**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 67/14

In the matter between:

**BAPEDI MAROTA MAMONE** Applicant

and

**COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS** First Respondent

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA** Second Respondent

**MINISTER OF PROVINCIAL AFFAIRS AND LOCAL GOVERNMENT** Third Respondent

**MOHLALETSI TRADITIONAL AUTHORITY** Fourth Respondent

**ACTING KGOŠIKGOLO KGAGUDI KENNETH SEKHUKHUNE** Fifth Respondent

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| **Neutral citation:** | *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others* [2014] ZACC 36 |
| **Coram:** | Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Leeuw AJ, Madlanga J, Nkabinde J, Van der Westhuizen J and Zondo J |
| **Judgments:** | Jafta J (dissenting): [1] to [66]<br>Khampepe J (majority): [67] to [111] |
| **Heard on:** | 26 August 2014 |
| **Decided on:** | 15 December 2014 |

**Summary:** Promotion of Administrative Justice Act 3 of 2000 — section 6(2)(e)(iii) and 6(2)(f)(ii)(cc) and (dd) — failure to consider relevant facts and rationality review — decisions of specialist bodies must be treated with appropriate respect — the Commission's decision did not fail to consider relevant facts and was not irrational

Traditional Leadership and Governance Framework Act 41 of 2003 — section 25(3) — Commission required to establish the relevant customary law as it was when the events that gave rise to the dispute or claim occurred and to apply that law

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## ORDER

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On appeal from the Supreme Court of Appeal (hearing an appeal from the North Gauteng High Court, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

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## JUDGMENT

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JAFTA J (Nkabinde J concurring):

*Introduction*

[1] This case concerns the application of customary law and customs of the Bapedi traditional community so as to determine the rightful king of that community. The matter comes before this Court as an application for leave to appeal against a decision

of the Supreme Court of Appeal in terms of which the applicant's appeal was dismissed.

[2] The applicant is Bapedi Marota Mamone, a traditional community in Limpopo province. It cites as respondents the Commission on Traditional Leadership Disputes and Claims, President of the Republic of South Africa, Minister of Provincial Affairs and Local Government, Mohlaletsi Traditional Authority and Acting Kgošikgolo Kgagudi Kenneth Sekhukhune. It is the Commission only that opposes the application.

[3] This litigation commenced as a review application in the North Gauteng High Court, Pretoria (High Court). The applicant challenged the Commission's decision that the kingship of the Bapedi traditional community resorted under the lineage of Kgoši Sekhukhune I. That challenge was unsuccessful hence the appeal to the Supreme Court of Appeal.

*Historical context*

[4] In pre-colonial times, the only form of government known to Africans was traditional leadership headed by a traditional leader known as *inkosi* by the communities that spoke Nguni languages and *morena*, or *kgosi* or *kgoši* in Sotho-speaking communities. The colonial powers called them chiefs and those who held a higher office, paramount chiefs, and others were referred to as kings.[1]

[5] The Commission traced interference with the traditional government of Bapedi to the period when the British ruled the area then known as the Transvaal from 1877 to 1881. The British passed a law which declared that the Governor of the Transvaal was the supreme chief over all African communities in the Transvaal and magistrates were appointed as administrators.[2] This changed the policy on non-interference in the

[1] Bennett *Customary Law in South Africa* (Juta & Co Ltd, Cape Town 2004) at 101-3.

[2] Law No 11 of 1881.

internal matters of Africans which was followed by the Zuid Afrikaanse Republiek (Transvaal Republic) before the British rule. On conquering the Republic, the British authorities introduced new laws, including the one referred to here.

[6] The Commission found that during that period, the British authorities established a Department of Native Affairs which was responsible for the affairs of the Africans. Traditional communities were governed under their own laws and customs which were administered by traditional leaders, subject to the right of appeal to the Governor as the supreme chief.

[7] When the Transvaal Republic regained independence from British rule, held the Commission, it also passed a law that declared its President as the supreme chief of Africans with powers of a senior traditional leader (*Hoofkaptein*). He could remove traditional leaders from office and replace them with others of his choice. He could also put in prison those who refused to carry out the policies of the Republic. These powers were used from time to time. In consequence the customary law rules of succession were not followed.[3]

[8] In 1909, the control of African affairs was vested in the Governor-General who succeeded the governors of the various colonies.[4] In 1927 the Native Administration Act was passed.[5] In *Western Cape Provincial Government*, this Court described this legislation in these words:

> "The Native Administration Act, 38 of 1927 appointed the Governor-General (later referred to as the State President) as 'supreme chief' of all Africans. It gave him power to govern Africans by proclamation. The powers given to him were virtually absolute. He could order the removal of an entire African community from one place to another. The Native Administration Act became the most powerful tool in the implementation of forced removals of Africans from the so-called 'white areas' into

[3] Bennett above n 1 at 120.

[4] Section 147 of the South Africa Act of 1909.

[5] 38 of 1927.

> the areas reserved for them. These removals resulted in untold suffering."[6] (Footnotes omitted.)

[9] The de-legitimisation of traditional leadership continued under the Native Administration Act which was amended and given a new title on a number of occasions. The treatment of traditional leaders under that Act was described by Professor Bennett in these terms:

> "Those [traditional leaders] who opposed the government, no matter what traditional legitimacy they might have enjoyed could be ousted from office or passed over in matters of succession. Hence, although the Department of Native Affairs was generally prepared to make appointments from the ruling families, where necessary it could depart from the established order of succession by choosing uncles or younger brothers or by promoting subordinate headmen. The outcome was a compliant cadre of 'traditional' leaders who provided the personnel needed to realise an increasingly unpopular state policy."[7]

[10] The colonial and apartheid laws also had a negative impact on customary law which was denied space to develop and evolve within the changing times. Customary law could not be applied if it was repugnant to the common law. It was ranked lower than the common law and any customary rule that was inconsistent with the common law was considered to be invalid. But that is no longer the position. The Constitution recognises customary law as a system of law equivalent to the common law.

[11] Both the common law and customary law derive their legal force from the Constitution. The validity of each of them is tested against the Constitution. This means that a customary law rule that is inconsistent with the common law retains its validity if it is in line with the Constitution. The days of declaring customary law invalid for being in conflict with the common law are over.

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[6] *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) at para 41.

[7] Bennett above n 1 at 109.

[12] Indeed, this Court in *Alexkor* declared:

> "While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to the common law but to the Constitution. The Courts are obliged by section 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law."[8]

*Constitutional context*

[13] The entire Chapter 12 of the Constitution is devoted to matters pertaining to traditional leadership and customary law. Section 211 proclaims that the institution of traditional leadership is recognised.[9] This recognition is extended to the status and the role played by traditional leadership in our society. It is apparent from the language of the section that recognition was given to an institution which was already in existence, having been established in terms of customary law.

[14] The Constitution also recognises traditional authorities that apply customary law and permits them to function subject to it. Every court is obliged to apply customary law when it is applicable, subject to the Constitution and legislation that deals with customary law. In *Alexkor* it was held:

> "It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law,

[8] *Alexkor Ltd and Another v Richtersveld Community and Others* [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (*Alexkor*) at para 51.

[9] Section 211 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."

> makes it clear that such law is subject the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with it and becomes part of the amalgam of South African law."[10]

*Relevant legislation*

[15] As the Constitution recognises traditional leadership institutions that were established in terms of customary law only, Parliament passed the Traditional Leadership and Governance Framework Act[11] (Framework Act) to regulate traditional leadership. In passing the Framework Act, Parliament was giving effect to Chapter 12 of the Constitution. One of the objects of the Act was to "restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practices". To that end, the Framework Act established the Commission on Traditional Leadership Disputes and Claims, the first respondent in these proceedings.

[16] The President appointed members of the Commission. They were persons "knowledgeable regarding customs and the institution of traditional leadership".[12] The Act required the Commission to "carry out its functions in a manner that is fair, objective and impartial".[13]

[17] The Commission's functions were set out in section 25 of the Framework Act. Owing to its centrality to the determination of this matter, it is necessary to quote the entire section:

[10] Above n 8.

[11] 41 of 2003.

[12] Section 23 of the Framework Act.

[13] Id section 22.

"**Functions of Commission**

(1) The Commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising in any province.

(2) (a) The Commission has authority to investigate, either on request or of its own accord—

(i) a case where there is doubt as to whether a kingship, senior traditional leadership or headmanship was established in accordance with customary law and customs;

(ii) a traditional leadership position where the title or right of the incumbent is contested;

(iii) claims by communities to be recognised as traditional communities;

(iv) the legitimacy of the establishment or disestablishment of 'tribes';

(v) disputes resulting from the determination of traditional authority boundaries and the merging or division of 'tribes';

(vi) where good grounds exist, any other matters relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927.

(b) A dispute or claim may be lodged by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information.

(c) The Commission may refuse to consider a dispute or claim on the ground that—

(i) the person who lodged the dispute or claim has not provided the Commission with relevant or sufficient information; or

(ii) the dispute is to be dealt with in terms of section 21(1)(a) in a case where section 21(1)(b) does not apply.

(3) (a) When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.

(b) The Commission must—

(i) in respect of a kingship, be guided by the criteria set out in section 9(1)(b) and such other customary norms and criteria relevant to the establishment of a kingship; and

(ii) the respect of a senior traditional leadership or headmanship, be guided by the customary norms and criteria relevant to the establishment of a senior traditional leadership or headmanship, as the case may be.

(c) Where the Commission investigates disputes resulting from the determination of traditional authority boundaries and the merging or division of 'tribes', the Commission must, before taking a decision in terms of section 26, consult with the Municipal Demarcation Board established by section 2 of the Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998).

(4) The Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection 2(a)(vi).

(5) The Commission must complete its mandate within a period of five years or within such longer period as the President may determine.

(6) Sections 2, 3, 4, 5 and 6 of the Commission Act, 1947 (Act No. 8 of 1947), apply, with the necessary changes, to the Commission.

[18] The Commission was authorised to "decide on any traditional leadership dispute and claim contemplated in subsection (2)" arising anywhere in the country. It had the authority to investigate on request by an affected party or of its own accord. Section 25(2) listed matters which could be investigated and decided by the Commission. These were—

(a) cases where there was doubt that a kingship, senior traditional leadership or headmanship was established in accordance with customary law and customs;

(b) instances where the title or right of the incumbent to a traditional leadership position was contested;

(c) claims by communities who sought to be recognised as traditional communities;

(d) the legitimacy, the establishment or disestablishment of tribes;

(e) disputes resulting from the determination of traditional authority boundaries and the merging or division of tribes; and

(f) any matter relevant to those listed above, including the consideration of events that may have arisen before 1 September 1927 if there are good grounds for a consideration of those events.

[19] Notably section 25(3)(a) obliged the Commission to "consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim". This section delineated the scope of investigations by the Commission. When considering a dispute or claim, the Commission was required to apply customary law and customs only. The Commission had to apply the customary law and customs of the relevant traditional community. This meant that in this case, the Commission had to consider and apply Bapedi customary law and customs only.

[20] Even then, the Commission was required to apply customary law and customs "as they were when the events occurred that gave rise to the dispute or claim". This is a clear indication that the Framework Act was to be applied retroactively to disputes and claims that arose before the Act came into force. In fact section 25(4) empowered the Commission to investigate "all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection 2(a)(vi)". Subsection 2(a)(vi) authorised the Commission to consider events that occurred before 1 September 1927 where good grounds existed. But the consideration of the events that preceded 1 September 1927 was an exception to the general power that the Commission should investigate claims and disputes which arose from that date onwards. The date marked the coming into operation of the Native Administration Act.[14]

[14] Above n 5.

[21] In operating retrospectively, the Framework Act sought to remedy many wrongs committed over centuries by the colonial and apartheid governments against the institution of traditional leadership. As mentioned earlier, the Governors and later the State President became the "supreme chief" of all Africans with absolute powers that he could use as he pleased against Africans. Many traditional leaders who were opposed to discriminatory policies of those governments were deposed and replaced with more pliable candidates who were appointed contrary to customary law and customs of the communities over which they were imposed.

[22] The Native Administration Act was one of the most comprehensive and potent tools used to advance apartheid policies. It was invoked to spearhead an onslaught on any traditional leadership which resisted implementation of those policies. Many traditional leaders were removed from office and others were demoted. The result was that a number of traditional leadership institutions were established and people who did not qualify under customary law were appointed as traditional leaders. These traditional leaders were willing to implement the policies of the government that appointed them, even if the communities they were supposed to lead rejected those policies. This destroyed the legitimacy of traditional leadership and the confidence that many communities had in the traditional institutions.

[23] When democracy was attained in 1994, there were many traditional leadership institutions created by the apartheid government, contrary to customs of African people. These institutions continued to operate under the Constitution, even though it recognised institutions that were established in terms of customary law only. It was left to Parliament to pass legislation that abolished illegitimate traditional leadership institutions. The Framework Act is this legislation. It has established a Commission whose task was to determine institutions that were not genuine and abolish them. The Commission was obliged to begin its functions by investigating the position of

paramountcies and "paramount chiefs" that were in existence when the Framework Act came into operation.[15]

[24] A decision of the Commission had to be supported by at least two thirds of its members.[16] The Commission was obliged to convey its decision to the President for implementation, within two weeks from the date on which it was taken. If the decision affected a king or queen, the President had to implement it immediately in terms of section 9 or section 10.[17] This is the background against which this matter must be decided. It is now convenient to set out the facts.

*Facts*

[25] Acting of its own accord, the Commission investigated the position of all the kingships in existence when the Framework Act came into force. This investigation included the kingship of the Bapedi traditional community. The Commission concluded that the kingship was established in accordance with customary law and customs of the Bapedi. A report to this effect was submitted to the President in January 2008.

[26] In the report, the Commission held that the paramountcy of Bapedi is a kingship. It concluded further that the kingship "resorts under the lineage of Sekhukhune". Kgoši Sekhukhune I became king in 1861, following the death of his father, Kgoši Sekwati I. Kgoši Sekwati had two sons, Sekhukhune I and Mampuru II. The latter was entitled in terms of customary law to become king but Sekhukhune I contested this. He challenged Mampuru II to a fight by throwing a spear towards him. Mampuru II declined the challenge and fled from the Bapedi community.

[15] Section 28(7) of the Framework Act provided:

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

[16] Id section 26(1).

[17] Id section 26(2).

[27] Sekhukhune I became king of Bapedi until he was incarcerated by the British government when it defeated the government of the Boer Republic which then ruled the Transvaal. Mampuru II returned and took over the kingship while Sekhukhune I was in prison. The British were later defeated by the Boers who re-established their Republic. Sekhukhune I was released from prison. The re-established government demanded that Mampuru II should relinquish the kingship and swear allegiance to it. When he refused, a Boer commando led by General Joubert was dispatched to deal with him. Mampuru II fled again and sought refuge under Chief Marishane. The commando took five hundred head of cattle that belonged to Mampuru II.

[28] Subsequently the Ba-Marishane traditional community was attacked by an army from the Boer Republic, with the assistance of Sekhukhune I. Their Chief was taken prisoner but Mampuru II managed to escape and sought shelter under Chief Nyabela of AmaNdebele. In 1882 and with the help of Chief Nyabela, Mampuru II returned and killed Sekhukhune I. The government of the Boer Republic demanded that Chief Nyabela should surrender Mampuru II so that he could be tried for the killing of Sekhukhune I. But, Chief Nyabela declined to hand him over. A commando attacked the AmaNdebele and a war ensued. Mampuru II was captured. He was convicted of murder and sentenced to death. He was later executed.

[29] In its investigation, the Commission identified two rules it considered relevant for determining whether at present the Bapedi kingship resorts under the Sekhukhune royal family or the Mampuru royal family. These families are made up by the descendants of Sekhukhune I and Mampuru II, who were the sons of Sekwati I.

[30] The Commission established that under the customary law of Bapedi in 1861, there was a rule of succession in terms of which a successor to a king was identified. It found that in terms of that rule, Mampuru II was entitled to succeed Sekwati I. However, on the evidence before the Commission, this did not happen because

Mampuru II fled when he was challenged to a fight by Sekhukhune I, who became the king of Bapedi community.

[31] The Commission determined that kingship of Bapedi could then also be acquired by violent means. It defined this as the might and bloodshed rule. It held that Sekhukhune I had become king in terms of this rule. It was for this reason that the Commission concluded that the kingship of Bapedi "resorts under the lineage of Sekhukhune". This decision led to the present litigation.

*Litigation history*

[32] Dissatisfied with the Commission's decision, the applicant instituted a review application in the High Court. It challenged the decision on various grounds, including:

(a) The decision that the kingship of Bapedi resorts under the lineage of Sekhukhune is "flawed as it is neither rationally connected to the information before the Commission nor to the reasons given by it".

(b) The conclusion reached by the Commission in paragraph 9.7 of its report is "not supported by facts and evidence placed before it and is inconsistent with the findings as pointed out in paragraph 8 of the same report".

[33] The Commission and the Acting Kgošikgolo Sekhukhune opposed the application. They defended the decision and asserted that it was properly made. The Commission disputed that its decision was not rationally connected to the information that was placed before it.

[34] The High Court rejected, as lacking substance, the grounds of review advanced by the applicant. As a result the application was dismissed with costs.

[35] The applicant appealed to the Supreme Court of Appeal. The issues raised in that Court were—

> "(a) whether the High Court's finding that there was a succession battle between Sekhukhune I and Mampuru II, which the former won, was correct;
>
> (b) whether the succession issue should have been determined solely on the basis that it was not unusual for kingship to be obtained through might and bloodshed and not by birth;
>
> (c) whether the High Court's findings that the Commission did not ignore relevant material evidence in its determination and was rationally connected to the information at its disposal was correct; and
>
> (d) whether the High Court's approach to the review of the Commission's administrative action was correct."[18]

[36] The Supreme Court of Appeal held that the Commission had correctly found that "Sekhukhune I legitimately usurped the kingship as it was not uncommon to do so through might and bloodshed".[19] With regard to the killing of Sekhukhune I by Mampuru II, the Supreme Court of Appeal held that "Mampuru II's conduct in clandestinely killing Sekhukhune I and thereafter fleeing was entirely inconsistent with an intention to conquer and take over kingship and was sheer murder for which he was accordingly convicted by a court of law and executed".[20]

[37] Furthermore, the Court found that the Commission had properly concluded that the applicant's reliance on certain historical facts was misplaced as those facts were irrelevant to the issues. Consequently, the Supreme Court of Appeal held that the applicant had failed to show that the Commission ignored relevant evidence and that there was "no basis on the record to conclude that the Commission's decision was not

[18] *Bapedi Marota Mamone v Commission of Traditional Leadership Dispute and Claims and Others* [2014] ZASCA 30; [2014] 3 All SA 1 (SCA) (Supreme Court of Appeal judgment) at para 14.

[19] Id at para 19.

[20] Id.

rationally connected to the information before it, or the reasons given by it".[21] The appeal was dismissed with costs.

*In this Court*

[38] The preliminary issue is whether leave to appeal should be granted. The matter raises a constitutional issue relating to the status and role of the Bapedi traditional leadership and the application of the Framework Act that was passed to give effect to section 211 of the Constitution. It is in the interests of justice to grant leave. A judgment of this Court on the interpretation and application of the relevant provisions will be of benefit regarding disputes that arose before the amendment of the statute. Moreover, there are prospects of success.

*Issues*

[39] The applicant persisted in the argument that the Commission had ignored relevant information that was placed before it and that the impugned decision was irrational. To substantiate the argument, the applicant contended:

> "[W]hile the High Court and the Supreme Court of Appeal have accepted and in fact ruled that Sekhukhune I legitimately usurped the kingship from Mampuru II, because it was not '*unusual at that time for kingship to be obtained by might and bloodshed*', both the High Court and the Supreme Court of Appeal have nonetheless failed to locate any justification of this critical finding in the Commission's report. No reasons or specific examples of pertinent cases were provided by the Commission in its report to substantiate its statement and to justify its deviation from the normal rules of customary succession by birth when it adopted the premise that 'it was not unusual at the time for kingship to be obtained by might and bloodshed'. Applicant contended before the Supreme Court of Appeal (and also contends with respect before this Court) that no historical records show that the principle of usurpation of kingship was a custom or tradition for succession among the Bapedi nation." (Emphasis in original.)

[21] Id at para 21.

[40] In essence the complaint captured in the statement above is that the Commission failed to apply the customary law rule of succession in reaching its decision. It will be recalled that we are concerned here with the decision to the effect that the kingship of the Bapedi traditional community presently resorts under the lineage of Kgoši Sekhukhune. It will also be remembered that in making this decision, the Commission had to consider events that occurred before 1 September 1927 which was the cut-off date for claims and disputes investigated by the Commission.[22]

[41] For a better understanding of the issues raised, it is necessary to remind ourselves about the requirements of the empowering provision, section 25(3) of the Framework Act. This section stipulated that—

> "[w]hen considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim."

[42] What this meant was that the Commission was obliged to consider and apply the Bapedi customary law of succession and their customs, as they were when the events that gave rise to the succession dispute occurred. Since the dispute related to succession to kingship after the death of Kgoši Sekhukhune, the Commission had to apply customary law followed by Bapedi at that time. The report compiled by the Commission at the conclusion of its investigation records that at the relevant time the Bapedi customary law of succession permitted only the sons of a timamollo to succeed a king. This is the customary rule the Commission identified and was obliged to apply. The Commission failed to do that.

[43] Instead what appears in the conclusion recorded by the Commission is that the impugned decision was advanced as one of the reasons to support the finding that the

[22] Section 25(4) of the Framework Act.

kingship of the Bapedi was established in accordance with customary law and customs of that community.

[44] On this aspect its report reads:

> "9.1 The official recognition of the institution of *bogoši bjo bogolo* was in line with customary law and customs of the traditional community of Bapedi in that:
>
> 9.1.1 The status of a traditional leader should be determined by the rank that he occupies within the traditional community as a whole.
>
> 9.1.2 The rank is determined by well-established customary laws common to most of the indigenous people of South Africa being the status of the mother, male primogeniture and the performance of specific rituals.
>
> 9.1.3 In this case the areas of jurisdiction will be those populated by Bapedi traditional communities and headed by senior traditional leaders who owe allegiance to *bogoši bjo bogolo*.
>
> 9.2 In the course of the history of Bapedi a kingship was established by Thulare I through subjugating and conquering neighbouring communities (1770-1820).
>
> 9.3 From the reign of Thulare I the kingship passed from one generation to the next through custom and sometimes through bloodshed.
>
> 9.4 Sekwati I virtually recreated the kingship after the wars of Mfecane. Sekwati re-established and extended the kingship of Bapedi started by Thulare I. After the death of Sekwati I in 1861 the kingship was claimed by Mampuru II and Sekhukhune I.
>
> 9.5 Sekhukhune I won the succession battle against Mampuru II upon the death of Sekwati I in 1861 and ascended the throne.
>
> 9.6 The paramountcy of Bapedi is a kingship.
>
> 9.7 The kingship resorts under the lineage of Sekhukhune."

[45] This conclusion lists a number of reasons underpinning the Commission's determination that the establishment of the kingship of the Bapedi accords with the

requirements of the Constitution and the Framework Act and should be given recognition. The impugned decision appears last in that list, more like a throw-away line made without any consideration and application of the relevant customary law.

[46] The Commission did not direct its attention to determining the succession question. That is borne out by further parts of the report. In paragraph 8.1 of the report, the Commission listed the issues to be determined as follows:

> "(a) Whether in the course of the history of Bapedi, a kingship was established;
>
> (b) if it was established by whom, how and when;
>
> (c) whether the kingship has since been passed on from one generation to another according to the custom of Bapedi;
>
> (d) whether after the death of Sekwati I the kingship was legitimately claimed by Sekhukhune I; and
>
> (e) whether the position of the Bapedi paramountcy was established in terms of customary law and customs."

[47] Succession after the death of Kgoši Sekhukhune is not part of the issues identified by the Commission itself. Barring only one, those issues related to determining whether the kingship was established in terms of customary law and customs. The sole issue that referred to Kgoši Sekhukhune was whether he had legitimately claimed the kingship after the death of his father. That issue had nothing to do with the question of succession after the death of Kgoši Sekhukhune.

[48] Consequently, in determining the succession question, the Commission misconstrued the essence of its power. It was enjoined to make the determination after considering and applying the relevant customary law of succession. The Commission's failure to follow peremptory requirements of the empowering provision rendered its decision reviewable.

[49] However, the difficulty that stands in the way of disposing of the matter on this ground is the fact that it was not raised as a ground of review in the High Court and

the Supreme Court of Appeal. It is raised for the first time in this Court. As a general rule, all grounds on which a constitutional challenge is mounted must be pleaded in the court of first instance. But, like any general rule, this rule has exceptions. In special circumstances, a litigant is permitted to raise an issue for the first time in this Court. It is a matter of the Court's discretion.[23]

[50] This discretion may be exercised in favour of a party raising a review ground for the first time here if the ground is apparent from the papers on record and allowing it to be raised would not prejudice the other parties. The question whether the Commission applied the customary law rule of succession, as contemplated in section 25(3) of the empowering legislation, is a legal one. And it must appear from the Commission's report that it had acted in the manner prescribed by the empowering provision when the Commission exercised its power. That report forms part of the record. It is apparent from the report that when the Commission reached the impugned decision, it did not apply the Bapedi customary law of succession, notwithstanding that it was obliged to do so.

[51] Since the new ground of review raises a question of law that does not depend on new facts not on record already, it can hardly be argued that the Commission would be prejudiced by its determination. Its report was completed and submitted to the President a long time ago. It is not as if the Commission would, in this litigation, add new facts to the report, showing that it did apply the customary law rule in question.

[52] Moreover, in response to the allegations made in the statement quoted in [39], the Commission did not dispute that it failed to give reasons to justify "its deviation from the normal rules of customary succession by birth". Nor did it object to the applicant raising this new ground of review for the first time in this Court.

[23] *CUSA v Tao Ying Metal Industries and Others* [2008] ZACC 15; 2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) at paras 67-8.

[53] In any event the applicant pertinently raised the following grounds of review in the High Court:

> "(a) the Commission, in deciding on the question where the lineage in which the Bapedi kingship resorted, ignored relevant facts and evidence placed before it or to which it had access as contemplated in section 6(2)(e)(iii) of the Promotion of Administrative Justice Act, 2000 (PAJA).
>
> (b) the decision of the Commission regarding the choice of lineage of the kingship of Bapedi is neither rationally connected to the information placed before it nor to the reasons given by it as contemplated in section 6(2)(f)(ii)(cc) and (dd) of PAJA."

[54] But before considering these grounds of review, which the Commission admits were raised in the High Court, it is necessary to outline the importance of the Bapedi customary law of succession. It is recorded in detail in the Commission's report. The rule entitled only the sons of a timamollo to succeed a king. It developed from the fact that Bapedi kings, like other traditional leaders, contracted polygynous marriages. It became necessary to formulate a rule in terms of which the king's successor was to be determined.

[55] The result was an extensive rule which catered for almost every eventuality. In terms of this rule a king had to marry a timamollo in order to raise the heir to the throne. If a king died without marrying one, it became the responsibility of the royal family (Bakgoma and Bakgomana) to identify and marry a timamollo on behalf of the deceased king. They would also appoint someone to "raise seed" on behalf of the deceased king. This is what happened in the case of Kgoši Malekutu who was killed by his brother Matsebe for the throne. Kgoši Malekutu died without having married a timamollo. It was only during the reign of Kgoši Sekwati, who was appointed much later as a regent for the successor to Kgoši Malekutu, that the Bakgoma and Bakgomana identified and married a timamollo to bear the heir to Kgoši Malekutu.

[56] As a regent, Kgoši Sekwati assumed the responsibility to raise seed on behalf of Kgoši Malekutu. The result was the birth of Mampuru II to whom the title to the Bapedi kingship belonged. In its report the Commission further records that in the Bapedi community, paternity was not an overriding consideration in determining succession to kingship. Hence Mampuru II became the heir of Kgoši Malekutu even though he was not his son but Kgoši Sekwati's son.

[57] The Commission's report also shows that in the event of a timamollo being unable to bear children, a surrogate mother was appointed.[24] If a timamollo died without issue, one of her sisters or a close relative would be married to the king in the same manner that a timamollo wife was married.[25] This illustrates how extensive the Bapedi customary law of succession was.

[58] The importance of this rule was not confined to determining the heir to the throne only. It also facilitated participation of the royal family in choosing and marrying a timamollo and thereby took part in the process of determining the future king. The community was also involved in that process as the lobolo (dowry) of a timamollo was paid from contributions made by the community. Therefore it was not the acts of the reigning king only which determined who the future king would be. It was the acts of a collective, including the royal family and the community. In that way there was some control by the royal family and the community over the issue of succession. This explains why, on the common cause facts before the Commission, a timamollo for Kgoši Malekutu was married only during the reign of Kgoši Sekwati.

[59] A timamollo could have been married during the rule of Kgoši Matsebe but one was not. Similarly this could have happened during the kingship of Kgoši Phetedi who became king upon killing his brother Matsebe. The only rational explanation for why this was not done is that the royal family and the community did not approve the manner in which Kgoši Matsebe and Kgoši Phetedi became kings. Both killed the

[24] In Sepedi the surrogate mother was called a hlatswadirope.

[25] The married sister of a timamollo was called a seantlo.

reigning king in order to ascend to the throne. This also explains why Mampuru II was regarded as the heir and rightful successor to Kgoši Malekutu who was also a son of a timamollo. The royal family and the community did not treat the usurpation of the kingship by Kgoši Matsebe and Kgoši Phetedi as having transmitted the kingship of Bapedi from the house of Kgoši Malekutu to their own houses. If that was the case, Mampuru II could have been the heir to Kgoši Phetedi.

[60] It is against this background that the two grounds of review raised by the applicant in the High Court must be assessed.

*Ignoring relevant facts*

[61] The source of this ground is section 6(2)(e) of PAJA. It provides that a court has power to review an administrative action if relevant considerations were not considered. Here it is clear that in reaching the impugned decision, the Commission failed to take account of the fact that on the common cause facts before it, the acquisition of kingship through violence did not translate into an automatic transmission of power to the offspring of a king who assumed kingship by violent means. Had the Commission taken into account that upon the killing of Kgoši Malekutu by Kgoši Matsebe, the kingship did not pass to Kgoši Matsebe's house so as his descendants could claim it, the Commission could not have reached the impugned decision. Its decision was in conflict with the undisputed facts.

*Rationality*

[62] With regard to this ground of review, the applicants invoked the provisions of section 6(2)(f)(ii)(cc) and (dd) of PAJA. This provision empowers courts to review an administrative action if the action was not rationally connected to the information before the administrator or the reasons given for it. What this means is that the information on which the decision is based and the reasons given for such decision must support and justify the decision taken. If they do not, the decision must be regarded as being arbitrary.

[63] Both section 33 of the Constitution[26] and PAJA prohibit arbitrary administrative actions. As this Court observed in *Democratic Alliance*,[27] the rationality requirement relates to both the means and the end, that is the process by which the decision is reached and the decision itself. In that case it was stated:

> "The conclusion that the process must also be rational in that it must be rationally related to the achievement of the purpose for which the power is conferred, is inescapable and an inevitable consequence of the understanding that rationality review is an evaluation of the relationship between means and ends. The means for achieving the purpose for which the power was conferred must include everything that is done to achieve the purpose. Not only the decision employed to achieve the purpose, but also everything done in the process of taking that decision, constitute means towards the attainment of the purpose for which the power was conferred."[28]

[64] Here I have already demonstrated that the Commission failed to consider and apply the Bapedi customary law of succession in deciding the lineage in which the Bapedi kingship resorted. The Commission omitted to apply the relevant customary law despite being obliged to do so by section 25(3) of the Framework Act. It follows that the Commission's decision was not rationally connected to the purpose of applying the relevant customary law when determining a dispute.

[65] Furthermore, in the light of the undisputed facts on succession from Kgoši Malekutu to Mampuru II, the Commission's decision was not rationally connected to the information submitted to it. In the context of those facts there was no link between Kgoši Sekhukhune's ascension to the throne and the question about lineage which was essentially an issue of succession, following the death of Kgoši Sekhukhune.

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[26] Section 33(1) of the Constitution provides:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[27] *Democratic Alliance v President of South Africa* [2012] ZACC 24; 2013 (1) SA 248 (CC); 2012 (12) BCLR 1297 (CC).

[28] Id at para 36.

[66] It follows that the grounds of review raised by the applicant in the High Court justify the setting aside of the Commission's decision. For these reasons I would uphold the appeal with costs.

KHAMPEPE J (Moseneke DCJ, Cameron J, Froneman J, Leeuw AJ, Madlanga J, Van der Westhuizen J and Zondo J concurring):

[67] I have had the benefit of reading the judgment prepared by my brother, Jafta J (main judgment). I embrace the main judgment's exposition of the facts and agree that leave to appeal should be granted. I differ, however, from its reasoning and conclusion. I find no reason to unsettle the Commission's decision. In my view, the appeal should fail.

*Background*

[68] The Commission on Traditional Leadership Disputes and Claims (Commission) was established by section 22(1) of the Traditional Leadership and Governance Framework Act[29] (Framework Act). It was a specially constituted body which had "authority to decide on any traditional leadership dispute and claim"[30] contemplated in section 25(2) of the Framework Act. This included cases "where there is doubt as to whether a kingship . . . was established in accordance with customary law and customs".[31] The Commission could institute investigations on request from interested parties or of its own accord.[32]

[29] 41 of 2003. All references are to the Framework Act as it applied when the Commission's enquiries were conducted. The Act has subsequently been amended by the Traditional Leadership and Governance Framework Amendment Act 23 of 2009.

[30] Section 25(1).

[31] Section 25(2)(a)(i).

[32] Section 25(2)(a), read with section 25(2)(b).

[69] The Commission's first task was to investigate the position of paramountcies that were established and recognised in South Africa upon commencement of the Framework Act.[33] Once the Commission had investigated the position of a paramountcy, it was required to make a decision and communicate it to the President "for immediate implementation"[34] by notice in the *Gazette*.[35]

[70] In accordance with the Framework Act, the Commission instituted an investigation into the Bapedi paramountcy of its own accord in 2005. The issues before it were whether the Bapedi had a paramountcy and, if so, under whose lineage it resorted. The latter question rested principally on whether Kgoši Sekhukhune I legitimately claimed the kingship after the death of Kgoši Sekwati.

[71] The Commission released its decision and report on 15 January 2008. It concluded that the Bapedi had an established paramountcy. More contentious, though, was the question of entitlement to the throne. For a start, the report identified two means through which kingship might be acquired. First, the firstborn son of a timamollo wife (the candle wife or great wife) was the king's rightful successor. A timamollo wife was nominated from among the king's wives by the royal advisors and community. Various ancillary rules applied in the event that the rightful heir predeceased his father or the timamollo wife was unable to bear a son. Second, the Commission found that kingship might be usurped from another "through might and bloodshed" (usurpation rule). The rule permitted one to forcibly take the kingship from another.

[72] The report then tracked the succession of leadership in the Bapedi community from its first leader, Diale, in the sixteenth century. Leadership transferred from father to son for a number of generations until Kgoši Dikotope, the incumbent king, was killed by his younger brother, Thulare, who usurped his kingship. Kgoši Thulare

[33] Section 28(7).

[34] Section 26(1) and (2)(a).

[35] Section 9(2)(a).

was succeeded by Kgoši Malekutu, who was the eldest son of Kgoši Thulare's timamollo wife. But before Kgoši Malekutu could produce an heir, he was poisoned by his younger brother, Matsebe, who took the throne for himself. Kgoši Matsebe ruled until he was killed and replaced by his brother, Phetedi.

[73] Kgoši Phetedi's reign was short-lived, however. The Bapedi kingdom was ravaged by King Mzilikazi's Matebele in the early 1800s, and Kgoši Phetedi was killed in the process. Sekwati, Kgoši Thulare's only surviving son, was nominated as regent for Kgoši Malekutu, and slowly rebuilt the kingdom. Mampuru II was born of Kgoši Sekwati's nominated timamollo wife, and was therefore the rightful heir. But, upon Kgoši Sekwati's death, Kgoši Mampuru II was challenged by Kgoši Sekwati's eldest son, Sekhukhune I, who also claimed the throne. Kgoši Mampuru II fled the kingdom under this challenge, and Kgoši Sekhukhune I thereafter ruled the Bapedi for around 20 years. The Commission found that, in taking the throne by force, Kgoši Sekhukhune I had legitimately usurped the Bapedi kingship from Kgoši Mampuru II.

[74] Kgoši Sekhukhune I's reign ended in 1882 when he was ambushed and killed by Kgoši Mampuru II, who was assisted by Nyabela, a chief of the Ndebele. Kgoši Mampuru II, however, immediately fled upon killing Kgoši Sekhukhune I. He ultimately sought refuge at Chief Nyabela's residence, where he was captured by the Boer government and executed for Kgoši Sekhukhune I's killing. The Commission thus found that Kgoši Mampuru II "did not ascend the throne" and, for that reason, concluded that Kgoši Mampuru II could not have retaken the kingship, which remained with Kgoši Sekhukhune I's lineage.

[75] The applicant is the traditional authority that represented the descendants of Kgoši Mampuru II during the Commission's investigations. It challenges the Commission's decision.

*The applicant's challenge*

[76] The applicant's review application is brought on two bases. First, the applicant argues that the Commission's decision that the kingship "resort[ed] under the lineage of [Kgoši Sekhukhune I]" was irrational. The decision was, the applicant posits, not rationally connected to the information placed before the Commission or the reasons it gave, a ground of review under section 6(2)(f)(ii)(cc) and (dd) of the Promotion of Administrative Justice Act[36] (PAJA). In essence, the ground of review requires that a decision be rationally justified and supported by the information before the decision-maker and the reasons given by it.[37]

[77] Second, the applicant argues that the Commission ignored relevant facts and evidence. It argues that this renders the Commission's decision reviewable under section 6(2)(e)(iii) of PAJA, which applies where "relevant considerations were not considered" by a decision-maker.[38]

*Standard of review*

[78] Before considering the factual basis for the applicant's contentions, it is necessary to sound a note of caution. Our right to just administrative action[39] and PAJA, the legislation enacted to give effect to that right,[40] require rigorous scrutiny of

[36] 3 of 2000. Section 6(2)(f)(ii)(cc) and (dd) of PAJA reads:

> "A court or tribunal has the power to judicially review an administrative action if the action itself is not rationally connected to—
>
> . . .
>
> (cc) the information before the administrator; or
>
> (dd) the reasons given for it by the administrator".

[37] *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* [2003] ZASCA 119; 2004 (3) SA 346 (SCA) at para 21 and *Carephone (Pty) Ltd v Marcus NO and Others* [1998] ZALAC 11; 1999 (3) SA 304 (LAC) (*Carephone*) at para 37. See also Hoexter *Administrative Law in South Africa* 2 ed (Juta & Co Ltd, Cape Town 2012) at 340-3.

[38] Section 6(2)(e)(iii) of PAJA reads:

> "A court or tribunal has the power to judicially review an administrative action if the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered".

[39] Section 33 of the Constitution.

[40] Section 33(3).

administrative decisions. But neither asks courts to substitute their opinions for those of administrative bodies. It is not required that a decision of an administrative body be perfect or, in the court's estimation, the best decision on the facts.[41] And this is particularly so for rationality review under PAJA. Hoexter notes that—

> "[a] crucial feature [of rationality review under PAJA] is that it demands merely a rational connection – not perfect or ideal rationality. In a different context Davis J has described a rational connection test of this sort as 'relatively deferential' because it calls for 'rationality and justification rather than the substitution of the Court's opinion for that of the tribunal on the basis that it finds the decision . . . substantively incorrect'."[42] (Footnotes omitted.)

[79] A level of deference is necessary – and this is especially the case where matters fall within the special expertise of a particular decision-making body. We should, as this Court counselled in *Bato Star*, treat the decisions of administrative bodies with "appropriate respect" and "give due weight to findings of fact . . . made by those with special expertise and experience".[43]

[80] This has resonance here. The Commission is a specialist body constituted by experts "who are knowledgeable regarding customs and the institution of traditional

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[41] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*) at paras 45-9; *Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd* [2003] ZASCA 46; 2003 (6) SA 407 (SCA) at paras 51-2; and *Carephone* above n 37 at paras 32 and 36.

[42] Hoexter above n 37 at 342, citing *Nieuwoudt v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission; Du Toit v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission; Ras v Chairman, Amnesty Subcommittee, Truth and Reconciliation Commission* 2002 (3) SA 143 (C) at 155G-H and 164G-H. Froneman DJP (as he was then) in *Carephone* id at para 36 also helpfully stated:

> "In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."

[43] *Bato Star* above n 41 at para 48. See also *Ekurhuleni Metropolitan Municipality v Dada NO and Others* [2009] ZASCA 21; 2009 (4) SA 463 (SCA) at para 10 and *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] ZASCA 78; 2005 (2) SA 302 (SCA) at para 39. See generally Hoexter above n 37 at 147-55.

leadership".[44] As this Court held in *Nxumalo*, it is appropriate to treat its decisions with some deference.[45] When considering a claim, the Commission is required by section 25(3)(a) of the Framework Act to—

> "consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim."

Notably, this provision tasks the Commission not only with applying the relevant customary law to the case before it, but also with determining what that law was at the relevant time. This latter question depends primarily on historical and social facts, which the Commission must establish through evidence led before it and its own investigation.

[81] In this case that investigation ran over two years. It covered a wealth of historical material, which this Court cannot easily assess. It also included a series of hearings, in which the applicant participated extensively. First, the Commission conducted separate hearings for the Sekhukhune and Mamone royal families, whose representatives gave testimony under oath and referred the Commission to supplementary research material. After these hearings the Commission conducted its own research, on the basis of which it drafted preliminary statements which it put to both royal families. The statements were about whether Kgoši Sekhukhune I successfully challenged Kgoši Mampuru II in 1861 and whether, after returning to kill Kgoši Sekhukhune I, Kgoši Mampuru II ascended the throne. Both royal families commented on these in writing. Thereafter they attended a joint hearing where their

[44] Section 23(1) of the Framework Act.

[45] *Nxumalo v President of the Republic of South Africa and Others* [2014] ZACC 27 at para 21. The Court stated:

> "There is no merit in the applicant's criticism of the High Court's approach in showing deference to the Commission. The Commission was a specialist body established by an Act of Parliament to deal with a special category of disputes affecting a large section of society. It was required to apply customary law in adjudicating those disputes. Members of the Commission were required to have expertise in traditions and customs. The High Court cannot be criticised for its approach." (Footnotes omitted.)

testimony and arguments were again heard. The Commission's 40-page report was released some months later.

[82] This Court may not neglect its duty to scrutinise the rationality of the Commission's decision. But, in doing so, it must be cognisant of the Commission's special expertise as well as the wealth and complexity of the factual evidence it considered in its wide-ranging enquiry. The fairness of that process, where representations were solicited from interested parties, was not challenged.

*The existence of the usurpation rule*

[83] In its papers before this Court, the applicant sought to challenge the Commission's customary-law finding that kingship could be usurped through "might and bloodshed". It said that the Commission's report failed to substantiate this critical finding and "justify its deviation from the normal rules of customary succession by birth".

[84] This argument, however, faces a fundamental difficulty. In its founding affidavit in the High Court, the applicant expressly conceded that the Commission had correctly established the usurpation rule. It said:

> "The Commission has found, correctly so, that it 'was not unusual for the kingship to be obtained through might and bloodshed and therefore usurpation of kingship by Sekhukhune I was in line with common practice at that time'."

The remainder of its affidavit proceeded on this basis. It assumed that the rule existed, but argued that the Commission was wrong not to apply that rule to Kgoši Mampuru II's killing of Kgoši Sekhukhune I. It said Kgoši Mampuru II's act "qualified [him] to assume the kingship through 'might and bloodshed'". That the applicant's founding affidavit repeatedly confirmed the rule's existence is unsurprising, for its own claim to the throne ultimately derived from Kgoši Thulare's usurpation by force of the kingship of his brother, Kgoši Dikotope.

[85] In its written submissions in this Court, the applicant tried to evade the concession in its founding affidavit. It said that it had conceded only the factual existence of the practice of usurpation by force, not its status as a custom. But that is not correct. The meaning of the applicant's concession, in the scheme of its affidavit, is clear. Indeed, the applicant went on to rely expressly on the usurpation rule to found its own claim to the kingship.

[86] In oral argument the applicant wisely abandoned its attempt to evade its concession and dispute the establishment of the usurpation rule. The applicant emphasised that it did not question the establishment of the rule, the existence of which was clearly established by the historical examples cited by the Commission's report.[46] This renders it unnecessary for this Court to consider whether the late challenge should be entertained and, if so, whether it should be successful.

*Rationality challenge*

[87] The applicant's case for rationality review before this Court is therefore narrow, just as it was in the High Court and the Supreme Court of Appeal. It is that the Commission acted irrationally in applying the usurpation rule to Kgoši Sekhukhune I's ousting of Kgoši Mampuru II, but not applying it to Kgoši Mampuru II's later assassination of Kgoši Sekhukhune I. The question is, accordingly, whether there is a rational point of distinction between Kgoši Sekhukhune I's ousting of Kgoši Mampuru II and the latter's killing of Kgoši Sekhukhune I two decades later.

[88] In my view, there plainly is. Kgoši Sekhukhune I challenged Kgoši Mampuru II with force. The latter declined to accede to that challenge, and fled. After that, Kgoši Sekhukhune I took the throne and killed Kgoši Mampuru II's

[46] These were Kgoši Thulare's forcible dispossession of his older brother, Kgoši Dikotope; Kgoši Matsebe's usurpation of his brother Kgoši Malekutu's reign; and Kgoši Phetedi's subsequent removal of his brother, Kgoši Matsebe.

followers. He welded together separate entities in the Bapedi nation, subjugating communities that were not paying him allegiance. And he ruled the Bapedi nation for a period of 20 years.

[89] Kgoši Mampuru II's killing of Kgoši Sekhukhune I was different in a material respect. Kgoši Mampuru II did not exert his authority over the Bapedi nation after killing Kgoši Sekhukhune I. Instead, he immediately fled and ultimately returned to the home of Chief Nyabela of the Ndebele, his co-conspirator in Kgoši Sekhukhune I's killing. While the applicant disputed this in the High Court and claimed that Kgoši Mampuru II thereafter assumed the kingship, it offered no cogent evidence to substantiate its claim.

[90] This seems to me an obvious and powerful point of distinction. After driving off Kgoši Mampuru II, Kgoši Sekhukhune I ascended the throne and reigned for 20 years. By contrast, after killing Kgoši Sekhukhune I, Kgoši Mampuru II fled and never subsequently reigned. As the Commission said, he "did not ascend the throne". The distinction between the two events is not one this Court may find irrational.

[91] The applicant invited us at the hearing to understand these facts differently. It said that we should view the intervening 20 years between Kgoši Sekhukhune I's driving-off of Kgoši Mampuru II and Kgoši Sekhukhune I's death as a continuing battle between the two for kingship, which Kgoši Mampuru II ultimately won when he killed Kgoši Sekhukhune I. This interpretation of the historical evidence, it argued, is supported by a number of skirmishes between the two during that period, to which it said the Commission should have attached greater weight.

[92] But even if we were persuaded by this argument, it misses the point of rationality review. That we could interpret the facts differently to the Commission does not, especially given the respect we must show to its findings in this context, entitle us to set aside its decision. If the Commission's decision is a rational one, as I have concluded, it is not open for us to intervene.

*Failure to consider relevant evidence*

[93] The applicant also continues to press, although faintly, a further argument it made before the High Court. This argument was based on the fact that Kgoši Mampuru II was installed as leader of the Bapedi for a period of two years during Kgoši Sekhukhune I's reign when the latter was incarcerated by the British. The applicant says the Commission failed to consider this evidence, and that Kgoši Mampuru II reclaimed his kingship while Kgoši Sekhukhune I was incarcerated.

[94] The High Court and Supreme Court of Appeal correctly dispensed with this argument. It is so that the Commission's report does not mention Kgoši Sekhukhune I's incarceration. But the Commission's affidavits explain why this was the case. His incarceration has no legal relevance. As the Supreme Court of Appeal held, Kgoši Mampuru II's coronation by the British "was inconsequential as it was a unilateral act, inconsistent with Bapedi customary law, and intended merely to fulfil that government's policy."[47] And there was no evidence that his coronation was sanctioned by the Bakgoma and Bakgomana, the royal advisors, upon whom the task of identifying the king in accordance with Bapedi customary law and custom rests.[48] The illegitimacy of Kgoši Mampuru II's rule during this period, the Commission pointed out, was borne out by the fact that Kgoši Sekhukhune I returned and reclaimed his kingship upon release.

*Other arguments*

[95] Before the Supreme Court of Appeal, the applicant also attempted to raise several other arguments it had not raised at first instance. That Court rightly dispensed with these, and they were not seriously pressed before us. It is thus not necessary to deal with their merits.

[47] Supreme Court of Appeal judgment above n 18 at para 19.

[48] Id.

[96] The main judgment, however, seeks to develop the applicant's case in another direction not contemplated by the parties. It states that the Commission's decision is susceptible to review because it wrongly assumed that Kgoši Sekhukhune I's heirs were able to succeed him in terms of customary law. It says the Commission assumed this only because it ignored relevant facts about Kgoši Matsebe and Kgoši Phetedi's usurpation of their brother Kgoši Malekutu's rule. The main judgment concludes that the Commission thus failed to appreciate that, while a king might acquire kingship through usurpation, he did not acquire kingship for his own house and could not, therefore, pass kingship on to his successors.

[97] In support of this, the main judgment points to the fact that Kgoši Sekwati raised seed for Kgoši Malekutu, and that no timamollo wives were married during the respective reigns of Kgoši Matsebe and Kgoši Phetedi, the younger brothers who usurped Kgoši Malekutu's kingship. According to the main judgment, the "only rational explanation" for why this was the case "is that the royal family and the community did not approve the manner in which Kgoši Matsebe and Kgoši Phetedi became kings".[49] The judgment further states that this "also explains why [Kgoši] Mampuru II [and not Kgoši Phetedi and Kgoši Matsebe] was regarded as the heir and the rightful successor to Kgoši Malekutu who was also a son of a timamollo".[50]

[98] It is, however, not open for us to find for the applicant on this basis. The applicant's founding papers in the High Court contain no trace of this argument, and did not argue that, if Kgoši Mampuru II did not reclaim the kingship in 1882, Kgoši Sekhukhune I's heirs did not inherit his kingship.[51] The applicant conceded that the Commission found "correctly" that the usurpation rule existed. And it never

[49] At [59].

[50] Id.

[51] Ordinarily a litigant must stand or fall by the case made in its founding papers. This rule ensures fairness to respondents who are forewarned of the case they must meet. See *Betlane v Shelly Court CC* [2010] ZACC 23; 2011 (1) SA 388 (CC); 2011 (3) BCLR 264 (CC) at para 29; *Van der Merwe and Another v Taylor NO and Others* [2007] ZACC 16; 2008 (1) SA 1 (CC); 2007 (11) BCLR 1167 (CC) at para 122; and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 150.

suggested that the rule entitled only the usurper, and not his heirs, to take the kingship. To the contrary, it stated that Kgoši Mampuru II's killing of Kgoši Sekhukhune I "qualified [Kgoši Mampuru II] to assume the kingship through might and bloodshed", with the implication that his descendant, who is the leader of the applicant, was now the rightful king. That was the sole basis on which the applicant sought to show that the Commission's decision was irrational.

[99] In addition, the applicant has not sought to depart from its pleaded case. The applicant has not disputed in any court that, if Kgoši Sekhukhune I rightfully took the kingship, his heirs were entitled to succeed him. The cited portion of the applicant's papers on which the main judgment relies related to its challenge to the establishment of the usurpation rule, and whether it was competent for Kgoši Sekhukhune I to take Kgoši Mampuru II's kingship through force. For convenience, I repeat it:

> "[W]hile the High Court and the Supreme Court of Appeal have accepted and in fact ruled that Sekhukhune I legitimately usurped the kingship from Mampuru II, because it was not 'unusual at that time for kingship to be obtained by might and bloodshed', both the High Court and the Supreme Court of Appeal have nonetheless failed to locate any justification of this critical finding in the Commission's report. No reasons or specific examples of pertinent cases were provided by the Commission in its report to substantiate its statement and to justify its deviation from the normal rules of customary succession by birth when it adopted the premise that 'it was not unusual at the time for kingship to be obtained by might and bloodshed'. Applicant contended before the Supreme Court of Appeal (and also contends with respect before this Court) that no historical records show that the principle of usurpation of kingship was a custom or tradition for succession among the Bapedi nation."

[100] This challenge, as I noted above, was abandoned by the applicant's counsel during oral argument. Certainly, the applicant has never put in issue the transmissibility of a usurping king's kingship. That is hardly surprising, given that, as pointed out above, Kgoši Mampuru II's own claim to the kingship depended on Kgoši Thulare being able to pass his kingship down to his heirs after taking it by force.

[101] The applicant's case before this Court, as it was in the High Court, was narrowly that the Commission should have found that Kgoši Mampuru II reclaimed the kingship in 1882 when he killed Kgoši Sekhukhune I. Were we now to find for the applicant on the basis the main judgment proposes, it would cause the Commission irredeemable prejudice. The Commission has not been afforded any opportunity to respond to these assertions, which appear for the first time in the main judgment. It would be denied basic procedural fairness if we were to decide that case against it here, without ever affording it an adequate hearing.

[102] And this unfairness would be even more sharply felt by other respondents. The fourth and fifth respondents are the Mohlaletsi Traditional Authority and Acting Kgošikgolo Kgagudi Kenneth Sekhukhune, the ruling house and incumbent leader of the Bapedi according to the Commission's decision. Though active before the High Court, neither party opposed the application before the Supreme Court of Appeal or this Court. They likely did so believing that the Commission's papers and arguments competently covered all the points that have ever been in issue. If a new point becomes the basis of this Court's decision, it would be unfair to these parties whose interests in the award of the kingship to their line are at the core of this case.

[103] In addition, the parameters of the usurpation rule and whether usurping kings could pass their kingship on to successors are not pure questions of law, as the main judgment states. They are predominantly factual enquiries. I have already stated that the rules of Bapedi customary law depend on fact for their existence. That is why the Commission considered reams of historical evidence in compiling its report. The establishment of these facts, not whether the Commission misconstrued its powers under section 25(3), underpins the conclusion reached by the main judgment. The evidence necessary to prove or disprove these facts has not been placed before us, since no party has ever disputed Kgoši Sekhukhune I's competency to pass on his kingship under Bapedi customary law.

[104] We cannot now find for the applicant on the ground the main judgment proposes. But even if we could, I am not persuaded that the main judgment demonstrates that the Commission's decision is reviewable.

[105] The first reason should already be clear. The main judgment finds that the Commission ought to have considered more fully the issue of succession after Kgoši Sekhukhune I's death, and the facts of Kgoši Malekutu's, Kgoši Matsebe's and Kgoši Phetedi's reigns and their bearing on that succession. It is, however, understandable that the Commission's report fails to deal with this. The dispute before the Commission related to the feud between Kgoši Mampuru II and Kgoši Sekhukhune I, their various skirmishes, the ultimate killing of Kgoši Sekhukhune I and whether this revived Kgoši Mampuru II's claim to the throne. I therefore part ways with the main judgment when it characterises the dispute before the Commission as "related to succession to kingship after the death of Kgoši Sekhukhune [I]".[52] The Commission's report can hardly be faulted – or declared unlawful – for omitting to cover in more detail something that was never in issue before it.

[106] Second, our standard of review is not "relatively deferential" if we draw a speculative chain of inferences to review an administrative decision. We should be slow to say, as the main judgment does, that the *only* rational explanation for the fact that no timamollo wives were married during Kgoši Matsebe's and Kgoši Phetedi's reigns – and that Kgoši Sekwati raised Kgoši Malekutu's (and not his usurping brothers') seed – was the royal family's disapproval of the manner in which Kgoši Matsebe and Kgoši Phetedi took the kingship. There may be many other explanations, circumstantial or related to customary law, which were not canvassed because neither party drew attention to or relied on this aspect of the report. The reason might lie, for example, in the war with the Matebele, which decimated the Bapedi population and left its traditional structures in disarray.

[52] At [42].

[107] And even if the explanation was the disapproval of the royal family, this does not mean that it constituted a customary-law rule that usurping kings can never pass on kingship. Nor does it mean that the royal family similarly disapproved of Kgoši Sekhukhune I's reign and refused to nominate a timamollo wife from among his wives. It should also be remembered, as stated above, that the Commission's decision need not, in the view of this Court, be perfectly explained in every respect. It need only be justifiable.

[108] Finally, the Commission's factual findings included that Kgoši Thulare forcibly dispossessed Kgoši Dikotope, becoming the leader of the Bapedi without any prior entitlement based on the customary rules of succession. Notwithstanding that Kgoši Thulare became king solely through usurpation, the Commission's report found – and this is not disputed by any party – that the Bakgoma and Bakgomana nominated a timamollo wife for him. That wife's son, Kgoši Malekutu, became "the rightful heir and successor in title to the kingship of the Bapedi after the death of [Kgoši Thulare]". Here is an undisputed example where the Bakgoma and Bakgomana did nominate a timamollo wife for a king who acquired his rule through usurpation. And, still more significantly, the Commission's finding on this point controverts the main judgment's core proposition that usurping kings could not pass on their authority to their heirs. It also provides ample justification for the Commission's decision that Kgoši Sekhukhune I's kingship competently passed down to his successors.

*Conclusion*

[109] The above considered, I find no reason to set aside the Commission's decision. The decision was neither irrational, nor did it ignore relevant facts. The appeal must be dismissed.

*Costs*

[110] In accordance with the normal rule that applies to constitutional litigation against an organ of state,[53] I make no order as to costs.

*Order*

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

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. There is no order as to costs.

[53] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 21-3.

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| For the First Respondent: | G Bofilatos SC and LM Montsho SC instructed by Bhadrish Daya Attorneys. |