CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 46/12
[2013] ZACC 3

In the matter between:

MMUTHI KGOSIETSILE PILANE	First Applicant
RAMOSHIBIDU REUBEN DINTWE	Second Applicant
and	
NYALALA JOHN MOLEFE PILANE	First Respondent
THE TRADITIONAL COUNCIL OF THE BAKGATLA-BA-KGAFELA TRADITIONAL COMMUNITY	Second Respondent

Heard on : 13 September 2012

Decided on : 28 February 2013

JUDGMENT

SKWEYIYA J (Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Van der Westhuizen J and Zondo J concurring):

[1] We are seized of an application for leave to appeal against the decision of Landman J, sitting in the North West High Court, Mafikeng (High Court). The High Court granted three interdicts, restraining the applicants from: convening any unauthorised meetings under certain auspices; acting in a manner contrary to applicable statutory and customary law; and holding themselves out as a traditional authority using specified names and cognate titles. For determination is the appropriateness of these three interdicts. I refer to the parties as they are in this Court.

The parties

[2] The first and second applicants are Mr Mmuthi Kgosietsile Pilane and Mr Ramoshibidu Reuben Dintwe, respectively. The applicants are residents of the Motlhabe village, one of 32 villages that comprise the Bakgatla-Ba-Kgafela Traditional Community (Traditional Community), located in the Pilanesberg area of the North West Province.[1] The applicants have for a number of years been dissatisfied with the administration of their village by the official governance structures within the Traditional Community. The applicants are leaders of a group that desires secession of the Motlhabe village from the Traditional Community.

[3] The first respondent is Mr Nyalala John Molefe Pilane, the senior traditional leader or *Kgosi* of the Traditional Community. The second respondent is the Traditional

[1] The North West Province is one of nine provinces in the Republic, established under section 103 of the Constitution. Adjacent to the North West Province is the sovereign state of Botswana.

Council of the Traditional Community (Traditional Council). The respondents are the officially recognised leaders of the Traditional Community in terms of sections 2(1)-(2) and 11 of the Traditional Leadership and Governance Framework Act[2] (Framework Act), read with sections 3 and 13 of the North West Traditional Leadership Governance Act[3] (North West Act).[4]

[4] It is common cause that the applicants have not been recognised as traditional leaders by the Premier of the North West Province, nor are the villagers of Motlhabe recognised as a traditional community, distinct from the Bakgatla-Ba-Kgafela Traditional Community.

Factual background

[5] Although all the villages that make up the Traditional Community are situated in South Africa, the Traditional Community recognises as their *Kgosikgolo*[5] a traditional leader who lives in Mochudi, Botswana.[6] His deputy, Mr Nyalala John Molefe Pilane, the first respondent, administers the affairs of the Traditional Community in South Africa and is based at Moruleng, North West Province, which is also the headquarters of the

[2] 41 of 2003.

[3] 2 of 2005.

[4] See below n 25 and n 26 for the recognition provisions under the Framework Act and North West Act respectively.

[5] The North West Act does not define the term "Kgosikgolo". Translated from the Setswana language, it means great chief. The *Kgosikgolo* of the Traditional Community is therefore its highest ranking traditional leader. It is unnecessary to determine whether the *Kgosikgolo* is recognised under South African legislation.

[6] Historically, the Bakgatla-Ba-Kgafela resided as one tribe based in Saulspoort. A section of Bakgatla-Ba-Kgafela then relocated further west and settled in Mochudi, Botswana. The two sections of the Bakgatla-Ba-Kgafela, however, remain closely connected.

Traditional Council. There are headmen or *dikgosana* and sub-councils assisting the *Kgosi* and the Traditional Council with the administration of traditional affairs at village level.

[6] The applicants and other members of the Motlhabe village have been dissatisfied for several years with the alleged mismanagement of the affairs of the Traditional Community. They describe their village as poor and under-developed. Their dissatisfaction springs from the alleged misallocation of resources amongst the villages comprising the Traditional Community. The resources of the Traditional Community include those derived from platinum mining and the Sun City Resort.[7] The applicants allege that these resources do not reach the Motlhabe village but are used for the benefit of those loyal to the Traditional Council and the *Kgosi*.

[7] There is also a longstanding leadership dispute, in which the first applicant claims to be the headman of the Motlhabe village, but has been denied official recognition under the relevant statutes. Rather, Mr Tlhabane Pilane, who is not a party to these proceedings, is the officially recognised *Kgosana* or headman of the Motlhabe village. The applicants complain that Mr Tlhabane Pilane's leadership, firstly, does not reflect the true leadership position under customary law. Secondly, in spite of his officially recognised position, he does not attend to governance issues in the Motlhabe village

[7] The Sun City Resort is a luxury leisure resort located in the North West Province. It was established in what was then the homeland of Bophuthatswana, where the Resort offered gambling facilities which were not permitted in apartheid South Africa.

through, among other things, his failure to call meetings to discuss community issues as required by custom. The applicants have made several unsuccessful attempts to resolve their grievances by appealing to recognised statutory structures with jurisdiction over their village.

[8] On 20 July 2009, a letter was addressed to the Traditional Council advising that the "Bakgatla-Ba-Kautlwale Pilane Motlhabe Tribal Authority" had resolved that they were an "Independent Tribe" and would, effective from 1 July 2009, no longer fall under the jurisdiction of the Traditional Council. The first applicant signed the letter as chairperson of the "Bakgatla-Ba-Kautlwale Pilane Motlhabe Tribal Authority". This correspondence prompted a threat of litigation by the respondents, in light of which the attempted secession was not pursued.

[9] Some months later, two government officials from the Department of Local Government and Traditional Affairs[8] attended a community meeting at the Motlhabe village and advised that, in order to secede, an application had to be made to, and granted by, the Premier in terms of the Framework Act and the North West Act. On this advice, the applicants decided to invite the residents of the Motlhabe village, as well as four neighbouring villages, to a meeting on 6 February 2010, an invitation to which was circulated on 31 January 2010. The invitation was signed by both the applicants, headed

[8] The two government officials are Mr Ruthwane and Mr Motswasele. Mr Ruthwane is a Director in the Traditional Affairs Directorate in the Department of Local Government and Traditional Affairs of the North West Province. Mr Motswasele is a District Co-ordinator for Traditional Affairs in the same Directorate.

"Motlhabe Tribal Authority Kgotha Kgothe" and contained the following text, which has been translated by the respondents from Setswana into English:

> "The Residents of the Motlhabe Village
>
> You are invited to a meeting on the 06 February 2010, at 09:00 in the morning at Motlhabe Community Hall.
>
> Agenda
>
> 1. The reply from the Government in connection with the [cessation and] independence of Motlhabe (from Moruleng Bakgatla).
> 2. [Decision and] Resolution of the Traditional Community in general in connection with the independence (from Moruleng Bakgatla)."[9]

[10] On 2 February 2010, a member of the South African Police Service telephoned the first applicant and advised that he would be arrested if the meeting took place. The applicants decided that the meeting should be cancelled. On 3 February 2010, the respondents' attorneys sent a letter to the applicants requesting an undertaking that the meeting would not be held. In line with the decision already taken to cancel the meeting, the applicants informed the members of the community on 5 February 2010 that the meeting had been cancelled. However, despite the cancellation of the meeting and contrary to the first applicant's instructions, we are told, his erstwhile attorney informed the respondents' attorneys that the meeting would in fact proceed. It was this erroneous

[9] The applicant disputes the translation of the words in square brackets. It is not necessary in the present case to settle this dispute.

advice that prompted the respondents to launch the urgent interim interdict application in the High Court.

Proceedings in the High Court

[11] On 5 February 2010, the respondents obtained an urgent interim interdict in the High Court in the following terms:

> " . . .
> 2. That the [applicants] and all persons acting through them or in collaboration with them, are interdicted from:
>
> 2.1. proceeding with the meeting planned for 6 February 2010 at 9:00 by M K (Mothi) Pilane and R Dintwe . . . referred to in an invitation/notice . . . and/or anyone on their behalf or whom they may represent, which meeting is planned to be held at the Motlhabe Community Hall, Saulspoort, Pilanesberg, District Rustenburg, North West Province;
>
> 2.2 organising or proceeding with any meeting purporting to be a meeting of the Traditional Community or of the Bakgatla-Ba-Kautlwale Pilane without proper authorisation by either of the [respondents] or order of this Honourable Court first had or obtained;
>
> 2.3 taking any steps or conducting themselves in any manner which is contrary to the provisions of the [North West Act], the [Framework Act] or the customs of the traditional community in Moruleng and the customary law, which steps or conduct is prejudicial to the [respondents], or disruptive to, or has any detracting or reducing or belittling effect on the status, role and function of the 1st and 2nd [respondents];
>
> 2.4 acting for or on behalf of the legitimate Kgosikgolo or Kgosi of the Bakgatla-Ba-Kgafela;

2.5 pretending to be authorised by the legitimate Kgosikgolo or Kgosi of the Bakgatla-Ba-Kgafela Traditional Community;

2.6 representing to any persons that they are authorised either by the legitimate Kgosikgolo or Kgosi of the Bakgatla-Ba-Kgafela Traditional Community or by virtue of any other reason to declare an independence or secession of the Motlhabe Village from the Bakgatla-Ba-Kgafela Traditional Community in Moruleng;

2.7 pretending or holding themselves out as a traditional community or a traditional authority under the name or names Bakgatla-Ba-Kautlwale or Bakgatla-Ba-Motlhabe or the traditional Authority of Motlhabe or any similar name or title or name title of whatever kind."

[12] The gravamen of the respondents' complaint in the High Court was that the applicants were meeting to further what the respondents characterised as an unlawful attempt to secede from the Traditional Community. This complaint will be addressed more fully in due course.

[13] On the return day of the interim interdict, the High Court rejected the respondents' complaint regarding the unlawfulness of the attempt to secede. The Court accepted that the applicants were entitled to meet to discuss their desired independence and matters of mutual interest, but found that the applicants were not entitled to convene meetings under names that implied that they were clothed with statutory authority as an independent traditional community, when in fact they were not. To do so, the High Court held, would

not be permissible in a constitutional dispensation, and the applicants should accordingly be interdicted from that conduct.

[14] On 30 June 2011, the High Court delivered judgment[10] (High Court judgment) and granted the following order:

> "1. The [applicants] and all persons acting through them or in collaboration with them, are interdicted from:
>
> 1.1 Organising or proceeding with any meeting purporting to be a meeting of the Traditional Community or Motlhabe Tribal Authority without proper authorisation by either of the [respondents].
>
> 1.2 Taking any steps or conducting themselves in any manner, which is contrary to the provisions of the [North West Act], the Framework Act or the customs of the traditional community in Moruleng and the customary law.
>
> 1.3 Pretending or holding themselves out as a traditional authority under the name or names Bakgatla-Ba-Kautlwale or Bakgatla-Ba-Motlhabe or the traditional authority of Motlhabe or any similar name or title of whatever kind.
>
> 2. The [applicants] are to pay the costs of the application jointly and severally, the one paying the other to be absolved."

[15] On 1 March 2012, the High Court refused the applicants leave to appeal. The applicants were also denied leave to appeal by the Supreme Court of Appeal.

[10] *Pilane and Another v Pilane and Another* [2011] ZANWHC 80.

Applicants' submissions

[16] The applicants contend that the final interdicts were granted incorrectly by the High Court and impermissibly limit their rights to freedom of expression, assembly and association. They advance that three fundamental flaws permeate the interdicts.

[17] The first flaw is that the High Court judgment is not based on the case made out by the respondents in their founding affidavit, notwithstanding that the relief granted had been prayed for in the notice of motion. The application in the High Court proceeded from a claim that the intended secession was unlawful and that, in turn, the planned meeting to discuss secession was unlawful. In other words, the contention that, by utilising the term "Motlhabe Tribal Authority", the applicants held themselves out as possessing statutory authority was not an allegation pleaded in the founding affidavit. It was argued that prayers in the notice of motion may be granted only if sustained by facts alleged in the founding affidavit.

[18] The second flaw is that the High Court's reasoning is based on the false premise that the applicants held out that they were in fact empowered by statute, as indicated by the following passage from the High Court judgment:

> "[I]n a constitutional dispensation no person or body of persons may create or reproduce structures otherwise than in terms of and in accordance with the constitutional processes

> contained within the Constitution which is the supreme law. This has been elegantly expressed in para 4.3 of the replying affidavit. I adopt and express it thus: Any action by a parallel but unsanctioned structure that is neither recognised by the law or custom, seeking to perform and assume functions which are clearly the exclusive preserve of such recognised authorities, ought to incur the wrath of the law."[11]

The applicants contend that this proposition is incorrect for the following reasons: (i) there is no statutory body known as a "Tribal Authority" under our current law; (ii) there is no evidence that the applicants sought to perform any function of any statutory or otherwise legally recognised body; and (iii) the applicants expressly disclaimed that they intended to hold themselves out as a statutory authority.

[19] The third flaw is that, on its own terms, the High Court order cannot be sustained as it prohibits conduct that the judgment found to be permissible. On the evidence, the High Court found that the applicants were part of a community that understands its identity with reference to a common ancestor; that they were entitled to meet to discuss their desired independence; and that they could not be interdicted from holding themselves out as a traditional community under the names mentioned. Despite this, the High Court interdicted the applicants and others from proceeding with any meeting "purporting to be a meeting of the Traditional Community".

[20] The applicants have made detailed submissions on the specific terms of each of the three interdicts, which are canvassed more fully below. In relation particularly to the first

[11] Id at para 21.

interdict, the applicants contend that using the title "Motlhabe Tribal Authority" cannot be unlawful as the Motlhabe Tribal Authority is a non-entity in law.[12] While the term "Tribal Authorities" existed as a statutory construct under the Black Authorities Act[13] and the Bophuthatswana Traditional Authorities Act,[14] both these statutes have been repealed. The applicants assert that they did not employ the term in its technical, legal sense to refer to the official apartheid or any statutory structures, but rather to refer to their leadership under customary law, as they have done for many years. Moreover, given Mr Tlhabane Pilane's failure to convene meetings of the community to discuss their grievances, the applicants aver that the community was, according to customary law, entitled to meet for this purpose at village level and to refer to that meeting as a *Kgotha Kgothe*,[15] an issue which was canvassed more fully in oral argument.

[21] Lastly, the applicants submit that, in any event, they undertook to refrain in the future from referring to themselves as the "Motlhabe Tribal Authority" or using any statutory language that has a technical meaning that does not apply to them. During oral argument, the applicants advanced that their undertaking ought to have disinclined the High Court from granting the interdicts.

[12] Rather it is the term "Traditional Community", which was not employed, that has a specified legal meaning in terms of the relevant legislation. See [33] below for a discussion on the relevant legislation.

[13] 68 of 1951.

[14] 23 of 1978.

[15] See [46] below for a description of *Kgotha Kgothe*.

[22] Regarding the second interdict, the applicants submit that it should not have been granted as it is too broadly framed to have a determinable meaning. It lacks specificity on which provisions of the stipulated legislation and custom must be observed and in respect of whom it operates. The overbreadth of the interdict, coupled with the fact that breach of its terms would give rise to contempt of court, renders the interdict inappropriate.

[23] In relation to the third interdict, the applicants submit, in essence, that there is no statutory or customary law impediment to representing one's leadership as a traditional authority and holding out the representatives of the Motlhabe community as their traditional authority. It is permissible under custom to do so and the applicants, in so doing, did not seek to usurp any power or to exercise any function belonging to a statutory body.

Respondents' submissions

[24] The respondents oppose the application for leave to appeal and argue that the High Court was correct in granting the interdicts. This is because it is only the respondents who are the legitimate and recognised structures in terms of the North West Act, the Framework Act and custom, and that no other formation could lawfully convene a meeting under the guise of an officially recognised traditional leadership structure. Furthermore, according to customary law, only the *Kgosi* or his duly recognised appointee, like a *Kgosana*, may convene a meeting of the Traditional Community or

subsection of it, for the purpose of discussing governance-related matters, and refer to a meeting of that kind as a *Kgotha Kgothe*. The respondents argue that the High Court was correct in stating that—

> "in a constitutional dispensation no person or body of persons may create or reproduce structures otherwise than in terms of and in accordance with the constitutional processes contained within the Constitution which is the supreme law."[16]

[25] The High Court judgment, the respondents argue, does not in any way hamper a formation or an individual from organising a meeting to discuss governance-related issues, but that this must be done under a different and permissible name. The applicants' rights to freedom of expression, assembly and association, when exercised through unlawful means, justify limitation in the form of an interdict. The High Court accordingly struck the correct balance between the rights of the parties involved, giving sufficient weight to the applicants' rights to expression, assembly and association on the one hand, and those of the respondents, on the other hand.

[26] Lastly, during the course of oral argument, the respondents contended that the undertaking by the applicants not to refer to themselves as the "Motlhabe Tribal Authority" was not in itself sufficient to obviate the necessity of the interdicts. In support of this contention, the respondents relied on the prior attempt by the applicants to secede

[16] High Court judgment above n 10 at para 21.

and their subsequent attempt to meet as the "Motlhabe Tribal Authority" as signifying a persistent intention to flout the respondents' lawful authority.[17]

[27] As far as the complaint about the vagueness and broadness of the second interdict is concerned, the respondents submit that the complaint bears no merit because the terms of the second interdict, when interpreted and understood within the context of the High Court judgment, are sufficiently precise.

Condonation

[28] Both the applicants and respondents have applied for condonation. The applicants request condonation for the late filing of the single supplementary volume of the record. No prejudice has been caused to the respondents as the supplementary record is very short and the respondents are familiar with the full record from the High Court proceedings. The respondents request condonation for the late filing of their notice of opposition and opposing affidavit, which arrived one day late. The applicants have not been prejudiced by this minor delay in filing. I am satisfied that both applications for condonation should be granted.

[17] We were referred to *IIR South Africa BV (incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (WLD) (*Tarita*).

Leave to appeal

[29] It is trite law that this Court will grant leave to appeal only where two conditions are met. First, the matter must raise a constitutional issue. Second, it must be in the interests of justice to grant leave to appeal.

[30] The applicants allege that the grant of the interdicts occasions infringements of their rights to freedom of expression,[18] assembly[19] and association.[20] I am satisfied that these rights are implicated here, as is the constitutional principle of accountability,[21] insofar as it pertains to traditional governance structures and leadership.[22]

[31] I have taken notice of the fact that numerous matters of a similar nature involving the respondents have appeared before the courts.[23] Resolving the present matter is also in the interests of justice as it will provide clarity on the rights of people living in the Traditional Community and in traditional communities more generally. I consider there to be prospects of success, which are apparent from my discussion below. For these reasons, I am of the view that it is in the interests of justice to grant leave to appeal.

[18] Section 16 of the Constitution.

[19] Id section 17.

[20] Id section 18.

[21] Id sections 1, 41 and 152.

[22] Id section 212.

[23] See cases referred to in the High Court founding affidavit of Mr Nyalala John Molefe Pilane (Case No 1369/2008, 2482/2008 and 1250/2009, North West High Court, unreported).

Constitutional, statutory and customary scheme

[32] The Constitution clearly states that customary law exists and must operate under its purview. Section 211 of the Constitution provides:

> "(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."

[33] Section 212(1) further provides for the enactment of national legislation to give effect to the recognition and role of traditional leadership at a local level.[24] This constitutional imperative was recognised through the enactment of the Framework Act, [25]

[24] Section 212(1) of the Constitution provides:

> "National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities."

[25] The Framework Act provides a national framework for the recognition of traditional communities and leaders as well as the establishment and recognition of traditional councils. The relevant provisions for recognising traditional communities and leadership in the Framework Act are set out below:

> **"2 Recognition of traditional communities**
>
> (1) A community may be recognised as a traditional community if it—
>
> (a) is subject to a system of traditional leadership in terms of that community's customs; and
>
> (b) observes a system of customary law.
>
> (2) (a) The Premier of a province may, by notice in the Provincial Gazette, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders in the province, the community concerned, and, if applicable, the king or queen under whose authority that community would fall, recognise a community envisaged in subsection (1) as a traditional community.
>
> (b) Provincial legislation referred to in paragraph (a) must—

and complemented by the North West Act,[26] both of which regulate the governance of traditional communities.

(i) provide for a process that will allow for reasonably adequate consultation with the community concerned; and

(ii) prescribe a fixed period within which the Premier of the province concerned must reach a decision regarding the recognition of a community envisaged in subsection (1) as a traditional community.

. . .

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 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."

[26] The North West Act provides for the recognition of traditional communities and leadership and defines the roles and functions of traditional leaders and traditional councils. It endeavours to provide an enabling environment for the recognition, protection, preservation, transformation and development of traditional communities, institutions, customary law and customs in the North West Province. The relevant provisions for recognising traditional communities and leadership under the North West Act are set out below:

"3 **Recognition of traditional community**

(1) The Premier may, on application by a community, recognise a community as a traditional community in the prescribed form: Provided such a community—

(a) is subject to a system of traditional leadership in terms of that community's customs and practices; and

(b) observes a system of customary law.

(2) The Premier shall consult with the community concerned, any other community affected by such application, the Local House of Traditional Leaders having jurisdiction within the area in which the applicant community resides, and the Provincial House of Traditional Leaders.

(3) The Premier shall, subject to the provisions of subsection (2), within a period of 12 months from the date of receipt of the application for recognition decide on such application.

[34] It is well established that customary law is a vital component of our constitutional system, recognised and protected by the Constitution, while ultimately subject to its terms.[27] The true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs.[28]

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(4) The Premier shall, by notice in the *Gazette*, publish any decision made in terms of subsection (1) within 30 days from the date of such decision.

(5) The Premier may at any time after the publication of the notice referred to in subsection (4) reverse his or her decision if it is subsequently established that the group of people who have been recognised as a traditional community—

(a) are not subject to a system of traditional leadership in terms of that community's customs and practices;

(b) do not observe a system of customary law; and or

(c) recognition as a traditional community was erroneously granted.

. . .

19 Identification of kgosana

(1) Bogosana of a traditional community shall be in accordance with the customary law and customs applicable in such a traditional community.

(2) The identification of a kgosana of a traditional community shall be made by the Royal Family in accordance with its customary law and customs.

(3) The Premier may recognise a person identified as contemplated in subsection (1) as kgosana of a particular traditional community.

(4) The Premier shall issue a person so recognised as kgosana with a certificate of recognition.

(5) The Premier shall issue a notice in the *Gazette* recognise a kgosana and such notice shall be served on the Local House of Traditional Leaders for information."

[27] *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC) (*Shilubana*) at para 43; *Bhe and Others v Magistrate, Khayelitsha and Others (Commission for Gender Equality as* Amicus Curiae*); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (*Bhe*) at para 41; and *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) at para 51.

[28] *Bhe* above n 27 at paras 87 and 90.

[35] Our history, however, is replete with instances in which customary law was not given the necessary space to evolve, but was instead fossilised[29] and "stone-walled"[30] through codification, which distorted its mutable nature and subverted its operation.[31] The Constitution is designed to reverse this trend and to facilitate the preservation and evolution of customary law as a legal system that conforms with its provisions.[32]

[36] On the present facts, the question of whether the interdicts should stand or fall can be resolved in terms of the common law on interdicts alone. However, mindful of the constitutional issues arising from the circumstances of this case, an assessment of the impact of the interdicts on constitutional rights is indispensable.

[37] I now turn to consider the merits of the appeal. It is convenient to deal with each of the three interdicts in turn.

First interdict

[38] The first interdict prohibits the applicants from: "[o]rganising or proceeding with any meeting purporting to be a meeting of the Traditional Community or Motlhabe Tribal Authority without proper authorisation by either of the [respondents]."[33]

[29] Id at para 43.

[30] *Gumede v President of Republic of South Africa and Others* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) at para 20.

[31] *Shilubana* above n 27 at para 45 and *Bhe* above n 27 at paras 43 and 81-3.

[32] *Gumede* above n 30 at para 22.

[33] High Court judgment above n 10 at para 36.

[39] The requisites for the right to claim a final interdict were articulated by Innes JA in *Setlogelo v Setlogelo*.[34] An applicant desirous of approaching a court for a final interdict must demonstrate: (i) a clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of an alternative remedy.[35]

Clear right

[40] It is not apparent from the papers filed in this Court or in the High Court exactly on what clear right, if any, the respondents seek to rely. At a technical level, the respondents' failure to plead and prove the first essential requirement for claiming a final interdict ought to have dealt a fatal blow to their case in the High Court. In my view, this on its own is enough to set aside the first interdict.

[41] An inkling of a right was alluded to by the respondents' counsel when pressed during oral argument in this Court to pinpoint precisely the clear right on which they stake their claim. It was submitted that a right to refer to, and to represent, oneself as a traditional community exists and stems from the definition of "traditional community" in the Framework Act and North West Act. "Traditional community" is defined in both statutes as a traditional community recognised in terms of the relevant recognition provisions in each statute. Those provisions require formal recognition of a community

[34] 1914 AD 221.

[35] Id at 227.

as a traditional community by the Premier and, in the case of the North West Act, by the Premier of the North West Province.

[42] On my understanding it was implied by counsel, though not expressly articulated, that official recognition confers upon a traditional community an exclusive right to refer to and represent itself as that. It was further implied that a properly recognised entity would be entitled to safeguard this right according to law. However, a characterisation of their claim as a type of "public law passing-off" was expressly disavowed by the respondents. Despite counsel's efforts to persuade us, the question of the right was and remains largely unanswered.

[43] As I have already commented, the Constitution contemplates that traditional leadership has an important role to play in our constitutional democracy.[36]

[44] The respondents have officially been recognised as the traditional leadership of the Traditional Community by statute to perform certain public functions, in accordance with the Constitution. Accordingly, they are organs of state.[37] Their authority and power are

[36] See [33] and [34] above.

[37] Section 239 of the Constitution, in relevant part, defines "organ of state" as:

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
>
> (b) any other functionary or institution—
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

devolved upon them as organs of state from the Constitution itself. However, given that statutory authority accorded to traditional leadership does not necessarily preclude or restrict the operation of customary leadership that has not been recognised by legislation, the position as it stands is far from clear.

[45] Moreover, it is not for a court to identify the elements necessary to sustain a claim, which ought properly to have been pleaded by the parties. Courts should be slow to pronounce on uncharted legal terrain, where they have not had the full benefit of argument, as in this instance. It is therefore fitting that a determination of the right is left for a more appropriate occasion, and I need not linger on the point further.

Kgotha Kgothe

[46] A *Kgotha Kgothe* is a traditional gathering at which members of a traditional community publicly debate and decide on matters affecting the community, which may include evaluating and criticising the performance of their leaders.

[47] The parties, however, disagree on the manner in which a *Kgotha Kgothe* is to be convened. The applicants say that it may be convened either at a village or traditional community level and may be convened either by the appointed *Kgosana* or by the community itself in the absence of the *Kgosana* where he fails to convene a *Kgotha*

(ii) exercising a public power or performing a public function in terms of any legislation".

Kgothe. They rely, to this end, on the expert evidence of Professor Mbenga. The respondents say that a *Kgotha Kgothe* may only be convened by the *Kgosi* or his authorised appointee, like a *Kgosana*, and rely in this regard on the expert evidence of Professor Bekker.

[48] This factual dispute relating to the entitlement to convene a *Kgotha Kgothe* according to customary law was not referred to oral evidence in the High Court. In accordance with the principle established in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[38] the High Court was obliged to decide the matter on the basis of the averments the applicants, as respondents in the High Court, raised in their answering affidavit, and any of the allegations of the respondents, as applicants in the High Court, that were not denied or were undeniable.[39] A proper resolution of the dispute would have favoured the applicants' evidence.

[49] What is more, since the dispute was raised for the first time by the present respondents in their replying affidavit in the High Court, and not in their founding affidavit, it need not be resolved to decide this case. The respondents must stand or fall by their founding papers.[40]

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[38] 1984 (3) 620 (AD).

[39] Id at 634E-635C.

[40] In *Director of Hospital Services v Mistry* 1979 (1) SA 626 (AD) at 635H-636B, the Appellate Division held:

> "When . . . proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in *Pountas' Trustees v Lahanas* 1924 WLD 67 at 68 and as has been said in many other cases:

Actual or reasonable apprehension of injury

[50] Given that no clear right has been established, it is not essential to consider the possible injury that could have befallen the respondents through the applicants' conduct. Indeed, since injury is the violation of the right, failing to prove the latter renders an enquiry into the former purely hypothetical. Acknowledging this, I proceed merely to make some observations concerning possible injury in the interest of giving clarity to the parties. I do so to illustrate that, even if the applicants had been successful in demonstrating a clear right exclusively to refer to themselves as a traditional authority, the first interdict still falls to be set aside for want of injury on the present facts.

[51] The applicants are alleged to have engaged in a course of conduct that evidenced an intention to continue to portray themselves as a traditional authority in a manner that

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> '. . . an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny'.
>
> Since it is clear that the applicant stands or falls by his petition and the facts therein alleged, 'it is not permissible to make out new grounds for the application in the replying affidavit' (per Van Winsen J in *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260)."

In *South African Transport and Allied Workers Union and Another v Garvas and Others* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) (*Garvas*) at para 114, this Court held as follows:

> "Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."

was contrary to law and caused ongoing injury to the respondents. Actual injury, rather than a reasonable apprehension of injury, was pleaded.

[52] It is appropriate first to have regard to the alleged course of conduct.

[53] To recapitulate, it was argued by the respondents that there was a link between the applicants' attempted secession of 20 July 2009 and their intended meeting of 6 February 2010, and that the latter was merely a furtherance of an unlawful attempt to usurp the authority and power of the respondents by purporting to create a competing, parallel authority within the Traditional Community. The respondents' case is that any injury to them was part of an ongoing course of unlawful conduct, which would have persisted, in the absence of an interdict.

[54] On an objective reading of the invitation to the proposed meeting of 6 February 2010,[41] the following becomes apparent. To begin, the term "Motlhabe Tribal Authority" does not exist in law. It can draw upon no statutory or other source of law, and in consequence lacks legal authority, despite explicit reference to the word "Authority" in the term. However, it still remains to be asked whether the applicants' convening of a meeting under the style "Motlhabe Tribal Authority" could portray them as being vested with any of the statutory powers that inhere in the respondents.

[41] The content of the invitation is reproduced at [9] above.

[55] Context is significant in this regard, two facts being of particular import. First, the agenda for the meeting, which appears in the central part of the body of the invitation, states the purposes of the meeting, namely to discuss the government officials' advice on the lawful methods of seceding from the Traditional Community and to decide on a course of action to pursue independence. Second, the invitation was signed by both the applicants, who are known to the Motlhabe community not to be members of the Traditional Council and to hold antipathy towards both the respondents.

[56] Both the contents and context of the invitation could only have portrayed the applicants, being would-be secessionists, in a way that emphasised the distinction between them and the respondents. Furthermore, no evidence of any confusion was relied on by the respondents in support of their claim. It is thus difficult to see how in these circumstances one might consider the applicants to be attempting to appropriate the identity, authority or powers of the respondents, when the terms and tenor of their attempted meeting, as contained in this invitation, speak to the very disassociation from the respondents that they seek. Furthermore, even if the applicants had used a particular name with the intention of bolstering their legitimacy, it does not necessarily follow that the use of that name was intended to assume the identity of the respondents or purport to assume the respondents' statutory authority. There may well be other circumstances, in which the evidence may sustain a different finding on those facts, but those need not concern us for present purposes.

Undertaking

[57] Even if the respondents had proved a clear and exclusive right to refer to themselves as the traditional authority of the Traditional Community and that the applicants' conduct had in fact resulted in actual injury to that right, it does not necessarily follow that an interdict is justified.

[58] The applicants were made aware for the first time of the respondents' objection to their use of the title "Motlhabe Tribal Authority" during the proceedings in the High Court. That much is indicated in their prior exchange of correspondence. In view of this fact, it is not possible to infer from the applicants' previous use of that title in their attempted secession an intention to defy the respondents' lawful authority. In addition, nothing was placed before the High Court to indicate that the applicants' undertaking not to use the term in future was not made in good faith. Accordingly, no reasonable apprehension of future injury remained.[42] This too renders the High Court order unsustainable.

[59] I am not persuaded by the respondents' reference, at the hearing, to the *Tarita* case[43] as authority for the proposition that the applicants' undertaking was insufficient to obviate the need for injunctive relief. That case was concerned with the enforcement of a restraint of trade agreement against a former employee who had taken up employment

[42] *Condé Nast Publications Ltd v Jaffe* 1951 (1) SA 81 (CPD) at 86G-H.

[43] Above n 17.

with a competitor company. The Court held, correctly, that the former employer was entitled, without enquiring into the good or bad faith of the employee, to rely on the agreement in interdicting her from working for a competitor. A comparable situation is not present in the matter currently before us.

[60] For these reasons, I am satisfied that the first interdict should be set aside, and I find it unnecessary to proceed to the third requirement of identifying any suitable alternative remedies.

Second interdict

[61] The second interdict prohibits the applicants from: "[t]aking any steps or conducting themselves in any manner, which is contrary to the provisions of the [North West Act], the Framework Act or the customs of the traditional community in Moruleng and the customary law."[44]

[62] To justify the grant of the second interdict, the respondents must show that the applicants breached the Framework Act, the North West Act, or the customs of the Traditional Community and customary law generally, or that a breach of that kind was reasonably apprehended. Since no breach or anticipated breach of either statute has been proved, no decision on the content of the customary law of the Traditional Community

[44] High Court judgment above n 10 at para 36.

was reached by the High Court, and no customary law other than that of the Traditional Community applies to the parties, the second interdict is wholly inappropriate.

[63] This second interdict also raises rule of law[45] concerns, for lack of specificity and for the consequent contempt of court that would result from a breach of any of its uncertain terms. In this regard, it also appears that the interdict is unsuitably tailored.

Third interdict

[64] Lastly, the third interdict prohibits the applicants from: "[p]retending or holding themselves out as a traditional authority under the name or names Bakgatla-Ba-Kautlwale or Bagkatla-Ba-Motlhabe or the traditional authority of Motlhabe or any similar name or title of whatever kind."[46]

[65] I commence by considering the names "Bakgatla-Ba-Kautlwale" and "Bakgatla-Ba-Motlhabe". The applicants' uncontested averments in the High Court were that—

> "[t]he word 'Bakgatla' comes from the word 'Kgabo' which means 'Monkey'. The monkey is the totem for the Bakgatla people. The name Bakgatla is shared by several groups of people who live in South Africa and Botswana. The Bakgatla people are, in the main, Setswana speaking.

[45] Section 1 of the Constitution provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (c) Supremacy of the constitution and the rule of law."

[46] High Court judgment above n 10 at para 36.

> Not all Bakgatla people are part of the Bakgatla-Ba-Kgafela traditional community: there are other groups of Bakgatla people."

It appears that the names "Bakgatla-Ba-Kautlwale" and "Bakgatla-Ba-Motlhabe" in themselves are not necessarily synonymous with a form of authority nor, on the applicants' version, do they purport to be. Rather, they appear to be signifiers of the applicants' ancestral lineage and their place of settlement. It also seems that the High Court went to great lengths to state this very point, when it held as follows:

> "The [applicants] belong to a group which has a distinct identity. To an extent identity is what a group of people call themselves. It is their cultural right to do so even if others identify the group differently or decline to recognise their identity.
>
> . . .
>
> The use of the names to describe their identity or to affirm their historical antecedents as described in the papers is an entirely different issue. . . . It is their belief that they are (to a degree which may be disputed) a distinct people. There is nothing on the papers which goes to show that this is a pretence or a sham which requires that to be interdicted."[47]

[66] The third interdict, therefore, at least insofar as it pertains to the use of the names "Bakgatla-Ba-Kautlwale" and "Bakgatla-Ba-Motlhabe", seems inconsistent with the reasoning of the High Court. In addition, it effectively prevents the applicants from using terminology that is descriptive of their identity as a people.

[47] Id at paras 32-3.

[67] What remains is to consider the effect of interdicting the applicants from holding themselves out as "the traditional authority of Motlhabe". It is common cause that the applicants are not recognised under statute as traditional leaders. They nonetheless aver that they are in fact leaders of their community according to customary law, which is denied by the respondents. This dispute the High Court did not settle. In spite of the parties' contradictory positions in this regard, in my view the applicants' undertaking to refrain from using these statutory terms to refer to themselves, as I have already discussed, ought to have been considered sufficient reason for declining to confirm this interdict.

[68] For these reasons, I am satisfied that the third interdict also should be set aside.

Constitutional considerations

[69] This Court has on more than one occasion recognised the significance of the rights to freedom of expression, association and assembly in the functioning of a democratic society.[48] It strikes me that the exercise of the right to freedom of expression can be enhanced by group association. Similarly, associative rights can be heightened by the freer transmissibility of a group's identity and purpose, expressed through its name,

[48] See *Garvas* above n 40 at para 63; *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27; 2012 (6) SA 588 (CC) (*Ambrosini*) at para 49; *Print Media South Africa and Another v Minister of Home Affairs and Another* [2012] ZACC 22; 2012 (6) SA 443 (CC); 2012 (12) BCLR 1346 (CC) at para 54; *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another* [2002] ZACC 30; 2003 (3) SA 513 (CC); 2003 (2) BCLR 182 (CC) at para 31; *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 24; and *South African National Defence Union v Minister of Defence and Another* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC) at para 8.

emblems and labels. These rights are interconnected and complementary.[49] Political participation, actuated by the lawful exercise of these rights, can and should assist in ensuring accountability in all forms of leadership and in encouraging good governance. The judgment of my Colleagues Mogoeng CJ and Nkabinde J expresses concern that not to allow the first interdict to stand would provide an avenue for the erosion of the rule of law. I do not share these concerns. I see no reason to believe that the lawful exercise of the applicants' rights would result in chaos and disorder. Rather, there is an inherent value in allowing dissenting voices to be heard[50] and, in doing so, permitting robust discussion which strengthens our democracy and its institutions.[51]

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[49] In *South African National Defence Union* above n 48 at para 8 it was held that—

> "[freedom of expression] is closely related to . . . freedom of association (s 18) . . . and the right to assembly (s 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial."

See also *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 28.

[50] In *Ambrosini* above n 48 at para 49 this Court stated:

> "The need to recognise the inherent value of . . . dissenting opinions was largely inspired by this nation's evil past and our unwavering commitment to make a decisive break from that dark history. South Africa's shameful history is one marked by authoritarianism, not only of the legal and physical kind, but also of an intellectual, ideological and philosophical nature. The apartheid regime sought to dominate all facets of human life. It was determined to suppress dissenting views, with the aim of imposing hegemonic control over thoughts and conduct, for the preservation of institutionalised injustice. It is this unjust system that South Africans, through their Constitution, so decisively seek to reverse by ensuring that this country fully belongs to all those who live in it." (Footnotes omitted.)

[51] In *Democratic Alliance and Another v Masondo NO and Another* [2002] ZACC 28; 2003 (2) SA 413 (CC); 2003 (2) BCLR 128 (CC) at para 43 this Court, albeit in the legislative context, stated:

> "It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, 'South Africa belongs to all who live in it. . .'."

[70] The three challenged interdicts adversely impact on the applicants' rights to freedom of expression, association and assembly. In the absence of more convincing argument from the respondents in relation to their own rights against which the applicants' interests are to be balanced, one is hard-pressed to find in the respondents' favour.

[71] The restraint on the applicants' rights is disquieting, considering the underlying dissonance within the Traditional Community and the applicants' numerous unsuccessful attempts to have this resolved. The respondents' litigious record also portrays a lack of restraint on the part of the Traditional Community's official leadership in employing legal devices to deal with challenges that should more appropriately be dealt with through engagement.[52] This could be seen as an attempt to silence criticism and secessionist agitation and, if so, would not be a situation that the law tolerates.

[72] This situation cries out for meaningful dialogue between the parties, undertaken with open minds and in good faith. One hopes that this will produce harmonious relations within the Traditional Community. Nonetheless, it bears mentioning that it is within the rights of the members of the Traditional Community to meet to discuss secession, unless a restriction on their constitutional rights is reasonable and justifiable in an open and democratic society.

[52] See above n 23 for an enumeration of similar matters involving the respondents.

[73] It follows that the High Court should not have confirmed any part of the interim order granted on 5 February 2010.

Costs

[74] The applicants have asked for costs, including the costs of two counsel. As successful litigants, I am satisfied that their prayer for costs should be granted. Regarding the costs order granted by the High Court, counsel for the respondents rightly conceded during oral argument that if the respondents were unsuccessful in this Court, the applicants should also be awarded their costs in the High Court.

Order

[75] In the circumstances, the following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is upheld.
4. The order of the North West High Court, Mafikeng on 30 June 2011 is set aside.
5. The Rule issued by the North West High Court, Mafikeng on 5 February 2010 is discharged.
6. The respondents are ordered to pay the applicants' costs in this Court and in the North West High Court, Mafikeng including the costs of two counsel.

MOGOENG CJ AND NKABINDE J

Introduction

[76] This application has a long and toxic history. It has its genesis in concerted efforts by the first applicant and his father over the years to assume the headmanship of the Motlhabe community. The basis for this claim was that the current lawfully appointed and recognised headman and his father were, according to the applicants, not the legitimate traditional leaders of that community. When it became apparent that none of the senior traditional leaders of the community of the Bakgatla–Ba–Kgafela in Botswana and South Africa were persuaded by the leadership claim of the first applicant, the latter chose to act as if he were the headman of Motlhabe and virtually ceased to recognise the first respondent as his traditional leader.

[77] The failure to earn this recognition was followed by a "unilateral declaration of independence" of the Motlhabe community from the Bakgatla–Ba–Kgafela Traditional Community which is essentially the claim for the secession of the community. It is against this background that subsequent events culminating in the respondents' application to the North West High Court, Mahikeng (High Court) to restrain the applicants from convening a meeting in 2010, should be viewed. This background also gives context to the use of the expressions "Motlhabe Tribal Authority" and "Kgothakgothe".

[78] The Constitution recognises the institution of traditional leadership.[53] Moreover, indigenous law, customary law and traditional leadership are listed as functional areas of concurrent national and provincial legislative competence and, in each, the competence is subject to the Constitution.[54] Traditional leadership is a unique and fragile institution. If it is to be preserved, it should be approached with the necessary understanding and sensitivity. Courts, Parliament and the Executive would do well to treat African customary law, traditions and institutions not as an inconvenience to be tolerated but as a heritage to be nurtured and preserved for posterity, particularly in view of the many years of distortion and abuse under the apartheid regime.

[79] Bearing in mind the need to help these fledgling institutions to rebuild and sustain themselves, threats to traditional leadership and related institutions should not be taken lightly. The institution of traditional leadership must respond and adapt to change, in harmony with the Constitution and the Bill of Rights. But courts ought not to be dismissive of these institutions when they insist on the observance of traditional governance protocols and conventions on the basis of whatever limitation they might impose on constitutional rights. Like all others, the constitutional rights the applicants

[53] Section 211 of the Constitution.

[54] Id Part A of Schedule 4.

seek to vindicate are not absolute.[55] They co-exist within a maze of other rights to which expression must also be given.

[80] We have had the benefit of reading the main judgment of our Colleague, Skweyiya J. We agree that leave to appeal be granted and that the appeal be upheld in respect of the second and third interdicts by reason of their over-breadth. The point of our disagreement relates to the first interdict in respect of which we would have dismissed the appeal. What follows are our reasons.

Parties

[81] The applicants are residents of Motlhabe village within the Bakgatla–Ba–Kgafela Traditional Community. The respondents are the leader and governance structure of the Bakgatla–Ba–Kgafela in terms of the Traditional Leadership and Governance Framework Act[56] and the North West Traditional Leadership and Governance Act.[57]

Factual and litigation history

[82] The factual background is comprehensively dealt with in the main judgment. It will be sufficient to mention only background facts and litigation history pertinent to this judgment.

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[55] *Prince v President of the Law Society of the Cape of Good Hope and Others* [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) and *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC).

[56] 41 of 2003 (Framework Act).

[57] 2 of 2005 (North West Act).

[83] The applicants describe their village as poor and undeveloped, deprived of the benefits that the Bakgatla–Ba–Kgafela Traditional Community derived from platinum mining. Because of their discontent with the manner in which the traditional community's finances were distributed for development and the alleged dereliction of duty by the appointed Kgosana or Headman of the Motlhabe village, Mr Tlhabane Pilane, they have decided to pursue independence from the Bakgatla–Ba–Kgafela traditional community. They were advised by certain government officials to apply to the Premier in terms of the relevant legislation for authorisation to secede under customary law.

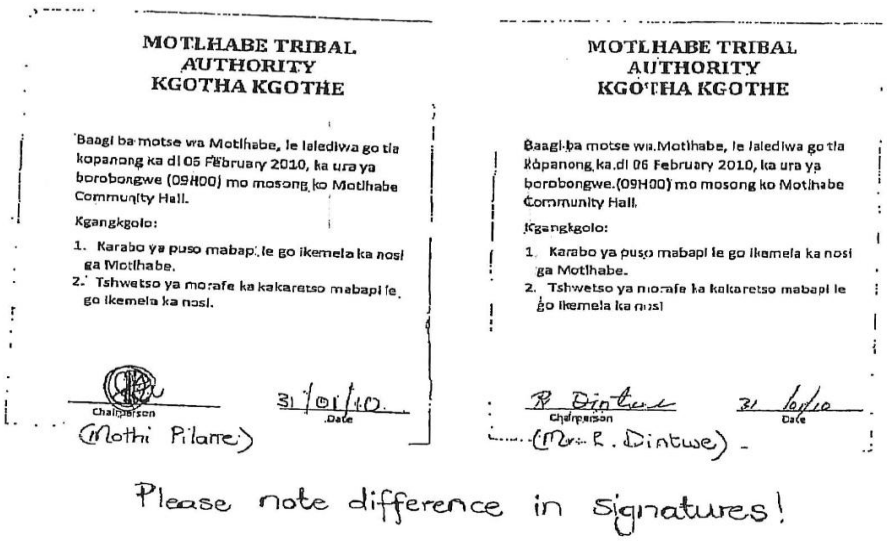
[84] The disputes between the parties have their origin in the invitations dated 31 January 2010, regarding a meeting planned for 6 February 2010 at Motlhabe village. The meeting is described in the invitations as "Kgothakgothe",[58] a general traditional meeting or gathering[59] which, in Setswana, stems from an adage that "Morafe o kgobokanngwa ke mong wa ona." Freely translated, this means that "a tribe or traditional community may only be convened or assembled in a 'Kgothakgothe' by the owner(s) of that tribe." Morafe in this instance denotes all villages of the Bakgatla–Ba–Kgafela Traditional Community and not individual villages.

[58] It is described by the respondent as a general meeting of the full traditional authority and not of a ward or village. It is also said to be a people's assembly or an "imbizo". See [103] below.

[59] Notably, the legally appointed Headman/Kgosana of Motlhabe explains that he does not have the power to convene a "Kgothakgothe".

[85] According to the applicants, the meeting was to be attended by the residents of Motlhabe and people from neighbouring villages. The purpose was to discuss the lawful processes available to the Motlhabe traditional community to obtain official recognition as an independent traditional community.

[86] The invitations are headed "Motlhabe Tribal Authority Kgothakgothe".[60] The contents of the invitations, as copied from the record and inserted below, read:



MOTLHABE TRIBAL AUTHORITY
KGOTHA KGOTHE

Baagi ba motse wa Motlhabe, le lalediwa go tla kopanong ka di 05 February 2010, ka ura ya borobongwe (09H00) mo mosong ko Motlhabe Community Hall.

Kgangkgolo:

1. Karabo ya puso mabapi le go ikemela ka nosi ga Motlhabe.
2. Tshwetso ya morafe ka kakaretso mabapi le go ikemela ka nosi.

Chairperson (Mothi Pilane) Date 31/01/10.

MOTLHABE TRIBAL AUTHORITY
KGOTHA KGOTHE

Baagi ba motse wa Motlhabe, le lalediwa go tla kopanong ka di 06 February 2010, ka ura ya borobongwe (09H00) mo mosong ko Motlhabe Community Hall.

Kgangkgolo:

1. Karabo ya puso mabapi le go ikemela ka nosi ga Motlhabe.
2. Tshwetso ya morafe ka kakaretso mabapi le go ikemela ka nosi

R Dintwe Chairperson (Mrs R. Dintwe) Date 31/01/10

Please note difference in signatures!

[61]

[60] Under the repealed Bophuthatswana Traditional Authorities Act 23 of 1978 (B), the appellation "Tribal Authority" was used to describe the "Traditional Council" or "Authority" of each "Tribe" or traditional community. See Annexure "B4" as part of Annexure "MP10", the letter by the then Bakgatla–Ba–Kgafela Tradition Council, addressed to the Human Rights Commission in which the Bakgatla–Ba–Kgafela Traditional Council is referred to as the Bakgatla–Ba–Kgafela Tribal Authority.

[61] For a translation and typed version see [87] below.

[87] Notably, one invitation is signed by the first applicant and the other by the second applicant. The following translated invitation, which leaves out the heading "Motlhabe Tribal Authority Kgothakgothe" is copied from the record and reads:

TRANSLATION OF INVITATION/NOTICE TO BE HELD AT MOTLHABE VILLAGE, MANKWE, RUSTENBURG, NORTH WEST PROVINCE

"The Residents of the Motlhabe Village"

You are invited to a meeting on the 06 February 2010, at 09:00 in the morning at Motlhabe Community Hall.

Agenda

1. *The reply from the Government in connection with the cessation and independence of Motlhabe (from Moruleng Bakgatla).*

2. *Decision and Resolution of the Traditional Community in general in connection with the independence (from Moruleng Bakgatla)."*

[88] Prompted by the invitations which were sent out on 31 January 2010 and intended to convene a "Kgothakgothe" or general meeting of the Bakgatla–Ba–Kgafela in Motlhabe village, the second respondent authorised the first respondent on 2 February 2010 to seek a court order restraining the applicants from "proceeding with

the intended meeting of 6 February 2010 as well as organising or proceeding with any meeting purporting to be a meeting of the Traditional Council or of the Bakgatla–Ba–Kautlwale Pilane or Motlhabe Tribal Authority without proper authorisation".[62]

[89] The respondents addressed a letter dated 2 February 2010 to the first applicant.[63] The letter states, among other things, that "[t]he prerogative to convene a '*Kgotha-kgothe*' resides with the Kgosi" in consultation with the Traditional Council and that the

[62] This was the resolution of the Bakgatla–Ba–Kgafela Traditional Council taken at Moruleng.

[63] The relevant parts of the letter read:

> "2. Your notice stating that you intend to convene a *Kgotha-kgothe* or general meeting of the Bakgatla–Ba–Kgafela in Motlhabe Village . . . has been referred to us by . . . both Kgosi M.J. Pilane and the Traditional Council of the Bakgatla–Ba–Kgafela . . .
>
> 3. The prerogative to convene a *Kgotha-kgothe* resides with the Kgosi, in this case, Kgosi Pilane, in consultation with the Traditional Council. Your meeting has not been sanctioned and permitted by both Kgosi Pilane and the Traditional Council and is therefore an illegal gathering.
>
> 4. . . .
>
> 5. Your intentions are unequivocally to discuss [secession] from the Bakgatla–Ba–Kgafela Traditional Authority as set out in your notice. . . . Much as the Constitution . . . enshrines the freedom of association, . . . your actions will, by their very nature, impinge on the very same and other constitutional rights of the rest of the Bakgatla–Ba–Kgafela in one or more or even all of the undermentioned ways.
>
> 6. Our instructions are further to advise you and your association or group as follows:—
>
> 6.1 Your said conduct of seeking [secession] has the following legal requirements, before you and your associates can even hold these prohibited meetings:
>
> a) the consent and approval of the general tribal meeting of the entire federation of the 32 villages commonly called "kgothakgothe" which form the Bakgatla–Ba–Kgafela in MORULENG;
>
> b) the consent and approval of the Traditional Authorities of both MORULENG and MOCHUDI;
>
> c) the consent and approval of both Kgosi N.M.J Pilane and H.M. Kgosikgolo Kgafela Kgafela;
>
> d) the consent and approval of the commission as well as the office of the Premier of the North West Province."

meeting was not sanctioned by the respondents. It cautioned that the meeting was therefore illegal. Under threat of arrest, the meeting was allegedly cancelled, but the respondents did not receive an undertaking from the applicants that the meeting would not be held. The respondents thereafter launched an urgent ex parte application in the High Court.

High Court proceedings

[90] In the High Court, the respondents sought and obtained certain interim interdicts including an order restraining the applicants and all persons acting through or in collaboration with them, from inter alia: (a) proceeding with the meeting referred to in the invitation as the "Motlhabe Tribal Authority Kgothakgothe"; (b) organising or proceeding with any meeting purporting to be a meeting of the Traditional Community or of the Motlhabe Tribal Authority without proper authorisation by the respondents; (c) pretending to be authorised by the legitimate Kgosikgolo or Kgosi of the Bakgatla–Ba–Kgafela Traditional Community; (d) representing to any person that they are authorised either by the legitimate Kgosikgolo or Kgosi to declare independence or secession of the Motlhabe village from the Bakgatla–Ba–Kgafela Traditional Community; and (e) pretending or holding themselves out as a traditional community or a traditional authority under the name of the traditional authority of Motlhabe.

[91] The bases for seeking these interim interdicts were that the applicants' actions, which are allegedly contrary to the provisions of the relevant statutes and customary law,

threatened to undermine the position of the Kgosi, the certificate of recognition and the order and sanctity of the hierarchy of the Moruleng traditional community. The respondents contended that the applicants had no authority and mandate to act on the affairs of the Moruleng tribal community and that by convening a "Kgothakgothe", which was not sanctioned, they violated the constitutional right of the Kgosi, including the rights of the Bakgatla–Ba–Kgafela Traditional Community without lawful cause.

[92] They said that if the meeting proceeded, the Moruleng traditional community would be misled and the conduct would result in (i) confusion and chaos concerning the status of the Kgosi and Royal Family of the Bakgatla–Ba–Kgafela and (ii) an ungovernable tribe which could lead to conflict, violence and threaten the lives and property of its people as well as its leadership. According to the respondents there was no other remedy to protect their rights and those of the traditional community of Moruleng. They said that the applicants would suffer no prejudice if the order was granted.

[93] In their answering affidavit the applicants contended that the respondents failed to make out a case for the grant of the interdicts. They stated, on the one hand, that "[t]he only case that is made out on the papers relates to the unlawfulness of the meeting planned for 6 February 2010." On the other, they pointed out that "[t]he meeting is a lawful meeting" convened to discuss the advice received from the government. The

applicants stated that the meeting was also "intended to provide an opportunity to consult further with nearby communities who may be affected by a process of that sort."

[94] It is averred that: (i) community meetings for Motlhabe village are also referred to as "Kgothakgothe"; (ii) the first respondent's appointment did not have the support of all members of the various royal families of the relevant traditional communities in Moruleng and that his "legitimacy is in question"; (iii) his leadership of the Bakgatla–Ba–Kgafela is statutorily recognised; (iv) under custom it lies within the power of the leadership of clans and the community itself to call meetings of the Motlhabe community and not the first respondent; and (v) people from neighbouring villages were also invited to attend. The applicants maintained that they were acting lawfully and denied that they purported to act on behalf of the respondents or Bakgatla–Ba–Kgafela or that they required the authority of the respondents. They maintained that the leadership no longer has legitimacy. It is contended that the respondents failed to use customary systems of dispute resolution before launching these proceedings.

[95] In their reply, the respondents denied that the applicants have the authority to convene a "Kgothakgothe". They said that the applicants had no right either by statute or customary practice to convene a "Kgothakgothe" under the auspices of an illegal and unlawful structure and should thus be interdicted. The respondents stated that the applicants had not suggested that they or others associated with them had ever challenged the legality of the appointment and position of the Headman of Motlhabe village in a

court of law or elsewhere. The respondents do not deny that the applicants have the rights and freedom to associate, meet and discuss any aspects of their lives subject to permissible limitations under custom and the Constitution. The respondents state that the applicants have used technical words to disguise and disown their creation known as "Motlhabe Tribal Authority".

[96] Regarding the requirements of an interdict, the respondents argued that they had a reasonable apprehension of fear that, if the scheduled meeting took place, chaos, violence and lawlessness would ensue in Moruleng and the lawful structures of governance would be compromised. This is particularly so because the meeting was to be attended not only by members of Motlhabe village but also people from neighbouring villages. They argued that their meetings are always disciplined and orderly and that the fears of the planned meeting descending into chaos and violence were unfounded.

[97] In confirming the rule nisi, the High Court held that it was not "necessary to examine the traditional law and customs in order to determine the nature of the traditional community meetings which may be held at the level suggested in their papers by the [applicants]"; in other words, whether they were entitled to convene a "Kgothakgothe" of the local community of Motlhabe. However, it concluded that the "proposed meeting could not have been a traditional meeting" of the Bakgatla–Ba–Kgafela Traditional Community. The High Court remarked that:

> "The invitations were sent out under the auspices of the Motlhabe Tribal Authority. The [applicants] cannot escape this fact.
>
> . . .
>
> It is abundantly clear that in a constitutional dispensation no person or body of persons may create or reproduce structures otherwise than in terms of and in accordance with the constitutional processes contained within the Constitution which is the supreme law. This has been elegantly expressed in para 4.3 of the replying affidavit. I adopt and express it thus: Any action by a parallel but unsanctioned structure that is neither recognised by the law or custom, seeking to perform and assume functions which are clearly the exclusive preserve of such recognised authorities, ought to incur the wrath of the law."[64]

[98] The High Court held that although the respondents do not approve of secession they cannot prohibit discussion about it. The Court accepted that the respondents are obliged to administer the affairs of the tribe in accordance with traditional law, custom and the applicable national and provincial legislation and prevent others from usurping their powers. While the High Court recognised that the Constitution protects the applicants' rights to assemble, to speak and to associate, it held that the purported creation of the "Tribal Authority" and the use of the name was done to demonstrate and bolster the legitimacy of their cause and that a "non-government body may not hold themselves out to be part of the organs of state . . . nor may they appropriate to themselves any symbols of state to proclaim a legitimacy which they lack."[65]

[99] The applicants unsuccessfully petitioned the Supreme Court of Appeal.

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[64] *Pilane and Another v Pilane and Another* [2011] ZANWHC 80 (High Court judgment) at paras 19 and 21.

[65] Id at para 24.

In this Court

[100] In their submissions, the applicants have exploited technical loopholes against the respondents. They pointed to three fundamental flaws which, they submit, permeate the final interdicts granted by the High Court. First, the High Court judgment is based on the false premise that the applicants held out that they have the necessary statutory authority whilst the evidence is to the contrary. In this regard, they argued that there is no statutory body known as a "Tribal Authority" since the repeal of the Black Authorities Act.[66] Second, that the High Court judgment is not based on the case made out in the founding papers. The third flaw relates to whether the requisites for an interdict were established. We deal with these in turn.

Alleged first flaw

[101] It is necessary to remind ourselves of the objects of the Framework Act and the North West Act. These statutes were enacted, among other things, not only for legalising, regulating and giving recognition to traditional leadership in areas like Moruleng, but also to incorporate observance of a system of customary law and community custom to the extent they are consistent with the Bill of Rights. These legislative enactments broadly set out norms and standards to define the place and role of traditional leadership with a view to transform the institution in line with constitutional imperatives. They also give recognition to the institution, status and role of traditional

[66] 68 of 1951.

leadership and governance according to custom and promote nation building, harmony and peace among all the people.[67] It is against this backdrop that we determine the lawfulness of the applicants' conduct which gave rise to the urgent ex parte application.

[102] It is correct that since the repeal of the Black Authorities Act[68] and the Bophuthatswana Traditional Authorities Act[69] there has been no statutory body known as a "Tribal Authority". However, the contention that the concept was replaced by that of a traditional authority elevates form above substance. It is clear that these bodies and the roles they play are fundamentally the same. Also, it cannot be denied that the appellation "Tribal Authority" would be understood by those concerned to refer to a body with authority.

[103] Contrary to assertions made by the applicants, it is not just anybody who can convene a "Kgothakgothe" which is otherwise known as an "imbizo" or "people's assembly". We find the following observations by the Congress of Traditional Leaders of South Africa, described as a voluntary association of progressive traditional leaders commonly known as CONTRALESA, instructive:

> "While accession to the seat of power by traditional leaders evolved to a stage where it became hereditary, the system of government was characterised by transparency, consultation and consensus seeking amongst those who would be affected by decisions

[67] See the preambles of the Framework Act and North West Act.

[68] Above n 66.

[69] 23 of 1978.

> taken; in other words government was democratic. The hierarchy of power structures comprised of sub-headman, headman, chief, and kings (these terms, save the latter, are not acceptable to traditional leaders who prefer the vernacular titles, but are used here purely for purposes of clarity). The sub-headman was the head of a small community occupying a small piece of land. He had his own council which was made up of some of the family heads of his area of jurisdiction . . . . One of the most important forums for decision making is the people's assembly (imbizo). Each one of the authorities has power to convene imbizo within his area of jurisdiction."[70]

[104] It is important to note that the people's assembly is convened by a particular leader who has the authority to do so and within his or her area of jurisdiction. The authorities identified are a Sub-headman, a Headman, a Senior Traditional Leader (Kgosi) and a King. These assemblies, unlike any other meeting, cannot be convened by any member of the Royal family or a particular clan who wishes to do so. If anybody other than the authorities who are duly empowered to convene a people's assembly were to purport to do so, it would be open to the authority vested with the power to convene that assembly at that level or above to have the imposter restrained from doing so.

[105] The applicants did not explain why, if the meeting was a community gathering of the people of Motlhabe village, the people from neighbouring villages were also invited to attend a Motlhabe village "Kgothakgothe". In their answering affidavit they said that the leadership of Mochudi in Botswana and Moruleng "has lost legitimacy in [their] eyes" in respect of the Motlhabe Community. The inference is irresistible that what they

[70] These submissions were made to the Constitutional Assembly on the constitutional role of traditional leaders in 1995. See Annexure "B" to affidavit of Professor Mbenga.

sought to achieve was to replace the alleged "no longer legitimate leadership" with their own leadership or governance structure, which they described in the invitations as the "Motlhabe Tribal Authority", thereby approbating to themselves symbols of state in order to claim legitimacy for and to bolster their conduct. The applicants do not deny having used the appellation "Motlhabe Tribal Authority" to refer to what they describe as their "traditional leadership". They used the appellation to convene a "Kgothakgothe", which according to them was to be attended also by people from neighbouring villages, a power they do not have. We agree with the High Court that the applicants cannot appropriate to themselves symbols of state to proclaim a legitimacy they lack.

Alleged second flaw

[106] Regarding the second flaw, it is contended that reference to the term "Motlhabe Tribal Authority" was not made in the founding affidavit and that that was not the case the applicants were brought to court to meet. However, it is noted that the respondents attached the invitations, containing the term "Motlhabe Tribal Authority", to the founding affidavit.

[107] The law on pleading and raising a point not covered in the pleadings is settled.[71] However, it needs to be remembered that pleadings are for the court and the court is not

[71] *Barkhuizen* v *Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 39.

for pleadings.[72] A court is bound to consider the substantial issues between the parties.[73] If the issues in dispute are clear, in the absence of prejudice technical objections ought not to be upheld.[74]

[108] It is inaccurate that the appellation "Motlhabe Tribal Authority" was not specifically mentioned in the founding papers. The first respondent referred to the applicants' ambition which allegedly reared its head as long ago as 20 July 2009, when the first applicant addressed a letter to the so-called "Moruleng Tribal Administration". The letter was annexed to the founding affidavit.[75] As the letterhead shows, the first applicant's purported new tribal authority was the "Bakgatla–Ba–Kautlwale Pilane Motlhabe Tribal Authority". The contents of the letter read:

> "THE SECRETARY
> MORULENG TRIBAL ADMINISTRATION
> MORULENG
> . . .
> We, Dikgoro tsa Bakgatla Ba Kautlwale Pilane, Kgosing, Marema, Morokologadi, Mabodisa and Mapotsane, at Motlhabe village, in the North West Province, at our meeting held on the 26th March 2009, resolved as follows.

[72] *Robinson v Randfontein Estates GM Co, Ltd* 1925 AD 173 at 198. See also *Firstrand Bank Ltd v Venter* [2012] ZASCA 117 at para 30.

[73] *Freitan (Pty) Ltd v Ciscryl (Pty) Ltd* [1998] ZAECHC 1 at para 6. See also *Shill v Milner* 1937 AD 101 at 105.

[74] *Joubert v Impala Platinum Ltd* 1998 (1) SA 463 (B) at 471E.

[75] Annexure "B": Notice by the Bakgatla–Ba–Kautlwale Pilane Motlhabe Tribal Authority dated 20 July 2009. Copies of the letter were sent to the MEC for Local Government and Traditional Affairs, Mahikeng; the Chairperson, House of Traditional Leaders, Mafikeng; Mr Motswasele of the Traditional Affairs Mogwase Regional Office; the Station Commissioner, Mogwase Police Station; and the Executive Mayor of Moses Kotane Local Municipality.

1. That with effect from 1st July 2009, we are no longer Part of your Tribal Administration and we shall no longer take part in any activity and even observe any [protocol] to your Administration.

2. That as an Independent Tribe, we shall be known as BAKGATLA BA KAUTLWALE PILANE.

3. That, the Tribal Administration shall be officially opened on the 1st August 2009."

[109] On 2 February 2010 the respondents, in a letter authored by the first respondent and addressed to the Chief Director of the Department of Local Government and Traditional Affairs, requested the latter to intervene in the matter regarding the "'so-called' Motlhabe Tribal Authority Kgothakgothe". A copy of the invitation was attached. In their answering affidavit, the applicants explain that they used the term "Tribal Authority", which they have used for many years, to refer to their traditional leadership in the Motlhabe village. The respondents were concerned that the meeting would "ultimately result in instability" within the community. We should not focus on the formalistic question whether the term "Motlhabe Tribal Authority" is used in the founding affidavit. Rather the true enquiry is whether the complaint has been pleaded and supported by established facts on record.[76] In the light of the above, it cannot be said that the applicants did not understand the case they were brought to Court to meet.

[76] *Competition Commission of South Africa v Senwes Ltd* [2012] ZACC 6; 2012 (7) BCLR 667 (CC) at para 29 and 44-5.

[110] There is thus no basis for the complaint that the term "Motlhabe Tribal Authority" was not used in the founding papers. Therefore, the purpose of the use of the appellation in the invitations was indeed none other than to lend a cloak of authority or legitimacy to the meeting the applicants sought to convene. There is no acceptable reason why the applicants chose not to refer to the meeting as the "community meeting of the people of Motlhabe village" as described in the answering affidavit or as the "Motlhabe Community meeting".

[111] The next question is whether the requisites for an interdict were established.

Requisites for an interdict

[112] It is correct that courts should be slow to grant interdicts that have the effect of limiting constitutional rights.[77] However, we are of the view that, in the circumstances of this case, the grant of the first interdict did not breach the applicants' rights to free association and free speech. The applicants contend that even if the community understood the reference "Motlhabe Tribal Authority" to mean something clothed with statutory recognition, the requirements for the granting of the interdict were not met. We do not agree.

[77] *President of the Republic of South Africa and Others v United Democratic Movement (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as* Amici Curiae*)* [2002] ZACC 34; 2003 (1) SA 472 (CC); 2002 (11) BCLR 1164 (CC).

[113] The requirements for a final interdict are well-known, namely (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other alternative and adequate remedy.[78] Additionally, where an application for an interdict is made ex parte, there should be a full disclosure of facts.[79] However, where there has been non-disclosure of facts, there is no rule of law which compels the court to set aside the interim interdict granted.[80] The granting or withholding of interdicts still remains a discretionary power.[81] A final interdict should only be granted in motion proceedings if the facts as stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order.[82]

[114] There can be no doubt that the respondents are the legally recognised traditional leadership structures in the Bakgatla–Ba–Kgafela Traditional Community.[83] As is apparent from the invitations, both applicants assigned themselves the position of "chairperson" of the "Motlhabe Tribal Authority", which position is unfamiliar within the traditional leadership structures. By convening a "Kgothakgothe", which was to be attended not only by the members of Motlhabe but also people from neighbouring villages that fall under the jurisdiction of the respondents, the applicants attempted to

[78] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[79] *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) at para 296.

[80] Prest *The Law & Practice of Interdicts* (Juta & Co, Ltd, 1996) at 245.

[81] Id at 253.

[82] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD) at 624D-E and *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (CPD) at 235E-G.

[83] See para [3] above.

usurp the powers of the Headman and the respondents. And by declaring their independence and stating that they do not recognise the first respondent's legitimacy, the applicants in effect sought to undermine and threaten the first respondent's position or remove him as a senior traditional leader of the Motlhabe village or community, in total disregard of section 12 of the Framework Act.[84]

[115] Professor Bekker has expressed very strong reservations about the lawfulness of the secession planned by the applicants. He records, that in years gone by, a leader of a secession and his followers would leave the community and the land in which they live, sometimes even their belongings. The Commission[85] is, in terms of sections 21[86] and

[84] Section 12 provides in relevant part:

> "Removal of senior traditional leaders, headmen or headwomen
>
> (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."

[85] The Commission on Traditional Leadership Disputes and Claims.

[86] Section 21(1) of the Framework Act provides:

> "(a) Whenever a dispute or claim 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."

25[87] of the Framework Act, vested with the power to deal with issues similar to those raised by the applicant. That authority does not seem to vest in the Premier.[88] This blends with the purpose for which the "Kgothakgothe" was to be held.

[116] In the circumstances, the respondents, as the lawful authorities were entitled to approach the High Court to resist the usurpation of their rights by the applicants, who had no authority under customary law and the relevant statutes to convene a meeting of that nature and form. Although the applicants have promised not to repeat what they have done, this was not a once-off event. They previously undermined the authority of the existing legitimate structures when they stated that they "were no longer part of [the

[87] Section 25 of the Framework Act sets out the functions of the Commission.

[88] See paras 10-6 of Professor Bekker's expert opinion:

> "In this case the [first applicant] has decided to 'secede' by staying put by just re-arranging the deckchairs. He does not say how he would acquire a territory nor how he would determine who his 'loyal' followers are to be . . .
>
> In terms of the Black Authorities Act 58 of 1951 the government literally froze all tribes that existed at the time . . . If all those . . . who were willy-nilly bundled into a tribal area [are] to be told they are legally entitled to secede it would create chaos. Hence the need for the Nhlapo Commission. . .
>
> Any community that feels that it has been done an injustice may apply to the Commission for redress. The [first applicant] has done so, but has abandoned (so it seems) the claim because the Commission was lackadaisical . . .
>
> While [the first applicant] may in an objective and calculating manner prepare a case for the Nhlapo Commission, a populist approach may lead to unrest and even insurrection. . .
>
> [Section 21(1) of the Framework Act provides:]
>
> (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 custom.
>
> (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.
>
> It is inconceivable that a Premier has concurrent powers to adjudicate on a dispute."

respondents'] Tribal Administration, and . . . shall no longer take part in any activities and even observe any protocol to [the respondents'] Administration." They declared their own independence and that their community would be known as "Bakgatla–Ba–Kautlwale Pilane". Their subsequent conduct reinforces the position that they seek to continue to operate as if the "unilateral declaration of independence"[89] has already been given effect to.

[117] Disorderliness is on the rise in this country and traditional communities are no exception. If it were to be permissible, the applicants' form of secession would have to be led by a legally-recognised leader of the community. Meetings that are meant to pave the way for secession should not be clothed with authority the applicants do not enjoy.

[118] The lawlessness and possible chaos the respondents feared may be implied from what the applicants stated in their letter of 20 July 2009. In addition, the convening of a general meeting of almost all the villagers in Motlhabe as well as people from neighbouring villages without any legal authority had the potential of creating factions and disorder which could make the Moruleng community ungovernable. In the circumstances, it cannot be said that the apprehension of harm was not reasonable.

[119] We are of the view that a proper balancing of the rights implicated is necessary. The setting aside of the first interdict will, in our view, provide an avenue for

[89] High Court judgment at para 17.

undermining legitimate traditional structures, leadership and governance and the erosion of the rule of law. The fact that the applicants have undertaken not to repeat the use of the appellation "Tribal Authority" in the future is, in the circumstances, insufficient because of their continued disregard for the recognised leadership.[90] The applicants have steadfastly maintained that the leadership of the respondents lacks legitimacy in their eyes and those of the community.

[120] The respondents had sought the intervention of the police and the Chief Director of the Department of Local Government and Traditional Affairs before launching the ex parte application. It has not been suggested by the applicants that an alternative remedy was available.

Conclusion

[121] In the circumstances we would have granted leave to appeal. We would not have interfered with the exercise of the High Court's discretion in relation to the first interdict. Accordingly, we would have dismissed the appeal in respect of the first interdict but upheld it in respect of the second and third interdicts with no order as to costs.

[90] See *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (W) at 166I-167C.

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