

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



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

Case Number: A255/2022

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: MAY 2024
SIGNATURE

In the matter between

BAKGATLA BA MOCHA BA PHOPOLO TRADITIONAL

COMMUNITY (OF MMAMETLHAKE)

First Appellant

AMOS PHOPOLO MALOKA III

Second Appellant

And

THE PREMIER: MPUMALANGA PROVINCE

First Respondent

THE CHAIRPERSON OF THE PROVINCIAL

COMMITTEE ON TRADITIONAL LEADERSHIP

DISPUTES AND CLAIMS (MPUMALANGA) [CTLDC] Second Respondent

THE COMMISSION ON RESTITUTION AND

LAND RIGHTS

Third Respondent

THE REGIONAL LAND CLAIMS COMMISSIONER

(MPUMALANGA PROVINCE)

Fourth Respondent

THE REGIONAL LAND CLAIMS COMMISSIONER

(LIMPOPO PROVINCE)

Fifth Respondent

THE MINISTER OF CORPORATIVE GOVERNANCE

AND TRADITIONAL AFFAIRS

Sixth Respondent

JUDGMENT

MAHOSI J

Introduction

[1] This is an appeal against the judgment of Mahlangu AJ sitting as a Court *a quo* dismissing the application to review and set aside the first respondent's decision not to grant the recognition of the first and second appellants and ancillary orders with costs. The appeal is with the leave of the Court *a quo*. Only the first, second, and fourth respondents ("the respondents") opposed the application.

The parties

[2] The first appellant is Bakgatla Ba Mocha Phopolo Traditional Community that has struggled to obtain official recognition since the dawn of South Africa's new constitutional democracy. The second appellant, Amos Phopolo Maloka III, is senior traditional leader of Bakgatla Ba Mocha Phopolo.

[3] The first respondent is the Premier of Mpumalanga Province. The second respondent is the Chairperson of the Committee on Traditional

Leadership Disputes and Claims (“the CTLDC”). The fourth respondent is the Regional Land Claims Commissioner (Mpumalanga Province).

[4] During 2009 and 2011, the appellants applied for recognition to the first respondent (“the Premier”) on the basis that they are an existing separate traditional community with its jurisdictional area under Amos Phopolo Maloka III. The Premier appointed the CTLDC, which was established in terms of the Traditional Leadership and Governance Framework Act¹ (“Framework Act”) to investigate the legitimacy their claim and whether the traditional leadership under Amos Phopolo Maloka III was established in accordance with customary law and customs.

Background facts

[5] The Bakgatla Ba Mocha Ba Phopolo Maloka originates from the regency. Nkotoane Phopolo I was a regent for Chief M[...]’s son, who was a minor when his father died. Nkotoane Phopolo I ultimately relinquished the regency, and Moepi, a rightful heir to the chieftaincy of Bakgatla ba Mocha, succeeded his father, and his chieftaincy is still in existence.

[6] Nkotoane Phopolo I established his chieftaincy at Mmamethlake and named it Bakgatla BaMocha Ba Phopolo Maloka. Because of factional fights, the chieftaincy later split into two: one under Tlhame Skep Maloka (Skep Maloka), his eldest son from the first house, and the other under Mpoko Maloka, his second wife. The chieftaincy under Mpoko and later under his wife Lehau is still in existence and is based in Pankop.

[7] Skep Maloka was deposed in 1904 as a result of a criminal conviction. There is a dispute over whether he was reinstated or not. Although the first respondent was not formally recognised, Skep Maloka was succeeded by his eldest son, Phopolo Maloka II. Phopolo Maloka bore four sons, Ramabele Hermas, Kau, Tlhame and Shubuthe. In 1951, his eldest son Ramabele Hermas took over until 1976, when he was succeeded by his son Malothle-Steven Maloka. The latter reigned until 1986 when he passed away and was succeeded by the second respondent, Amos Phopolo III.

¹ Act 41 of 2003, as amended.

[8] The appellants bought their piece of land in 1922. In 1923, the Bakgatla ba Mmakau bought land near the appellant's land. The Bakgatla ba Mmakau were later recognised as a traditional community, and their Chief was given jurisdiction over the area of. The appellants were forced to recognise Chief Makgoko of Bakgatla Ba Mmakau as their Chief until the present era.

[9] In the early 1930s, the appellants were forcibly dispossessed of their land. In 1997, they lodged a restitution of land claim with the office of the Regional Land Claim Commission: Limpopo ("the Commission"). After investigating the claim, the Commission recommended that the appellants' claim be accepted and compensated for the properties that were no longer feasible for restoration. The Regional Land Claims Commissioner approved the recommendations.

[10] Against the above backdrop, the CTLDC recommended that the appellants' claim lacked substance and merit. Its recommendations were based on the findings that the Bakgatla Ba Mocha Ba Phopolo Maloka's chieftaincy under Skep Tlhame was deposed in 1904 and was never recognised again. As the appellants are under Chief Mokgoko of the Bakgatla BaMmakau, the CTLDC found that they do not have their area of jurisdiction. In addition, the CTLDC relied on section 25(2)(viii) of the Traditional Leadership and Governance Framework Amendment Act² to conclude that the claim falls outside its mandate, which authorises the Commission to investigate all leadership claims and disputes dating from 1 September 1927 to the coming into operations of provincial legislation dealing with traditional and governance matters.

[11] After considering the recommendations, the Premier dismissed the appellants' claim for lack of substance and merit. Dissatisfied with the Premier's decision, the appellants launched the review application.

In the Court *a quo*

² Act 23 of 2009.

[12] The application was mainly based on the grounds that the CTLDC failed to consider the application for the first appellant to be recognised as a separate traditional community and that its land was successfully restored to it by the Land Claims Commission. The further grounds were, *inter alia*, that the Premier's acceptance of the recommendations without additional consultation and the CTLDC's finding that the claim falls outside its mandate rendered the Premier's decision reviewable.

[13] The respondent opposed the application on the merits and raised a point *in limine* regarding the non-joinder of Bakgatla Ba Mmakau Community under Chief Makgoko and the Royal family. The Court agreed with the respondents on the non-joinder. However, it dealt with the merits and concluded that the Commission's recommendations and the Premier's decision were unimpeachable and dismissed the application. Aggrieved by this decision, the filed the leave to appeal, which was granted.

In this Court

[14] On appeal, the appellants contended that the Court *a quo* misdirected itself by concluding that they had not been able to show any indication or evidence that they are subject to a system of traditional leaders in terms of any custom that observes a system of customary law. They further contended that the Court *a quo* failed to consider that their application was to obtain official recognition of the first appellant as an existing traditional community and the second appellant as their Senior Traditional Leader.

[15] The appellants contended that the Premier referred to the Commissioner's recommendations instead of applying himself to the evidence presented at the hearings. Lastly, the appellants challenged the finding that they failed to follow "the correct legal procedure enshrined in the Constitution and relevant legislation in dealing with the recognition of the traditional community and its traditional leaders."

[16] The respondents contend that non-joinder is fatal to the appellants' case. They also claim that the appellants failed to follow the procedure for recognising the traditional community and traditional leader as outlined in

section 2 of the Framework Act and section 3 of the Mpumalanga Traditional Leadership and Governance Act ("Mpumalanga Act"). In addition, they opposed the numerous grounds raised by the appellants.

Statutory framework

[17] It is apposite to commence by setting out the statutory framework within which the issues will be determined. The institution of traditional leadership is established in terms of customary law subject to the Constitution. Section 211 of the Constitution provides for the recognition of the traditional leaders as follows:

- '(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.

[18] Section 212 of the Constitution provides for the role of traditional leaders. It provides that:

- '(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.'

[19] The national legislation envisioned by section 211 of the Constitution is the Framework Act, and the Mpumalanga Act is the provincial legislation. Both legislations are aimed at legalising, regulating, and giving recognition to the institution of Traditional Leadership in areas where Traditional Leadership applies.

[20] Section 11 of the Framework Act³ provides for the recognition of senior traditional leaders, headmen and headwomen. Subsection 1 requires the royal family to identify a person who qualifies in terms of customary law to assume the position in question and to inform the Premier of the Province concerned of the particulars of the person so identified to fill the position and of the reasons for identifying that person. The Premier must recognise the person identified by the royal family in accordance with provincial legislation as a senior traditional leader, headman or headwoman, as the case may be.

[21] Section 3(1) of the Mpumalanga Act provides that a community envisaged by section 2(1) of the Framework Act may apply to the Premier to be recognised as a traditional community. On receipt of the application, the Premier:

- '(a) may consult relevant stakeholders on the application;

³ 11. (1) Whenever the position of senior traditional leader, headman or headwoman is to be filled-

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

(i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 12(l)(a), (b) and (d) apply to that person; and

(ii) through the relevant customary structure, inform the Premier of the province concerned of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and

(b) the Premier concerned must, subject to subsection (3), recognise the person so identified by the royal family in accordance with provincial legislation as senior traditional leader, headman or headwoman, as the case may be.

- (b) must forward such an application to the Provincial House of Traditional Leaders;
- (c) may conduct an investigation in respect of the application to ascertain whether the community concerned qualifies to be recognised as a traditional community; or
- (d) may convene a referendum.'

Analysis

[22] It is undisputed that the recognised community in the area of jurisdiction concerned is Bakgatla Ba Mmakau under Chief Mmakau. It is further undisputed that the Bakgatla Ba Mmakau Community and the Royal family were not joined. In addressing the issue of non-joinder, the Court *a quo* held that:

'[40] It is my view that this separation will definitely have an impact either negative or positive on Chief Mokgoko. On that basis he will certainly have a legal and substantive interest in the matter as the stand-alone arrangement which Applicants wish to have, will affect him as the Chief. It will be critical for him to be part of those discussions/proceedings of traditional leadership. Therefore, merely serving the papers on the Acting Chief of Bakgatla Ba Mmakau would not satisfy the legal requirement of joining a party to the proceedings. It is my view that where traditional leaders are appointed, all the traditional structures need to be informed as provided by the two Acts mentioned above, namely "the Framework Act" and "the Mpumalanga Act". I am entirely in agreement with the contention made by the Respondents that failure to join the traditional leadership from whom the Applicants want to be a stand-alone entity would be disastrous and not be in the best interest of the Applicants, more so that this matter is regulated by the Acts of Parliament.'

[23] It concluded that:

'[45] It is clear and evident from both the two Acts, i.e. Framework and Mpumalanga Act that the Royal Family and Inner Royal Family plays a very pivotal and critical role in recognising a traditional leader within a traditional community. It is therefore, indeed on these basis that the Respondents have raised a concern as well a *point in limine* that the Applicants have failed and

ignored a crucial aspect of including a very important role player, namely, the Royal Family in the recognition of the traditional leader of a particular traditional community.

[46] Therefore, failure to include or join the Royal Family or the inner Royal Family as a core and key player, would not have been good for the Applicants' case. It is evident that the Applicant that there is a serious non-compliance with these important and relevant pieces of legislation which have been pointed out *supra*.'

[24] It is trite that if parties have a direct and substantial interest in the proceedings they should be joined unless the Court is satisfied that they have waived their right to be joined.⁴ This principle was reinforced by this Court in *Wessels N.O and Others v Estate Late Esias Johannes Janse Van Rensburg N.O and Others*.⁵ It is apparent that the Bakgatla Ba Mmakau Community and the Royal family have a direct and substantial interest in the matter and there is no evidence that they waived their rights to be joined. The submission that they were served with the Court papers and, therefore, aware of the proceeding, is without merit. They were not cited and thus not afforded an opportunity to be heard. This is contrary to the principles of natural justice.

[25] Having found that the joinder was fatal to the appellants' case, the Court *a quo* should not have proceeded to determine the merits without Bakgatla Ba Mmakau Community and the Royal Family. It follows that the Court *a quo* erred in granting an order in their absence. To this extent, the appeal should succeed.

[26] However, the issue of the non-joinder still needed to be addressed and to simply have dismissed the appellants' application on this ground, would not have solved the ongoing dispute and would have spawned further litigation, costs and delays. The proper course of action, having regard to the facts of this matter, would have been to treat the point *in limine* on the same basis as

⁴ See *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A)

⁵ (48555/2011) [2023] ZAGPPHC 2040 (29 December 2023).

an exception and to have afforded the appellants the opportunity to remedy the situation. This shall be reflected in the order granted by this court below.

[27] To the extent that the order of the court *a quo* whereby the appellants' review application had been dismissed is to be overturned, the appellants shall be substantially successful and there is no cogent reason why costs should not follow that event. By the same token, the respondents were substantially successful in respect of the non-joinder point in the court *a quo* and costs should follow that event.

[28] Accordingly, the following order is made:

1. The appeal is upheld.
2. The order of the Court *a quo* is set aside and replaced with the following order:
 - (a) The point *in limine* regarding non joinder is upheld.
 - (b) The appellants are granted leave to join the Bakgatla Ba Mmakau community and the Bakgatla Ba Mmakau Royal Family within 20 days from date of this order or within such longer time as this court may grant on good cause shown.
 - (c) The applicants are ordered to pay the respondents' costs in respect of the point *in limine*.
 - (d) The review application is postponed *sine die*.
3. The first, second, and fourth respondents are ordered to pay the appellants' costs of the appeal, jointly and severally, the one paying the other to be absolved.

D Mahosi

Acting Judge of the High Court

I agree

N. Davis

Judge of the High Court

I agree

E van Der Schyff

Judge of the High Court

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be __ May 2024.

Appearances

For the Appellant:	Advocate L. Kok
Instructed by:	Maphalla Mokate Conradie Incorporated Attorneys
For the Respondent:	Advocate E.M. Baloyi-Mere SC
Instructed by:	State Attorney

