

SOUTH AFRICA / JUDGMENT

Bafokeng Private Land Buyers Association and Others v Royal Bafokeng Nation and Others (999/08) [2016] ZANWHC 27 (31 May 2016)

[2016] ZANWHC 27**COURT**

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

999/08

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(NORTH****WEST DIVISION, MAHIKENG)****CASE****NO.: 999/08****DATE:**

31 MAY 2016

In

the matter between:

BAFOKENG

PRIVATE LAND BUYERS

ASSOCIATION.....1ST

APPLICANT

SETUKE

FAMILY.....2ND

APPLICANT

THEKWANA

COMMUNITY.....3RD

APPLICANT

And

THE

ROYAL BAFOKENG

NATION.....1ST

RESPONDENT

MINISTER

OF LAND AFFAIRS

REGISTRAR

OF

DEEDS.....2ND
 RESPONDENT
 MOGONO
 COMMUNITY.....3RD
 RESPONDENT
 CHANENG
 COMMUNITY.....4TH
 RESPONDENT
 KHUNOU
 FAMILY.....5TH
 RESPONDENT
 MOTEPE
 FAMILY.....6TH
 RESPONDENT
 RANTSHABO
 FAMILY.....7TH
 RESPONDENT
 TSITSING
 COMMUNITY.....8TH
 RESPONDENT
 MAKGATLHA
 COMMUNITY.....9TH
 RESPONDENT
 BAPHIRING
 COMMUNITY.....10TH
 RESPONDENT
 MOKGATLE
 FAMILY.....11TH
 RESPONDENT
 MPUTLE
 FAMILY.....12TH
 RESPONDENT
 COMMISSIONER FOR
 RESTITUTION
 OF.....13TH
 RESPONDENT

LAND RIGHTS: NORTH WEST REGION

JUDGMENT

Landman J:

Introduction

[1] This judgment concerns an application in terms of Rule 7 of the Uniform Rules of Court. The issue is whether the Royal Bafokeng

Nation (the RBN), a tribe or traditional community, and in consequence their attorneys, were authorized to launch an application

(the main application) against, inter alia, the Minister of Land Affairs (the Minister) for, inter alia, an order declaring, in effect, that the Bafokeng tribe is the registered owner of the land (set out in an annexure) held by the Minister of Land Affairs in terms of title deeds 'in trust for' or 'in bewaring voor' the Bafokeng tribe. The other relief is sought to give effect to the declaration.

[2] The land listed in the annexure includes land in respect of which some members/families or clans of the tribe who have become known as the LRC Clients and the Mputle family. They claim that this land, is held in terms of the trust formula, for their ancestors and on their behalf and not for the tribe. For convenience I shall refer to this land as 'the disputed land' and the claimants as the 'land claimants'. The expressions 'the Bafokeng', 'the tribe' and the 'RBN' will be used interchangeably.

The complaint about authorization

[3] The complaint about the lack of authority is raised by the land claimants, more particularly the LRC clients. The complaint of the LRC clients regarding the alleged lack of authority is articulated by Mr Rapoo, one of the LRC clients, in his opposing affidavit in the main application and in a separate application, the Rule 7 application.

[4] Mr Rapoo says:

'Under custom, the Council does not have the power to make a decision of the sort, at least alone. Insofar as the Council does have

decision-making powers on such matters it has to consult very broadly within the traditional community before doing so, and act on the community's wishes. That is especially so given the historical disputes and the importance of the matter to the people. The members of the Supreme Council were aware of the disputes. Land restitution claims have already been launched. They were aware of the syndicates' descendants' claims to properties.'(Page 2016, para 183.)

Given that they had been no prior consultations, this meant that at the very least that the issue should have been taken back to the various communities and constituencies that make up the Bafokeng for discussion, deliberation and endorsement. There was no such process either before the decision was taken or after it was taken. This means it was not properly taken. (Page 2016, para 185.)

Even if the Supreme Council that met on 22 September 2005 did have the power to make a decision of this sort, the decision was overturned by subsequent events. On or about 29 July 2006 a Kgotha-Kgothe, also known as a pitso, was held at the Bafokeng Civic Centre Auditorium in Phokeng. I was personally present at the pitso. At the pitso there was general opposition to the idea that all the land be transferred

to the so-called Bafokeng Nation. The Kgosi gave an undertaking at that pitso that he would not pursue the matter before you consulted

further. He never consulted further in any meaningful way. (Page 2017, para 186.)

The pitso is an important meeting under our custom. Communities have raised concerns about representation at the pitso and how decisions

are taken. However, the Kgosi is not allowed to go against the decisions of the pitso. It is the highest ranking decision making

body in the traditional community. As Kgosi himself says: 'My mandate comes from consulting with this body. The people can overturn my input and views on any given matter through the general meeting'. These meetings are a forum where the community can, under custom, hold the Chief to account. According to the Chief, the systems of government are meant to ensure that 'people's concerns, opinions, and ideas are an integral part of policy-making, and there are sufficient checks and balances in place so that no branch of governance can act on its own'. (These quotes are from 'Traditional Governance in the age of democracy' on www.bafokeng.com (Page 2017, para 188.)

There was a lot of confusion and unhappiness that the community, at a local level, had not been consulted about matters relating to any property transfers. That is required under custom. The result was that there was a refusal to adopt any resolutions at the pitso supporting the Development Trust. I personally objected and others did too speaking for their community. (Page 2018, para 190)

'No meaningful consultation took place after the pitso. Some people were summoned to the Chief's Homestead and these issues were discussed but this is not consultation with the communities as required by custom. As far as I am aware, people attending the Chiefs homestead did not attend with any mandate from the community. Under custom, discussions of the sort must first be held within a community and at our community council meetings. This did not happen.' (Page 2018, para 191.)

'A follow up pitso was held in August or September 2006. It was announced through billboards, newspapers and the radio. I attended

this meeting. I have been told that the agenda was published in the Rustenburg Herald. When I attended the meeting I did not know the agenda. The meeting was chaired by a lawyer Steve Phiri who represented the Applicant. It was made very clear at this meeting by those who spoke that the Development Trust was not acceptable as a solution to the land issue. I recall Lucas Mekgwe spoke. The court proceedings were not discussed at this meeting. It was agreed that the land issue would not be dealt with through the Development Trust.' (Page 2019, para 194.)

'All of this means that these proceedings have not been authorised. It also means that there is no agreement to the proposed final ownership regime.' (Page 2020, para 196.)

Referral to oral evidence

[5] I decided, for the reasons set out in my judgment of 12 December 2013, to refer the issue concerning the authorization of the

litigation for oral evidence. I did so in the following terms:

‘The attorneys for the RBN Fasken Martineau are directed to prove their authority to act in the main application for this purpose. This issue is referred to oral evidence on a day to be determined by the registrar in respect of the following questions:

Did the Supreme Council for the RBN take a decision to authorise the bringing of this application on 22 September 2005?

Does the Supreme Council have power to take such a decision under customary law, and if so, is it necessary for it to consult broadly

within the traditional community before taking such a decision?

Was any such decision overturned or reversed by subsequent events and more particularly by the kgotha kgothe meetings of the traditional

community held in 2006?’

[6] Questions 1 and 3 are questions of fact. Question 2 is a question of law and, depending on its answer, a question of fact may arise.

The hearing of oral evidence

[7] Messers Taute, Rapetsane and Mokati testified on behalf of the RBN. Mr Rapetsane is a kgosana (headman) and a member of the Tribal Council

[8] Mr Mokati, an advocate, testified that he is a kgosana for kgotla ya Masoung which is located in an area in Thabaneng and Masosobane. He became a kgosana when his father passed away in 2009. He has attended Supreme Council meetings since 2009; first as kgosana and then both as kgosana and Executive for Land affairs. He had been employed as the Executive for Land Affairs in Royal Bafokeng Administration (the RBA) since August 2010.

[9] Mr Taute’s evidence is only of relevance to the recording of the meetings of the kgotha kgothe.

[10] Only Mr B E Mputle testified on behalf of the LRC clients. Mr Mputle lives at Mogono village. His kgosana is Majali K Mogare. Mr Rapoo did not testify. The LRC clients intended calling Prof Gulbrandsen but he suffered a heart attack and was unable to travel and give viva voce evidence. The LRC clients have applied for permission to place Prof Gulbrandsen’s evidence before this court by way of affidavit.

My approach to the issues at hand

[11] It seems to me that I must approach the issues at hand in the following way:

- (a) Decide whether the affidavit by Prof Gulbrandsen should be admitted and if so under what conditions and whether any further process is necessary; and
- (b) If no further steps are indicated:
 - (i) Evaluate the oral evidence tendered.
 - (ii) Determine the applicable law and custom.
 - (iii) Decide the Rule 7 application.
- a) The application to admit the evidence of Prof Gulbrandsen on affidavit

[12] It is common cause that Prof Gulbrandsen was unable to attend the hearing of oral evidence in February 2016 for medical reasons. He is recovering from open heart surgery, which took place in the previous year, shortly before the hearing. He was readmitted to hospital with chest pains. He was advised by his medical practitioners to avoid any situation that gives rise to stress, such as travelling the long distance to South Africa and giving evidence and being placed under cross-examination. The RBN have declined to consent to the admission of Prof Gulbrandsen's evidence by way of affidavit; hence this application.

[13] The application to admit this evidence by means of an affidavit is founded on Rule 38(2) of the Uniform Rules of Court. This sub-rule reads as follows:

'The witnesses at the trial of any action shall be examined viva voce, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.'

[14] Rule 38 applies to trials but it is applicable to a referral to oral evidence. The oral evidence stems from an application, it would have been competent to file Prof Gulbrandsen's affidavit as part of the application.

[15] Mr Budlender SC (with him Ms S Cowan and Mr R Tshetlo) who appeared on behalf of the LRC clients, submitted that evidence should be admitted by way of affidavit because:

- (a) There is sufficient reason to admit the evidence by affidavit, as contemplated by Rule 38(2).
- (b) The proviso to Rule 38 is triggered, because Prof Gulbrandsen could not make himself available for cross-examination, other than via the means tendered (skype or telephone) which the RBN elected to reject.

(c) The RBN has conceded material portions of Prof Gulbrandsen's evidence and has otherwise failed to demonstrate why its remaining concerns with his evidence cannot be addressed as matters going to the weight of his evidence. Accordingly the RBN does not reasonably require Prof Gulbrandsen's attendance for cross-examination.

[16] Mr Budlender SC made further submissions why the application should succeed and then dealt with the reasons that the RBN raised for requiring Prof Gulbrandsen to give oral evidence. I do not find it necessary to set out these submissions, as I am convinced that I should admit Prof Gulbrandsen's evidence by way of affidavit. To the extent that it is necessary to canvass these submissions I shall do so while considering the submissions made by Mr Loxton SC (with him Mr Antrobus SC and Mr Wesley) who appeared for the RBN.

[17] The central objection of the RBN to the admission of Prof Gulbrandsen's evidence is set out in the answering affidavit.

It is this. Prof Gulbrandsen is not qualified either as an anthropologist or legal academic to provide expert guidance testifying to the customary law which applies within the RBN on the issues in dispute. He himself points out that he has not consulted with any members of the RBN and has not conducted any research within the Bafokeng traditional community.

[18] I do not understand the challenge to Prof Gulbrandsen's standing and status to be based on the mere fact that he is not an anthropologist or a legal academic. He is a professor emeritus of social anthropology at the Department of Social Anthropology at the University of Bergen, Norway. His qualifications are not in doubt. The fact that he may not be a legal academic is also of little importance, particularly as traditional law and custom has largely been the province of anthropologist with only a few jurists making important contributions in this field.

[19] I understand the objection to be based primarily on the fact that Prof Gulbrandsen has little personal knowledge of the specific

customary law, which applies within the RBN and that he has not conducted any research within the Bafokeng traditional community. The objection is based on the proposition in RBN's affidavit that customary law differs from community to community and that the customary law applied in other communities is not the same as that applicable to the RBN. However, I am of the view that Prof

Gulbrandsen evidence concerning the values in regard to consultation, transparency and democracy, with reference to the relationship

between a Kgosi and his people are common values to which regard can and must be paid. These general values accord with my own reading of texts applicable to South African Tswana communities. When the evidence of Prof Gulbrandsen moves from general values to the particular and the implementation of those values in the RBN community I would be entitled either to reject that evidence; if I am satisfied that it lies beyond the Professor's expertise, or to

give it whatever weight it deserves in the circumstances. I do not regard this objection as sufficient to exclude Prof Gulbrandsen's evidence as a whole. It is hardly necessary to state that the admission of Prof Gulbrandsen's evidence is not decisive of the issues in dispute. The absence of cross-examination on crucial aspects is of course a matter that must be and will be taken into consideration. Any failure to afford a witness who testified an opportunity to comment on the evidence of Prof Gulbrandsen means that the latter's opinion must be excluded. In the end, while acknowledging the expertise of a witness, the decision is that of this court.

[20] The other complaints that the RBN raised as regards the value of Prof Gulbrandsen's evidence can be dealt with if his evidence is admitted on affidavit and do not constitute sufficient grounds to refuse the application.

[21] I am satisfied that a proper case has been made out to admit Prof Gulbrandsen's evidence on affidavit and it is admitted. I do not find it necessary makes its admission subject to any conditions.

[22] I turn now to the evidence relating to three issues

Question 1

[23] Did the Supreme Council for the RBN take a decision to authorise the bringing of this application on 22 September 2005?

[24] It is conceded that the Supreme Council passed the resolution of 22 September 2005. Nevertheless it is necessary to establish, at the outset, what is the Supreme Council of the RBN. The RBN has traditionally had a chief or Kgosi who is advised by a council of hereditary headmen or dikgosana. Each kgosana presides over a ward council or kgotla. Currently there are 72 kgotlas. When the dikgosana meet they form the Tribal Council. The Tribal Council is an entirely traditional body and its powers, functions and procedures are rooted in traditional or customary law. I shall use the term Kgosi and dikgosana (single kgosana) in this judgment.

[25] The RBN also has an Executive Council. The Executive Council is a fairly recent creation established when the constitution of the Executive Council and the changes that it heralded, were adopted by the general meeting of the RBN on 21 September 1997 and the assembly mandated the Kgosi of the RBN to sign it. The constitution was also signed by the chief negotiator of the dikgosana and by various negotiators. But it seems to me that this body also functioned as the Tribal Authority, a statutory body instituted by legislation for each tribe by the then Government of Bophuthatswana. See the Bophuthatswana Traditional Authorities Act 23 of 1978. This statute has since been repealed.

[26] A practice has developed for the Tribal Council and the Executive Council to meet in a joint session. When they do so this has been termed the Supreme Council. The Supreme Council has no written constitution.

- [27] The Kgosi chairs the Tribal Council, the Executive Council and the Supreme Council. However, in the case of the Supreme Council, the Council usually elects a chair unless one is designated by the Kgosi's office.
- [28] The Supreme Council normally meets four times a year, but may be convened whenever an emergency arises. Attendance at Supreme Council meetings is compulsory for members of the Tribal Council and Executive Council, seven days' notice of a meeting of the Supreme Council must be given. The agenda is set out in the notice, but proposed resolutions are not attached to the notice. The assembly votes for the resolution by a show of hands. When the Kgosi is present he customarily addresses the Council.
- [29] The Supreme Council reports back to the kgotha kgothe on its activities. The kgotha kgothe is a general assembly of the people

called by the Kgosi twice a year. But may be summoned by the Kgosi at any time. Each kgosana is required to report back on proceedings at the Supreme Council at the kgotla of his village. The elected members of the Executive Council report on the resolutions to their constituency at the kgotla of his or her village.

- [30] Mr Rapetsane explained the motivation for the resolution in question. The people had been upset because the President of Bophuthatswana had to be present whenever the land or rights in land were in issue. After the new dispensation came into being, the Minister of Lands or his or her representative had to be present for the same reason.

- [31] One of the factors causing the resolution to be taken was that in 2000, when the RBN was doing business with Impala Platinum Mines, a representative of the Minister of Land Affairs was required to be present at a meeting of the kgotha kgothe. The Minister's

representative would often not attend the meeting. When this happened the project or development came to a halt. The people were unhappy about this situation. They were particularly offended by the fact that on 21 September 2002 a representative of the Minister had been present, as the issue concerned the granting of a long lease. But in 2006 it was discovered that the file had been mislaid and the kgotha kgothe was obliged to repeat the exercise on 30 September 2006.

- [32] Mr Rapetsane was present when the Supreme Council passed and adopted the resolution of 22 September 2005. The resolution is set in exhibit 'D1' page 11. The minutes of this meeting appears at page 111 of 'D1'. The resolution was preceded by a presentation, illustrated by slides, by Lucas Moalusi, an attorney of the firm Bell Dewar Hall. A copy of the slides are to be found at 'D1' pages 113 to 158. On the completion of the presentation, the resolution was moved by Bruno Sabela, an executive of the Royal Bafokeng Administration (the RBA). The assembly voted for the resolution by a show of hands. It was passed unanimously. Thereafter the Kgosi addressed the Council as was his habit. No evidence to the contrary was led.

Question 2

[33] Does the Supreme Council have power to take such a decision under customary law, and if so, is it necessary for it to consult broadly within the traditional community before taking such a decision?

As regards this question I shall briefly:

- (a) record the common cause premise;
- (b) set out the oral evidence of the RBN;
- (c) record the concessions made under cross examination;
- (d) set out the oral evidence of the LRC clients; and
- (e) summarise the evidence of Prof Gulbransen.

(a) The common cause premise

[34] It is common cause that the Supreme Council took this resolution without the issue serving before the kgotha kgothe and without it being discussed by at each kgotha.

(b) The oral evidence of the RBN

[35] Mr Rapetsane testified that it is his responsibility as the community leader to inform the people of his community as to what took place in the Supreme Council. It is common cause that there are no documents that go to show that the resolution of 22 September 2005 was disclosed to any kgotha or in any way to members of the traditional community or to any of the applicants before the case started. Mr Rapetsane said that he reported it to his kgotha but agreed that if he had reported on it, the secretary would have recorded it as it is the responsibility of the secretary to write all the minutes.

[36] Mr Rapetsane testified that if an issue concerned the alienation of land or rights in land, the issue must serve before the people assembled at a kgotha kgothe. They attendees vote on whether to approve the resolution or not. In his view the determining factor is whether the consent of the Minister of Land Affairs was required. Thus the lease of surface rights and a servitude in favour of Eskom or Magalies Water was presented to the kgotha kgothe for approval.

[37] However, in those instances where there is no need for the consent of the Minister of Land Affairs to deal with land the Supreme Council makes the decision. It does not serve before the people at a Kgotha kgothe. This has occurred when the Supreme Council resolved to transfer the farms Welverdiend and Portions 30 and 31 of Kgetleng River Municipality to a land claimant (through the Regional Land Claims Commission) subject to a RBN being compensated. The RBN had bought the farm after 1994. Therefore it was not trust land involving the Minister of Land Affairs. So too the resolution to spend an amount of R80 million to top up the national government's grant to build the Royal Bafokeng Sports Palace, was taken by the Supreme Council. Only a report relating to this was made to the kgotha kgothe.

[38] The Supreme Council passed a resolution in 2012 to purchase additional land (4 619 hectares at Swartruggens) on behalf of the RBN to replace land taken by mining activities and voted R55 million for this purpose. The kgotha kgothe was informed of the decision. The approval of the kgotha kgothe was not required.

(c) Concessions

[39] Under cross-examination Mr Rapetsane accepted that the following principles or rules of government, extracted from a speech by the Kgosi, applied to the RBN:

‘Despite what some may think there is plenty of evidence to support the idea that our traditional form of government espouses the principles of democracy.

These include:

Mechanisms to ensure that the Kgosi is carrying out the will of the people.

Political representation at multiple levels of local government, and,

A system for electing village representatives to our council.’

‘Every time there is a major issue that affects the community I seek input at a kgotha kgothe in my capacity as the chair of that body and my mandate comes from consulting with those present.’ (Volume D1 at page 63.)

‘Vision for the future and conclusion.

As I stated earlier, the ultimate authority for the destiny of this community lies with you, the Bafokeng people. In our system no major decision that affects the community can be taken without your approval... When we come together at Kgotha Kgothe twice a year we are gathering as a community to decide our future.’ (Volume D1 at page 66.)

‘As a traditionally governed entity, then, the Bafokeng system of governance embraces a range of mechanisms for ensuring that people’s

concerns, opinions and ideas are an integral part of policymaking and that there are sufficient “checks and balances” in place so that no branch of government can act on its own.’ (Volume D1 at page 76.)

‘Democracy is not a new or a revolutionary concept to the Bafokeng.’

‘There is plenty of evidence to support the idea that our traditional form of government espouses certain principles of democracy, these include mechanisms to ensure that the Kgosi is carrying out the will of the people, political representation at multiple levels of local government and even a system for electing village representatives to the council.’ (Volume D1 at page 74.)

‘One might ask what is traditional governance? It is a way of organising community life that is founded on basic human principles

such as respect, sense of community and a sense of commitment to ones neighbours as well as oneself.' (Volume D1 at page 75.)

'Our traditions and values as people are part and parcel of the form of government we embrace, one that values all segments of the society both young and old, male and female, one that prioritises the needs of the community along with the needs of individuals and one that seeks consensus in decision making rather than the strong arm tactics of powerful individuals.' (Volume D1 at page 81.)

[40] Some time was spent on the crucial issue whether the kgotha kgothe has the primary say as regards important issues. And although Mr Rapetsane says he answered the question; he did not give a pertinent question until Mr Budlender pressed it home. In the end Mr Rapetsane agreed that where there is disagreement between the Supreme Council and the kgotha kgothe, every attempt is made to resolve it by discussion and negotiation. It may be necessary to achieve resolution by having an expert explain the issues. If the disagreement between the Supreme Council and the majority of the kgotha kgothe, continues the matter may be resolved by asking the kgotlas to consult and to come up with a resolution. But if the kgotha kgothe stands firm then the Supreme Council must comply with the wishes or decision of the kgotha kgothe.

[41] The status and nature of the kgotha kgothe was explored with reference to the website of the RBN. The following was put to Mr Rapetsane:

'The Royal Bafokeng has a government system that operates as follows...

The Pitso ya Kgotha Kgothe General meeting.

A general meeting Pitso ya Kgotha Kgothe of the Bafokeng people constitutes the highest legislative and executive authority of the

Bafokeng and thus any decisions of the executive council is capable of being overturned at the Kgotha Kgothe. It is here that extremely important decisions such as the disposal of land or mineral rights can only be taken.'

Mr Rapetsane did not agree that the kgotha kgothe is the highest legislative and executive authority.

[42] In pursuance of the same aspect a portion of the Kgosi's speech (Exhibit D1 page 63) was put to Mr Rapetsane for comment.

'The Kgosi says the highest ranking decision making body in the kingdom is called Kgotha Kgothe.'

Mr Rapetsane disagreed with this statement. He however agreed that the kgotha kgothe that was the highest ranking decision making body pertaining to the disposal of land and agreement.

[43] The following statement was put to Mr Rapetsane:

‘Every time there is a major issue that affects the community I seek input at the Kgotha Kgothe in my capacity as the chair of that body and my mandate comes from consulting with those present. In other words my inputs and views on any given matter can be overturned by the people through the general meeting.’

Mr Rapetsane agreed with this statement.

- [44] Mr Rapetsane also agreed with the proposition put to him that the Kgosi does not seem to say that it has to go to the kgotha kgothe just because ministerial approval is required. What he is saying in the context is it has to go to the kgotha kgothe because it is a very important matter.
- [45] Mr Rapetsane agreed with reference to the case described in Phokeng- People of the Dew at page 137 that the RBN needed a mandate from a community meeting or tribal meeting in order to proceed with a case or appeal against it.
- [46] Mr Rapetsane agreed with the following proposition: if, in the main case, a counterclaim is made by some people who say the land does not belong to the RBN, it belongs to them and if the Court upholds their claim, that would cause very great problems for the RBN because it may lead to secession and it may lead to the breaking up of the nation.
- [47] The proposition that the Supreme Council is mainly a consultative body and if it does have the power to make decisions, it did not have the power to make the decision to bring this court case was put to Mr Rapetsane. He replied: ‘I am in disagreement with you because that is what we have been doing with the exception of this case.’
- [48] Mr Mokati was referred to a passage in a speech called ‘the Role of Traditional Leadership in South Africa’ by Kgosi Leruo Molotlegi presented at the University of Pretoria on Wednesday 10 September 2003. The Kgosi said:

‘The highest ranking decision-making body in the kingdom is called Kgota-Kgote. This is a general meeting of all Bafokeng that is held twice annually and whenever there is an important matter to debate.’ (Bundle D1 at page 76.)

[49] He commented as follows:

‘The highest decision making body with regard to encumbrance of land, which is an object which unifies all of us, is made at the

Kgotha-Kgothe. With regard to other things, you cannot decide them at the Kgotha-Kgothe, it is impractical... I am not

disagreeing with what [the Kgosi] is saying but I can qualify it and we should realise that Kgosi had just got into office at that point in time. ... You see, on day-to-day basis there are decisions which are made with the, by the executive of, of the administration and there are decisions taken by the Traditional Council and there are decisions taken by the Kgosanans and there are decisions taken by the Supreme Council. --- The Supreme Council meets every, once every four months,

once or so every four months, except when there is a need to, to call it on urgent basis. The Supreme Council deals with the budget, it makes decision on the budget of every year and those decisions are announced at the Kgotha-Kgothe and they are also announced as Kgotla levels. So it is not correct that only the Kgotha-Kgothe makes decisions. There are serious matters of purchase of land where, which are made at the Supreme Council. At the Supreme Council we are dealing with decisions to litigate almost...There are decisions which are made regularly regarding to litigation because most of the time there is invasion of our land by squatters and before I take a decision to go and litigate and interdict those squatters we call a Supreme Council to make a decision...

The Kgotha-Kgothe was called four times in 2006, as I understand (inaudible), to deal with the trust issue... That was

special Kgotha-Kgothe, not ordinary Kgotha-Kgothe... Ordinary Kgotha-Kgothe sits two times a year, only when there is a need for special resolution can, can the Kgotha-Kgothe be called on special grounds and, and if I were to wait for Kgotha-Kgothe to make decisions for me to bring interdicts it would be untenable because there are often encroachments of land by, by squatters and I have to deal with that on a daily basis where we have to make decisions, take them to Supreme Council to empower us to proceed.'

(d) The LRC client's evidence - Mr Mputle

[50] Mr Mputle hardly touched on the issues in dispute. He first heard of the resolution of the Supreme Council of 22 September 2005, when he read about it in a newspaper. He showed the report on the Mputle family. They agreed that they would approach the court for relief and they consulted a legal representative. They wanted to ensure that their land was registered in the name of the Mputle family and not in the name of the RBN.

[51] The witness usually attends his local kgotla. Their kgosana had not reported back to them about the decision of the Supreme Council to Institute litigation in the High Court. Had the kgosana reported upon it, the witness would have raised an objection to the resolution. The family was not consulted. This is the main reason that the family disputes the matter because the land belongs to them.

[52] He was asked whether he raised it at the kgotha kgothe and replied that he had not. He was asked whether he had thought to deal with it by consultation or negotiation at the kgotha kgothe. He replied 'No, we must intervene'.

[53] The witness was asked whether the dispute was about the land and that they must go to court. He replied in the affirmative. He was asked whether they must present a case in court. He was replied affirmatively. He was also asked whether they would put in a counterclaim and he agreed that they would do so. He was asked whether he trusts the court to settle the dispute. He answered affirmatively.

[54] He expressed no opinion that the Supreme Council had not authorised the litigation.

(e) Prof Gulbrandsen's affidavit

[55] Prof Gulbrandsen's evidence is set out in a paper attached to his affidavit. The paper is entitled: 'Tswana value principles of consultation, transparency and all-inclusive democracy with reference to the relationship between Kgosi and the people'.

[56] The professor locates the obligation or expectation that the chief will present for public debate all major issues of relevance to the nation, in the nature of chieftainship amongst the Tswana people. He says:

'The kgosi is expected to present for public debate all major issues of relevance to the morafe, which traditionally meant the assemblage of all (male) heads of household in the royal kgotla. In more recent times, this assembly has become even more inclusive, especially as women have been allowed to attend and speak. This means, also, that the chief is expected to call for debate whenever a reasonable

section of the morafe makes a request for it, and, once assembled, everybody might propose an issue to be debated. In particular, for reasons I shall explain. Subsequently, the chief should assemble the people in the kgotla in case of enduring community tension and conflict of any kind to restore social order, peace and harmony, known as kagiso (see also Appendix A). Conversely, when assembled in the kgotla, the people are not restricted by the agenda pronounced by the kgosi; by virtue of the ground rule of kgosi ke kgosi ka batho, people are free to bring forward issues for debate.' (Para 3.)

[57] Prof Gulbrandsen expresses the view that the value of consultation, transparency and all-inclusive democracy applies to the Bafokeng. He says:

'Let me indicate my observation that anthropologists working across the South African border have not, to my knowledge, presented in the ethnographic accounts of conflict with the continuity across the border in respect of the principles, values, etc with which I am concerned.' (Para 24.)

[58] After summarizing what has been communicated to him about the decision of the Supreme Council of September 2005, the attitude and positions adopted by the LRC clients, culminating in the main application, he says:

'Although the LRC's clients are somehow heterogeneous communities, they all agree on these objections against the procedure. I also understand that they are unified in the claim that the case is to be redirected from the court and to the communities for consultation and debate with them. It is my understanding that there is a demand for a procedure for consultation and debate at a localised level, such as in the context of the assembly of the kgoro, according to customary principles directly with the communities who say they bought or themselves owned the land also drew another consultation procedure.' (Para 30).

'I have been asked by the LRC whether this claim is consistent with Tswana values and principles.' (Para 31.)

[59] Prof Gulbrandsen expresses the opinion that:

‘... [T]here are important arguments for presenting the matter publicly to the Bafokeng in the kgotla, at the local level of the kgoro, and, in any event, ultimately, the plenary assembly of kgotha kgothe.’ (Para 34.)

[60] Prof Gulbrandsen then sets out in detail his reasons for this

conclusion.

Question 3

[61] Was any such decision overturned or reversed by subsequent events and more particularly by the kgotha kgothe meetings of the traditional community held in 2006?

[62] I proceed to record:

- (a) the oral evidence by the RBN;
- (b) concessions made by the RBN witnesses;
- (c) the evidence of the LRC clients.
- (a) The oral evidence by the RBN

[63] Mr Rapetsane testified that the resolution of the Supreme Council taken on 22 September 2005 was not reversed at the Supreme Council nor by a decision at the kgotha kgothe.

[64] Mr Rapetsane agreed having regards to the speech of the Kgosi and the minutes of the Supreme Council, that by the end of the 2006 kgotha kgothe, people would have been under the impression that land was going to develop with the Trust but there may have been some doubt as to which land were going to the Trust. He also agreed that the transcript of the kgotha kgothe of 28 May 2006 show that at that meeting there were complainants who said they are the owners and they do not agree.

[65] The agenda for this meeting contained as item 4.13 a resolution proposing the ratification of the RBN Development Trust resolution taken by the Supreme Council on 24 November 2005. It was put to Mr Rapetsane that the kgotha kgothe was being asked to ratify the decision which was made by the Supreme Council about the transfer of the assets and was not merely being informed of the fact. He disagreed with the proposition.

[66] Mr Moalosi made a presentation at the kgotha kgothe held on 29 July 2006 that the assets that to be placed in the Trust would include money, shares and land. However, the decision for that day was restricted to money and the shares. See exhibit D1 page 326. At that same meeting there were many objections raised by people who said that they were the land buyers. The meeting decided to adjourn so that consultation with the claimants could take place and so that all the kgotlas should be consulted.

- [67] At the Supreme Council meeting on 28 September 2006, the Kgosi agreed to the proposal that the land should not be included as an asset of the Development Trust.
- [68] The kgotha kgothe met again on 30 September 2006. The kgotha kgothe was asked to consider two main questions. Firstly whether it agreed with the structure of the trust and the membership of the trust and secondly which assets should go into the trust. The assembly agreed in principle on the Trust. They were told that there are going to be some changes to the Trust Deed that will again serve before the Kgotha kgothe. The Kgosi said that he intended 'to sit with each and every one of the land claimants'.

(b) Concessions made under cross-examination

- [69] Mr Rapetsane was also referred to situations where the people had brought pressure to bear on a Kgosi to reverse his decision. In 1926 Chief E P L Molotlegi claimed personal ownership of the farms Haakbosch 340 and Hoornsfontein 571 in 1926. These farms were registered in 1891 and 1892 respectively in the name of the Superintendent of Natives in trust for the then Chief of this tribe and not the 'Chief and the tribe'. The Kgosi reluctantly agreed that the farms were the property of the tribe saying that:

'We have come to agreement and the pressure of forces working against me I am forced to relinquish my claims to the said farms though this will go down in history as an individual feat of singular delinquency.'

- [70] Mr Budlender SC referred Mr Rapetsane to a second example contained in the publication Phokeng – The People of the Dew by Bernard Mbenga & Andrew Manson at page 90.

'On 9 May 1883 a portion of Bierfontein 432 was registered in the name of the Location Commission, in trust for Kgosi Tumagole (and subsequently his successor, Molotlegi).'

'On 15 August 1903, a portion of Kookfontein 337 was registered in the name of the Commissioner for Native Affairs, in trust for Kgosi Molotlegi.'

'In January 1906, the same Kgosi negotiated to buy himself a 68-morgen portion of the farm Rooikoppies 171 whose owner, A G Henningse, was selling it for 900 pounds.'

'Molotlegi bought this farm 'for his own private use' and made a down payment of 400 pounds in February 1906.'

'However on 15 November 1926 Molotlegi renounced his 'personal right in the properties', declaring that they "were purchased for and belong to the Bafokeng Tribe."

'It is not clear what prompted Molotlegi to renounce his right to these farms, but it could have been public pressure since the farms were bought with public resources.'

- [71] Mr Rapetsane agreed that there were two issues raised at the Kgotha kgothe. One was the principle of the Trust and the structure of the Trust and the other was which assets should go to the Trust. The kgotha kgothe initially agreed that they could not proceed with the decision without further consultation on both of those questions. As a result of the consultation they reached agreement that they could proceed with the Trust and its membership. The question of the land was reserved for another time.
- [72] It was put to Mr Rapetsane that implicit or implied in that decision was that there would be no change in the status of the land (all the land including the land held in trust) until the consultation was completed Mr Rapetsane replied: 'I do not think that they were saying that because I think at that time the Supreme Council had already made a resolution to remove the Minister and I believe at that stage the case was already before the Court.' Mr Budlender said the case was not before the Court at that time.

Mr Mokati

- [73] Mr Kenneth Modisilo Mokati was not present at the meeting of 2006 but he attended the meeting of the kgotha kgothe of May 2006. He spoke and supported the idea of the Trust but thought that it was important that the composition of the trust be changed to allow more Dikgosana to be represented on the Trust. His contention on that day was that the Trust should be representative and that land should not form part of the Trust; land should remain outside the Trust.
- [74] Mr Mokati was referred to what the programme director, Mr Phiri, said at a meeting of the Kgotha-Kgothe on 28 May (which Mr Mokati did not attend).

'On the other side there were those that said the lands that we are talking about are lands that belonged to our forefathers who bought them without any help from anyone, who said he was a Mofokeng. And now if there is something that was not with those land, there must be a consultation with us, the owners of the lands, not with people who say are land owners whilst they are not owners of lands. We are talking about those who are not the offspring of those forefathers and let the Kgotha-Kgothe be postponed, there should be a discussion with us, the land owners.' (Volume D2, page 392)

The witness commented on the passages as follows:

'We, the original Bafokeng, whose forefathers went to Kimberley and contributed towards the purchase of land, we call ourselves landowners. His position is that all the Bafokeng own the land and that it is their forefathers who went to [work at] Kimberley to buy the land.'

(c) The LRC client's oral evidence

- [75] Mr Mputle did not attend the kgotha kgothe in 2006 that allegedly reversed the Supreme Council's resolution of 22 September 2005 or, if he did, he does not remember doing so.

Evaluation

[76] The three questions, that have been referred to oral evidence, arise in the context of the application made by the LRC clients under Rule 7(1) of the Uniform Rules of Court. This Rule provides as follows:

‘(1) Subject to the provisions of sub-Rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.’

[77] In *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705E-H Flemming DJP said:

‘The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney

The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is

authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.

As to when and how the attorney’s authority should be proved, the Rule-maker made a policy decision. Perhaps because the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1). Courts should honour that approach. Properly applied, that should lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants especially certain

financial institutions.’

This approach has been accepted by the Supreme Court of Appeal in *Unlawful Occupier of the School Site v City of Johannesburg* (2005) All SA 108 (SCA).

[78] It will be recalled that the authority of the RBN’s attorney is not disputed rather the Rule 7 application was used to challenge the resolution passed on 22 September 2005 by the Supreme Council to embark on litigation. There is no evidence that the LRC clients doubt that the Supreme Council, and thus the RBN, has authorized the main application.

[79] I turn to evaluate the evidence regarding the three questions referred to oral evidence. In doing so I must have regard to the correct approach to traditional law and custom as expressed in *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008). For present purposes it is only necessary to quote the summary at para 49:

‘To sum up: where there is a dispute over the legal position under customary law, a court must consider both the traditions and the

present practice of the community. If development happens within the community, the court must strive to recognise and give

effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of section 39(2) must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law...’

The first question

[80] The first question is answered in the affirmative as it is common cause that the Supreme Council of the RBN took a decision on 22 September 2005 to authorize the bringing of the main application.

[81] It is convenient to consider the third question at this stage. The question is: was any such decision overturned or reversed by subsequent events and more particularly by the kgotha kgothe meetings of the traditional community held in 2006? The evidence is clear and unambiguous. The sentiment of the people attending the kgotha kgothe at the four meetings in 2006 was that the land of the Bafokeng should not be transferred into the RBN Development Trust. The land claimants took the opportunity at some of the meetings to state (as they had done in the past) that the disputed land belonged to them and not the Bafokeng tribe. The Kgosi agreed to meet with the land claimants. He met with some land claimants but nothing came of this.

[82] No resolution was taken at the 2006 meeting at the kgotha kgothe and no sentiment was expressed that the tribe should not seek to recover the land held in trust for it from the Minister of Land Affairs.

[83] I accordingly find that the resolution taken by the Supreme Council on 22 September 2005 was not overturned or reversed by subsequent events and in particular it was not reversed by at any kgotha kgothe of the traditional community held in 2006.

The second question

[84] I turn to the second question which is: does the Supreme Council have power to take such a decision under customary law, and if so, is it necessary for it to consult broadly within the traditional community before taking such a decision? This question consists of two points.

First part: powers

- [85] The first part of the second question is: does the Supreme Council have the power to take such a decision under customary law? The oral evidence presented is that the Supreme Council has the power to authorize the institution of litigation. Mr Rapetsane testified about the powers that the Supreme Council had in September 2005. He said that amongst the powers that it had were the powers: to approve budgets, to be involved or enter into business transactions, to establish entities like Royal Bafokeng Finances, Royal Bafokeng Holdings and Royal Bafokeng Institute and other entities, to protect the property of the community, to litigate, the to negotiate with the municipality in an attempt to create better lives for the people.
- [86] The people were the source of these powers. They conferred these powers on the Supreme Council at the meetings that were held at the kgotlas as well as at the kgotha kgothe. When pressed for proof of the conferment of these powers he said the kgotla of the kgosanas jointly when they sat with the Executive Council conferred these powers on the Supreme Council.
- [87] I accept that in the early part of the last century the tribe, on the rare occasions that it engaged in litigation, would do so at the instance of the Kgosi advised by the Tribal Council. The power of a traditional community to authorize litigation, at the time the resolution was passed, was vested in a statutory body. This body until 24 September 2004 was termed a Traditional Authority In the case of the North West Province and was established in terms of the Bophuthatswana Traditional Authorities Act 23 of 1978 (the BTA Act).
- [88] Section 28(4) of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act) that came into operation on 24 September 2004 provides that:
- ‘a tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council contemplated in section 3 and must perform the functions referred to in section 4...’
- The concept of a tribal authority includes a traditional authority.
- [89] The Supreme Council is a joint sitting of the aforementioned bodies, so that when it is said that the Supreme Council has authorized this litigation, this will be a correct statement provided the members of the Supreme Council who are members of the Executive Council/ Traditional Council, duly quorate in terms of its governing law, voted in favour of this action. The Executive Council as the Traditional Council may speak for the tribe and authorize litigation. See *Bengwenyama-Ya-Maswazi Community and Others v Minister for Mineral Resources and Others* (783/2013) [2014] ZASCA 139; 2015
- (1) SA 197 (SCA) (26 September 2014) at para 40. The resolution is morally strengthened should the members of the Tribal Council endorse the action.

- [90] Must I consider whether the Executive Council was quorate when it contributed to the passing of the resolution? This issue did not constitute one of the grounds relied upon by the LRC in their Rule 7 application. Although some questions were asked of the RBN's witnesses no application was made to broaden the grounds on which the authority of the Supreme Council or rather the Executive Council was challenged. I decline to investigate this aspect. The purpose of the referral to oral evidence was to hear evidence on the three questions formulated on the basis of the LRC clients' Rule 7 application.
- [91] I therefore find that the resolution of 22 September 2005 was validly passed by the Executive Council which had the power to do so.

Second part: consultation

- [92] The second part of the second question is whether it is necessary for the Supreme Council to consult broadly within the traditional community before taking such a decision? The formal answer is that there is no mechanism which requires the Supreme Council to consult before taking a decision. But this does not exhaust the subject. The Supreme Council consults ie is informed of developments and informs others of its activities (reports back) in a broad and continuous sense through its three constituent parts.
- [93] First each kgotla is linked to the Tribal Council through one or more Dikgosana who are members of the kgotla members of the Tribal Council and thus members of the Supreme Council. Each Kgosana as a members of the Tribal Council undoubtedly has a responsibility to convey to his kgotla what has been decided or is under consideration at the Tribal Council whether the Tribal Council sits alone or with the Executive Council as the Supreme Council. In turn the kgosana would convey to the Tribal Council the problems and views of the kgotla.
- [94] Secondly the members of the Executive Council communicate in much the same way to their constituencies and to the Executive Council and thus to the Supreme Council.
- [95] Thirdly the Kgosi communicates and consults the tribe through the institution of the kgotha kgothe and because the Kgosi chairs the Supreme Council, or is entitled to do, and chairs the Tribal Council and the Executive Committee, and all the members of the Supreme Council (and especially for our purposes the members of the Executive Council) are obliged to attend the kgotha kgothe the views, sentiments and resolutions of the tribe in general assembly are communicated to the Supreme Council.
- [96] This brings me to the factual question whether the issue of launching litigation against the Minister of Land Affairs so as to vest land held in trust for the tribe into the name of the RBN were discussed at the each individual kgotla, by the constituencies and in particular at a kgotha kgothe meeting.

The kgotha kgothe

- [97] The kgotha kgothe which began as a generally assembly of the married adult men of the tribe has developed into a general assembly of all members of the tribe although in practice only a percentage of the members attend.
- [98] It is the prerogative of the Kgosi to summons the members of the tribe to the pitso ya kgotha kgothe. It is the Kgosi who determines the issues for consultation or discussion or in respect of which he seeks the views and sentiments of the tribe. It is the Kgosi who consults the tribe and receives the opinion or sentiment and, lately, resolutions of the kghota kgothe. A kgotha kgothe does not take place in any other manner.
- [99] The result is that the question posed for decision must be recast to include the question whether the Kgosi was obliged to consult the nation and to debate with them the proposal that the High Court should be approached for an order that the land (including land that the land claimants for themselves and their successors) held in terms of the trust formula be registered in the name of the RBN?
- [100] There is some evidence that the consent of the tribe at a pitso was required for the alienation of tribal land in terms of customary law applicable at the time. A Kgosi who wished to dispose of tribal land, in a manner of speaking, would summons a kgotha kgothe in order to receive the views or sentiments of the members of the tribe. This was done for instance in 1876 by a neighbouring tribe called the 'Bapo tribe' (probably the Bapo Ba Mogale tribe). See *Hermannsberg Mission Society v The Commissioner for Native Affairs and Darius Mogalie* 1906 TS 135 where the facts showed that the alienation of tribal land received the consent of the tribe at a pitso (although Innes CJ, Mason J concurring, held that the consent of the tribal council would have been sufficient). The Transvaal Colony, the Union and Republican governments, the Bophuthatswana government and currently the National and Provincial governments require a decision regarding the alienation of land to be taken at a the equivalent of the kgotha kgothe.
- [101] But I do not accept the evidence that, according to traditional law and custom, only the question of the alienation of land should be debated at the kgotha kgothe. I rather accept the opinion of anthropologists such as Dr Schapera that the Kgosi would debate 'matters of public concern' or, to put it differently, 'important questions' at such a meeting. Matters concerning land would be viewed as matters of public concern. See Schapera, *The Bantu-Speaking Tribes of South Africa - An Ethnographical Survey*, who said at 184:
- 'But among the Sotho all matters of public concern are dealt with finally before a general assembly of the initiated men. This assembly (pitso) must be summoned by the Chief whenever occasion arises. It is usually, but not invariably, preceded by a meeting of the great council. The Chief, who presides, puts the issue before the people. Anybody present can then take part in the ensuing debate....Should

most of the speakers express different views from those favoured by the Chief and his advisers, the latter will attempt to argue them round; but no Chief would dare oppose public opinion as here revealed unless he is looking for trouble.

Normally, however, the voices of the councillors, if they support him, will carry sufficient weight with the general assembly for the decision previously arrived at to be approved, and thus enable the Chief to carry his policy into effect.

The existence of these councils greatly limits the Chief's actual exercise of his power. Political life is so organized that effective

government can result only from harmonious co-operation between him and his people. Kxosi ke kxosi ka morafe, say the Tswana: "a

Chief is Chief by grace of his tribe." Despite the fact that ultimate control over almost every aspect of tribal life is concentrated in his hands, and the very considerable authority he consequently has, he is very seldom absolute ruler and autocratic

despot.'

[102] What is a matter of public concern? And who decides this? As it is the Kgosi's prerogative to summons the kgotha kgothe it follows that it is the Kgosi's prerogative to decide what matters should be introduced for consultation and debate. It is necessary to notice that the exercise of the Kgosi's prerogative and his decision on whether a matter is of 'public concern' or sufficiently important for it to be raised at a kgotha kgothe, is taken on advice of the Tribal Council and in the case of the RBN probably also that of the Executive Council or both sitting as the Supreme Council.

[103] What is clear is that there are powerful social and conventional forces which govern the exercise of the Kgosi's prerogative. But it seems to me that one must ask whether according to traditional law and custom, now prevailing amongst the Bafokeng, the prerogative of the Kgosi, as advised by the Tribal Council and Executive Council or Supreme Counsel, has been replaced by an objective standard and that the Kgosi is obliged to act in terms of this standard so that the exercise of the prerogative is open to a legal challenge?

[104] The evidence presented goes to show that the Kgosi perceives that his role as ruler of the Bafokeng is deeply rooted in the will of the people but it does not go to show that his prerogative in this respect has been transformed into something that may be challenged in a court of law or that the Kgosi can be compelled by a court of law to call a kgotha kgothe because some grouping believes that a matter is one of public concern. Today the courts of law may come to assistance of tribe members to enforce traditional law and custom but I think that the issue of the has not been debated sufficiently by the Bafokeng nor have the ramifications of such a step been explored to transform the Kgosi's prerogative into an enforceable obligation. It is true that a court of law may develop traditional law and custom. But I would be very hesitant to do so where the matter has not been properly debated and the consequences, mechanisms and implications for the role, status and

purpose of a Kgosi have not been properly explored.

- [105] In my opinion the evidence supports the view that the prerogative of the Kgosi to determine whether a matter is one of public concern remain just that. The Kgosi's appreciation of what constitutes such a matter may be formed and shaped by the persuasive powers of his or her advisers but in the end it remains the Kgosi's prerogative. Furthermore as Prof Gulbrandsen has pointed out the community may call the Kgosi to account and seek to debate the issue at a pitso even though it is not, as it were, on the agenda. But this has not been done save that the land disputants have aired their views
- [106] In this case the Kgosi, and the Tribal Council and Executive Council or Supreme Council, did not consider that the issue regarding the need to secure the transfer of the registered ownership of land held by the State, in terms of the trust formulation, to the tribe was a matter that should be aired at a kgotha kgothe even though it was known that some members of the tribe held the view that certain portions of land were held in trust for their ancestors and therefore for themselves. The reason for this probably coincides with the reasons put forward by Mr Rapetsane. The result is that I conclude that traditional law and custom did not oblige the Kgosi nor the Supreme Council or its constituent councils, to seek the sentiment of the members of the tribe in general assembly before passing the resolution of 22 September 2005.
- [107] The next question is what can aggrieved members of the tribe do if they hold, as the land disputants do, the view that the Kgosi acted contrary to the will of the people? In the past (and even now) the Kgosi's decision might have adverse consequences and might lead to secession or migration of some or most members of the tribe or even the deposition of the Kgosi. But the aggrieved members of the tribe may, as they have done, seek declaration of their rights to property in a court of law. Mr Mputle, for one, believes that this is the correct forum and the correct way forward.
- [108] Finally I consider whether consultation was necessary through the medium of members of the Executive Council reporting to their constituencies and by thee dikgosana at each kgotla.
- [109] There is no evidence about what the members of the Executive Council did. Mr Rapetsane said that the issue was discussed at his kgotla. Mr Mputle says that it was not discussed at the kgotla which he attended. This aspect was not the focus of the Rule 7 application and it does not detract from the validity of the resolution in question.

Authority to Act

- [110] I find that the RBN's attorney have satisfied me that they have the necessary authority to act on behalf of the RNB in the main proceedings.

Summary

- (a) The first question is answered in the affirmative as it is common cause that the Supreme Council of the RBN took a decision on 22 September 2005 to authorize the bringing of the main application.
- (b) The second question is answered in two parts. As to the first part, the Supreme Council does not as such have the power to institute

litigation. However, this power is vested in the Executive Council which functions as the Traditional Council. The Executive Council may authorize litigation either separately or as a component of the Supreme Council provided it is quorate. However, the issue of whether the Executive Council was quorate is not a ground relied upon by the LRC Clients and I do not need to decide this issue. Consequently I find that the resolution was validly passed.

- (c) As to the second part of question two. It is the Kgosi's prerogative to summons a kgotha kgothe on matters of public concern. The Kgosi has not deemed it fit to consult the nation and to debate with them the proposal that the High Court should be approached for an order that the land (including land that the land claimants for themselves and their successors) held in terms of the trust formula be registered in the name of the RBN. Traditional law and custom has not reached a stage where exercise of the Kgosi's prerogative may be challenged in a court of law.
- (d) The question whether the issue was discussed by the constituencies of the Executive Council or each kgotla was not the focus of the Rule 7 application and need not be decided.
- (e) The third question is answered in the negative. The resolution taken by the Supreme Council on 22 September 2005 was not overturned or reversed by subsequent events and in particular it was not reversed by any kgotha kgothe meeting of the traditional community held in 2006.
- (f) The RBN's attorney have satisfied the court that they have the necessary authority to act on behalf of the RBN in the main proceedings.

Costs

- [111] Bearing in mind that the Royal Bafokeng Nation has at its command vast resources as compared to those members of the tribe who are the land claimants and that this is a matter which concerns the entire tribe, it seems to me that it would be appropriate to make no order as to costs.

Order

- [112] I make the following order:

1. Attorneys Fasken Martineau have satisfied this court that they have the necessary authority to act on behalf of the Royal Bafokeng Nation in the main proceedings instituted under case number 999/2008.

2. I make no order as to costs.

A A Landman

Judge of the High Court

APPEARANCES:

Date of hearing: 31 March 2016

Date of Judgment: 31 May 2016

Counsel for the Applicant: Adv Loxton SC, Adv Antrobus SC & Adv Wesley Instructed by Fasken Martineau Attorneys

Counsel for the Respondents: Adv Budlender SC, Adv Cowen & Adv Tshetlo

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