**IN THE HIGH COURT OF SOUTH AFRICA,**

**GAUTENG DIVISION, PRETORIA**

**CASE NO: 55035/2012**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

20 March 2018
DATE

SIGNATURE

In the matter between:

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| ACTING KGOSHIKGOLO | First Applicant |
| KGAGUDI KENNETH SEKHUKHUNE | |
| MOHLALETSI TRADITIONAL AUTHORITY | Second Applicant |

And

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| THE COMMISSION ON TRADITIONAL | First Respondent |
| LEADERSHIP DISPUTES AND CLAIMS | |
| THE PRESIDENT OF THE REPUBLIC | Second Respondent |

OF SOUTH AFRICA

THE MINISTER OF PROVINCIAL AFFAIRS AND LOCAL GOVERNMENT — Third Respondent

THULARE VICTOR THULARE — Fourth Respondent

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JUDGMENT

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Mlambo JP

Introduction

[1] This is an application to review and set aside the first respondent's findings that the appointment of the First Applicant as Acting Kgosikgolo[1] of the Bapedi[2] tribe[3], was irregular and not in line with the customs and customary laws of the Bapedi and that the fourth respondent is the rightful heir to the Bokgosi[4] of the Bapedi. The applicants further seek ancillary relief in the form of declaratory orders that the claim by the fourth respondent that he is the rightful heir to the Bokgosi of the Bapedi and the investigation of that claim by the first respondent are invalid in law. Further the applicants seek an order directing the second respondent, the President of the Republic of SA ("The President") as well as the third respondent, the Minister of Provincial Affairs and Local Government to refrain from recognising and

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[1] The translation of this term is Paramount King

[2] This is the description and name of the tribe used in this Judgment. I'm mindful that other names have been used for the same tribe i.e. Bapedi Bamaroteng, Bapedi Bamohlaletsi, Bapedi Marote Mamone etc.

[3] I use this term mindful that the Framework Act (infra) uses the term "traditional community" which has the same meaning as found in section 1 as a community that is subject to a system of traditional leadership in terms of that community's customs and observes a system of customs and customary law.

[4] The translation of this term is Kingship

appointing the fourth respondent as the Kgosikgolo of the Bapedi pending the determination of this review, as well as an order declaring that the first applicant is the Acting Kgosikgolo of the Bapedi. In the final analysis the applicants seek an order condoning their late initiation of this application.

[2] The main protagonists in this application are the first applicant, Kgagudi Kenneth Sekhukhune ("KK Sekhukhune"). KK Sekhukhune is the current Acting Kgosikgolo[5] of the Bapedi. Through this application he seeks to preserve that position thereby upsetting the findings of the first respondent. The first respondent is the Commission on Traditional Leadership Disputes and Claims ("the Commission") which made the findings sought to be upset by the applicants. The fourth respondent is Thulare Victor Thulare (Victor Thulare). He is the son of Rhyane Thulare. Even though Rhyane Thulare is not a respondent, having passed away in 2007, he also features prominently in this matter.

[3] The main issues requiring consideration and resolution are whether the Commission had the competence to entertain the claim by Victor Thulare that he was the rightful Kgosikgolo of the Bapedi and to make the findings impugned in this application, the application of the doctrine of *res judicata*, being the primary basis advanced that the Commission was not so competent, based on a submission by the applicants reliant on a Judgment which preserved KK Sekhukhune's appointment as Acting Kgosikgolo; whether the Commission's finding that the appointment of KK Sekhukhune, as Acting Kgosikgolo, was not in accordance with the customs and customary laws of the Bapedi, was in accordance with the Commission's mandate. The determinations sought, renders it prudent that I set out in some detail the factual historical background as well as the legal factual matrix giving rise to the contested issues and I do so in the paragraphs that follow.

[4] The acknowledged history of the Bapedi tribe dates back to the early part of the 18th century. This history is aptly set out in the Judgment of the Constitutional Court in *Bapedi Marote Mamone v Commission*

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[5] Colloquially referred to as a Regent

*on Traditional Leadership Disputes and Claims*[6] from paragraphs 26 - 28. (I refer to this Judgment hereinafter as the *Bapedi Marote Mamone* Judgment for ease of reference). For our purposes it is sufficient to consider this history from the time of King Sekhukhune II. He was predeceased by his son and heir to the throne, Thulare II, meaning that upon his death, there was no heir to the throne through him and his wife, Lekgolane, who was the only recognized so-called *timamollo* or candle wife[7] that could bear an heir to the throne. After the death of Sekhukhune II, Morwamoche III, the younger brother to Thulare II, was appointed as Acting Kgosikgolo as well as to raise seed for his deceased elder brother Thulare II.

[5] The Bapedi married Mankopodi Thulare Sekhukhune (Mankopodi) to Morwamoche III, as "*seantlo*"[8] to Lekgolane, Thulare II's wife who had been unable to bear an heir to the throne. Morwamoche III is KK Sekhukhune's father and at the time of his death in 1965, Rhyane Thulare, amongst others, had been born from his union with Mankopodi. Rhyane Thulare was the heir to the throne that Morwamoche III had been appointed as Acting Kgosikgolo to raise. Therefore, Morwamoche III was the biological father of Rhyane Thulare through Mankopodi and KK Sekhukhune through his sixth wife, Makopi. In customary parlance Thulare II, Morwamoche III's elder deceased brother, was Rhyane Thulare's sociological father.

[6] It is also common cause that even though Rhyane Thulare and KK Sekhukhune were in effect brothers, their mothers were different and they belonged to separate royal houses i.e. Rhyane Thulare belonged to the senior House of Thulare in which resided the Kingship of the tribe. KK Sekhukhune belonged to the junior House of Morwamoche. This factual matrix is common cause and there is further no dispute that Rhyane Thulare's name in the Sekhukhune Kingship lineage is Sekhukhune III[9] and that he was the rightful and legitimate heir to the Bapedi Kingship throne. I refer to him in this Judgment by his common

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[6] 2015 (3) BCLR 268 (CC)

[7] A *timamollo* is a wife specifically married by the tribe for the King through whom an heir is to be raised.

[8] Surrogate wife

[9] This name was given to Rhyane Thulare in a properly constituted name giving ceremony performed according to the customs of the Bapedi

name, Rhyane Thulare, being the name used by all and sundry throughout. I mean no disrespect to him in doing this, I wish to minimize the element of confusion that may befall those uninitiated and less conversant with customary law parlance. Rhyane Thulare is Victor Thulare's father.

[7] At the time of Morwamoche III's death, Rhyane Thulare was still too young to take over the reins and Mankopodi, his mother, was installed as Acting Kgosigadi (Regent) until Rhyane Thulare became of age. It is during Mankopodi's reign that the problems that have given rise to the current disputed issues arose. A number of versions have been advanced depending on which side one looks regarding the causes of the problems and I have no intention of dealing with that aspect of the matter as nothing much turns on it. During her reign, the legitimate royal body that oversaw the Kingship succession and installation of the Kgosikgolo, the Bakgoma and Bakgomana was divided in the middle. One faction called for Mankopodi's dethroning and for Rhyane Thulare to take over and another faction was opposed to the idea until such time she was consulted and agreed to step down.

[8] The faction that called for Rhyane Thulare to take over consulted him as well as other relevant authorities such as the Magistrate of the area, the Lebowa Government and the necessary documentation was signed. However, Rhyane Thulare was not prepared to take over until his mother Mankopodi was consulted. During this time the strife between the two factions resulted in violence and several huts being burnt. Mankopodi was also chased out of the village. In view of the ongoing strife, Rhyane Thulare left the tribal area and went to live in Seshego, a township outside Polokwane. At some stage Rhyane Thulare was fetched by a faction of the Bakgoma and Bakgomana, from Seshego and requested to take over the reins but he instead went to fetch his mother, Mankopodi. This led to an impasse especially as the anti Mankopodi faction were not in favour of any further dealings with her. In view of this impasse especially Rhyane Thulare's refusal to take over the Bokgosi reins from his mother Mankopodi, a faction of the Bakgoma and Bakgomana took a decision that Rhyane Thulare had abdicated and that KK Sekhukhune be appointed as Acting Kgosikgolo.

There is a dispute whether he was also expected to raise seed for the Kingship or to revive the house of Thulare II and whether a candle wife was married for him for this purpose. I was not requested to resolve these issues, which would have in any way, been academic in the light of the decision I have come to regarding the main issues before me.

[9] KK Sekhukhune was indeed appointed as Acting Kgosikgolo by the Lebowa Government in 1976, a decision subsequently endorsed by the President. However, Rhyane Thulare asserted his right to the throne initiating a number of tribal meetings as well as engagements with the Lebowa Government. In 1989 Rhyane Thulare's efforts succeeded and the Lebowa Government deposed KK Sekhukhune and appointed Rhyane Thulare as Kgosikgolo. This led to litigation, which I deal with shortly hereafter.

[10] In the meantime, a dispute was lodged, with the Commission, by the House of Mampuru asserting that the Kingship lineage of the Bapedi tribe did not reside in the House of Sekhukhune but in the House of Mampuru. This is a dispute that related to events and circumstances dealt with in the *Bapedi Marote Mamone* Judgment of the Constitutional Court referred to above. The dispute related to the contestations for the Kingship in those times between Mampuru II who was the younger brother to Sekhukhune I. The Commission investigated that dispute and determined that the Bapedi paramountcy was a Kingship and that this resorted under the lineage of Sekhukhune.

[11] That decision was challenged by way of a review application in this Court and dismissed, the Court upholding the Commission's findings. An appeal to the Supreme Court of Appeal failed and eventually the Constitutional Court in the *Bapedi Marote Mamone* Judgment also dismissed the appeal and upheld the Commission's findings. The facts regarding that challenge against the Commission's finding regarding the lineage of the Bapedi Kingship are sufficiently set out in the decisions of the Supreme Court of Appeal and Constitutional Court. Those judicial pronouncements effectively affirmed the claim of the House of Sekhukhune that the Kingship of the Bapedi resided with it. The matter

*in casu* is a sequel to the Commission's finding on the lineage issue and the litigation that followed.

[12] Once the Commission found that the lineage of the Bapedi Kingship resorted in the house of Sekhukhune, the contestation between Rhyane Thulare and later Victor Thulare with KK Sekhukhune ensued. I have already mentioned that by the time the Commission got around to investigating the contested claims of Rhyane Thulare, KK Sekhukhune and Victor Thulare, Rhyane Thulare had already passed away. The Commission however proceeded with its investigation of the claims nevertheless and made the findings that in terms of the customs of the Bapedi tribe, Rhyane Thulare was the rightful heir to the Bapedi Kingship throne, that KK Sekhukhune's appointment was irregular and not in line with the customs and customary laws of the Bapedi and that Victor Thulare was the rightful Kgosikgolo of the Bapedi. It is these findings that KK Sekhukhune seeks to upset in these proceedings.

Condonation

[13] The Commission issued its findings and recommendations on 20 January 2010 and handed its report to the President who announced such findings on 29 July 2010. This application was then launched on 24 September 2012, i.e. some twenty-six months after the Commission made its findings. As this application is in terms of the Promotion of Administrative Justice Act[10], that Act (PAJA) prescribes that such applications must be launched within one hundred and eighty days from the time the impugned decision is made. This application was admittedly instituted well outside the time period prescribed in PAJA. I must therefore consider at the outset, whether the applicants have demonstrated that good cause exists for this Court to condone the late initiation of this application. The approach to applications for condonation has been restated in many cases. See *Van Wyk v Unitas Hospital and Another*[11], where the following is stated:

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[10] Act 3 of 2000 as amended

[11] 2008 (2) SA 472 (CC)

*"20. This Court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success."*

*22. An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable."*

[14] As is apparent above, this application was brought considerably out of time and I must say the explanation provided for the delay is utterly unsatisfactory. The applicants provided a contradictory explanation in their papers. They first stated that they only became aware of the Commission's findings in August 2011 but later changed tact stating they became aware in August 2010. They also stated that they delayed bringing the application as they were waiting for the conclusion of the Sekhukhune/Mampuru lineage litigation. They however initiated the application before that litigation was finalised.

[15] In my view, despite the considerable delay in launching this application, it is in the interests of justice that I exercise my discretion in favour of condoning the failure to comply with the timeline provisions of PAJA regarding the lodging of this application. The application raises a number of critical and important issues regarding the Bokgosi of the Bapedi which require substantive resolution. The application also raises issues with a bearing on the Constitution and which require judicial consideration. The statement of the Constitutional

Court in *Glenister v President of the Republic of South Africa and Others*[12] is instructive that –

> *49. The explanation furnished for the delay is utterly unsatisfactory. Ordinarily, this should lead to the refusal of the application for condonation. However, what weighs heavily in favour of granting condonation is the nature of the constitutional issues sought to be argued in the intended appeal, as well as the prospects of success. This case concerns the constitutional authority of Parliament to establish an anti-corruption unit, in particular the nature and the scope of its constitutional obligation, if any, to establish an independent anti-corruption unit. These are constitutional issues of considerable importance.*
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> *50. It is, therefore in the interests of justice to grant condonation."*

[16] The main issue requiring determination is whether the doctrine of *res judicata* presents a total bar to the Commission, a Constitutionally established structure whose objective is to investigate the past as well as past conduct in the customary law realm of this country and recommend remedial action where applicable, from investigating and resolving matters that are the subject of a pre-Constitutional judicial decision. In the following paragraphs I set out the facts and background circumstances on which the *res judicata* argument is premised.

**The previous litigation**

[17] A proper starting place is the appointment of KK Sekhukhune. It is common cause that after his appointment as Acting Kgosikgolo in 1976, this was confirmed by the State President on October 1976 and KK Sekhukhune was issued with a letter of appointment dated 27 October 1976. His first 10 years of regency were peaceful until 1986 when a group of young men from the Mangana regiment, including Rhyane Thulare, demanded that KK Sekhukhune should hand over the

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[12] CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)

Bokgosi to Rhyane Thulare. These efforts were sustained including meetings with the Magistrate of the area and the Lebowa Government. Consequently, in 1989, the Lebowa Government took a decision to depose KK Sekhukhune, on the same day, appointed Rhyne Thulare as Kgosikgolo. ,KK Sekhukhune launched an application, in this Court, then called the Transvaal Provincial Division of the Supreme Court (TPD), to review and set aside his deposition as well as the appointment of Rhyane Thulare as Kgosikgolo[13].

[18] The Court, per Van Dijkhorst J[14], set aside the decision to depose KK Sekhukhune as well as Rhyane Thulare's appointment thus reinstalling KK Sekhukhune as Acting Kgosikgolo. It was also found that Rhyane Thulare had abdicated the Bokgosi. The Court further held that the issues whether Rhyne Thulare was born heir to the Bokgosi, or that he should be regarded as the rightful heir thereto, and whether Rhyne was divorced and chased away together with Mankopodi were academic. The applicants rely on this Judgment for their *res judicata* argument. This Judgment was penned by Judge Van Dijkhorst (Van Dijkhorst Judgment) and I will return to it when I consider the *res judicata* argument shortly. The Chief Minister and the Lebowa Government unsuccessfully appealed that Judgment in the appellate division in 1991.

[19] Undaunted, in 1992 the Chief Minister and the Lebowa Government decided to establish the Bapedi BaThulare tribe and appointed Rhyne Thulare as Kgosikgolo of that newly created tribe. This gave rise to another round of litigation and in 1994 a further Judgment was handed down in this Court by Du Plessis J interdicting the enthronement of Rhyane Thulare as Kgosikgolo of the Bapedi BaThulare tribe. A sequel to this legal contestation was an order granted in KK Sekhukhune's favour in 2000 by this Court directing the Premier of the Limpopo Province, who had succeeded the Chief Minister of the Lebowa Government to issue a certificate certifying KK Sekhukhune's appointment as Acting Kgosikgolo of the Bapedi tribe. I mention these Court decisions for completeness sake as the applicants

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[13] K.K Sekhukhune v A. Ramodike and Others 1991 case number 1988/2078

[14] Van Dijkhost J judgment dated 20 June 1991

rely wholly on the Van Dijkhorst judgment for their reliance on *res judicata*.

[20] On 16 May 2006, having come empty handed from the legal contestations with KK Sekhukhune, Rhyne Thulare lodged a dispute with the Commission claiming that he was the rightful Kgosikgolo of the Bapedi. KK Sekhukhune initiated interdict proceedings in this Court[15] to restrain the Commission from entertaining Rhyane Thulare's claim but that application was dismissed with costs. Rhyane Thulare however passed away the following year in 2007, before learning the fate of his claim. Victor Thulare lodged his claim with the Commission in 2008 which led to the Commission making the findings challenged in this application. Victor Thulare was not a party to the litigation between his father, Rhyane Thulare and KK Sekhukhune.

## The Framework Act and the Commission

[21] To complete the background scenario it is also necessary to consider the coming into being and the role of the Commission. Sections 211[16] and 212[17] (Chapter 12) of the Constitution of the Republic of South Africa[18] (the Constitution) deals with the recognition, place and role of customary traditional leadership in our Constitutional dispensation. In this chapter the Constitution specifically recognises the institution of traditional leadership, its status and role according to customary law,

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[15] KK Sekhukhune v Chairman of the Commission on Traditional Leadership Disputes and Claims and Sekhukhune Rhyane Thulare, Case No. 5678/2006

[16] Recognition

211 (1) The institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution.

(2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

[17] Role of Traditional leaders

212 (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.

(2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-

(a) national or provincial legislation may provide for the establishment of houses of traditional leaders and

(b) national legislation may establish a council of traditional leaders.

[18] Act 106 of 1996

subject to democratic principles. The Constitutional Court acknowledged in the *Bapedi Marote Mamone* judgment, that the colonial and apartheid Governments interfered and undermined the institution of customary traditional leadership. The Constitutional Court said:

> 49. *"Many traditional leaders who were opposed to discriminatory policies of those governments were deposed and replaced with more pliable candidates who were appointed contrary to customary law and customs of the communities over which they were imposed."*[19].

Other forms of interference mentioned by the Constitutional Court were repressive laws, in particular the Black Administration Act[20] and other apartheid laws which provided for the creation of territorial authorities and self-governing states. The Constitutional Court stated that in order to restore the dignity of the institution of traditional leadership, the Constitution makes provision in Chapter 12 that legislation be enacted in terms of which issues of customary traditional leadership are to be considered and resolved. The Traditional Leadership and Governance Framework Act as amended, ("the Framework Act")[21] is the legislative enactment contemplated in Chapter 12. In passing the Framework Act, Parliament was giving effect to Chapter 12 of the Constitution. One of the objects of the Framework Act is to *"restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices".* To that end, the Framework Act, in section 22(1)[22], established the Commission.

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[19] In para 21

[20] Act 38 of 1927

[21] Act 41 of 2003

[22] 22(1) There is hereby established, with effect from the date of coming into operation of the Traditional Leadership and Governance Framework Amendment Act, 2009, a commission known as the Commission on Traditional Leadership Disputes and Claims.

[22] In terms of section 25(1)[23], the Commission operates nationally and has the authority to decide on any traditional leadership disputes and claims contemplated in subsection 2 and arising from any province. Furthermore in terms of section 25(2)(a)[24], the Commission has authority to investigate, either on request or of its own accord, any case where there is doubt as to whether a kingship, senior traditional leadership or headmanship was established in accordance with customary law and customs and also a traditional leadership position where the title or right of the incumbent is contested. Section 28(7)[25] enjoins the Commission to investigate, in terms of section 25(2), the position of a paramountcy and paramount Chiefs that had been established and recognised, and which were still in existence and recognised, before the commencement of the Framework Act, before the Commission commences with any other investigation in terms of section 25(2). In terms of this section the Commission must:

> *"(i) [i]n respect of a kingship, be guided by the criteria set out in section 9(1)(b) and such other customary norms and criteria relevant to the establishment of a kingship; and (ii) in respect of a senior traditional leadership or headmanship, be guided by the customary norms and criteria relevant to the establishment of a senior traditional leadership or headmanship, as the case may be."* Lastly in section 25(3) the Framework Act empowers the Commission that: *"When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they were*

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[23] 25(1) The Commission operates nationally in plenary and provincially in committees and has authority to investigate and make recommendations on any traditional leadership dispute and claim contemplated in subsection (2).

[24] 25(2) (a) The Commission has authority to investigate and make recommendations on (i) a case where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs; (ii) a case where there is doubt as to whether a principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs; (iii) a traditional leadership position where the title or right of the incumbent is contested; (iv) claims by communities to be recognised as kingships, queenships, principal traditional communities, traditional communities, or headmanships; (v) the legitimacy of the establishment or disestablishment of 'tribes' or headmanships; (vi) disputes resulting from the determination of traditional authority boundaries as a result of merging or division of 'tribes'; (viii) all traditional leadership claims and disputes dating from 1 September 1927 to the coming into operation of provincial legislation dealing with traditional leadership and governance matters; and (ix) gender-related disputes relating to traditional leadership positions arising after 27 April 1994.

[25] 28 (7) The Commission must, in terms of section 25 (2), investigate the position of paramountcies and paramount chiefs that had been established and recognised, and which were still in existence and recognised, before the commencement of this Act, before the Commission commences with any other investigation in terms of that section.

*when the events occurred that gave rise to the dispute or claim."*

[23] In the exercise of its functions and of its own accord, the Commission initiated the investigation referred above regarding the paramountcy and Kingship lineage of the Bapedi. The Commission thereafter considered both Rhyane Thulare and Victor Thulare's claims. It embarked upon a lengthy hearing and came to the conclusion that Rhyne Thulare was the rightful successor to the throne; that Victor Thulare is the rightful heir to the Bokgosi of the Bapedi: and that KK Sekhukhune's appointment as acting Kgosikgolo was irregular and not in line with the customs and customary laws of the Bapedi.

*Res judicata*

[24] Before me the applicants submitted that the *res judicata* doctrine, premised on the Van Dijkhorst Judgment, trumps the Commission's competence to have considered the claims lodged with it. It was submitted that properly considered and applied, the Van Dijkhorst Judgment, presented a complete bar to the Commission from entertaining Victor Thulare's claim. This was on the basis that this Court in that Judgment, as a Court of competent jurisdiction, had finally pronounced on the matter dealt with by the Commission. It was contended in this regard that Victor Thulare was Rhyane Thulare's son and for this reason the Van Dijkhorst Judgment settled the issues of contestation to the throne of the Bapedi by decreeing that Rhyane Thulare had no claims to the Bokgosi.

[25] A further basis advanced for relying on the Judge Van Dijkhorst Judgment was that he had in fact dealt with the matter in accordance with customary law when he set aside the decision of the Lebowa Government and its Chief Minister to depose KK Sekhukhune. It was further submitted that the Commission was never seized with the question whether KK Sekhukhune's appointment was in accordance with the customs and customary laws of the Bapedi and that for this reason it was not open to the Commission to investigate and determine that question. A related argument was that the Van Dijkhorst Judgment was binding on the President (the second respondent) and

as such he was precluded from accepting and announcing the Commission's findings.

[26] The respondents contended on the other hand that the Commission had a constitutional mandate to restore the status of the institution of traditional leadership in line with Constitutional imperatives, and that the Court Judgment based on other legislation enacted prior to the coming into effect of the Constitution remained only evidence of what they contained and were subject to evaluation in the same way as any other evidence, and that they were not binding on the Commission.

[27] The common law doctrine of *res judicata* is a firmly established principle in our jurisprudence and continues to apply. Its essence is that a judicicial pronouncement by a Court of competent jurisdiction has already been rendered in a matter between the same parties, regarding the same subject matter and where the same relief is sought[26]. The essence of the *res judicata* doctrine is to ensure certainty in the resolution of legal disputes and that a multiplicity of actions should not be countenanced in matters that have already been adjudicated and finally determined by the Courts.

[28] There can be no quible, therefore that the purpose of *res judicata* must also be to balance the public interest in the finality of litigation with the public interest of ensuring a just result on the merits. As pointed out by counsel for Victor Thulare, the doctrine is intended to promote orderly administration of justice and is not to be mechanically applied where to do so would create injustice. In this regard the Constitutional Court in *Molaudzi v S*[27] cautioned against revisitng its own past decisions unless this was called for in the interets of justice. The Court stated:

> 30. "The general thrust is that *res judicata* is usually recognised in one way or another as necessary for legal certainty and the proper administration of justice. However, many jurisdictions recognise that this cannot be absolute. This is because '[t]o

[26] See Prinsloo NO & others v Goldex 15 (Pty) Ltd & another[2012]ZASCA28

[27] (CCT42/15) [2015] ZACC 20; 2015 (8) BCLR 904 (CC); 2015 (2) SACR 341 (CC)

perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience

32. Since *res judicata* is a common law principle, it follows that this Court may develop or relax the doctrine if the interests of justice so demand.55 Whether it is in the interests of justice to develop the common law or the procedural rules of a court must be determined on a case-by-case basis.56 Section 173 does not limit this power. It does, however, stipulate that the power must be exercised with due regard to the interests of justice.57 Courts should not impose inflexible requirements for the application of this section.58 Rigidity has no place in the operation of court procedures. ...

37. The incremental and conservative ways that exceptions have been developed to the *res judicata* doctrine speak to the dangers of eroding it. The rule of law and legal certainty will be compromised if the finality of a court order is in doubt and can be revisited in a substantive way. The administration of justice will also be adversely affected if parties are free to continuously approach courts on multiple occasions in the same matter. However, legitimacy and confidence in a legal system demands that an effective remedy be provided in situations where the interests of justice cry out for one. There can be no legitimacy in a legal system where final judgments, which would result in substantial hardship or injustice, are allowed to stand merely for the sake of rigidly adhering to the principle of *res judicata*."

[29] The statement by the Constitutional Court above is apposite. I understand it to mean that a decision, judicial or otherwise, which is shown to perpetuate an anomaly and/or injustice and I add, be shown to be clearly out of sync with Constitutional values and the interests of justice may be reconsidered resulting in the relaxation of the *res judicata* doctrine. Such must yield to the Constitution in line with its injunction that all law must be interpreted in line with its spirit, purpose and objects. In *Holomisa v Argus Newspapers LTD*[28] the statement is made that it is the duty of all Courts to take into

[28] 1996 (2) SA 588 (W)

account the provisions of the Constitution in the application, development and reconsideration of the common law, and that this may in appropriate cases entail that pre-Constitution judicial determinations be superseded.

[30] It is so therefore that where necessary, *res judicata* too must be considered, applied and developed through the prism of and in line with our Constitution, its vaues and dictates, as the supreme law with which all law must conform. In cases where there is a direct Constitutional injunctition, the supremacy of the Constitution is clear. This case is one such instance where the remediation of past wrongs, through the Commission, in the traditional leadership sphere is a Constitutional imperative that must be vindicated. On a proper reading of sections 211 and 212 of the Constitution and the Framework Act, it is clear that the Commission was established on a clear Constitutional premise to consider past conduct and decisions regarding traditional leadership matters. The Commission's mandate is to look back in history. Commenting on the powers and authority of the Commission encapsulated in the Framework Act, the Constitutional Court, in the *Mampuru v Sekhukhune* Judgment said:

> *"This is a clear indication that the Framework Act was to be applied retroactively to disputes and claims that arose before the Act came into force. In fact section 25(4) empowered the Commission to investigate "all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection (2)(a)(vi)". Subsection (2)(a)(vi) authorised the Commission to consider events that occurred before 1 September 1927 where good grounds exist".*[29]

This Constitutional imperative is the prism through which to consider the application of the doctrine of *res judicata* in the present context. It is not helpful to resort to this doctrine without taking into account the context of the cause of the Commission's mandate and authority.

[31] Clearly therefore, on a general premise, the Commission, when conducting its investigations has Constitutional impramature. Its very

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[29] At para20

mandate and authority derives from the Framework Act being the legislation contemplated in sections 211 and 212 of the Constitution, to investigate, amongst others, as is the case here, any contested title or right of the incumbent to the Kingship. The Framework Act enjoins the Commission in section 25(3)(a) with the power to consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.

[32] In my view therefore, a measure of deference is called for when it comes to matters dealt with by the Commission and Courts must accord due weight to decisions of the Commission as stated by the Constitutional Court in paragraph 79 of the *Bapedi Marote Mamone* Judgment that:

> *"A level of deference is necessary – and this is especially the case where matters fall within the special expertise of a particular decision making body. We should, as this Court counselled in Bato Star, treat the decisions of administrative bodies with "appropriate respect" and "give due weight to findings of fact ... made by those with special expertise and experience".*

Whilst care should be exercised when reconsidering past judicial decisions, these cannot be presented as a complete bar to the Commission from doing its work. Clearly therefore, the Commission was not debarred as submitted, by the *res judicata* doctrine, from conducting its investigations of the claims lodged with it. The necessary further consideration is whether the findings of the Commission were *res judicata* in the sense that Van Dijkhorst considered and decided them. That enquiry must also be done on a case by case basis within the context of Constitutional principles.

[33] Having determined that the Commission was perfectly at large to conduct the investigation of the claims lodged with it, I must now consider its findings that are said to be *res judicata* on the basis of the Van Dijkhorst Judgment. On a purely notional basis therefore, the premise of any argument reliant on *res judicata* must be that a past judicial decision is sought to be undone in the subsequent

proceedings, in this case, in the proceedings before the Commission. The contention here must be that the Commission's findings have the effect of undoing the Van Dijkhorst Judgment hence the assertion of the *res judicata* doctrine. This, I surmise, calls for an examination of the issues considered and conclusions reached by Van Dijkhorst. In that application, KK Sekhukhune had applied for the review and setting aside of a decision of the Chief Minister and the Lebowa Government, to depose him as Acting Kgosikgolo and appoint Rhyane Thulare as Kgosikgolo of the Bapedi. Rhyane Thulare, was the second respondent there and had brought a conditional counter application for a declaratory order that he was the born heir to the Kingship.

[34] The findings of the Commission that must, according to the applicants, yield to the *res judicata* doctrine are those to the effect that Rhyane Thulare was the rightful heir to the Bapedi Kingship; that Rhyane Thulare had not abdicated the Bokgosi and that Victor Thulare is the rightful heir to the Bapedi Kingship. The nub of the sumission is that these issues related to a traditional leadership dispute that was resolved by the Van Dijkhorst Judgment. I do not understand the sumbission to be that this Court must follow that Judgment in line with precedent or *stare decisis*. I'm requested to find that the Van Dijkhorst Judgment is a firm platform on which to uphold the application of the *res judicata* doctrine regarding the issues considered by the Commission.

[35] Van Dijkhorst J, in his Judgment, refers to aspects of the customs and traditions of the tribe relating to the appointment of a Kgosi of the tribe. The Judge specifically mentions that according to tribal customary law *"the appointment of a Kgosi*[30] *(chief) or an acting Kgosi rests with the Bakgoma and Bakgomana*[31] *of the tribe."* This is the platform on which Judge Van Dijkhorst based his conclusions in that matter. Other aspects of the customs and traditions of the tribe are dealt with in the Judgment which are strictly speaking not necessary to be rehashed here. The Judgment also traversed the historical background facts and circumstances around Sekhukhune II, Thulare II,

[30] The literal translation of this term is Chief
[31] The highest decision making body in the Tribal hierarchy

Lekgolane, Morwamoche III, Mankopodi and Rhyane Thulare. In so far as Rhyane Thulare is concerned the Judgment confirms that he was Mankopodi's son by Morwamoche III and was the seed that the latter was tasked to raise for Thulare II i.e. to ascend the throne as Kgosi of the tribe. The Judgment further traces the turbulence during Mankopodi's reign as regent culminating in the decision of the Bakgoma and Bakgomana to appoint KK Sekhukhune as Acting Kgosi which was rubberstamped by the Chief Minister and the Lebowa Government.

[36] Van Dijkhorst J then concluded that some important documents and evidence had been withheld from the Lebowa Government when it took the decision to depose KK Sekhukhune. A further basis for the Judgment was that the Bakgoma and Bakgomana were never consulted by the Lebowa Government when deciding to depose KK Sekhukhune. In the Judge's words, the Bakgoma and Bakgomana were *"the owners of the Bokgosi and that they had to decide upon it at Mohlaletse".* Mohlaletse was the seat of the royal family. In the Judge's words:

> *"It is evident that it was clear to those in power and Rhyne and his followers that Rhyne had no hope to convince a meeting of the Bakgomana at the seat of the tribe to depose KK and restore Rhyne to the chieftaincy."* This line of reasoning led the Judge to conclude that Rhyane Thulare had steadfastly avoided meeting the Bakgoma and Bakgomana to discuss his reinstatement as Kgosi. Therefore, in the Judge's view, no decision had been taken by the Bakgoma and Bakgomana to depose KK Sekhukhune. For this reason, the Judge concluded that the decision of the Chief Minister and the Lebowa Government could not stand.

[37] Van Dijkhorst found that it was not necessary to consider and decide the issue whether Rhyane Thulare was the rightful heir to the Bokgosi of the Bapedi, having already disposed of the matter as set out above. The Commission however considered this issue in terms of its mandate to consider claims lodged with it and made its finding. As an

issue not considered and decided by Van Dijkhorst, *res judicata* cannot affect that finding. In this regard the Commission stated:

> *"The commission finds that Sekhukhune III* [Rhyane Thulare] *was the rightful heir of the Bapedi for the following reasons:*
>
> *a) The Commission has already found that the mother of Sekhukhune III, Mankopodi was seantlo to Lekgolane, therefore he is the first born son of the Candle wife. Morwamoche III was his biological father, and Thulare II was his sociological father.*
>
> *b) It is not in dispute that from birth all the rituals and processes, such as registration before the Magistrate, were carried out for Sekhukhune III and he was held out as the heir apparent.*
>
> *c) The events which followed the fallout between Mankopodi and the royal council support the conclusion that Sekhukhune III indeed was the heir to the throne of Bapedi. It is common cause that Bakgoma and Bakgomana pursued Sekhukhune III to take over from his mother who was regent. Sekhukhune III was unhappy with the manner in which he was approached as Bakgoma and Bakgomana asked that he should not tell his mother and therefore refused to ascend the throne as requested. It is unlikely that Bakgoma and Bakgomana would have gone to these lengths for someone who, according to the Respondent was not the rightful heir.*
>
> d) *The Respondent's claim that he had 'thicker' blood than Sekhukhune III because of his parentage is novel in customary law and customs. It is trite that in terms of custom it is rank which determines seniority and not affinity by blood. The Respondent concedes that he is junior in rank to the sons of Thulare II, but maintains that he has a better right because of his blood."*

[38] The other Commission finding said to be *res judicata* is that relating to Rhyane Thulare's abdication. The Commission found that Rhyane Thulare did not abdicate the Bokgosi. As pointed above the Van

Dijkhorst Judgment concluded that he had, though admittedly not countenanced in the customary structure of the tribe. In this regard the Judge stated: *"Did Rhyane repudiate the Bogosi? Bakgomana found so and so did Mahlo and the two magistrates. I am not bound by any of these decisions. I must, however, state that this type of decision falls squarely within the ambit of the Bakgoma and Bakgomana as custodians of the Bogosi and whatever I say cannot bind them, but solely the parties before Court. "In coming to the conclusion that Rhyane through his deeds repudiated the chieftainship, I bear in mind the evidence of Mr Bothma that it is not easily accepted that the chieftainship has been renounced. As a general proposition, I go along with this. I don't find that it is a principle of customary law, because there are no precedents for the situation, but as a matter of logic, repudiation of chieftainship will not easily be accepted."* Van Dijkhorst then found that Rhyane Thulare had spent little time at Mohlaletse to speak with any authority about the customs and traditions of the tribe, that he was a weakling controlled by his strong-willed mother, Mankopodi, that he had refused to sign the pension fund forms of members of the tribe, which only the Kgosi could do, that he had spurned all attempts by the Bakgoma and Bakgomana to get him to come to Mohlaletse and assume his role as Kgosi. On all these bases the Judge concluded that Rhyane Thulare had abdicated the Bokgosi. He said:

> *"The application for a declaratory order that Rhyne did not repudiate the chieftainship, has to be dismissed. I have stated that the other issues are academic, once this issue is decided in this way. The reason therefor is that there is no basis in customary law or history or logic for a contention that a Kgosi who, of sound mind and fully capable of fulfilling the functions of a Kgosi, renounced or repudiated his chieftainship, can reclaim it later. Reference to idiots or incapacitated persons are not ad idem. To hold otherwise, would wreak havoc with the societal patterns established by the tribe after such renunciation. The case between Rhyne and the tribe is therefore closed. He has no residual rights to the Bogosi."*

[39] In coming to its finding, the Commission approached the issue by retracing the tumultuous events underlying Mankopodi's reign and her removal by the Bakgoma and Bakgomana. With that background the Commission found:

> *"It cannot be denied that the friction between Mankopodi and Bakgoma and Bakgomana caused Sekhukhune III undue distress, as he could not betray his mother. Ultimately, when he was ready to take over, Bakgoma and Bakgomana, who were opposed to Mankopodi, saw an opportunity to get someone else who would be more pliable. It was clear to them that they would lose their grip on power with Sekhukhune III on the throne, as he would no doubt continue to consult his mother (whom they despised) on matters of kingship. Furthermore, Sekhukhune III never gave up his quest for kingship. He made various attempts to ascend the throne. This is evidenced by the litany of litigation between himself and the Respondent. None of these attempts were successful. Sekhukhune III died without title. In order for the Commission to make a finding on this issue, it is important for the matter to be considered in its proper context. The atmosphere that prevailed at the time was that Bakgoma and Bakgomana despised the mother of Sekhukhune III. Consequently, there was strife in the community due to this dispute. Mankopodi was banished from the area. Therefore, it is the Commission's finding that when Sekhukhune III failed to ascend the throne it did not amount to repudiation as it was impossible to do so in the circumstances."*

[40] Whilst the Commission did not specifically find that abdication was a concept foreign in the customary scheme of the Bapedi, its finding should be understood within the Commission's enabling context – to investigate and resolve issues before it through the application of the customs and customary laws of the tribe concerned, at the time the events unfolded. Furthermore, Van Dijkhorst also recognised that his views on the matter were not supported by the customs of the tribe hence he specifically made the point that only the parties before him were bound by his findings. There can therefore be no debate that it is the Commission's word that must prevail. *Res judicata* must yield to

the Constitutional injunction driving the Commission as well as the expertise it had at its when considering this matter, through the application of the customs and customary laws of the Bapedi at the time. The Commission's pronouncement took account of the complicity of a section of the tribe in preventing Rhyane Thulare from ascending the throne.

[41] The other Commission finding contended to be outlawed by the *res judicata* doctrine is the finding that Victor Thulare is the rightful heir to the Bokgosi of the Bapedi. This is on the basis, as I pointed out earlier, that Victor Thulare is Rhyane Thulare's son and that therefore he can't have any claim to the Bapedi Bokgosi as the Van Dijkhorst Judgment settled all issues related to that issue on the basis that Rhyane Thulare had no further claims to the Bokgosi. I must say on a purely conceptual basis and properly considered, I do not see how the *res judicata* doctrine outlaws the Commission's finding regarding Victor Thulare's claim to the Bokgosi. He was not a party to the litigation that culminated in the Van Dijkhorst Judgment. Furthermore the relief Victor Thulare sought before the Commission has nothing to do with the relief sought by Rhyane Thulare before Van Dijkhorst J. Victor Thulare advanced his own claim to the Bokgosi whilst Rhyane Thulare was advancing his own claim to the Bokgosi back then. It goes without saying that even though both Rhyane and Victor Thulare may be regarded as having sought the same relief, a claim to the Kingship, it was actually not similar. They were asserting their personal claims to the Bokgosi and at very different times and contexts. Clearly another key requirement of *res judicata* is not met. The previous litigation concerned the validity of the letters of KK Sekhukhune's appointment issued in the pre-constitutional apartheid-era and a dismissal of the claim by Rhyne Thulare to the "*chieftainship*" of the Bapedi.

[42] Perhaps the same party requirement calls for deeper consideration in sofar as Victor Thulare is concerned. As I say in the preceding paragraph, Victor Thulare was never a party to the previous litigation. This requirement is not cast in stone and may in appropriate cases and in line with this Court's duty to develop the common law, be relaxed or adapted in order to address new factual situations facing a Court. There is no reason in principle, why a Court cannot relax the

same party requirement for the very reasons why the two other requirements have, over time, been relaxed. In *Prinsloo NO & others v Goldex 15 (Pty) Ltd & another* (supra) the SCA said –

> *"23. In our common law the requirements for res judicata are threefold: (a) same parties, (b) same cause of action, (c) same relief. The recognition of what has become known as issue estoppel did not dispense with this threefold requirement. But our courts have come to realise that rigid adherence to the requirements referred to in (b) and (c) may result in defeating the whole purpose of res judicata. That purpose, so it has been stated, is to prevent the repetition of law suits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue (see. Eg. Evins v Shield Insurance Co Ltd 1980 (2) SA 815 (A) at 835G). Issue estoppel therefore allows a court to dispense with the two requirements of same cause of action and same relief, where the same issue has been finally decided in previous litigation between the same parties.'*

[43] On the facts of this case however the route advocated by the SCA finds no application. In the customary law realm, the claim to Bokgosi is an evolving process dependent on the circumstances of each case. The fact that Victor Thulare is Rhyane Thulare's son was not by itself an automatic qualification to the Bokgosi. There are other important requirements based on the customs of the Bapedi tribe that must be met such as whether he was the first born son of a *timamollo* (candle wife) married by the tribe to produce an heir to the throne. These are issues the Commission investigated and made findings on regarding Victor Thulare. These are fact and circumstances completely unrelated to the facts underlying Rhyane Thulare's struggles with the Bakgoma and Bakgomana and before Van Dijkhorst J. In this regard the Commission said:

> *"5.3.29 According to the Claimant's* [Victor Thulare] *version he is the only son born of the candle wife., Manyaku and*

*Sekhukhune III* [Rhyane Thulare]. *Sekhukhune III did not father his siblings Motodi and Phatudi. Prior to the death of Sekhukhune III, Bakgoma and Bakgomana agreed that as the only biological son of Sekhukhune III he would succeed him. The respondent* [KK Sekhukhune] *contends that the Claimant cannot claim the Kingship of Bapedi in that he is not born of a candle wife, his paternity is doubtful and his father and grandfather before him never reigned as kings; therefore, he cannot claim what his ancestors did not possess.*

*5.3.30 The fact that Thulare II and Sekhukhune III never reigned as kings cannot prevent the Claimant form claiming his birthright. It is common cause that Thulare II was not barred from ascending the throne, but for his death. Furthermore, on the respondent's own version he is reviving the house of Thulare II. With regard to Sekhukhune III, he was destined to be the king of Bapedi. The circumstances for not ascending the throne have been discussed at length hereinabove, it is not necessary to repeat. At the time of the death of Sekhukhune III, his claim to the kingship of Bapedi had already been lodged with the Commission.*

*5.3.31 The Commission has already found that the father of the Claimant, Sekhukhune III, was the rightful heir to Thulare II and the Claimant's mother, Manyaku, is a candle wife. Therefore, the Claimant as the first born of his parents, is the rightful heir to the kingship of Bapedi."*

[44] A further aspect to the same party requirement relates to the privy argument advanced on behalf of the applicants. This was to the effect that Victor Thulare, as Rhyane Thulare's son was in fact the latter's privy and therefore the Commission couldn't entertain his claim on the basis of the *res judicata* doctrine. The concepts of privies and privity were discussed in *Ferreira vs Minister of Social Welfare*[32] and *Scharf vs*

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[32] 1958(1) SA 93(E)

*Dempers & Co*[33]. In that case, reference was made to *Voet 44.2.5* where he gives examples of those who are "deemed" to be the "same person". The Judge stated that in English law, such persons are said to be privies of the parties to the original action. The Judge went further (at page 95H to 96A) to say:

> "*An examination of the examples given by Voet in the section referred to above, shows that the persons who are "deemed" to be the same as the persons concerned in the previous action all derived their interest in the later action from the parties to the original action. This concept appears basic in the view taken by the English law. In Halsbury's Laws of England 3rd ed Vol 15, para 372, privies are said to be those "claiming or deriving title" under the parties to the previous action. It is also stated that the term "privity" implies a "mutual or successive relationship to the same interests".*

[45] I have already stated above that the fact that Victor Thulare was Rhyane Thulare's son, though crucial this was, on its own, not enough to solidify his entitlement to the Bokgosi. For this reason, Victor Thulare cannot be regarded as Rhyane Thulare's privy in the litigation with KK Sekhukhune as he is not asserting Rhyane Thulare's claim to the Bokgosi but his own and based on facts peculiar to him. The ineluctable conclusion is therefore that Victor Thulare was not a party nor can he be regarded as Rhyane Thulare's privy, in the application before Van Dijkhorst J. This means that a key requirement of *res judicata* is not fulfilled. It also cannot be argued that the second and third respondents were Rhyane Thulare's privies in the litigation before Judge Van Dijkhorst. In line with my view expressed elsewhere in this Judgment, the subject matter of the previous litigation is not the same as the current.

[46] I have, in the preceding discussion, considered the findings of the Commission that are said to be *res judicata* on the basis of the Van Dijkhorst Judgment and I have demonstarted that none of them are, as the requirements of the doctrine have not been fulfilled. This must

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[33] 1955(3) SA 316 (SWA)

lead to the finding that the *res judicata* doctrine cannot affect the findings made by the Commission.

[47] The applicants further seek the setting aside of the Commission's finding that the appointment of KK Sekhukhune was irregular and not in line with the customs and customary laws of the Bapedi. The only basis advanced for this contention is that this was not requested by either Rhyane Thulare and or Victor Thulare in their claims to the Commission. This is a misconceived argument. The Commission was eminently authorised to investigate this issue of its own accord (my emphasis) in terms of section 25 (2)(a) of the Framework Act, i.e. to investigate instances where traditional leadership is in dispute or is contested. In fact, this finding was one which the Commission had to make in the scheme of things. This finding was integral to the main finding regarding the Commission's pronouncement that Victor Thulare was the rightful heir to the Bokgosi of the Bapedi. For what its worth, I make the point here that *res judicata* finds no application as this issue was not raised nor advanced before Van Dijkhorst and as such was never dealt with by that Court. The Commission dealt with this issue and stated:

> *"Assuming that Sekhukhune III could not ascend the throne for any reason, according to the customs and customary law of Bapedi, the next eligible son would be the second born son of the candle wife* [Mankopodi], *in this case, Ramphelane. Failing which the sons of Thulare II from the other houses in order of rank: Malekutu, Phetudi, Sekwati, Matsebe, Phatudi, Morore and Mafetse respectively. In the event that any of the sons within the house of the deceased king, cannot take over the most senior mokgoma (being the brother of the deceased king), should raise seed on behalf of the deceased king. After the death of Thulare II, Morwamoche III the brother of Thulare II raised seed on behalf of his brother. It is in dispute as to who among the bakgoma was the most senior at the time. However it is not important to make a finding on this aspect as the principle remains. In this case, the Respondent* [KK Sekhukhune] *claims that bakgoma and bakgomana acted in terms of customary law on that even though the sons of Thulare II were still alive and were available to ascend the throne, he had a better right because of his*

*blood and the illegitimacy of Thulare II and his progeny. In the same breath, he claims that he has already married a candle wife and is raising seed on behalf of Thulare II. The Commission finds that the appointment of the Respondent as the acting Kgosikgolo of the Bapedi was not in accordance with the customs and customary laws of Bapedi in that:*

*a) Bakgoma and bakgomana without justification, overlooked Ramphelane the brother of Sekhukhune III who was next in line as well as the other sons of Thulare II in order of their rank who were still alive:*

*b) Furthermore, it is common cause that by the time the Respondent was installed as acting Kgosikgolo there were two sets of bakgoma and bakgomana, a situation which still exists. Consequently, the decision to appoint the Respondent was taken by a section thereof. The Bapedi nation continues to be divided to date."*

[48] The reasoning of the Commission is clearly located within the customs and customary laws of the Bapedi at the time of the unfolding of the events in question. No argument has been advanced that this was not so. Furthermore, no argument has been raised to suggest that the Commission overlooked any aspect of the customs and customary laws of the Bapedi in reaching this conclusion. In a nutshell no argument suggesting any irregularity on the part of the Commission has been advanced regarding its investigation and conclusion regarding KK Sekhukhune's appointment. In the circumstances no other conclusion can be made other than that the Commission's conclusion must stand. I also point out that no direct attack is advanced on the usual grounds required in such matters against the Commission findings. It has not been shown in what respects were the Commission's findings unrelated to the issues it had to investigate. The Commission's findings have also not been shown to have been unrelated to the customs and customary laws of the Bapedi. These findings were not shown to be irrational, materially influenced by ulterior motives or to have been unauthorized by the Framework Act. I can therefore find no reason to set aside the Commission's findings.

[49] Having reached the conclusions above the declaratory relief sought by the applicants also stands to be refused. In the final analysis, KK

Sekhukhune has no basis whatsover to refuse to step down as Acting Kgosikgolo, for Victor Thulare to ascend the throne.

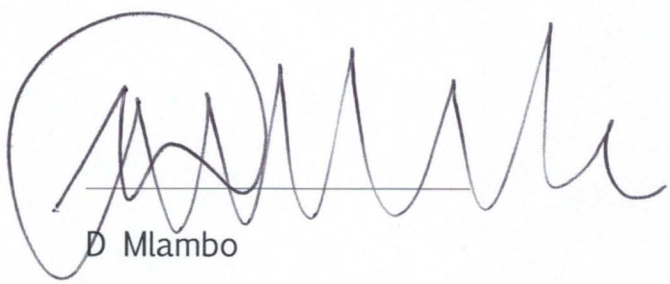
[50] The review application accordingly stands to be dismissed.

*Order*

I accordingly grant the following order:

(a) The application is dismissed.

(b) The applicants are ordered to pay the costs of the Respondents, such costs to include the costs occasioned by the employment of two counsel.



D Mlambo

Judge President, Gauteng Division
of the High Court of South Africa.

Appearances:

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|---|---|
| For Applicant: | Adv John Peter SC |
| | Adv M Augustine |
| Instructed by: | Nozuko Nxusani Inc |
| For 1st, 2nd and 3rd Respondents: | Adv N M Arendse SC |
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| Instructed by: | Bhadrish Daya |
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| | Adv Johan Myburgh |
| Instructed by: | Van Dyk and Horn |
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