25(2)(a)(iii) and 25(2)(a)(iv) the Traditional Leadership and Governance Framework Act.**

[163] It is clear from the Applicants' application that the following information was provided:-

(a) A description of the community*: Makuleke Traditional Community;*

(b) The size of the community*: Approximately 15000 members,*

which include people who were moved from the Makuleke Region and those people that either are the descendants of the original Makuleke community or have become part of the community by living with the Makulekes in their villages at Blocks H, I and J Nthaveni.

(c) The name of the community: *The Makuleke Traditional Community.*

(d) The name of the senior traditional leader and headmen or headwomen, if any*: Phahlela Jutas Mugakula*

(e) Names of persons whom the community regards as its leaders in accordance with the community's customary law and their customary designations*: In the Pafuri Triangle, there were 9 Headman under Makuleke, at Nthaveni only three headman continued to operate being Makahlule, Qaza and Headkraal.*

(f) The envisaged number of councilors*: There are various structures in place in the Makuleke community. The role of the Royal family, headed by the hosi or chief, is to provide the leadership of the community and the role of the tribal council is to provide for the administration of the villages at Ntlhaveni. Traditionally the royal council is the royal family. Royal women are included in the royal council. While they do not attend every meeting, they play an important role especially in relation to serious problems. In each village the headman or induna forms his own council, which will have some family members and some appointed members.*

After the land claim, the Communal Property Association (CPA) emerged. The CPA has an executive council, which is elected every 3 years. It was found necessary that the CPA should interact with a consultative forum,

which has been renamed "the development forum". The need for the forum was to ensure proper consultation with, and participation by, members of the Makuleke community in all the villages within Makuleke. The development forum meets every 3 months and it rotates its meetings between the 3 villages. There are 30 members of the development forum when they all come together.

The tribal council administers the land in Nthlaveni, but the land in the Kruger Park is owned and administered by the Communal Property Association.

(g) A description of the area within which the community generally resides: *Blocks I, J and H Ntlhaveni, but the Makulekes also own the Pafuri Triangle in the Kruger National Park which is registered in the Communal Property Association.*

[164] From the Applicants application and submissions submitted to the 2nd Respondent it is also clear that the Applicants are subject to a system of traditional leadership in terms of that community's customs and observes a system of customary law.

[165] In the Ralushai Report, the following was stated:-

"Your Commission conducted a thorough research on the Makuleke claim. The investigation revealed the following:-

1. Prior to 1945 Makuleke, Mhinga and Shikundu were allocated separate areas by the government and at that time the areas were called locations.

2. After 1945, during the regime of Chief Adolph Mhinga, Makuleke was effectively made Mhinga's headman. That was the time when Makuleke lost his status of chief.

3. …

4. The orginal Makuleke area has now been restored to the Makulekes by the Hanekom Land Commission.

5. The present Makuleke area outside the Kruger Park has developed to such an extent that it now deserves to be regarded as a chieftaincy. Historically the present Maluleke area originally belonged to Mhinga and later formed part of the Kruger Park. It would therefore mean that Makuleke was settled in a piece of land which belonged to Mhinga.

6. Makuleke is regarded as a chief by his own people as well as by some of the neighbouring chiefs."

[166] From the above stated facts, as well as the history given of the Makulekes it is clear that the 2nd Applicant has been operating as a community in Blocks I, J and H Ntlhaveni. The 2nd Applicant has alleged and proved all the requirements to be recognized as a community in terms of both **Section 2(1) of the Traditional Leadership and Governance Framework Act, as amended**, as well as **Section 3 of the Limpopo Traditional Leadership and Institutions Act 6 of 2005**.

[167] This area (Block I, J and H Ntlhaveni) however falls within the area of Mhinga. In my view, the specific area and location occupied by the Applicants are clearly identifiable with clear boundaries. The area, although forming part of the Mhinga area, is a separate and specific area. There is no reason why Blocks I, J and H Ntlhaveni cannot be declared to be an area of authority falling under

the 2nd Applicant. In addition, the 2nd Applicant is also a land owner of the Pafuri Triangle.

[168] While reparations involve compensation for the property taken, dignity restoration is based on principles of restorative justice and thus seeks to rehabilitate the dispossessed. Restorative justice is interested in 'restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberate democracy, restoring harmony based on a feeling that justice has been done, and restoring social support'. When reparations and restorative justice are married, dignity restoration is the offspring of this formidable union.

[169] In my view, the present matter is an example where reparations and restorative justice should be married in order to restore dignity to the Applicants. I believe the above mentioned factors, cumulatively taken, amount to exceptional circumstances under which an order for substitution of the court's decision for that of the administrator, will be just and equitable.

[170] I now turn to deal with the question of whether the 1st Applicant should be declared the Senior Traditional Leader of the Makuleke Traditional Community.

[171] **Section 12(1) of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005** stipulates as follows:-

> *"**Recognition of senior traditional leader, headman or headwoman***
>
> *(1) Whenever a position of a senior traditional leader, headman or head woman is to be filled-*

(a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to the customary law of the traditional community concerned-

(i) identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and

(ii) through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of the specific person.

(b) the Premier must, subject to subsection (2)-

(i) by notice in the Gazette recognise the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, headman or headwoman, as the case may be;

(ii) issue a certificate of recognition to the person so recognised; and

(iii) inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional leader, headman or headwoman"

[172] Having considered **Section 12 of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005,** in my view, this court is not in the position to declare the 1st Applicant the Senior Traditional Leader of the 2nd Applicant because the Royal Family has to identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question and through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the

Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of the specific person.

[173] There can be no recognition of the 1st Applicant as Senior Traditional Leader prior to the appointment of the 1st Applicant as Senior Traditional Leader by the Royal Family. This court will be bypassing the Royal Family's role if this court is to issue a declaratory order in this regard.

COSTS:

[174] The only issue remaining is the issue of costs. The 1st, 2nd, 3rd, 4th and 5th Respondents applied for costs in the event of the application being dismissed. In turn, the Applicants applied for costs to be awarded against those Respondents opposing the application in the event of the Applicants being successful.

[175] In my view, there is no reason why the general rule applicable to costs in that the costs should follow the event, should not be applicable in the present matter. There were no submissions made by any party to deviate from the general rule either. It should however be noted that the relief claimed was against the 1st, 2nd and 5th Respondents. The 3rd and 4th Respondents opposed the application on the basis that it had an interest in the matter. In my view, being alive to the Biowatch principle, which requires that an unsuccessful party in legal proceedings against the state be spared from paying the costs in constitutional matters, the 3rd and 4th Respondents should be spared from paying the costs of the Applicants. In my view, costs should only be awarded against the 1st, 2nd and 5th Respondents.

ORDER:

[176] I therefore make the following order:-

1. The decision and/or finding made by the 2nd Respondent on the 17th of March 2017 in respect of the claim of the Applicants, is reviewed and set aside.

2. The 1st Respondent's acceptance of the recommendation by the 2nd Respondent is reviewed and set aside, and declared invalid.

3. The decision of the 1st Respondent, based on the finding of the 2nd Respondent, dated 17 March 2017, is reviewed and set aside.

4. The Makuleke Community (2nd Applicant) is declared to be an independent traditional community separate from the Mhinga Tribe from date of this order.

5. The Premier of the Limpopo Province (1st Respondent) is ordered to, by notice in the Provincial Gazette, recognize the 2nd Applicant as a traditional community.

6. The 2nd Applicant is ordered to transform and adapt customary law and customs as to comply with the relevant principles contained in the Bill of Rights in the Constitution of South Africa.

7. The identification and recognition of the Senior Traditional Leader of the 2nd Applicant is referred to the Makuleke Royal Family to identify an appropriate person who qualifies in terms of customary law to assume the position of a Senior Traditional Leader taking into consideration the relevant principles contained in the Constitution of the Republic of South Africa, and thereafter submit the name of such person to the 1st Respondent (the Premier) for recognition.

8. The 1st, 2nd and 5th Respondents are ordered to pay the costs of the application, jointly and severally, the one to pay the other to be absolved.

M. NAUDÈ-ODENDAAL
JUDGE OF THE HIGH COURT,
POLOKWANE

APPEARANCES:

HEARD ON:	**27 OCTOBER 2022**
JUDGMENT DELIVERED ON:	**13 MARCH 2023**

For the 1st and 2nd Applicants:	Adv. P.G. Seleka SC
Instructed by:	Webber Wentzel Attorneys C/O Everton Dankuru Attorneys moray.hathorn@webberwentzel.com matthew.ilsley@webberwentzel.com evertondankuru@gmail.com
For the 1st, 2nd and 5th Respondents:	Adv. L.G.P. Ledwaba
Instructed by:	The Office of the State Attorney Polokwane RMakhamathe@justice.gov.za KTepanyega@justice.gov.za
For the 3rd and 4th Respondents:	Mr. T. Sibuyi

Instructed by:	Mabuza Attorneys Polokwane thomas@mabuzas.co.za