

SOUTH AFRICA / JUDGMENT

Pilane and Others v Premier of the North West Province and Others (M539/2019 ; UM239/2022) [2025] ZANWHC 52 (12 March 2025)

[2025] ZANWHC 52**COURT**

North West High Court, Mafikeng

BEFORE

A Reddy

CASE / FILE NUMBER

M539/2019 ; UM239/2022

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**IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION -
MAHIKENG
CASE
NO: M 539/ 2019**

Reportable:	YES / NO Circulate to Judges: YES / NO
Circulate to Magistrates:	YES / NO Circulate to Regional Magistrates: YES / NO
In the matter between:	KGOSI MOLEFE JOHN PILANE FIRST APPLICANT BAKGATLA BA KGAFELA TRADITIONAL COUNCIL SECOND APPLICANT BAKGATLA BA KGAFELA ROYAL FAMILY (MORULENG) THIRD

APPLICANT
KAGISO
PILANE
FOURTH
APPLICANT
AND
PREMIER
OF THE NORTH WEST
PROVINCE
FIRST
RESPONDENT
COMMISSION
OF INQUIRY INTO TRADITIONAL
DISPUTES
IN RESPECT OF BAKGATLA
BA
KGAFELA, BATLHAKO BA LEEMA AND
BAPO
I AND II COMMUNITY DISPUTES
SECOND
RESPONDENT.
ADV
M.S. BALOYI SC N.O.
THIRD
RESPONDENT
HOSI
A.K. MAHUMANI N.O.
FOURTH
RESPONDENT
PROF
MOLELEKI.N.O.
FIFTH
RESPONDENT
MEC
FOR LOCAL GOVERNMENT
HUMAN
RESOURCES AND
TRADITIONAL
AFFAIRS
SIXTH
RESPONDENT
KGAFELA
KGAFELA II
SEVENTH
RESPONDENT
MERAPE
RAMONO
EIGHTH
RESPONDENT
OBAKENG
KEROMENG

NINTH
RESPONDENT
BA
KGATLA BA SEFIKILE COMMUNITY

TENTH
RESPONDENT
CASE
NO. UM239/2022

AND
KGOSI
MOLEFE JOHN PILANE

FIRST
APPLICANT
BAKGATLA
BA KGAFELA ROYAL

FAMILY
SECOND
APPLICANT

And
PREMIER
OF THE NORTH WEST
PROVINCE

FIRST
RESPONDENT
RAMANO
PILANE LINCHWE

SECOND
RESPONDENT

Judgment
is handed down electronically by distribution to the parties'
legal representatives by e-mail. The date that the
judgment is deemed
to be handed down is 12
March 2025 at 14h00.

ORDER

1.

It is ordered that: The findings and recommendations
of the
Commission of Inquiry into the Traditional Disputes in respect of the
Bakgtala Ba Kgafela, Batlhala Ba Leema and Bapo I
and II Community
Disputes ("the Baloyi Commission") issued on 20 August
2019, in so far as they relate to the Bakgatla
Ba Kgafela
investigations is irrational, unlawful, unconstitutional and invalid.

2.

The said findings and recommendations of the Baloyi
Commission are
reviewed and set aside.

3.

The first respondent's ("Premier's")

decision
of 26 August 2019, to accept or approve the recommendations of the
Baloyi Commission in so far as they related to the
Bakgatla Ba
Kgafela is irrational, unlawful, unconstitutional and invalid, and
are reviewed and set aside.
4.
The respondents shall pay such costs of this application
jointly and
severally, the one paying the others to be absolved.

JUDGMENT

REDDY J

Introduction

- [1] What served before this Court are two consolidated applications as per the order of Dewrance AJ of 17 August 2023.
- [2] In UM 539/2019, in an amended Notice of Motion, a declarator is sought which reads:
1. Declaring that the findings and recommendations of the Commission of Inquiry into the Traditional Disputes in respect of the Bakgtala Ba Kgafela, Batlhala Ba Leema and Bapo I and II Community Disputes (“the Baloyi Commission”) issued on 20 August 2019, in so far as they relate to the Bakgatla Ba Kgafela investigations as irrational, unlawful, unconstitutional and invalid.
 2. Reviewing and setting aside the said findings and recommendations of the Baloyi Commission.
 3. Declaring that the first respondent’s (“Premier’s”) decision of 26 August 2019, to accept or approve the recommendations of the Baloyi Commission in so far as they related to the Bakgatla Ba Kgafela is irrational, unlawful, unconstitutional and invalid.
 4. That the first respondent’s decisions as aforesaid are reviewed and set aside.
 5. That the first respondent shall pay the costs of this application and the rest of the respondents pay the costs only in the event they oppose this application in which event the respondents shall pay such costs jointly and severally the one paying the others to be absolved.
 6. Further and/or alternative relief.”
- [3] In an amended Notice of Motion under case number UM 239/2022, the applicants sought the following relief:

“1. That the first respondent’s decision to designate and recognize the second respondent as the permanent Kgosi of the Bakgatla Ba Kgafela traditional community as evidenced by the Certificate of Recognition dated 31 October 2022 issued by the first respondent in favour of the second respondent be and is hereby declared unlawful, unconstitutional and invalid and is hereby set aside.

2. That the recognition certificate issued by the first respondent in favour of the second respondent on 31 October 2022 is hereby declared unlawful, unconstitutional, and invalid and is accordingly set aside.
3. That the first respondent’s decision to designate and recognize the second respondent as the permanent Kgosi of the Bakgatla Ba Kgafela traditional community as evidenced by the Certificate of Recognition dated 31 October 2022 issued by the first respondent in favour of the second respondent be reviewed and set aside.
4. That the recognition certificate issued by the first respondent in favour of the second respondent on 31 October 2022 be reviewed and set aside.
5. ALTERNATIVELY, in the event that the above Honourable Court is not inclined to grant orders in prayer 2 & 3 above, that the decision of the first respondent referred to in paragraph 2 above and the recognition certificate referred to in prayer 3 hereof be and are hereby

suspended pending the final determination of the proceedings before this Honourable Court under case number UM 127/2020 and UM 539/2019 or any subsequent appeal in respect thereof.”

The parties

- [4] A proper introduction of participating parties is peremptory for the purposes of an easy flow of reading. In this regard, I am constrained to deal with UM 539/2019, as this is dispositive of both applications as will become apparent. Towards this end, the parties will be referred to by the appellations as cited. The first applicant is Kgosi Molefe John Pilane, (“Kgosi Pilane”), a duly recognized Kgosi/ Senior Traditional Leader of the second applicant. Kgosi Pilane is also a member of the Bakgatla Ba Kgafela Traditional Community Moruleng (Saulspoort), North West, Province.
- [5] The second applicant is the Bakgatla Ba Kgafela Royal Family, (“the Royal Family”), a statutory entity or institution recognized in terms of the provisions of the North West Traditional Leadership and Governance Act, 2 of 2005,(the NWTLGA) read with the provisions of the Traditional and Khoi-San Leadership Act 3 of 2019, the latter of which the Constitutional Court on 30 May 2023 declared unconstitutional, as “parliament overwhelmingly failed in facilitating public participation”. See: Mogale and Others v Speaker of the National Assembly and Others [2023] ZACC 14.

- [6] The third applicant is the Royal Family of the Bakgatla Ba Kgafela Traditional Community, which is a body that is recognized by law with designated powers to decide and put forward a name of Kgosi for recognition by the second respondent. The fourth applicant is Kagiso Pilane, a member of the Royal Family.
- [7] The first respondent is the Premier of the North West Province, (“the Premier”), cited in his official capacity as the executive authority of the North West Province, as evinced in section 25 of the Constitution.
- [8] The second respondent is the Commission of Inquiry into the Traditional Disputes in Respect of the Bakgatla Ba Kgafela, Batlhako Ba Leema and Bapo 1 and II Community Disputes. The third respondent is Advocate M.S Baloyi SC, N.O. The fourth respondent is Hosi A. K Mahumani, N.O. The fifth respondent is Professor Moleleki N.O. The sixth respondent is the MEC for Local Government Human Settlements and Traditional Affairs. The seventh respondent is Kgafela Kgafela II. The eighth respondent is Merafe Ramano. The ninth respondent is Obakeng Keromeng. The tenth respondent is Ba Kgatla Ba Sefikile Community. This application is opposed by first, sixth, seventh, ninth and tenth respondents.

Background facts

- [9] On 15 June 2016, the Baloyi Commission (the Commission) was established. In terms of Proclamation Number 19/2016 read with Proclamation Number 49/2017 published by the Premier, the Commission was required to investigate the following Terms of Reference:
- a. The role of the Paramount Chief in terms of the traditional custom, specifically in Botswana vis-à-vis in Moruleng;
 - b. The powers and procedure, if any to appoint a senior traditional leader of the Bakgatla ba Kgafela in Moruleng;
 - c. Determine who is the rightful heir in terms of the tradition and custom, had Tidimane Pilane not acted in the manner he did, which led to the appointment (the manner and the procedure is not in dispute) of Chief Nyalala Pilane;
 - d. The merits and demerits of Mr Ramono Merafe’s claim as senior traditional leader as was referred to North West Provincial Committee during 2014;
 - e. The role of senior traditional leaders of Bakgatla ba Kgafela in Moruleng;
 - f. The correct relationship between Kgafela-Kgafela II and the senior traditional leader in Moruleng under our constitutional dispensation;
 - g. The role of the 32 (thirty-two) sub-villages in officiating the appointment of the senior traditional leader of Moruleng village;
 - h. The role of the 32 (thirty-two) villages in Moruleng in the acquisition process;

- i. The flow of financial benefits in any transaction conducted with any third party in the name or on behalf of Bakgatla ba Kgafela by any person.”

[10] Pursuant to the Commission’s conclusion a report was crafted. On 26 August 2019, the recommendations of the Commission as accepted by the Premier were as follows:

“1. Paragraphs A; B & G

The Premier take note of our findings that:

- 1.1 the customary law and tradition of BBK recognises the institution of Kgosi Kgolo.
- 1.2 the customary law and tradition, Kgosi Kgolo selects a Kgosi for Moruleng and can remove
- 1.3 There is no procedure for the appointment of a Kgosi in Moruleng.
- 1.4 The community place no role in officiating the appointment of the Senior Traditional Leader in Moruleng.

1 Paragraphs C & D

The Premier should take note of our findings that:

- 1.1 BBK are one tribe made up of BBK Mochudi and BBK Moruleng.
- 1.2 According to BBK custom and tradition, the Chieftainship of Saulspoort is hereditary.
- 1.3 The rightful heir is the person selected by Kgosi Kgolo who may, at his discretion, consult with members of the royal family.
- 1.4 According to custom and tradition of BBK, the claim of Mr Merafe Ramono to chieftainship by virtue of his status as eldest son Kgosi Tidimane is without merit. (emphasis added)

[11] On 06 July 2020, predicated primarily on the adoption of the final Commission report, the former Premier withdrew Kgosi Pilane’s certificate of recognition as Kgosi. Kgosi Linchwe was recognized as an interim Kgosi. A proclamation in a Government Gazette gave legitimacy to these changes. These changes were underscored by communique dated 11 June 2020 emanating from Kgafela Kgafela II. The contents of the latter aerate that the Royal Family has acquiesced to appoint Kgosi Linchwe to act as Kgosi on a temporary basis “when Mr. Nyalala Pilane is removed as Kgosi”

[12] On 16 November 2022, Kgosi Pilane attained knowledge of the recognition certificate that had been issued by the Premier in favour of Kgosi Linchwe. On the latter date, his attorneys were instructed to address a communiqué to the Premier wherein clarity was sought in relation to same. On 18 November 2022 as a matter of course, the Premier was served with this correspondence. The nub of which was to ascertain how the appointment of Kgosi Linchwe had occurred given the legal challenges that were still sub judice. Within the body of this communication strict time frames were imposed on the Premier to retort. These timelines were simply disregarded.

- [13] On 25 November 2022, a response outside the designated timelines was received. In broad strokes, it stated that the appointment of Kgosi Linchwe followed requisite customary practices. No delineation of these practices or disclosure of documentation was provided with sufficient specificity to comprehend what underpinned the Premier's decision. Given the veil of secrecy that shrouded the appointment of Kgosi Linchwe, the inescapable inference is that the appointment and designation of Kgosi Linchwe was buttressed by an ulterior motive. Central to this clandestine cause was the disruption of the Bakgatla Ba Kgafela in Moruleng. This would achieve its definitive objectives. First, a monopoly of the control of the affairs, second access to the finances of the Bakgatla Ba Kgafela in Moruleng.
- [14] The Royal Family in Moruleng had not made a decision to designate Kgosi Linchwe within the prescripts of the NWTLAGA as the permanent Kgosi for Bakgatla Ba Kgafela in Moruleng. The failure by the Premier to disclose the relevant documents and reasons for this decision results in the drawing of the irresistible inference that neither exists. It logically follows that this decision would also offend the Promotion of Administrative Justice Act 3 of 2000, (PAJA) in the face of a clear absence of reasons.
- [15] Furthermore, and most concerningly, the certificate of recognition of Kgosi Linchwe indicates that the Premier is "pleased to recognise and hereby designate the person referred to below referred to as kgosi/ acting kgosi/ regent kgosi/ deputy kgosi..... designee to act on behalf of PERMANENT". To make short shrift of this point, the Premier is not enjoined to make such a decision. In terms of extant legislation this power vests in the Royal Family. The distinction is the following, the Premier is not empowered to designate a Kgosi, he is only clothed with the power to recognise a designated person. On recognition, the Premier is duty bound to issue a recognition certificate. In casu Kgosi Linchwe's recognition and designation by the Premier is backdated to 27 August 2022 having been made on 31 October 2022.
- [16] Notwithstanding legitimate expectations and a substantial and direct interest in the process, the Premier denuded any rights that Kgosi Pilane may have had. Additionally, the Premier was acutely aware of the challenge against the appointment of Kgosi Linchwe as an interim Kgosi. The failure by the Premier to facilitate and engage with Kgosi Pilane on its own, renders the decision of the Premier susceptible to being declared procedurally irrational, unlawful and unconstitutional. This would inexorably result in the decision of the Premier being set aside.

The case for the Premier

- [17] The heart of the Premier's case rests on four pillars. First, there is no basis for reviewing and setting aside the findings of the Commission. Put simply, the concession made is that Kgosisigolo Kgafela Kgafela II is the ultimate repository of power to appoint a Kgosi to rule over the Moruleng section of Bakgatla Ba Kgafela community in Moruleng. Second, it is impermissible for this Court to commandeer the powers of the Commission by substituting its recommendations. Third, an affidavit which has not been recanted or retracted. Fourth,

the judgment of Hendricks J (as he then was) remains apposite to issues in both review applications.

- [18] Kgosi Pilane on 27 July 2012 deposed to an affidavit supporting the application of Kgosi Kgafela Kgafela II's application for South African citizenship. The timelines are significant. The Commission sat between 2016 and 2018 with its recommendations finding favour on 20 August 2019. At no point, after deposing to the latter affidavit, did Kgosi Pilane recant same. All that Kgosi Pilane offers is that an incorrect proposition of law cannot be held against him or the Traditional Community of Bakgatla Ba Kgafela in Moruleng. Kgosi Pilane furthermore contends that the mere fact that he confirmed that Kgafela Kgafela II is "our" supreme monarch who rules over both sections of Bakgatla Ba Kgafela community in Botswana and the Republic of South Africa does not alter an undisputable fact, namely that the Republic is a sovereign state founded on the supremacy of the Constitution.
- [19] As far as the application under UM 239/2022 are concerned section 14 of the NWTLAG requires the Royal Family to decide the customary law issue. When this is done, it is then for the Premier by executive act to withdraw the certificate. Once the Royal Family had made the decision, the Premier was to co-operate. This interaction is ordained by section 14(3) of the NWTLAG that on receipt of the decision, the Premier shall withdraw the certificate of Kgosi/Kgosigadi.

Version of the Sixth and Seventh respondents

- [20] The version of these respondents is not central to the determination of this application given my conclusion.

Version of the ninth and tenth respondents

- [21] Similarly, the version of these respondents need not detain this Court given the concession that these respondents disclosed that their point of interest and focus centered on the Commission's report and its recommendations.

The submissions of the applicant

- [22] As a precursor to the substance of his contentions, Adv Matebese SC asserted that a failure by (i) the Commission to file an affidavit, (ii) the Premier to file an answering affidavit, and (iii) the Premier together with the Commission to avert facts on which the decision was made, disjunctively or conjunctively is dispositive of the application. The argument continued that the Premier, a functionary clothed with the statutory power to take and who took the decisions under review, has adopted a non-possum legal stance by not filing and answering affidavit. An answering affidavit by its very nature would have provided the reasons that underpinned the decision of the Premier. The filing of a confirmatory affidavit by the Premier is of no moment as it falls gravely shy of what is required.

[23] In view of the statutory power that the Premier is enjoined with an explanation was called for. This is more so, as the Premier is only empowered in terms of the NWTLAGA to recognize traditional leaders. This legislation makes it impermissible for the Premier to delegate this exclusive power.

[24] Continuing with the theme of the lack of an answering affidavit by the Premier, Adv Matebese SC submitted it was incumbent on the Premier to have provided reasons for the decision made after the reading of the Commission's report. The Premier may exercise discretion to accept the findings of the Commission's Report, but the weight attached to the report can only be edified by the provision of reasons. On this ground alone, Adv Matebese SC asserted that the Premier's decision stands to be reviewed and set aside in terms of section 5(3) of PAJA. To reiterate this, Adv Matebese SC referred to *Arnaudov & Others v Minister of Home Affairs and Another* 4

[2004] JOL 12901 (T).

[25] Furthermore, Adv Matebese SC placed much store on *Altron TMT Holdings Proprietary Limited and Another v Minister of Trade and Industry and Others* (2019/46376)

[2020] ZAGPJHC 162 (8 July 2020) where Lamont J at paragraph 26 posited:

"The whole decision making process and reasoning for reaching the decision are not provided on oath as the decision-maker Minister Davies failed to file an affidavit in these proceedings. Altron suggested in its supplementary affidavit that there was no evidence to suggest that the submissions made by the public (including Altron) had ever been placed before the Minister for consideration; that the second submission to the Minister did not even contain a summary or reference to the representations made, there is no record setting out the basis upon which the Minister dealt with the representations made if he considered them at all. These were all invitations to provide the evidence in the form of an affidavit by the Minister dealing with the issues. There were other issues with which he would have been expected in my view to have dealt with including for example the change in the identity of the person awarded facilitator status, the failure to include the controls contemplated by the various reporting conditions, time limits and review period."

[26] In accentuating the Premier's exclusive power in the recognition of traditional leaders, reference was made to a communiqué dated 31 August 2022 which was addressed to the Office of the Premier. This was telling, so contention ran, as it gives life to the submission regarding the recognition of the traditional leaders being the exclusive domain of the Premier.

[27] Adv Matebese SC submitted that it was significant that when the application was triggered in 2022, the Premier using the Department of Cooperative Governance and Traditional Affairs as a conduit delivered an answering affidavit wherein, he contended that the designation and recognition of Kgosi Linchwe was founded on a letter dated 11 June 2020 from Kgafela Kgafela II. Adv Matebese SC postulates that the Premier contended in the answering affidavit that the 'instruction from the Royal family regarding the

second respondent being rendered a permanent Kgosi came before the review application, and it therefore cannot be correct to suggest

that by signing it on 27 August 2022, the Premier meant this to have any effect on the outcome of the awaited judgment.’

[28] The relevance of the dates is best illustrated by the contention that nowhere in the answering affidavit of Lehoko was any mention made of a letter from Kgafela Kgafela II dated 31 August 2022. Neither was any mention made of the minutes of the Royal Family meeting of August

2022. It was only when the matter is set down in the normal opposed motion that the deponent on behalf of the Premier presents the letter and minutes of the purported Royal Family meeting of 27 August 2022.

Collectively, those responsible for deposing of these affidavits have therefore committed perjury.

[29] Adv. Matebese SC contends that the Kgosi Linchwe was recognized as an interim Kgosi on 06 July 2022, in terms of the proclamation in the Government Gazette number 8125. Furthermore, the contention ran that the NWTLGA does not recognize a position as ‘interim Kgosi’ but only that of the ‘acting Kgosi.’

[30] Adv. Matebese SC submitted that the Premier as a functionary clothed with the statutory power within the context of these proceedings has simply refrained from disclosing what formed the substance of his decision. This is reiterated by the failure of the Premier to have filed an answering affidavit as is practice and customary in proceedings of this nature. The conduct of the Premier is further exacerbated by clear non-compliance with the prescripts of the Northwest Traditional Leadership and Governance Act 2 of 2005. The latter legislation empowers the Premier with exclusive authority to recognize traditional leaders. It is impermissible for the Premier to delegate this power.

[31] Adv. Matebese SC contends that the supplementary affidavit purportedly deposed to by Dr. M.S. Bole, who is described as “the Head of the Department of Co-operative Governance and Traditional Affairs of the North West Province”, does little to advance the opposition of the Premier. The argument is this regard continued Dr Bole did not claim to be holding any position within the Premier’s Office. Moreover, Dr Bole fails to expound on how his position as the Head of the Department of Co-operative Governance and Traditional Affairs, a separate organ of state, makes him privy to the decisions of the Premier and significantly the justification thereof. It is within this context that the Premier’s decision falls to be reviewed within the tenets of section 5(3) of PAJA. To further accentuate this principal Adv. Matebese SC, referred to *Arnaudov & Others v Minister of Home Affairs and Another* 2004 JOL 12901 (T).

[32] Turning to the record, the submission was that the record of proceedings dispatched by the respondents in terms of Rule 53 (1)(b) of the Uniform Rules of Court, incorporates a copy of the recommendations of the Commission signed by the Premier as proof of acceptance of

same. The ratification of the report is then referred to as the decision by the Premier on the recommendations of the Commission. There is no accurate record of the evidence presented at the Commission. In sum, the respondents were unable to provide a complete record which impugns the entire findings of the Commission as the reliability of the record is questionable. In accenting the contention of an incomplete record, Adv Matebese SC submitted that the report and submissions made by the applicants' expert Professor Khunou are not part of the record received from the Premier and the Commission's attorneys.

[33] Flowing from an unreliable record, Adv Matebese SC contended that it was unlikely that the Premier could have applied an abstemious mind to the findings. The absence of crucial annexures to the report exacerbates the latter. The ineluctable conclusion is that the Premier simply assented to the report in its incomplete form.

[34] Moreover, Adv Matebese SC continued that the Premier, when taking the decision to adopt the recommendations of the Commission, had no regard to the evidence

contained in the transcript or the collective submissions of the parties or pertinent documentary evidence, but placed exclusive store on the summarized report of the Commission. The narrative that the Premier failed to provide reasons for his decision was accentuated. The failure to provide reasons for accepting the Commission's recommendations renders his decision irrational. Viewed holistically, Adv Matebese SC opined that the Premier and the Commission had a duty to consider the entire conspectus of evidence placed before it. The failure to have considered all the evidence renders the recommendations and the decision susceptible to review.

[35] In so far as the Commission's failure to quorate, Adv Matebese SC stated as follows in his written

submissions:

" 34. What is even worse for the Commission and more concerning is that Hosi Mahumani was not a member of the Commission during 2016. He was appointed with effect from 26 December 2017 after the passing away of the late Judge Maluleke. He only participated for approximately six (6) months in the hearings and when almost all the evidence had been led. Certainly, he had to rely on the record of the evidence for him to make an informed decision on the matter. It is bewildering how he familiarised himself with the evidence that is indistinct and incomplete.

35. Furthermore, the evidence of 20 July 2017 in the record ends with Judge Maluleke saying that the hearing is adjourned until Monday. The evidence then starts again on 6 February

2018. In essence, the record of proceedings between the remaining days of July 2017 and 5 February 2018 was not furnished to the applicants.

36. It also appears that Professor Moleleki did not contribute nor participate in the preparation of the report and the recommendations. In essence, only Adv. Baloyi SC, amongst the three Commissioners who listened to the evidence from September 2016 to 26 June 2018, participated in the preparation of the report and the recommendations.
37. We submit that on a proper interpretation of regulation 4(2) of the Regulations, the quorum for the Commission was fixed at two
- (2) members for the entire proceedings. This means that even at the time of the drafting of the report it was imperative that the quorum of two members always be maintained.
38. Importantly, though, is that the two members that form the quorum must be members that are capable and able to participate in the proceedings or the preparation of the report. Kgosi Mahumani, for the reasons aforesaid could not and was unable to make any contribution, let alone a meaningful one, to the report and recommendations of the Commission.
39. For the above reasons it is our submission that the Commission did not quorate at the time it made its report and recommendations. For this reason alone, the report and the recommendations deserve to be reviewed and set aside in terms of section 6(2)(b) of the Promotion of Administrative Act (“PAJA”) “
- [36] Adv Matebese SC provided an overview of the legislative framework which forms the bulwark of Traditional Leadership and the recognition of same by the supreme law, the Constitution. Reference was made to various constitutional injunctions to demonstrate that the Commission failed to appreciate the legislative backdrop that was significant in dealing with the Bakgatla Ba Kgafela investigation, notwithstanding the Commission’s specific terms of reference. Notably, within the four corners of these applications, the Constitution recognizes that the Republic of South Africa is a sovereign state which is predicate on the rule of law. Crucially, no royal family that resides outside the geographical area of the Republic of South Africa can profess to act in terms of legislation applicable in RSA or profess to exercise power derived from legislation that is meant to apply within the RSA territorial jurisdiction. To bolster his submissions Adv Matebese SC referred to the following authorities : Bhe and others v Magistrate, Khayalitsha and others (Commission for Gender Equality as amicus curiae); Shibi v Sithole and others; South African Human Rights Commission and another v President of the Republic of South Africa and another
- [2004] ZACC 17; 2005 (1) SA 580 (CC) at para [41] [also reported as Bhe and others v Magistrate, Khayelitsha and others; Shibi v Sithole and others; SA Human Rights Commission and another v President of the RSA and another at
- [2004] ZACC 17; 2005 (1) BCLR 1 (CC) – Ed].Alexkor Ltd and another v Richtersveld Community and others [2003] ZACC 18; 2004

- (5) SA 460 (CC) at para [51] [also reported at 2003 (12) BCLR 1301 (CC) – Ed]. See too Bhe’s case paras [42]– [46]; MM v MN and another 2013 (4) SA 415 (CC) at paras [23]– [25] [also reported as Mayelane v Ngwenyama and another (Womens’ Legal Centre Trust and others as amici curiae) at 2013 (8) BCLR 918 (CC) – Ed]

Submissions by the Premier

- [37] Adv Ramolefe SC asserts that the Kgosi Pilane has failed to make out a case for the relief sought in both applications. To this end, Kgosi Pilane has not tenuously demonstrated what personal right has been impugned by the findings of the Commission under challenge, or the appointment of Kgosi Linchwe. Ironically, Kgosi Pilane brandishes the name of Merafe Ramano who he contends is the rightful heir to the Traditional Leadership of Bakgatla Ba Kgafela. A damaging concession, so the argument progressed, by Kgosi Pilane is that Kgosi Kgolo Kgafela Kgafela (“Kgosi Kgolo”) is the Supreme Monarch who rules over both sections of Bakgatla Ba Kgafela Community (in Botswana and the Republic of South Africa) and that “ the first respondent, rules South African component of the community on behalf of Kgosi Kgolo.”
- [38] Adv Ramolefe SC, contends that except for pinning their hopes on asking that a “resolution” be provided, Kgosi Pilane has not dealt with the affidavit attached to the answering affidavit. This affidavit by its very terms incontrovertibly sets out where the Premier derives the authority to appoint Kgosi Linchwe.
- [39] Adv Ramolefe SC continued that Kgosi Pilane sought final relief when there existed a bona fide dispute of fact. Put differently, Adv Ramolefe SC submitted that where there is a dispute as to the facts, a final interdict should only be granted in motion proceedings if the facts as stated by the respondents together with the admitted facts by the applicant justify such an order. Where facts, although not formally admitted cannot be denied, they must be admitted. See: Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd. (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984)
- [40] Adv Ramolefe SC concluded that the fact that the affidavit deposed to by Kgosi Pilane, which is attached to the Premier’s answering affidavit is undisputed, has the ineluctable conclusion that Kgosi Pilane is incapable of disavowing the contents of same. That being so, the version of the Premier must be accepted.
- [41] In addressing Pilane v Pilane 2013 (4) BCLR 431 (CC), Adv Ramolefe SC submitted that the applicant’s contention that the crisp issue before the apex court was never about the authority of the third respondent or the Paramount Chief in Mochudi over the residents of or the Bakgatla Ba Kgafela is misplaced. To correct

this, Adv Ramolefe SC referred to paragraph 5 of Pilane where the following was held:

“[5] Although all the villages that make up the Traditional Community are situated in South Africa, the Traditional Community recognises as their Kgosi Kgolo a traditional leader who lives in Mochudi, Botswana. His deputy, Mr Nyalala John Molefe Pilane, the first respondent,

administers the affairs of the Traditional Community in South Africa and is based at Moruleng, North West Province, which is also the headquarters of the Traditional Council.”

[42] Adv Ramolefe SC avers given the tortuous history of the matter, the applicants election to proceed by way of PAJA was convenient. This is so as Kgosi Pilane’s affidavit, together with his evidence at the Commission as well as binding precedent, made other legal avenues insurmountable as a viable option to seek judicial redress. At any rate, the primary objective of the applicants by these applications is to thwart the application of customary law and the customs of Bakgatla Ba Kgafela relating to the removal of a Kgosi and the appointment of another. The contention continued that it has been demonstrated by the Home Affairs Affidavit and in *Pilane and Another v Pheto and Others* (CA 582/11)

[2012] (30 September 2011), that these matters fall under direct customary authority of Kgosi Kgolo Kgafela II. This contention is fortified by Kgosi Pilane’s failure to have made out a case in terms of section 3 of PAJA, averring the infringement of any legally recognizable right or at a lower level a legitimate expectation to remain a Kgosi.

[43] Simply put, there is no basis to challenge the appointment of Kgosi Linchwe. Pivotal to the absence of a challenge to the latter is Kgosi Pilane’s in depth understanding and appreciation of customary law as it finds application to the appointment of a Kgosi and his removal by Kgosi Kgolo Kgafela II at his election. Significantly, Kgosi Pilane makes no challenge to Kgosi Kgolo Kgafela II customary law right to remove him. Against the backdrop of these impediments, Kgosi Pilane pursued a more pliable all-encompassing route to attack the Premier’s decisions, make out no cause of action about the way either decision affects him personally and as a last throw of the dice lump his relief under the umbrella of the Constitution.

[44] Accordingly, Adv Ramolefe SC postulated that the acceptance of the recommendations of the report and the appointment of the Kgosi is neither irrational decisions nor are they in breach of the principle of legality. There has been no impugning of the constitution as it relates to the institution of the Kgosi in line with custom. Resultantly, both review applications fall to be dismissed with costs.

Seventh Respondent

[45] On the aspect of the incomplete record, Adv Matshego proposed that the whole record ought not to be corrected or set aside. Only that part of the record relevant to the decision or ruling sought to be reviewed need to be furnished. To underscore this submission Adv Matshego referred to *Helen Suzman Foundation v Judicial Service Commission* (Trustees for the time being of the Basic Rights Foundation of South Africa as Amicus Curiae) 2018 (7) BCLR 763 (CC).

- [46] Adv Mashego continued that it logically followed that information is relevant if it sheds light on the decision-making process and the factors that were likely at play in the mind of the decision maker. To this end, the evidence of the seventh respondent is not central to the determination of this matter.
- [47] Crucially, in instances where an incomplete record sought is to be corrected or set aside, an applicant is entitled to use the machinery provided in Rule 35(13) of the Uniform Rules of Court without any intervention from the court. The applicants were best placed to exhaust Rule 35(13) in lieu of placing reliance on an incomplete record for the purpose of setting aside the Premier's decision. Moreover, it has been held that the idea that more is better and that it is the wiser 'to put everything before the Judge' belongs to the lazy and insecure. It would therefore have been prudent to take cognizance of Rule 53(3) and make an informed decision as to what is relevant for the purpose of the review. *Pieter v Administrateur Suid Afrika* 1972 (2) SA 220 (SWA) at 228A, *Makate v Joosub* [unreported Case No 57882/19] dated June 2020 at paragraph 52-61, *Venmop 275 (Pty) Ltd v Cleveland Projects (Pty) Ltd* 2016 (1) SA 78 (GP) at 90 F-G.
- [48] Notwithstanding the applicants' contentions as to the incomplete record, Adv Matshego asserted that it was not the applicants' case that the whole record, despite being incomplete, is relevant for the purpose of the review.
- [49] In casu Adv Matshego avowed that an enquiry must be conducted to determine whether the missing portion of the record is material. Put differently, whether it was possible to adjudicate the review on the filed record. If so, the review should proceed. If the opposite holds water, a finding must be made as to whether the applicant has taken all reasonable steps to reconstruct the missing portion of the record.

The legal principles

- [50] Prior to the advent of the Interim Constitution, South African administrative law was generally understood to be founded on the common law. See: *Zantsi v Council of State, Ciskei & Others*
- [1995] ZACC 9; 1995 (4) SA 615 (CC), 1995 (10) BCLR 1424 (CC). The courts reviewed the exercise of public power based on their inherent jurisdiction. See: *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17; 1999
- (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at paras 23 and 28, *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1903 TS 111, 115.

- [51] To this end, courts developed and applied judge-made rules of review, with which exercises of public power were required to comply. Accordingly, the actions of decision-makers could be set aside if they abused their discretion, failed properly to apply their minds or failed to follow the rules of natural justice. See: *Johannesburg Stock Exchange & Another v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132 (A), 152, Chapter 63 Just Administrative Action, Jonathan Klaaren and Glenn Penfold.
- [52] In the pre-constitutional era, administrative law and the courts' power of review were based on the constitutional principles of the rule of law and sovereignty of Parliament. See: *Pharmaceutical Manufacturers Association of South Africa & Another: In re Ex parte President of the RSA & Others* [2000] ZACC 1; 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) at paras 33, 35 and 37. The Interim Constitution replaced the sovereignty of Parliament with the new governing principle of constitutional supremacy in that the Constitution became the supreme law of the Republic. Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.
- [53] In terms of section 33 of the Constitution, the basis for judicial review of administrative action was subsumed in the protection of a fundamental right and express commitment to constitutional supremacy and the constitutionally inspired principle of legality or the rule of law doctrine. The principle of legality – or the rule of law doctrine – recognizes that all public power flows from the Constitution and must be consistent therewith. See: F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, February

2005) Chapter 11

- [54] Section 33(3) of the Constitution is the bedrock of PAJA. PAJA was enacted on 3 February 2000. By and large PAJA underscores the constitutional right to just administrative action; clarifies the scope and content of the right to procedural fairness; enacts a detailed regime for the provision of reasons, provides a legislative basis for judicial review of administrative action; and provides an institutional framework for the enforcement of such rights. Chapter 63 Just Administrative Action Jonathan Klaaren and Glenn Penfold.

Discussion

- [55] To my mind, additional clarification as regards contents and accuracy of the Commission's report is superfluous given my findings. I turn to give attention to the substance of same.

The first applicant's right to bring this application.

- [56] Central to bringing applications before this Court is section 21 (1)(c) of the Superior Courts Act 10 of 2013, which provides:

“21(1) A Division has jurisdiction over all persons resident or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law cognisance, and has the power to-

(a)

(b)

(c) In its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right of obligation, notwithstanding that such person cannot claim any relief consequential upon the determination

(2)

(3)"

[57] In *Geldenhuys and Neethling v Beuthin* 1918 AD 326, the Appellate Division held that successful declaratory relief can only be granted on the demonstration of two fundamentals. First, that the applicant has an interest in an existing future or contingent right or obligation. Second, it must consider whether the order should be granted. The interest that underpins the first fundamental requirement has been understood to be an interest which is analogous to an interest a party has to intervene in proceedings in the high court, namely, to have a direct and substantial interest in the subject matter. *Milani et al v SA Medical and Dental Society et al* 1990 (1) SA 899 (T) at 902 G.

[58] There is no underscoring, Kgosi Pilane has an interest in an existing future or contingent right or obligation that is intertwined with the applications before this Court. He was born into the second ruling house in Moruleng. In short, Kgosi Pilane is a direct descendant of Ramono (Kgamanyane). Resultantly, Kgosi Pilane's locus standi is unquestionable. See: *Family Benefit Friendly Society v Commissioner for Inland Revenue et al* 1995 (4) SA 120 (T) at 125 B.

[59] To my mind this application is disposed of on these triune factors.

No proper record

[60] A logical point of departure would be to consider our current law on what Rule 53 record encompasses. The purpose of rule 53 is to "facilitate and regulate applications for review". *Jockey Club of South Africa v Forbes* [1992] ZASCA 237; 1993

(1) SA 649 (A) (*Jockey Club*) at 661. In *Jockey Club* it was held at 660:

"Not infrequently the private citizen is faced with an administrative or quasi-judicial decision adversely affecting his rights but has no access to the record of the relevant proceedings nor any knowledge of the reasons founding such decision. Were it not for Rule 53 he would be obliged to launch review proceedings in the dark and, depending on the answering affidavit(s) of the respondent(s), he could then apply to amend his notice of motion and to supplement his founding affidavit."

[61] The requirement in rule 53(1)(b) that the decision-maker file the record of decisions is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review. See: *Lawyers for Human Rights v Rules Board for Courts of Law* [2012] ZAGPPHC 54; 2012

(7) BCLR 754 (GNP) at para 23.

[62] There is no underscoring the role that Rule 53 plays in empowering a court to perform its constitutional edict. In *Lawyers for Human Rights* at para 23 the following was held:

“Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant’s right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.”

[63] What serves before this Court is an incomplete record. It is trite that a Rule 53 record should contain all information relevant to the impugned decision or proceedings. Our courts have postulated that every scrap of paper throwing light however indirectly on what the proceedings were, which is raised by Kgosi Pilane in this instance is ventilated. *Adv Matebese SC* was at pains to emphasize the steps taken to extract the record of the Commission. Furthermore, *Adv Matebese SC* exposed the missing portions of the record and the failure of the Commission to have considered critical contributions. The failure to have provided a complete record of the evidence at the hearing of the Commission is inextricably linked to the decision taken by the Premier.

The failure to provide

reasons

[64] Section 33(2) of the Constitution imposes a duty on public administrators to give written reasons to those whose rights have been adversely affected by administrative action. This constitutional obligation is given effect to, in PAJA, which sets out that any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the decision, is entitled to demand reasons for the administrator’s decision. S5 of PAJA provides:

‘(1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

- (2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.
- (3) If an administrator fails to furnish adequate reasons for an administrative action it must, subject to subsection
- (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.
- (4)(a) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.
- (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including-
- (i) the objects of the empowering provision;
 - (ii) the nature, purpose and likely effect of the administrative action concerned;
 - (iii) the nature and the extent of the departure;
 - (iv) the relation between the departure and its purpose;
 - (v) the importance of the purpose of the departure; and
 - (vi) the need to promote an efficient administration and good governance.
- (5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.
- (6)(a) In order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the Gazette publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.
- (b) The Minister must, within 14 days after the receipt of a request referred to in paragraph (a) and at the cost of the relevant administrator, publish such list, as contemplated in that paragraph

[65] The Premier did not provide reasons.

The Commission did not quorate

[66] Adv Matebese SC crisply sets this issue out in the following manner. Hosi Mahumani (Mahumani) was not a member of the Commission during 2016. Mahumani was appointed with effect from 26 December 2017 after the demise of Judge Maluleke. Quintessentially, Mahumani only became relevant to the Commission for six (6) months when a significant

portion of the evidence had been tendered. Of concern, Adv Matebese SC contended, was the ability of Mahumani to become conversant with the evidence from an incomplete record.

- [67] Significantly Adv Matebese SC submitted that Professor Moleleki did not contribute or participate in the preparation of the recommendations. Essentially, only Adv Baloyi SC NO from amongst the three Commissioners who heard evidence from September 2016 to 26 June 2018, participated in the preparation of the report and the recommendations. Furthermore, Adv Matebese SC contended that on a proper interpretation of regulation 4(2) of the Regulations, the quorum for the Commission was fixed at two (2) members for the entire proceedings. It followed axiomatically that the quorum of two members had to be maintained. Crucially, the two members that formed the quorum had to meaningfully participate in the proceedings or the preparation of the report. To this end, Mahumani's was hamstrung to make any contribution to the report and recommendations of the Commission. It is a view which I align with.
- [68] It is incontrovertible more appositely as it relates to the Premier and the Commission that their conduct fall within the category of just administrative action which is susceptible to be reviewed primarily within s 6 of PAJA and the principle of legality. There is a plethora of shortcomings in the process that was followed, the most notable of which was the incomplete record and the absence of reasons by the Premier as well as the failure for the Commissioned to quorate.
- [69] Consequently, a proper case has been made for the relief as per the Notice of Motion in UM 539/2019. As indicated in paragraph [1], the latter motion was consolidated with UM 239/22. The consolidation of these motions is a clear indicator of the interwoven nature of same. Resultantly, the order will speak to both motions.
- [70] A costs order is the exercise of a judicial discretion. The applicants have been successful. There is no basis to deviate from the customary order that costs follow the result. In the premises, I make the following consolidated order:

Order

1. It is ordered that: The findings and recommendations of the Commission of Inquiry into the Traditional Disputes in respect of the Bakgtala Ba Kgafela, Batlhala Ba Leema and Bapo I and II Community Disputes ("the Baloyi Commission") issued on 20 August 2019, in so far as they relate to the Bakgatla Ba Kgafela investigations is irrational, unlawful, unconstitutional and invalid.
2. The said findings and recommendations of the Baloyi Commission are reviewed and set aside.

3. The first respondent's ("Premier's") decision of 26 August 2019, to accept or approve the recommendations of the Baloyi Commission in so far as they related to the Bakgatla Ba Kgafela is irrational, unlawful, unconstitutional and invalid, and are reviewed and set aside.
4. That respondents shall pay such costs of this application jointly and severally, the one paying the others to be absolved.

A REDDY

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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