



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 174/20

In the matter between:

KGABAGARE DAVID LANGA

Applicant

and

PREMIER, LIMPOPO

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
COOPERATIVE GOVERNANCE, HUMAN
SETTLEMENTS AND TRADITIONAL
AFFAIRS, LIMPOPO**

Second Respondent

RALUSHAI COMMISSION OF INQUIRY

Third Respondent

KGATLA COMMISSION OF INQUIRY

Fourth Respondent

HANS MASEBE LANGA

Fifth Respondent

Neutral citation: *Langa v Premier, Limpopo and Others* [2021] ZACC 38

Coram: Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgment: Theron J (unanimous)

Heard on: 13 May 2021

Decided on: 5 November 2021

ORDER

On appeal from the High Court of South Africa, Limpopo Division, Polokwane, the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order granted by the High Court is set aside and replaced with the following:
 - “(a) The first respondent’s Notice 4 of 2017 in Provincial Gazette 2843 of 8 August 2017 is unlawful, invalid and set aside.
 - (b) The first respondent’s Notice 5 of 2017 in Provincial Gazette 2845 of 16 August 2017 is unlawful, invalid and set aside.
 - (c) The orders in paragraph (a) and (b) above will apply from the date of this order.”
5. The first respondent must pay the applicant’s costs in both the High Court and in this Court, including the costs of two counsel.

JUDGMENT

THERON J (Khampepe ADCJ, Jafta J, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Tlaletsi AJ and Tshiqi J concurring):

Introduction

[1] The applicant in this matter seeks leave to appeal against the order and judgment of the High Court of South Africa, Limpopo Division, Polokwane (High Court), in which the High Court dismissed an application to review and set aside the Premier of the Limpopo Province’s decision to remove the applicant as the senior traditional leader

of the Mapela Traditional Community and recognise the fifth respondent as senior traditional leader in his stead.

[2] The applicant, Mr Kgabagare David Langa, was appointed as senior traditional leader of the Mapela Traditional Community in 2009. The first respondent is the Premier of the Limpopo Province, who issued the applicant's certificate of recognition as senior traditional leader. The second respondent, the Member of the Executive Council for the Department of Co-operative Governance, Human Settlement and Traditional Affairs in Limpopo Province (Department), is the political overseer of the Institution of Traditional Leadership of Limpopo Province. The third respondent, the Ralushai Commission of Inquiry, and the fourth respondent, the Kgatla Commission of Inquiry, were delegated provincial committees established to deal with disputes and claims of chieftainship in Limpopo Province. The fifth respondent, Mr Hans Masebe Langa, was recognised by the Premier as the senior traditional leader of the Mapela Traditional Community in 2017 upon the removal of the applicant as senior traditional leader. The first, second, third and fourth respondents filed an answering affidavit in the High Court but have not filed papers in this Court.

[3] Before canvassing the factual background against which the present dispute must be understood, it is necessary to set out the legal framework that regulates the appointment and removal of senior traditional leaders in Limpopo Province.

Legislative scheme

[4] The appointment and removal of traditional leaders in Limpopo Province is governed by overlapping provincial and national legislation. The relevant national legislation is the Traditional Leadership and Governance Framework Act¹ (Framework Act), which was amended by the Traditional Leadership and Governance Framework Amendment Act² (2009 Amendment Act). The Framework Act anticipates

¹ 41 of 2003.

² 23 of 2009.

the promulgation of provincial legislation dealing with traditional leadership, and in Limpopo Province that legislation is the Limpopo Traditional Leadership and Institutions Act³ (Limpopo Act). Section 2(1) of the Limpopo Act makes the Limpopo Act subject to the Framework Act.

[5] Both the Framework Act and the Limpopo Act require executive sanction for the appointment and removal of traditional leaders. Under the Framework Act, the appointment and removal of a king or queen falls within the purview of the President of the Republic,⁴ whereas the appointment and removal of senior traditional leaders, headmen or headwomen is within the remit of the Premier of the relevant province.⁵

Appointment of traditional leaders

[6] Section 12 of the Limpopo Act, which mirrors section 11 of the Framework Act, regulates the recognition of senior traditional leaders by the Premier:

- “12 Recognition of senior traditional leader, headman or headwoman
- (1) Whenever a position of a 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 the customary law of the traditional community concerned—
- i. identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and
- ii. through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified

³ 6 of 2005.

⁴ Sections 9 and 10 of the Framework Act.

⁵ Id sections 11-2.

to fill the position and of the reasons for the identification of the specific person.

- (b) the Premier must, subject to subsection (2)—
 - i. by notice in the Gazette recognise the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, headman or headwoman, as the case may be;
 - ii. issue a certificate of recognition to the person so recognised; and
 - iii. inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional leader, headman or headwoman.
- (2) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the Premier—
 - (a) may refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations; or
 - (b) may refuse to issue a certificate of recognition; and
 - (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.
- (3) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (2) has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.”

[7] Section 12(1) is concerned with recognition at the instance of a royal family, which is given effect to by the Premier in terms of section 12(2). Notably, section 12 does not make provision for the appointment of a traditional leader at the instance of, or pursuant to a recommendation or decision by a Commission established in terms of the Framework Act.

Removal of a traditional leader

[8] Section 13 of the Limpopo Act, which mirrors section 12 of the Framework Act, sets out the procedure for relieving someone of their royal duties. It reads in relevant part:

“13 Relief of royal duties

- (1) Relief of royal duties shall be 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;
 - (d) a transgression of a customary rule or principle that warrants removal; or
 - (e) persistent negligence or indolence in the performance of the functions of his or her office.
- (2) Whenever any of the grounds referred to in subsection (1)(a), (b), (d) and (e) come to the attention of the royal family and the royal family decides to remove a senior traditional leader, headman or headwoman, the royal family concerned must, within a reasonable time and through the relevant customary structure—
 - (a) inform the Premier of the province concerned of the particulars of the senior traditional leader, headman or headwoman to be removed from office; and
 - (b) furnish reasons for such removal.
- (3) Where it has been decided to remove a senior traditional leader, headman or headwoman in terms of subsection (2), the Premier must—
 - (a) withdraw the certificate of recognition with effect from the date of removal;

- (b) publish a notice with particulars of the removed senior traditional leader, headman or headwoman in the Gazette; and
- (c) inform the royal family concerned, the removed senior traditional leader, headman or headwoman, and the provincial house of traditional leaders as well as the relevant local house of traditional leaders of such removal.”

[9] Section 13(2) draws a distinction between removal on any of the grounds referred to in subsection 1(a), (b), (d) and (e), on the one hand, and removal on the ground of wrongful appointment or recognition (subsection 1(c)), on the other. In the case of the former (removal for a reason other than wrongful appointment or recognition), section 13(2) says that when any of the listed grounds come to the attention of the royal family, they must inform the Premier of the particulars of the relevant leader and furnish reasons for the removal. When there has been a decision by a royal family to remove a leader in terms of section 13(2), the Premier, acting in terms of section 13(3), must withdraw the leader’s certificate of recognition, publish a notice of the withdrawal in the Gazette and inform the royal family and the Provincial House of Traditional Leaders (Provincial House) of the withdrawal. It is significant, at this stage, to note that section 13 is silent on the procedure to be followed when removal is on the ground of wrongful appointment or recognition envisaged in section 13(1)(c).

Disputes concerning traditional leadership

[10] The Framework Act makes provision for the investigation of disputes concerning traditional leadership by Commissions constituted either in terms of section 22 or section 26A of the Framework Act.⁶ Section 26A establishes provincial committees to deal with disputes and claims relating to traditional leadership, whose members are appointed by the Premier by notice in the Provincial Gazette. In terms of section 25(2)(a), a Commission has the authority to investigate a traditional leadership

⁶ Section 21 of the 2009 Amendment Act, which inserted section 26A of the Framework Act. Where the Framework Act uses the word “Commission”, it refers either to a provincial committee established under section 26A of the Framework Act, which operates provincially, or the Commission on Traditional Leadership Disputes established under section 22 of the Framework Act, which operates nationally.

position where the title or right of the incumbent is contested. Both the Ralushai and Kgatla Commissions were delegated the authority to investigate and make recommendations on traditional leadership disputes and claims in Limpopo Province, including in respect of traditional leadership disputes in the Mapela Traditional Community. Whereas the Ralushai Commission was formed before the promulgation of the Framework Act in 2003, the Kgatla Commission derived its authority from section 26A of the Framework Act.⁷

[11] Both the Limpopo Act and the Framework Act regulate the possible implementation of recommendations made by a Commission constituted in terms of either section 22 or section 26A of the Framework Act. As I explain below, the relevant provisions in each Act deal with a different leg of the process by which a recommendation by a Commission may be implemented by the Premier.

[12] Section 26 of the Framework Act provides:

“26 Recommendations of Commission

- (1) A recommendation of the Commission is taken with the support of at least two thirds of the members of the Commission.
- (2) A recommendation of the Commission must, within two weeks of the recommendation being made, be conveyed to—
 - (a) the President and the Minister where the position of a king or queen is affected by such a recommendation; and
 - (b) the relevant provincial government and any other relevant functionary to which the recommendation of the Commission applies in accordance with applicable provincial legislation insofar as the consideration of the recommendation does

⁷ The Kgatla Commission (whose full title is the Limpopo Provincial Committee of the Commission on Traditional Leadership Disputes and Claims) was established in terms of section 26A(1) of the Framework Act. The Premier of Limpopo appointed four members of the Provincial Committee in terms of section 26A(2)(a) of the Framework Act and the Minister of Co-operative Governance and Traditional Affairs appointed a member of the Commission as chairperson in terms of section 26A(3) of the Framework Act, thus making a five-member committee.

not relate to the recognition or removal of a king or queen in terms of section 9, 9A or 10.

- (3) The President or the other relevant functionary to whom the recommendations have been conveyed in terms of subsection (2) must, within a period of 60 days, make a decision on the recommendation.
- (4) If the President or the relevant functionary takes a decision that differs with the recommendation conveyed in terms of subsection (2), the President or the relevant functionary as the case may be must provide written reasons for such decision.”

[13] Notably, before the Framework Act was amended by the 2009 Amendment Act, section 26 referred to the implementation of a “decision” of a commission. Section 26 of the Framework Act now refers to a “recommendation” made by a commission. This amendment was not reflected in section 30 of the Limpopo Act, which purports to regulate the implementation of “decisions” taken by a commission in terms of section 26(2) of the Framework Act. It provides:

- “(1) The Premier must, within seven days of receipt of the *decision* of the commission in terms of section 26(2) of the Framework Act, refer such decision to the provincial house of traditional leaders for its advice on implementation.
- (2) The provincial house of traditional leaders must submit its advice contemplated in subsection (1) to the Premier within 14 days of receipt: Provided that the Premier may, if he or she deems it necessary, require the provincial house of traditional leaders to submit its advice within a specified shorter period.
- (3) The Premier must implement the decision of the commission within 30 days of receipt of such decision from the commission.” (Emphasis added.)

[14] The applicant accepts – and I do not understand the fifth respondent as seriously disputing – that the word “decision” in section 30 can be read as “recommendation”. I agree. By cross-referring to “the decision of the commission in terms of section 26(2) of the Framework Act”, section 30(1) imports the change of language from “recommendation” to “decision”.

[15] At the hearing of this matter, there was an extensive debate as to the interplay between section 26 of the Framework Act and section 30 of the Limpopo Act. It seems clear to me that, properly construed, the two provisions regulate different matters. Section 26 of the Framework Act regulates the Premier's decision whether to approve a recommendation made by a Commission. Section 26(4) makes it clear that the Premier is entitled to take a decision that differs with the Commission's recommendation and then provide written reasons for that decision. Section 26(5)(a) then imposes on the Premier an obligation to provide the President and the Minister with a report on the implementation of decisions she has made on the recommendations of the Commission. This seems to be a clear indication that there is a distinction between the Premier's decision on the recommendation of the Commission, on the one hand, and the implementation of that decision, on the other. And this is where section 30 of the Limpopo Act comes in. The section, which is headed "Implementation of decisions of commission", requires, as a first step, that the Commission's recommendation be referred to the Provincial House for its advice on implementation.⁸

[16] Together, section 26 of the Framework Act and section 30 of the Limpopo Act empower the Premier to take a decision on a recommendation made by a commission and to implement that recommendation, provided the requirements of each provision are met.

Background to the present dispute

[17] At the heart of this appeal is a leadership dispute that has pitted the applicant and fifth respondent against each other as rival claimants to the position of senior traditional leader of the Mapela Traditional Community. This dispute was referred to the Ralushai and Kgatla Commissions, which both recommended the recognition of the fifth respondent as senior traditional leader. The applicant has denied the correctness of these recommendations. As such, it is not possible to set out a common cause account of the historical antecedents to the dispute between the applicant and fifth respondent.

⁸ Section 30(1) of the Limpopo Act.

However, because the applicant's challenge to the recommendations made by the Ralushai and Kgatla Commissions is not properly before this Court, and the correctness of those recommendations has no bearing on the resolution of the present appeal, I will not make a finding on this issue, but merely set out this history according to the overview provided by the Kgatla Commission in its report, which was accepted by the High Court. Nothing turns on the correctness of this account, which is included here merely to provide the context within which the Royal Family and the Premier acted to replace the applicant with the fifth respondent.

[18] Kgoshi Hans Malesela Langa I was the first traditional leader of the Mapela Traditional Community. He had 29 wives. The applicant's father, Hendrik Madikwe Langa, was the progeny of the late Kgoshi Hans Langa I and his fifth wife and therefore came from the fifth house of the late Kgoshi. Kgoshi Hans Langa I was succeeded by Alfred Sedibu Langa, who was the first-born son of the late Kgoshi and his first wife. The applicant's father and Kgoshi Alfred Sedibu Langa were therefore half-brothers born to different houses.

[19] Kgoshi Alfred Sedibu Langa died in 1937 without male issue to succeed him as Kgoshi. He was succeeded by his younger brother, Johannes Nkgalabe Langa, who acted as regent until his death in 1957. The death of Johannes Nkgalabe Langa gave rise to a new line of successors with the nomination of the applicant's uncle, Godwin Motape Langa, in 1957. Like the applicant's father, Godwin's mother was the fifth wife of the late Kgoshi Hans Langa I and was thus born from the fifth house of the late Kgoshi. When Godwin died in 1958, he was succeeded by the applicant's father, who was nominated and appointed as acting Kgoshi.

[20] The reign of the applicant's father ended in 1976 when John Masebe Langa, who was from the second house of Kgoshi Hans Langa I, was appointed as acting senior traditional leader of Mapela Community. John Masebe Langa was appointed with the

sole mandate of cohabiting and having a child with the candle wife (masechaba),⁹ Rosina Queen Langa. That child would be the successor to Alfred Sedibu Langa. The fifth respondent was born out of the cohabitation of John Masebe Langa and Rosina Queen Langa.

[21] In the wake of unrest instigated by supporters of the applicant's father, John Masebe Langa was replaced by the applicant's father, who reigned until his death in 1990. He was succeeded by his wife Athalia, who ruled as a regent until 2009.¹⁰ She was in turn succeeded by her son, the applicant, who was recognised as senior traditional leader of the Mapela Traditional Community in terms of a certificate of recognition issued by the Premier, which took effect from 6 November 2009.

[22] In 1997, the Ralushai Commission completed its work and handed its report to the Premier. In its report, the Commission recommended that the applicant's mother, Athalia, be removed as regent and replaced by the fifth respondent on the basis that the fifth respondent's appointment would restore the bloodline of Chief Alfred Sedibu Langa. For reasons which are not apparent from the record before us, these recommendations were not implemented.

[23] In a letter dated 16 January 2009, it appears that the Office of the Premier advised the District Manager that the same leadership dispute which had been investigated by the Ralushai Commission had been referred to the Provincial House for hearing. The letter further stated that the Provincial House approved the finding that the applicant's mother "was properly married as a candle wife and that [the applicant] is the rightful heir to the throne". The District Manager appears to have forwarded this letter to the Royal Family on 16 October 2009. On 6 November 2009, the applicant

⁹ A candle wife is a woman married to a member of the royal family for the sole purpose of producing a male child.

¹⁰ The Framework Act defines "regent" as "any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position in a temporary capacity until a successor to that position who is a minor, is recognised".

received a certificate of recognition issued by the Premier in terms of section 12(1)(b) of the Limpopo Act.

[24] The Kgatla Commission was established in terms of section 26A(1) of the Framework Act. At some stage, the date of which is not evident from the papers, the dispute concerning the applicant's recognition as senior traditional leader was lodged with the Kgatla Commission. On 23 January 2013 the Commission gave notice of a public hearing concerning this dispute.

[25] In a report dated 17 September 2013, the Kgatla Commission recommended that the applicant be removed from his position as senior traditional leader of the Mapela Traditional Community in terms of section 12(1)(c) of the Framework Act, read with section 13(1)(c) of the Limpopo Act (i.e. on the basis of "wrongful appointment or recognition") and that the fifth respondent be recognised as senior traditional leader in terms of section 12(1)(b) of the Limpopo Act. Its recommendation was also based on a finding that the appointment of the fifth respondent would restore the bloodline of the original Kgoshi's son, Alfred Sedibu Langa.

Withdrawal of the applicant's certificate of recognition and recognition of the fifth respondent

[26] The correspondence and documents before this Court reveal that the Premier and various functionaries within the Department and the Premier's office had a somewhat murky understanding of the statutory regime governing the recognition and appointment of senior traditional leaders. In particular, the correspondence reveals uncertainty about the role played by the Royal Family where a commission has recommended the removal of a senior traditional leader and the appointment of another person in their stead. Some correspondence refers to the Royal Family "identifying" the senior traditional leader, whereas other correspondence suggests that the Royal Family's role is one of implementation only. In view of the conclusions I reach, the internal correspondence between the Premier and Department officials is of no moment. All that is germane, for purposes of determining this appeal, is that on

8 August 2017 the Premier published a notice in the Provincial Gazette stating that he recognised the fifth respondent “as senior traditional leader in terms of section 12(1)(b)(i) of the [Limpopo Act]” (recognition notice). Thereafter, on 16 August 2017, the Premier published a further notice in the Provincial Gazette stating that “in terms of section 13(3)(b) of the [Limpopo Act]” the applicant “is removed from office as senior traditional leader” (withdrawal notice). The present matter concerns the validity of these two notices.

Litigation history

[27] In review proceedings before the High Court, the applicant brought a wide-ranging attack on the Premier’s decisions to withdraw his certificate of recognition and to recognise the fifth respondent as senior traditional leader in his stead. He also sought orders setting aside recommendations by the Ralushai Commission and Kgatla Commission that the fifth respondent be recognised as senior traditional leader. The applicant contended that the Premier’s recognition and withdrawal decisions were *ultra vires* sections 12, 13 and 30 of the Limpopo Act.

[28] The applicant also pleaded that the issue and withdrawal of a certificate of recognition amounted to procedurally unfair administrative action in terms of the Promotion of Administrative Justice Act¹¹ (PAJA). In this regard, the applicant said he was not given notice of the Premier’s intention to withdraw his certificate of recognition and was not provided with an opportunity to make representations or given notice of his right to request reasons or to appeal or review the decision.. Notably, although the applicant contended in his founding affidavit that the conclusions and recommendations made by the Ralushai and Kgatla Commissions were “incorrect” and procedurally unfair, the applicant abandoned these arguments in his replying affidavit in the High Court.

¹¹ 3 of 2000.

[29] The High Court dismissed the review application. It rejected the argument that the Royal Family's identification of the fifth respondent did not meet the requirements of section 12(1)(a) of the Limpopo Act. It noted that the resolution identified the fifth respondent as "the legitimate one to hold the title" of the original Kgoshi's successor. It held that while the word "identify" (which is used in section 12(1)(a)(i)) was not used in the resolution, the use of "acknowledge" sufficed. The High Court also rejected the contention that the recognition decision was nullified because the Royal Family and the Premier did not inform the Provincial House of the recognition of the fifth respondent. It found that it was clear from the plain wording of section 12(1) of the Limpopo Act that the Provincial House plays no role in the identification and recognition of a chief. The Court held that the Legislature could not have intended that a failure to inform the Provincial House would nullify the entire recognition process.

[30] The High Court held that section 13(2)(a) is only applicable where the removal of the traditional leader, or the relief of his royal duties, is at the instance of the royal family concerned on one of the grounds listed in subsections (1)(a), (b), (d) and (e). It noted that, in this instance, the relief of royal duties was based on subsection (1)(c).

[31] Finally, the High Court rejected the applicant's contention that non-compliance with section 30 of the Limpopo Act invalidates the entire recognition process. It noted that while section 30(1) is couched in peremptory terms, non-compliance would only vitiate the decision if, having regard to the subject matter of the prohibition, its purpose in the context of the legislation, the remedies provided in the event of any breach of the prohibition, and the nature of the mischief it was designed to remedy or avoid, it appeared that non-compliance would be visited with nullity. The High Court accepted that because the Provincial House played no part in the decision-making process, a failure to notify it did not vitiate the Premier's recognition of the fifth respondent.

[32] The High Court dismissed the review application and thereafter refused leave to appeal. The applicant's further application for leave to appeal was also dismissed by

the Supreme Court of Appeal. In this Court, the applicant seeks leave to appeal against the High Court's dismissal of his review application.

The applicant's case in this Court

[33] In the High Court, the applicant sought an order setting aside the Premier's withdrawal and recognition decisions, as well as the decisions of the Kgatla and Ralushai Commissions. In his replying affidavit before the High Court, the applicant expressly stated that he was applying to have the decision of the Premier reviewed and not the decisions of the Commissions. The fifth respondent argues that this amounted to an abandonment of the applicant's review against the findings of both Commissions.

[34] In his founding affidavit in this Court, the applicant did not seek to impugn the findings and decisions of the Commissions. However, in the applicant's written submissions, he raises two additional points regarding the lawfulness of the Kgatla Commission's recommendations that were not raised in his founding affidavit. First, he points to the Kgatla Commission's non-compliance with section 26 of the Framework Act, which required it to convey its recommendation to the Premier within two weeks of the recommendation being made. Secondly, he emphasises that the Kgatla Commission did not have jurisdiction to resolve the present leadership dispute because the claim was submitted six months after Chapter 6 of the Framework Act came into operation. He also points to a number of defects in the Commission's constitution and approach. In addition – also for the first time in this Court – the applicant contends that the Kgatla Commission had neither the power to identify a person for recognition as a traditional leader nor the power to recommend that the applicant be removed from his position.

[35] Parties are bound by their pleadings and are generally precluded from arguing a different case than that which they pleaded.¹² As mentioned, even though the

¹² *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) at para 35 and *SATAWU v Garvas* [2012] ZACC 13; 2013 (1) SA 83 (CC); 2012 (8) BCLR 840 (CC) at paras 113-4.

lawfulness of the Kgatla Commission was raised in the applicant's notice of motion in the High Court, the applicant subsequently abandoned, in express terms, any review of the Commission's work. The applicant does not challenge the Commission's findings in his founding affidavit in this Court and has sought to resuscitate the challenge for the first time in his written submissions. It follows that his challenge to the constitution of the Kgatla Commission is not properly before this Court. Moreover, even if this Court were minded to consider a challenge to the Kgatla Commission's findings, the record does not contain the factual information necessary to make a determination on this question. This would also be prejudicial to the respondents, who have not had an opportunity to fully address the challenge.

[36] The case that is properly before this Court is whether the High Court erred when it dismissed the applicant's challenge to the Premier's decision to recognise the fifth respondent as senior traditional leader of the Mapela Traditional Community, which was given effect to by the recognition notice, and the decision to remove the applicant from the position, which was given effect to by the withdrawal notice.

Jurisdiction and leave to appeal

[37] This matter concerns the lawfulness of the Premier's recognition of the fifth respondent as senior traditional leader and removal of the applicant as senior traditional leader, pursuant to the provisions of the Framework Act and Limpopo Act. This determination turns on the proper interpretation of certain provisions of both of those Acts, which regulate the removal and appointment of senior traditional leaders. The matter also implicates section 211(1) of the Constitution to the extent that it concerns the institution of traditional leadership, which this Court has said has "important constitutional dimensions".¹³ The appeal thus engages this Court's jurisdiction. Leave to appeal should be granted on the basis that the application

¹³ *Sigcau v President of the Republic of South Africa (Centre for Law and Society as amicus curiae)* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC) at para 15.

implicates a matter of considerable importance to the Mapela Traditional Community, and has strong prospects of success, as will become evident.

Lawfulness of the Premier's withdrawal notice

[38] On 8 August 2017, the Premier published the recognition notice, which stated that the recognition of the fifth respondent as senior traditional leader was in terms of section 12(1)(b)(i) of the Limpopo Act. In a further notice published in the Provincial Gazette on 16 August 2017, the Premier purported to remove the applicant from office as senior traditional leader in terms of section 13(3)(b) of the Limpopo Act.

[39] The applicant says there are two flaws in the Premier's withdrawal of the applicant's certificate of recognition. The first is that when the Premier issued the notice in the Provincial Gazette, he purported to act in terms of section 13(3)(b) of the Limpopo Act, even though that section only becomes applicable when the ground for removal is any of the grounds listed in section 13(1) other than wrongful appointment and recognition. In this matter, the withdrawal of the applicant's certificate of recognition was "wrongful appointment and recognition", which means that the Premier could not have acted lawfully in terms of section 13(3) of the Limpopo Act. The applicant also says that in *Tshivhulana*¹⁴ this Court confirmed that the Premier has no power to remove a senior traditional leader on the ground of wrongful appointment or recognition. The second flaw in the withdrawal of the applicant's certificate of recognition, according to the applicant, is that the Royal Family did not pass a resolution in which it decided to relieve the applicant of his duties. In view of the conclusion I reach, it is not necessary to delve into the merit of this submission.

[40] The fifth respondent submits that removal on the ground of wrongful appointment or recognition is excluded from the domain of the Royal Family by virtue of section 13(2) of the Limpopo Act. And, since the Royal Family was excluded from recommending removal on the ground of wrongful appointment, it was the Premier who

¹⁴ *Tshivhulana Royal Family v Netshivhulana* [2016] ZACC 47; 2017 (6) BCLR 800 (CC) (*Tshivhulana*).

had to comply with section 13(1)(c). The fifth respondent submits that the Premier thus acted in terms of section 13(1)(c) on the findings and recommendations of the Kgatla Commission as he was required, and entitled, to do.

[41] I disagree. A Premier's powers under section 13(3) are triggered only once she is informed of the royal family's decision to remove a senior traditional leader on any of the grounds in section 13(1) *other than wrongful appointment and recognition*. In this matter, it is common cause that the basis for the withdrawal of the applicant's certificate of recognition was "wrongful appointment and recognition". It follows that the Premier's section 13(3) powers were not triggered.

[42] But if a Premier is not empowered by section 13(3) to remove a traditional leader on the grounds of wrongful appointment or recognition, is there another legal basis for doing so? While section 12(1)(c) of the Framework Act and section 13(1)(c) of the Limpopo Act clearly authorise the removal of a senior traditional leader on either of these grounds, these provisions do not prescribe the procedure that must be followed, nor do they say who is empowered to exercise this power of removal. However, as I explain, when these provisions are read with sections 25 and 26 of the Framework Act, it is clear that the Premier, acting on the recommendation of a commission, has the power to remove a senior traditional leader on the ground of either wrongful appointment or recognition.

[43] Section 25(2)(b)(ii) of the Framework Act specifically confers on a commission the authority to investigate, either on request or of its own accord, a traditional leadership position where the title or right of the incumbent is contested. Upon undertaking such an investigation, a commission may very well conclude that the incumbent does not have a legitimate claim to the position and should be replaced on the ground that he or she was wrongfully appointed. Section 26 of the Framework Act then requires the commission to communicate its recommendation to the Premier, who in turn is obliged to decide whether to accept the recommendation and implement it. If the Premier decides to accept and implement a recommendation regarding the

outcome of a traditional leadership dispute which requires the removal of the incumbent traditional leader, the removal would be authorised by section 12(1)(c) of the Framework Act (and section 13(1)(c) of the Limpopo Act, to the extent that it is applicable). Section 30 of the Limpopo Act (to the extent that it is applicable) would then empower the Premier to implement the removal.

[44] For completeness, it is necessary to deal with the argument advanced by the applicant that the effect of this Court's decision in *Tshivhulana* is that the Premier does not ever have the power to remove a senior traditional leader on the basis of wrongful appointment or recognition. In *Tshivhulana*, this Court was asked to decide whether a traditional community is obliged to exhaust the internal remedies prescribed in section 21 of the Framework Act when its dispute is against the decision of the Premier. This Court reasoned that because the Premier is a key role-player in the dispute resolution scheme in section 21, it would be absurd for the traditional community to pursue a remedy in terms of that scheme. In a dispute concerning allegedly wrongful appointment or recognition by the Premier, if the section 21 process were to be followed, the Premier would, in effect, be both a party to, and resolver of, the dispute.¹⁵ The Court made the point that it must be correct that the Premier is disqualified from resolving a dispute concerning wrongful appointment or recognition in terms of section 21 because the Premier, by virtue of the fact that the Framework Act gives her the exclusive power to appoint a headman, is also impliedly disqualified from removing a headman on the ground of wrongful appointment or recognition.¹⁶ The Court also went on to remark that "[t]he Framework Act does not prescribe a procedure for the removal of a headman on the ground of wrongful appointment or recognition".¹⁷ However, apart from being *obiter dicta* (comments said in passing), when read in their proper context it is clear that these remarks were made with only the Premier's powers under section 12(2) of the Framework Act in mind. The Court was commenting on the fact that section 12(2) of the Framework Act does not give the Premier the power, at

¹⁵ Id at para 40.

¹⁶ Id at para 42.

¹⁷ Id at para 41.

the instance of a royal family, to remove a traditional leader on the ground of wrongful appointment or recognition. Crucially, the dispute in *Tshivhulana* did not concern a removal by the Premier at the instance of a commission and the and the Court did consider the possibility of removal on the ground of wrongful appointment or recognition pursuant to a recommendation made by a commission in terms of section 26 of the Framework Act. These *obiter* statements must be read in context and cannot be interpreted as denuding the Premier of the power to implement a recommendation made by a commission to remove a senior traditional leader on the ground of wrongful appointment or recognition. To read *Tshivhulana* as precluding the Premier from ever withdrawing a senior traditional leader's certificate of recognition on this basis would effectively neuter the legal force of recommendations made by commissions. Limiting the holding in *Tshivhulana* to the Premier's powers in terms of section 12(2) of the Framework Act avoids this absurdity.

[45] In this matter, the Premier could therefore have derived the power to implement the decision of the Kgatla Commission from sections 13(1)(c) and 30 of the Limpopo Act, read with sections 25 and 26 of the Framework Act. Instead, the Premier purported to issue the withdrawal notice in terms of section 13(3)(b) of the Limpopo Act. This is significant. In *Harris*,¹⁸ the Minister of Education issued a notice in terms of section 3(4) of the National Education Policy Act,¹⁹ which purported to require independent schools to enforce an age requirement for admission of learners to grade 1. This Court concluded that section 3(4) did not give him the power to do this. The Minister attempted to argue that even if the notice was not valid under section 3(4), it was valid under section 5(4) of the South African Schools Act²⁰ (Schools Act), and therefore that the mistaken reference to section 3(4) did not render the notice *ultra vires*.²¹ This Court rejected that argument and held that it was not open to the Minister to rely on section 5(4) of the Schools Act "to validated what was invalidly

¹⁸ *Minister of Education v Harris* [2001] ZACC 25; 2001 (4) SA 1297 (CC); 2001 (11) BCLR 1157 (CC) (*Harris*).

¹⁹ 27 of 1996.

²⁰ 84 of 1996.

²¹ *Harris* above n X at paras 14-5.

done under section 3(4) of the National Education Policy Act”.²² Thus the decision of the Minister could “not be rescued by reference to powers which the Minister might possibly have had but failed to exercise under the Schools Act”.²³

[46] Thus, if a functionary purports to exercise under one Act a power that that Act does not confer upon him or her, that exercise of power is unlawful even if there is another Act that confers such power on the functionary.²⁴ In this case, the Premier published a notice in the Provincial Gazette in which he purported to remove the applicant “in terms of section 13(3)(b)” of the Limpopo Act. There is no suggestion of an administrative error in the affidavits filed by the Minister. When this apparent misquote in the Premier’s notice was raised at the hearing of this matter, counsel for the fifth respondent attempted to argue that the Premier had exercised his power in terms of section 30 of the Limpopo Act and only had “regard to” section 13. Following this Court’s approach in *Harris*, it is not open to the Premier to now place reliance on section 30.

[47] It follows that the Premier was not authorised to act in terms of section 13(3)(b), given that the withdrawal of the applicant was on the ground of wrongful appointment or recognition.

Conclusion and remedy

[48] In issuing the withdrawal notice, the Premier purported to exercise powers not conferred on him by section 13 of the Limpopo Act, and accordingly infringed the constitutional principle of legality. The withdrawal notice is therefore unlawful and stands to be set aside.

²² Id at para 18.

²³ Id.

²⁴ This principle has subsequently been confirmed by this Court in *Sigcau* above n X at para 27 and *Nxumalo v President of the Republic of South Africa* [2014] ZACC 27; 2014 (12) BCLR 1457 (CC) at para 14.

[49] The notice in which the Premier purported to recognise the fifth respondent must likewise be set aside because the recognition notice and withdrawal notice are two sides of the same coin. If the withdrawal notice is set aside, this Court cannot uphold the recognition notice, since there is nothing in the Limpopo Act which suggests that two different people can hold the position of senior traditional leader at the same time. I understood counsel for the fifth respondent accepting as much at the hearing of this matter. I am fortified in this view by the fact that section 12(1) of the Limpopo Act envisages that a senior traditional leader is only recognised in terms of the section if there is a need for the position to be filled. Recognition takes place together with the withdrawal of the incumbent senior traditional leader's certificate of recognition. If the withdrawal notice falls, so too must the recognition notice.

[50] What remains to be determined is whether the notices should be set aside with prospective or retrospective effect. This Court has previously held that the retrospectivity of an order of invalidity can be limited "to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute".²⁵ Likewise, limiting the retrospective effect of an order setting aside an unlawful exercise of public power can protect the interests of persons who have altered their position on the basis that it was valid and would suffer prejudice if it were set aside with full retrospective effect. Of course, "even then the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality".²⁶

[51] In *Bengwenyama*, this Court endorsed a flexible approach for determining an appropriate just and equitable remedy following a declaration of unlawful administrative action:

²⁵ *Minister of Police v Kunjana* [2016] ZACC 21; 2016 (2) SACR 473 (CC); 2016 (9) BCLR 1237 (CC) at para 36.

²⁶ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (*Bengwenyama*) at para 84.

“The rule of law must never be relinquished, but the circumstances of each case must be examined in order to determine whether factual certainty requires some amelioration of legality and, if so, to what extent. The approach taken will depend on the kind of challenge presented – direct or collateral, the interests involved and the extent or materiality of the breach of the constitutional right to just administrative action in each particular case.”²⁷

[52] In the papers before this Court, the fifth respondent directed our attention to the outcome of interdict proceedings in the High Court that were finalised after the High Court dismissed the applicant’s review application. In its judgment, the High Court recorded that the fifth respondent had been inaugurated as senior traditional leader on 18 March 2018 and that the royal kraal was thereafter restored from Fothane to Magope, where the late Kgoshi Alfred Sebudi Langa had once ruled. The result of the proceedings was an order interdicting the applicant and others from holding themselves out to be Mapela Traditional Council members; issuing permission to occupy certificates; operating in the name of the senior traditional leader from the Fothane office; collecting monies from the Mapela Traditional Community in the name of the Mapela Traditional Authority; and acting in the position of senior traditional leader and presiding over traditional hearings.

[53] Although neither party made submissions regarding remedy, what the High Court judgment makes plain is that the inauguration of the fifth respondent on 18 March 2018 as senior traditional leader had a host of practical and administrative consequences. In this case, a retrospective order invalidating the withdrawal and recognition notices would upend the legal effect of actions taken by the fifth respondent in his capacity as senior traditional leader and thus cause prejudice to those members of the Mapela Traditional Community who have altered their position on the assumption that these actions were valid.

²⁷ Id at para 85.

[54] In publishing the recognition and withdrawal notices, the Premier acted upon the recommendation of the Kgatla Commission, which reached the same conclusion as the Ralushai Commission, namely, that the fifth respondent is the rightful senior traditional leader of the Mapela Traditional Community. Due to the Premier's incorrect understanding of the process and legal framework to be followed in order to implement such a recommendation, notices were issued that referred to the wrong empowering provision. I am not satisfied that this was a flagrant instance of illegality.

[55] To allow the invalidity of the notices to operate retrospectively would risk disruption to the orderly and effective administration of the Mapela Traditional Community. In view of the extent of the illegality and the fact that the fifth respondent has carried out the functions of a senior traditional leader since March 2018, I am satisfied that the order setting aside both the recognition notice and withdrawal notice must operate prospectively.

[56] It is thus unnecessary to consider whether the Premier complied with sections 12(1)(b) and 30 of the Limpopo Act, and whether either the recognition or the withdrawal can be set aside on the basis that the requirements of procedural fairness in terms of section 3 of PAJA were not met. Similarly, it is not necessary to deal with the admissibility of the Commissions' reports in the High Court, given that the lawfulness of the Premier's decisions does not turn on the correctness of these reports. Finally, as explained, a challenge to the constitution, jurisdiction and work of the Ralushai and Kgatla Commissions is not properly before this Court.

Order

[57] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order granted by the High Court is set aside and replaced with the following:
 - “(a) The first respondent’s Notice 4 of 2017 in Provincial Gazette 2843 of 8 August 2017 is unlawful, invalid and set aside.
 - (b) The first respondent’s Notice 5 of 2017 in Provincial Gazette 2845 of 16 August 2017 is unlawful, invalid and set aside.
 - (c) The orders in paragraph (a) and (b) above will apply from the date of this order.”
4. The first respondent must pay the applicant’s costs in both the High Court and in this Court, including the costs of two counsel.

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