REPORTABLE

CASE NO. 227/2006

IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

EMMANUEL SEGWAGWA MAMOGALE	APPLICANT
and	
PREMIER, NORTH WEST PROVINCE	1ST RESPONDENT
MOTLALEPULE CHRISTINE MATHIBEDI	2ND RESPONDENT
SECRETARY: HOUSE OF TRADITIONAL LEADERS: NORTH WEST PROVINCE	3RD RESPONDENT
BAKWENA BA MOGOPA ROYAL FAMILY	4TH RESPONDENT

JUDGMENT

MOGOENG JP.

INTRODUCTION

[1] The Applicant ceased to be recognised as and to occupy the position of senior traditional leader (Kgosi) of the Bakwena Ba Mogopa tribe, as regent, with effect from 31 October 2005 in consequence of the decision taken by the first Respondent ("the Premier"). He then launched this application to challenge his removal from office. The factual background which is necessary for the determination of the issues, is set out below.

FACTUAL BACKGROUND

[2] Kgosi Letlhogile Royal David Mamogale of the Bakwena Ba Mogopa tribe died in September 2003. Since his eldest son Motheo, who should succeed him, was too young to take up office, the Applicant was identified by the Bakwena Ba Mogopa Royal Family ("the Royal Family") to act as regent for Motheo. According to the documentation generated by the office of the Premier, the North West Provincial Government recognised the Applicant as the regent on 28 November 2003.

[3] Some members of the tribe and some members of the Royal Family subsequently made allegations of maladministration and poor leadership against the Applicant. The allegations were primarily about the handling of contracts relating to the exploitation of the tribe's mineral rights. Apparently some investigations, the nature and status of which are not very clear, were conducted under the auspices of the Royal Family. Those investigations are said to have exposed maladministration by the Applicant and his deputy. The aforegoing concerns and complaints culminated in two meetings of

the Royal Family at which the fate of the Applicant as the regent was almost sealed.

[4] The first meeting was held on 05 June 2005 and the second on 16 June 2005. The Applicant attended only the first of the above meetings. His removal from the leadership of the tribe was discussed at that meeting. Apart from generalisations about the Applicant's poor leadership and his failure to execute the mandate that the Royal Family had tasked him with, no specific reasons were advanced as to why the Applicant had to be relieved of his duties as regent. Be that as it may, the minutes reflect that the Royal Family resolved to, among other things, relieve the Applicant of his regency and to identify a substitute regent at the next meeting.

[5] The next meeting was held on 16 June 2005, where the second Respondent, Ms Motlalepule Christine Mathibedi, who is Motheo's paternal aunt, was identified as the new regent. It was resolved that the Applicant would be granted his request, to be allowed to act as regent until he turned 70 years of age on 31 October 2005, on the strict understanding that he would not handle issues relating to mineral rights. It was also resolved that the Provincial Government be notified of the decisions which the Royal Family had taken about the leadership of the tribe, so that Government could do what had to be done to regularise the change of leadership.

[6] Accordingly a covering letter from the Royal Family as well as the minutes of the above two meetings were subsequently dispatched to the Directorate of Traditional Leadership and Institutions, which in

turn forwarded them to the Director General of this Province, Dr Manana Bakane-Tuoane.[1] THE DIRECTOR GENERAL THEN PREPARED A MEMORANDUM IN WHICH SHE RECOMMENDED TO THE PREMIER TO, AMONG OTHER THINGS, ENDORSE THE ROYAL FAMILY'S DECISION TO RELIEVE THE APPLICANT OF HIS DUTIES WITH EFFECT FROM 31 OCTOBER 2005 AND TO RECOGNISE THE SECOND RESPONDENT'S APPOINTMENT AS REGENT FOR MOTHEO WITH EFFECT FROM 01 NOVEMBER 2005, BY SIGNING THE RECOMMENDATION AND THE CERTIFICATE OF RECOGNITION WHICH WAS ATTACHED TO THE RECOMMENDATION.

[7] Having considered the recommendation, the Premier took the decision on 07 October 2005: (i) to endorse the removal of the Applicant from the position of regent with effect from 31 October 2005; and (ii) to recognise the second Respondent as regent with effect from 01 November 2005, by signing both the recommendation from the Director General as well as the certificate of recognition. This decision was communicated to, ***inter alia***, the Applicant and the second Respondent.

[8] When the Applicant and some members of the Royal Family who are opposed to the recognition of the second Respondent as regent learnt about the Premier's decision, they registered their opposition to it by addressing a letter dated 02 November 2005 to the Premier. It is not necessary to repeat the contents of that letter, suffice it to say that the issues raised were, for example, whether the right person was identified as regent; whether the members of the Royal Family who were present when the second Respondent was identified as regent

[1] The office of the Director General and the Directorate of Traditional Leadership and Institutions are part of the Premier's office.

formed the quorum;[2] AND WHETHER THERE WAS COMPLIANCE WITH THE PROVISIONS OF THE TRADITIONAL AUTHORITIES ACT.[3] These complainants also requested that the second Respondent be removed from her position with immediate effect. This was followed by a meeting, also said to be of the Royal Family which was held on 13 November 2005. The minutes of this meeting show that a resolution was passed to, among other things, reverse the appointment of the second Respondent and to restore the ***status quo ante*** by reinstating the Applicant. Yet another meeting of the Royal Family was held on 07 January 2006. It, ***inter alia***, resolved that:

(a) the second Respondent be removed from the position of regent and that the Applicant be reinstated;

(b) the meeting at which the decision was taken to remove the Applicant[4] AND TO REPLACE HIM WITH THE SECOND RESPONDENT[5] was unprocedural since:

(i) the required quorum was not formed;

(ii) it was chaired by a third party instead of a member of the Royal Family;

(iii) the majority of members of the Royal Family were not notified of the meeting;

(iv) the correctness of the minutes was questionable.

(c) the Applicant was neither formally informed about a complaint against him nor afforded a fair opportunity to respond

[2] At the meeting of the Royal Family held on 16 June 2005.
[3] The Bophuthatswana Provincial Authorities Act No. 23 of 1978.
[4] The meeting of the Royal Family held on 05 June 2005.
[5] The meeting of the Royal Family held on 16 June 2005.

thereto, and this should have been done.

[9] In response to the above, including the letter, dated 12 January 2006, that was written by the Applicant's attorneys to the Premier, the Premier's office said that they were satisfied that the meetings of the Royal Family which culminated in the decision to remove the Applicant and the decision to identify the second Respondent to replace him as regent were correctly constituted, and that the resolutions passed by those meetings were beyond reproach. The Applicant then launched this application for the Court to review and set aside the Premier's decision in terms of which the Applicant was relieved of his duties as regent and the second Respondent was recognised as regent. The grounds of review follow below.

GROUNDS OF REVIEW

[10] The Applicant relied on three main grounds, namely, that:

(a) section 42 of the Bophuthatswana Traditional Authorities Act No. 23 of 1978 ("the Bop Act") was not complied with prior to the removal of the Applicant by the Premier;

(b) the Premier failed to act in terms of s 13(3) of the Traditional Leadership and Governance Framework Act No. 41 of 2003 ("the Framework"); and

(c) the Premier failed to give the Applicant a hearing in terms of the provisions of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA").

Other grounds were also raised. I do not think it is necessary to list and address them.

POINTS *IN LIMINE*

The second Respondent took two points ***in limine***, and I deal with them below.

Locus standi

[11] The first point ***in limine*** was that the Royal Family or those members of the Royal Family who seem to owe allegiance to the Applicant resolved that Kgosi[6] Joy Mamogale should bring this application on behalf of the Royal Family. Since this application was not launched by him, but by the Applicant, the Applicant did not, according to the Respondents, have the legal standing to bring this application. There is no merit in this point since the Applicant made it clear in his founding affidavit that he was bringing this application in his personal capacity. He never claimed to have been authorised by the Royal Family to bring this application on their behalf.

Lack of Jurisdiction: Failure to exhaust internal remedies

[12] The second point ***in limine*** is that this Court lacks the jurisdiction to entertain this matter because s 21(1)(a)[7] read with s 25(2)(a)(ii) of the Framework provides that disputes of and claims relating to

[6] The Setswana word for senior traditional leader in terms of the Framework (previously referred to as Chief).

[7] The Respondents refer to s 21(2)(a). There is no way they could have meant to refer to s 21(2)(a) and still have contended that the Commission should entertain the dispute. In case I am wrong, see footnote 2 below.

traditional leadership must be referred to the Commission on Traditional Leadership Disputes and Claims ("the Commission"). The Applicant has failed to do so and he is, according to the second Respondent, prevented by s 7(2) of PAJA from approaching this Court directly. I will deal first with the above provisions of the Framework and then with those of the PAJA.

[13] Section 21[8] READ WITH S 25[9] provides at least four possibilities through which a dispute envisaged by s 21(1)(a) may or could be resolved:

i) the first step is for the affected traditional community or traditional communities or customary institutions ("the parties") to seek to resolve the dispute internally in accordance with customs.[10] An internal solution in accordance with customs would not have been an option in this matter because it is the decision of the deeply divided Royal Family itself which is the root-cause of the dispute.

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[8] **21. Dispute resolution.**–
(1)(A) WHENEVER A DISPUTE CONCERNING CUSTOMARY LAW OR CUSTOMS ARISES WITHIN A TRADITIONAL COMMUNITY OR BETWEEN TRADITIONAL COMMUNITIES OR OTHER CUSTOMARY INSTITUTIONS ON A MATTER ARISING FROM THE IMPLEMENTATION OF THIS ACT, MEMBERS OF SUCH A COMMUNITY AND TRADITIONAL LEADERS WITHIN THE TRADITIONAL COMMUNITY OR CUSTOMARY INSTITUTION CONCERNED MUST SEEK TO RESOLVE THE DISPUTE INTERNALLY AND IN ACCORDANCE WITH CUSTOMS.
(B) WHERE A DISPUTE ENVISAGED IN PARAGRAPH (A) RELATES TO A CASE THAT MUST BE INVESTIGATED BY THE COMMISSION IN TERMS OF SECTION 25(2), THE DISPUTE MUST BE REFERRED TO THE COMMISSION, AND PARAGRAPH (A) DOES NOT APPLY.
(2)(a) A dispute referred to in subsection (1)(a) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute in accordance with its internal rules and procedures.
(b) If a provincial house of traditional leaders is unable to resolve a dispute as provided for in paragraph (a), the dispute must be referred to the Premier of the province concerned, who must resolve the dispute after having consulted–
(i) the parties to the dispute; and
(ii) the provincial house of traditional leaders concerned.

[9] **25. FUNCTIONS OF COMMISSION.**–
(1) The Commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising in any province.
(2)(a) The Commission has authority to investigate, either on request or of its own accord–
(i) a case where there is doubt as to whether a kingship, senor traditional leadership or headmanship was established in accordance with customary law and customs;
(ii) a traditional leadership position where the title or right of the incumbent is contested.

[10] Section 21(1)(a).

(ii) in the event of attempts to resolve the dispute through internal avenues having failed, then the dispute must be referred to the provincial house of traditional leaders[11] ("the House");

(iii) if the House also fails to resolve the dispute, then it must refer the dispute to the Premier of the province concerned to resolve it. From the scheme of the Act, it appears that, having consulted the parties to the dispute and the House concerned, the Premier's word on the matter would be final, subject of course to recourse to the Courts.[12]

(iv) the fourth option, which runs parallel to (i) to (iii) above, is to refer the dispute directly to the Commission. As soon as the dispute envisaged by s 21(1)(a) arises, its very nature will indicate whether or not the parties should first try to resolve it internally, where it is feasible, or whether it should be referred directly to the Commission.[13] If the dispute relates to a case that must be investigated by the Commission,[14] THEN THE DISPUTE MUST BE REFERRED TO THE COMMISSION. THE COMMISSION, WHICH OPERATES NATIONALLY AND REPORTS TO THE PRESIDENT OF THIS COUNTRY, HAS THE AUTHORITY TO INVESTIGATE, EITHER ON REQUEST OR OF ITS OWN ACCORD, ***INTER ALIA***, a dispute relating to a traditional leadership position where the title or right of the incumbent is contested. It appears to be the intention of the Legislature that the House

[11] Section 21(2)(a).
[12] Section 21(2)(b).
[13] See s 21(1)(b).
[14] Section 25(2).

and the Premier should not have the authority to handle the disputes and matters referred to in s 25(2) of the Framework. As will be seen below, each of these structures is intended to have its own area of focus with regard to traditional leadership issues. It is, however, not clear which cases the House and the Premier would be entitled to deal with since s 25(2) seems to give all the cases to the Commission. Be that as it may, the right of the second Respondent to act as regent is contested in this case.[15] It, therefore, appears that this would ordinarily be the kind of dispute which the Commission would be best suited to handle as the Respondents contend.[16]

[14] One of the main obstacles, to the Commission's involvement, is that it is the Premier's decision which is challenged by the Applicant in this matter. I do not think that it was the intention of the Legislature to subject the decision taken by a Premier on a dispute relating to traditional leadership, to the Commission's investigation and decision-making at the request of say, the Applicant. The functions of this Commission as set out in s 25 of the Framework and the spirit of the framework do not even remotely suggest that route as an option except perhaps where a Premier may request that his/her decision be looked into by the Commission or where the President may call upon the Commission to look into the matter.

[15] The Framework has established two parallel structures or frameworks

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[15] Section 25(2)(a).

[16] It is not clear who decides whether to exhaust the internal mechanisms failing which to refer the matter to the House, then to the Premier if the need arises, or to refer the dispute directly to the Commission. One can only assume that with all the resources at the disposal of the Directorate of Traditional Leadership and Institutions and the House, they will give the necessary guidance to the parties in this connection.

through which disputes relating to traditional leadership and institutions are to be resolved. The first, which has the Premier as its ultimate decision-maker, is set out in subparagraphs 13(i) to (iii) above, whereas the other which reports to the President of this country is mentioned in subparagraph 13(iv) above. Each structure is apparently meant to address disputes and matters which are distinct from those addressed by the other. It is just that those disputes and issues which fall within the ambit of subparagraphs 13(i) to (iii) above are not easily identifiable let alone specified whereas those to be entertained by the Commission are listed. The Framework seems to have placed the authority of a Premier and the powers of the Commission on par with regard to resolving disputes affecting traditional leadership and institutions which fall within their respective spheres of operation. When a Premier has made a decision on a dispute which he or she has the authority to decide, that is supposed to end that dispute. Similarly, when the Commission has pronounced itself on a dispute, that should end the matter subject to whether or not the President of the Republic endorses it. None of this would, of course, preclude the aggrieved party from approaching a Court of law.

[16] According to the Respondents, as already stated, the Commission is the avenue that the Applicant should have first referred the dispute to for resolution before he could properly approach this Court. Since the Applicant failed to do so, it was submitted that this Court lacks the jurisdiction to entertain this matter. The reason being that PAJA, on which the Applicant also relies to challenge the decision of the Premier, requires of the Applicant or a person in his position, save in

exceptional circumstances, to first exhaust all the internal remedies provided for in any other law, before referring the dispute to this Court. In this case the internal remedy is, according to the Respondents, the Commission.

[17] The Respondents also contended that since no exceptional circumstances existed which could justify the Applicant's exemption from having to exhaust the internal remedies provided for by the Framework, PAJA precluded him from approaching this Court. Section 7(2)[17] of PAJA would ordinarily constitute a clear ouster clause in a situation where a dispute envisaged by s 21(1)(a) is before Court and the Applicant wants to rely on PAJA to challenge the decision that gave rise to the dispute, without first having exhausted internal remedies. This leads me to the next question, which is whether or not exceptional circumstances exist on the strength of which the Applicant is exempted from exhausting the internal remedies provided for by the Framework.

[18] A question arises as to whether or not a referral of a s 21(1)(a) dispute to the house of traditional leaders and, if necessary to the Premier or directly to the Commission, as contended for by the second Respondent, falls within the meaning of **'internal remedy'**. In other words, what are the parameters of **'internal'** within an African traditional setting which provides the framework within which a solution could be found. Is a remedy perhaps not to be understood as **'internal'** if it is located within the confines of the Royal Family or the particular traditional community, between traditional communities or other customary institutions? I doubt whether the resolution of the dispute in this case provided by the House, the

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[17] **7. Procedure for judicial review**.—

. . . . . .

(2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

Premier or the Commission[18] could properly be regarded as an internal remedy. And that would explain why s 21(1)(a) refers to measures taken by a traditional community, or traditional communities or customary institutions to resolve their disputes as an attempt **'to resolve the dispute internally'** but does not characterise, similar attempts to resolve the same disputes by the House, the Premier or the Commission as internal measures.

[19] The Premier of this Province has pronounced herself on the removal of the Applicant as regent of the Bakwena Ba Mogopa tribe and on the recognition of the second Respondent as his replacement. This decision has elevated what once was an internal dispute, potentially capable of internal resolution, to a dispute between a faction of the Royal Family as well as a section of the tribe on the one hand, and the Provincial Government on the other, which has caused the resolution to no longer be internal. A truly internal dispute is, in the context of this case, capable of being resolved by the Royal Family through customary laws, customs and processes. On the contrary, a Premier, who has already pronounced himself or herself on a matter, cannot be summoned to a meeting of the Royal Family or of the tribe for the purpose of attempting to find any internal solution envisaged by s 21(1)(a). Accordingly, once the Premier takes a decision, the dispute loses every semblance of being internal. It follows that s 7(2) of PAJA does not apply to this case.

[20] After the Premier decided on the dispute, it was open to the Applicant to bring this application to this Court which clearly has the jurisdiction

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[18] See sections 21 and 25 of the Framework ***supra***.

to entertain it. I will now deal with the merits of the application, starting with the obligations allegedly imposed on the Premier by s 13(3) of the Framework.

SECTION 13 OF THE FRAMEWORK

[21] Mr Tsatsawane, on behalf of the Applicant, submitted that the Premier was in terms of s 13(3) of the Framework duty-bound, upon receipt of the letters of the Applicant and his supporters which constitute at least an allegation that the identification of the second Respondent as regent was not done in accordance with customs or processes, to refer the matter to the provincial house of traditional leaders for its recommendation.[19] The Premier did not do so and her failure to refer the matter to the House was, according to Mr Tsatsawane, irregular. For that reason her decision should be set aside. Section 13(3) provides that:

> "**13. Recognition of regents.**–
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> . . . . . .
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> (3) WHERE THERE IS EVIDENCE OR AN ALLEGATION THAT THE IDENTIFICATION OF A PERSON AS REGENT WAS NOT DONE IN ACCORDANCE WITH CUSTOMARY LAW, CUSTOMS OR PROCESSES, THE PREMIER–
>
> (A) MAY REFER THE MATTER TO THE RELEVANT PROVINCIAL HOUSE OF TRADITIONAL LEADERS FOR ITS RECOMMENDATION; OR
> (B) MAY REFUSE TO ISSUE A CERTIFICATE OF RECOGNITION; AND
> (C) MUST REFER THE MATTER BACK TO THE ROYAL FAMILY FOR RECONSIDERATION AND RESOLUTION WHERE THE CERTIFICATE OF RECOGNITION HAS BEEN REFUSED."

[19] The Premier could not act in terms of s 13(3)(b) since she had already recognised the second Respondent as regent.

It follows from the above provisions of s 13 that the Premier's decision to refer the matter to the provincial house of traditional leaders is discretionary, and so is the decision to refuse to issue a certificate of recognition. If a Premier is of the opinion that there is no substance in the evidence or allegation envisaged by s 13(3) then he/she need not act in terms of s 13(3)(a) or (b). It was not, therefore, an irregularity for the Premier to have decided, after perusing the minutes of the meetings of the Royal Family held on 05 June 2005 and 16 June 2005 and the Director General's memorandum, not to refer the dispute relating to the recognition of the second Respondent as regent to the provincial house of traditional leaders. Having regard to the contents of the above documentation, it cannot be said that her decision is without any factual basis and therefore irrational. The provincial act on traditional leadership and institutions, which is the Bop Act, is the next issue to be discussed. Before I do so, I find it convenient and appropriate to discuss briefly, the sections of the Framework in terms of which the Respondents acted.

SECTIONS 11 AND 12 OF THE FRAMEWORK

[22] It appears that the meetings of the Royal Family which were held on 05 June 2005 and 16 June 2005 and which decided to remove the Applicant from his position as regent and to replace him with the second Respondent, and the Premier's endorsement of those decisions were meant to comply with the provisions of s 11 and s 12 of the Framework. Section 12[20] OUTLINES THE CIRCUMSTANCES UNDER

[20] **12. Removal of senior traditional leaders, headmen or headwomen**.–

WHICH, AND THE PROCEDURE TO BE FOLLOWED WHEN, A SENIOR TRADITIONAL LEADER, A HEADMAN OR HEADWOMAN IS TO BE REMOVED FROM HIS/HER POSITION. IN TERMS OF THIS SECTION, IT IS THE ROYAL FAMILY WHICH OUGHT TO TAKE THE DECISION TO REMOVE THE LEADER WHEREAFTER THAT DECISION WOULD BE COMMUNICATED TO THE PREMIER WHO WOULD IN TURN, OBVIOUSLY IF SATISFIED ABOUT THE CORRECTNESS OF THE DECISION OF THE ROYAL FAMILY, WITHDRAW THE RECOGNITION OF THAT LEADER. THE PROCEDURE SET OUT IN S 11[21] of the

(1) A SENIOR TRADITIONAL LEADER, HEADMAN OR HEADWOMAN MAY BE REMOVED FROM OFFICE ON THE GROUNDS OF–
(A) CONVICTION OF AN OFFENCE WITH A SENTENCE OF IMPRISONMENT FOR MORE THAN 12 MONTHS WITHOUT AN OPTION OF A FINE;
(B) PHYSICAL INCAPACITY OR MENTAL INFIRMITY WHICH, BASED ON ACCEPTABLE MEDICAL EVIDENCE, MAKES IT IMPOSSIBLE FOR THAT SENIOR TRADITIONAL LEADER, HEADMAN OR HEADWOMAN TO FUNCTION AS SUCH;
(C) WRONGFUL APPOINTMENT OR RECOGNITION; OR
(D) A TRANSGRESSION OF A CUSTOMARY RULE OR PRINCIPLE THAT WARRANTS REMOVAL.
(2) WHENEVER ANY OF THE GROUNDS REFERRED TO IN SUBSECTION (1)(A), (B) AND (D) COME TO THE ATTENTION OF THE ROYAL FAMILY AND THE ROYAL FAMILY DECIDES TO REMOVE A SENIOR TRADITIONAL LEADER, HEADMAN OR HEADWOMAN, THE ROYAL FAMILY CONCERNED MUST, WITHIN A REASONABLE TIME AND THROUGH THE RELEVANT CUSTOMARY STRUCTURE–

(A) INFORM THE PREMIER OF THE PROVINCE CONCERNED OF THE PARTICULARS OF THE SENIOR TRADITIONAL LEADER, HEADMAN OR HEADWOMAN TO BE REMOVED FROM OFFICE; AND
(b) furnish reasons for such removal.
(3) Where it has been decided to remove a senior traditional leader, headman or headwoman in terms of subsection (2), the Premier of the province concerned must, in terms of applicable provincial legislation–
(a) withdraw the certificate of recognition with effect from the date of removal;
(b) publish a notice with particulars of the removed senior traditional leader, headman or headwoman in the *Provincial Gazette*; and
(c) inform the royal family concerned, the removed senior traditional leader, headman or headwoman, and the provincial house of traditional leaders concerned, of such removal.
(4) Where a senior traditional leader, headman or headwoman is removed from office, a successor in line with customs may assume the position, role and responsibilities, subject to section 11.

[21] **11. Recognition of senior traditional leaders, headmen or headwomen**.–
(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(1)(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 reason for the identification of the person; and
(b) the Premier concerned must, subject to subsection (3), recognize 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.
(2) a) The provincial legislation referred to in subsection (1)(b) must at least provide for–
(i) a notice in the *Provincial Gazette* recognising the person identified as senior traditional leader, headman or headwoman in terms of subsection (1);
(ii) a certificate of recognition to be issued to the identified person; and
(iii) the relevant provincial house of traditional leaders to be informed of the recognition of a senior traditional leader, headman or headwoman.
(b) Provincial legislation may also provide for–
(i) the election or appointment of a headman or headwoman in terms of customary law and customs; and
(ii) consultation by the Premier with the traditional council concerned where the position of a senior traditional leader, headman or headwoman is to be filled.
(3) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the Premier–
(a) may refer the matter to the relevant provincial house of traditional leaders for its recommendation; or
(b) may refuse to issue a certificate of recognition; and
(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

Framework, for the identification of the new leader and the recognition of that new leader by the Premier, would then have to be followed. On the face of it, there appears to be nothing wrong with what was done by the Respondents in apparent compliance with the provisions of sections 11 and 12. After all, the Royal Family is empowered to resolve its own disputes and to deal with its own affairs or the affairs of the affected traditional community rather than abdicate its responsibility to outsiders.

[23] Be that as it may, none of the Respondents, however, sought to rely on s 11 and s 12. Even if they did, s 12 does not apply to this case. It would possibly have applied if the Applicant had been convicted of an offence, or if he suffered from physical or mental infirmity or had violated a customary rule or principle that warrants removal. None of these grounds which are set out in s 12(1)[22] were raised or relied on. They are also not borne out by the facts of this case.

[24] Even if any of the Respondents sought to contend that on the facts a case has been made out for the removal of the Applicant from a leadership position, and that these provisions of the Framework provide the legal basis for what the Royal Family and the Premier did, it would have been extremely difficult to circumvent the provisions of s 42(1)(a) of the Bop Act which provides that an alleged failure or refusal by a traditional leader or headman to comply with any other law, which it is his[23] duty to comply with, including a transgression of

(4) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (3) has been reconsidered and resolved, the Premier must recognize the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.

[22] See footnote 19 above.

[23] The Bop Act uses he or his to include male and female.

a customary rule or principle which warrants removal, would also be a misconduct which would have to be enquired into by a commission.[24] THE FRAMEWORK, SECTIONS 11 AND 12 THEREOF IN PARTICULAR, COULD NOT THEREFORE HAVE BEEN RELIED ON IN DISREGARD OF THE PROVISIONS OF S 42 OF THE BOP ACT. I DEAL WITH THIS MORE FULLY BELOW.

THE PROVINCIAL ACT

[25] Unlike the Framework, the definition section of the Bop Act defines **"Chief"** as **'a person recognised as chief or acting chief under section 36'**. This then means that reference to chief in any section of the Bop Act must be understood to also be reference to acting chief.[25] SEVERAL OBSERVATIONS BASED ON THE PROVISIONS OF S 42[26] and the

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[24] Established in terms of s 42 of the Bop Act.

[25] The fundamental problem in this matter relates to the failure of the Framework (i) to cross-refer to the Bop Act or the applicable provincial legislation; (ii) to extend the meaning of a senior traditional leader or headman or headwoman to the one acting or regent, for this raises a doubt as to whether or not the provisions of sections 11 and 12 of the Framework are to be understood to apply to acting senior traditional leader, acting headman or acting headwoman.

[26] **42. MISCONDUCT.–**

(1) Whenever there is reason to believe that a chief or headman is guilty of misconduct in that he–

(a) fails or refuses to comply with any provision of this Act or of any other law which it is his duty to comply with;

(b) disobeys, disregards or make wilful default in carrying out a lawful order given to him by a person having authority to give it, or by conduct displays insubordination;

(c) conducts himself in a disgraceful, improper or unbecoming manner;

(d) uses intoxicating liquor or dependence-producing drugs excessively;

(e) abuses his powers of extorts, or by the use of compulsion or arbitary means obtains, any tribute, fee, reward or present;

(f) tries or punishes any person without being duly authorised thereto by or under any law;

(g) becomes a member or takes part in the affairs of an organisation or association whose objects are subversive of or prejudicial to constituted government or law and order; or

(h) is negligent or indolent in the discharge of his duties,

the President may charge him in writing with such misconduct and appoint a commission to enquire into the matter.

(2) At any enquiry by a commission appointed under subsection (1), a chief or headman shall be entitled to be heard: Provided that the proceedings shall not be invalidated by any failure of the chief or headman to attend the enquiry.

(3) The commission shall–

(a) at the conclusion of the enquiry, find whether the chief or headman is guilty of the misconduct and inform him of its findings; and

(b) forward to the President, for submission to the Executive Council, the record of the proceedings, a statement of its finding, the reasons therefor, and any observations which it might wish to make.

(4) If the commission has found that the chief or headman, is guilty of the misconduct, the Executive Council may–

(a) caution or reprimand the chief or headman; or

(b) impose on him a fine not exceeding two hundred rand, payable or recoverable from any remuneration to be paid to him in terms of this Act for the benefit of the Bophuthatswana Revenue Fund in such

facts of this case with regard to what the Premier should have done need to be made, and they are set out below:

(i) the Bop Act has not been repealed. It is recognised as the applicable provincial legislation that governs issues affecting traditional leadership and institutions in the North West Province;

(ii) the concerns and complaints apparently raised by some members of the tribe and of the Royal Family against the Applicant could at best constitute a **'reason to believe that a chief or headman is guilty of misconduct'**;

(iii) a reason to believe that a chief might be guilty of misconduct would have justified the appointment of a commission of enquiry by the President/Premier;

(iv) the President/Premier would have had to charge the Applicant with a particular misconduct in writing;[27]

(v) the Applicant would then have been entitled to be heard by the commission;[28]

(vi) the commission would, after hearing all the evidence,

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instalments as the Executive Council may determine; or
(c) direct that for such period not exceeding two years as the Executive Council may determine, he shall not be paid any remuneration under section 39;
(d) impose on him any two or more of the penalties referred to in paragraphs (a), (b) and (c) jointly; or
(e) in the case of a chief, depose him; or
(f) in the case of a headman, direct the President or chief concerned to discharge him.

[27] See s 42(1) of the Bop Act which provides for (ii) to (iv) above.

[28] See s 42(2) of the Bop Act.

have had to pronounce upon the guilt or otherwise of the Applicant;

(vii) in the event of the commission having found the Applicant guilty, it would have had to inform the Applicant of its findings and to forward to the Premier, for submission to the Executive Council, the record of the proceedings, a statement of its findings and the reasons therefor;[29] and

(viii) the sanction would then be determined by the Executive Council and not the Premier alone.[30]

[26] The commission was not appointed and none of the above steps were obviously taken. The reason given for this failure, to act in terms s 42, is that the Applicant has by implication pleaded guilty and even suggested possible sanctions against himself. It is noteworthy that this reason was advanced, not by the Premier and not even by Mr Ruthoane of her office, but by the second Respondent. No section of the Bop Act or of any Act that the Court is aware of, makes provision for the Premier's exemption from compliance with s 42 of the Bop Act.

[27] Dr Senatle, for the Respondents, submitted that the provisions of s 42 are merely directory but not peremptory. He submitted that s 42 provides that the President/Premier '**may'** charge a traditional leader in writing with a misconduct and appoint a commission, not '**shall'** charge him in writing with a misconduct and appoint a commission.

[29] See s 42(3) of the Bop Act which applies to (vi) and (vii) above.
[30] See s 42(4) of the Bop Act.

This submission must be rejected. The significance of the word **'may'** in this context is that the Premier may choose to ignore the allegations of misconduct levelled against a traditional leader. Allegations of misconduct do not automatically give rise to an obligation on the Premier to charge a leader and appoint a commission. Should he/she, however, decide to charge a traditional leader with a misconduct and appoint a commission, then several obligations are imposed on that commission with respect to (i) the rights of the accused traditional leader; (ii) its duties; and (iii) obligations are also imposed on the Executive Council in the event of the traditional leader being found guilty. There simply is no way around the establishment of a commission of enquiry in the North West Province when a traditional leader including an acting one and a regent, is accused of misconduct or maladministration for as long as s 42 or its equivalent exists.

[28] The situation in this case best explains why a commission of enquiry is of critical importance. Queries raised about the composition of the Royal Family at its meetings of 05 and 16 June 2005 and the procedures followed at those meetings where very important decisions were taken, highlight the crucial role that a commission is meant to play in the circumstances by reason of its apparent impartiality. It appears that the Applicant was not charged with specific acts of misconduct. Sweeping statements such as maladministration, poor leadership and some scant reference to not taking advice and not having handled issues relating to mining rights properly, were mentioned. No details were given. The Applicant was not afforded a proper opportunity in those meetings to answer to

even these generic allegations. The meetings were dominated by people who apparently have a direct interest in the mineral rights and the leadership position of the community.[31]

[29] Our customary laws and processes must be developed in such a way as to harmonise them with the Bill of Rights and the ethos of the Constitution of the Republic of South Africa Act, No. 108 of 1996, ("the Constitution").[32] ANY CUSTOMARY LAW, PRACTICE OR SYSTEM WHICH DISREGARDS THE FAIR ADMINISTRATIVE ACTION THAT THE PEOPLE OF THIS COUNTRY DESERVE, IS CONTRARY TO THE ETHOS OF OUR CONSTITUTION AND NEEDS TO BE DEVELOPED SO AS TO EMBRACE A NEW HUMAN RIGHTS CULTURE BROUGHT ABOUT BY OUR CONSTITUTION. THE MINUTES OF THE MEETINGS OF THE ROYAL FAMILY HELD ON 05 AND 16 JUNE 2005 ARE CHARACTERISED BY DISREGARD FOR THE RIGHTS OF THE APPLICANT TO BE TOLD WHAT CHARGES ARE PREFERRED AGAINST HIM AND TO SPEAK IN HIS DEFENCE. THE BOP ACT MAKES ADEQUATE PROVISION FOR FAIR ADMINISTRATIVE ACTION IN LINE WITH THE SPIRIT OF OUR CONSTITUTION.

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[31] A commission of enquiry would obviously not have been presided over by any of the parties who is reasonably suspected of having a personal interest in the subject-matter of discussion. This is in contrast to the situation where the meeting of the Royal Family held on 16 June 2005 was chaired by a Mr Poho who does not even bear the Royal surname, who has not denied that he and the second Respondent are romantically involved and that he (Mr Poho) has a direct interest in the mining rights of the tribe and that the second Respondent would by reason of their relationship indirectly benefit to the extend of a 26% interest which Mr Poho's company is said to have in exploiting, directly or indirectly, the mining rights of the tribe. Not only was the second Respondent very vocal about the issue of a woman taking over, who turned out to be none other than herself, Mr Poho chaired the meeting at which the second Respondent, apparently his lover, was identified as regent. Apart from removing the Applicant and replacing him with the second Respondent, the second issue which dominated both meetings was contracts relating to the tribe's mining rights and that they should be left to the new incumbent, the second Respondent, to deal with. The importance of the commission of enquiry envisaged by s 42 could not have become even more apparent, in the light of these allegations or perceptions, whether they are true or false. The integrity of the decisions of the Royal Family which led to this case is compromised by the aforegoing questions about the decision-making process.

[32] See s 39 of the Constitution, which provides that:

39. Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit purport and objects of the Bill of Rights.

(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

BOTH THE ROYAL FAMILY AND THE PREMIER FAILED TO ACT IN LINE WITH THE ETHOS OF OUR CONSTITUTION.

[30] I am satisfied that the Premier's decision to endorse the Royal Family's decision to relieve the Applicant of his position as regent, thus effectuating his removal, without a recommendation to that effect by a commission appointed in terms of s 42 of the Bop Act, and her recognition of the second Respondent as regent in the place of the Applicant, constitutes a gross irregularity. Both decisions fall to be set aside.

FAILURE TO COMPLY WITH PAJA

[31] The last ground raised relates to the alleged non-compliance with the provisions of PAJA in so far as they require of the maker of an administrative decision,[33] WHICH IS ADVERSE TO THE INTERESTS OF A PERSON, TO HEAR THAT PERSON OR ALLOW THAT PERSON TO MAKE WRITTEN REPRESENTATIONS BASICALLY IN TERMS OF THE ***AUDI ALTERAM PARTEM*** rule, before the decision is made.[34] I have already decided that the Premier's decision to remove the Applicant and to replace him with the second Respondent is flawed and that the Applicant must succeed in this application. But, for what it is worth, there has been non-compliance with the provisions of PAJA. The decision taken by the Premier is administrative in nature, it is adverse to the interests of the Applicant, the Applicant should have been given some kind of a hearing or an opportunity to make representations before the

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[33] *Pharmaceutical Manufacturers Association of South Africa v President of the Republic of South Africa and Others* 2000(2) SA 674 (CC); *Febsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC).

[34] See s 3 of PAJA; *Schoonbee and Others v MEC for Education, Mpumalanga and Another* 2002 (4) SA 877 (T) at 882–883.

decision was made by the Premier or her delegate(s), but this was not done. As I said above, the meetings of the Royal Family held on 05 and 16 June 2005 are a far cry from compliance with what the spirit of the Constitution[35] AND PAJA REQUIRES WITH RESPECT TO FAIR ADMINISTRATIVE ACTION.

THE STRUCTURAL INTERDICT

[32] The Applicant has, ***inter alia***, asked this Court to direct the Premier and the second Respondent to act as set out below:

> "5. THE FIRST RESPONDENT BE DIRECTED TO DO ALL THAT IS NECESSARY IN TERMS OF APPLICABLE LEGISLATION TO GIVE EFFECT TO THE RELIEF IN PARAGRAPHS 1, 2, 3 AND 4 ABOVE.
>
> 6. THE SECOND RESPONDENT BE DIRECTED TO, WITHIN SEVEN (7) DAYS FROM THE DATE ON WHICH THE ORDER IS GRANTED, DELIVER TO THE REGISTRAR OF THE ABOVE HONOURABLE COURT AND NOTIFY THE APPLICANT OF SUCH DELIVERY, A REPORT ON ALL THE DECISIONS AND ACTIONS TAKEN BY THE SECOND RESPONDENT PURSUANT TO THE SECOND RESPONDENT'S RECOGNITION AS REGENT."

[33] No reason was advanced for an order which includes such a structural interdict. The Court is not aware of any threat of or incident of non-compliance with an order of this Court relating to this or a similar matter which would justify the above structural interdict being made an order of this Court. After all, it is only in an appropriate case that a Court may order a structural interdict to secure compliance with a Court order, by directing the party, against whom the order is made, to report back to the Court in question. The Court would then be able to give such further ancillary orders or directions as may be

[35] See s 33 of the Constitution.

necessary to ensure the proper execution of the order.[36]

[34] This was explained in *Minister of Health & Others v Treatment Action Campaign & Others (No. 2)*[37] as follows:

> "The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the Court to enable it to satisfy itself that the policy was consistent with the Constitution. . . . In appropriate cases they [the courts] should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary."

Selikowitz J relied on this case in *City of Cape Town v Rudolph & Others*[38] and said:

> "I do not believe that a declaration, standing on its own, will suffice. There has already been such a declaration, made by the Constitutional Court. It has not induced applicant to comply with its constitutional obligations. Something more is therefore necessary.
>
> The circumstances and, in particular, the attitude of denial expressed by applicant in failing to recognise the plight of respondents as also its failure to have heeded the order in *Grootboom* makes this an appropriate situation in which an order, which is sometimes referred to as a structural interdict, is 'necessary', 'appropriate' and 'just and equitable'."

It follows from the absence of the facts supporting the structural interdict prayed for and from the authorities cited above, that there can be no justification for making an order which incorporates prayers 5 and 6 of the Notice of Motion. For these reasons, the order

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[36] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); *City of Cape Town v Rudolph & Others* 2004 (5) SA 39 (C).

[37] 2002 (5) SA 721 (CC).

[38] 2004 (5) SA 39 (C) at 88E–F.

to be made will exclude prayers 5 and 6. The Applicant is legally represented and he would obviously take advice on what to do, in the unlikely event of the Respondents' non-compliance with this order.

ORDER

[35] In the result the following order is made:

a) the points ***in limine*** on the Applicant's lack of ***locus standi*** and this Court's lack of jurisdiction are dismissed;

b) the decision of the Premier to relieve the Applicant of his position as regent with effect from 31 October 2005 is reviewed and set aside;

c) the decision of the Premier to recognise the second Respondent with effect from 01 November 2005 is reviewed and set aside;

d) the Applicant is reinstated as regent of the Bakwena Ba Mogopa tribe; and

e) the Premier is to pay costs of this application to the Applicant.

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M.T.R. MOGOENG
JUDGE PRESIDENT OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 07 SEPTEMBER 2006
DATE OF JUDGMENT : 12 OCTOBER 2006

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