Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates	**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG

CASE NUMBER: M456/2019

In the matter between:-

GEORGE POGISO MOSETLHI MATLHAKE	1st Applicant
BAROLONG BOO RATLOU BOO SEITSHIRO ROYAL FAMILY AND COMMUNITY	2nd Applicant

and

THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	1st Respondent
THE PREMIER OF THE NORTH WEST	2nd Respondent
N MAKABANYANE N.O	3rd Respondent
KGOMOTSO MONGAKE N.O	4th Respondent
OUPA SUPING N.O	5th Respondent
MOSHETE MOTSAATHEBE	6th Respondent

CORAM: MFENYANA J

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 10h00 on **06 March 2024.**

ORDER

(1) The late filing of the first to fifth respondent's answering affidavit is condoned.

(2) The report of the first respondent entitled "Commission of Inquiry report on the traditional leadership dispute and claims of the Barolong Boo Ratlou Boo Seitshiro by Mr Pogiso George Mosetlhi Matlhaku", submitted to the second respondent, and the recommendations contained therein, are reviewed and set aside.

(3) The decision of the second respondent on 21 August 2019, based on and approving the report by the first respondent entitled " Commission of enquiry report on the traditional leadership dispute and claims of the Barolong Boo Ratlou Boo Seitshiro by Mr Pogiso George Mosetlhi Matlhaku" and the recommendations thereto, is reviewed and set aside.

(4) The first to fifth respondents shall pay the costs of the application on a scale as between attorney and client, jointly and severally, the one paying the other to be absolved, such costs to include costs consequent upon the employment of two counsel.

JUDGMENT

MFENYANA J

INTRODUCTION

[1] This application concerns the traditional leadership of the Barolong Boo- Ratlou Boo – Seitshiro tribal community.

[2] The applicants seek *inter alia*, to review and set aside certain decisions and proceedings of the Commission on Traditional Leadership Disputes and Claims (the Commission) and the Premier of the North West province (the Premier), which purport to approve the report and recommendations of the Commission.

[3] Sometime in 2012 the first applicant lodged a claim for the senior traditional leadership position of the Barolong Boo Ratlou Boo Seitshiro traditional community. In 2017 the court issued an order

setting aside the decision of the Premier to approve the appointment of the sixth respondent as a Kgosi The court further directed that a Commission directed that a Commission of Inquiry be established to investigate the who the rightful heir of the Barolong Boo Ratlou Boo Seitshiro is, and establish the membership of the royal family.

[4] In 2018 the present Commission was appointed by the former Premier of the North West province to investigate the chieftaincy and the rightful heir of the Barolong Boo Ratlou Boo Seitshiro and incidental issues thereto, including establishing the membership of the Barolong Boo Ratlou Boo Seitshiro royal family.

[5] The term of office and terms of reference of the Commission were extended on several occasions.

APPLICANTS' CASE

[6] The applicants aver that the extension of the term of office of the Commission for the period between October 2018 and 31 March 2019 were not validly made, as they followed upon a proclamation that was non- existent, having been withdrawn in May 2018. Subsequent thereto, the proclamation was not published in the

Government Gazette but the Provincial Gazette, and did not relate to the applicants.

[7] The applicants assail the proceedings conducted by the Commission from October 2018 to 31 March 2019 as void *ab initio* (from 23 October 2018 when the second last extension would have commenced), and fall to be set aside.

[8] When the Commission commenced its sittings on 9 July 2018, all the parties were in attendance. On that day, the proceedings had to be postponed to enable the sixth respondent to obtain legal representation. The applicants however contend that the postponement was at the instance of the Commission, as they argued on behalf of the sixth respondent, despite submissions to the contrary, by the applicants.

[9] It is further the applicants' contention that the several postponements that ensued thereafter were caused by the lack of readiness of the sixth respondent, and the Commission's failure to provide information requested by the applicants. All these delays, coupled with the conduct of the members of the Commission led the applicants to conclude that the panel members may be conflicted, and sought a declaration in that regard. No response

was received from the Commission.

[10] Numerous letters were addressed by the applicants to the Commission relating to a myriad of issues ranging from the non-adherence to the terms of reference by the panel members, proof of expertise and knowledge of the panel members, perceived bias, the Commission's failure to respond to letters and clarify issues, as well as a request for the transcript of proceedings of 9 to 23 July 2018. The letters were predominantly, not responded to by the Commission, and none of the concerns raised were addressed. The transcript was also not provided. The proceedings went ahead regardless, albeit at a snail's pace, with the first witness only commencing with his evidence on 20 November 2018.

[11] On 28 August 2018 the Commission gave a ruling on an application for recusal, ostensibly made from the Bar on behalf of the applicants. There is a lot of contention about this 'application' as the applicants aver that they could not have been in a position to determine their firm stance on the recusal of the panel members, absent the necessary information from the Commission, which they had requested, but had not been favoured with. It is on this basis that the applicants contend that the purported application for

recusal or the consideration thereof by the Commission was irregular and premature.

[12] On that day the proceedings were once again adjourned for the Commission to respond to the applicant's concerns raised in their various letters. It is the applicants' contention that this too, did not go as smoothly as it should, as the Commission only heeded this requirement when it was raised by the sixth respondent's attorney, abandoning its earlier directive that the matter should proceed.

[13] Despite not addressing the concerns raised by the applicants, on 5 November 2018 the Commission proceeded to schedule a hearing for 20 November 2018. The applicants aver that they attended the sitting under protest as none of the issues raised had been responded to. They advised the Commission as much.

[14] The applicants further contend that the proceedings convened on 20 November 2018 were not valid as the Commission's term of office had expired and no valid extension was in place. The proceedings ultimately commenced with the testimony of the applicants' first witness.

[15] On 21 November 2018, the applicant's witness proceeded with his

testimony. It is the applicants' contention that the witness was cross- examined by the Commission despite that not being permitted in terms of the terms of reference, and improper questions asked and versions put by the Commission. This ultimately led to the applicants calling upon the Commission and the evidence leader to produce information they referred to and cross- examined the witness on, and further make themselves available to testify and be cross- examined in the inquiry.

[16] On the same basis, the applicants declined to attend any further hearings and on 19 February 2019 filed an application for the recusal of the panel members.

[17] On 31 March 2019 the Commission addressed a letter to the applicants advising that their application for recusal had been denied on the basis that a similar application had been made on 27 August 2018 which had also been refused. Despite a request by the applicants, the Commission did not provide any further reasons for this decision and or their decision of 27 August 2018.

[18] Consequently, the applicants conclude that the Commission has no appreciation of its role and has proven itself incompetent to conduct the proceedings independently, and without prejudice or bias.

[19] They seek a further order for the Commission to recuse itself, and that the Premier be directed to constitute a new and competent Commission.

[20] During the hearing of the matter, Mr Seleka submitted on behalf of the applicants that, despite the review application still pending, the Commission proceeded to write a report. The applicants later learnt that the Premier had already approved the report on 21 August 2019. Thus, their bid to stop the Premier from approving the report of the Commission become superfluous.

[21] However, Mr Seleka argued that the fact – finding mission by the Commission could not be completed amidst the complaints of bias and incompetence on the part of the Commission. He argued that there was therefore no basis for the report to the Premier. He conceded that the issue of the recusal of the panel members has become moot and could only serve as background information.

RESPONDENTS' CASE

[22] The answering affidavit was filed approximately 13 days out of time. The respondents sought that the late filing be condoned. They argued that the delay was largely occasioned by compliance

requirements in the office of the state attorney, and the steps necessary for appointment of counsel.

[23] Having considered that the length of the delay is not significant, the reasons proffered therefor, I am of the view that the interests of justice dictate that the late filing be condoned so as to enable a full ventilation of the matter.

[24] In opposing the application, the respondents raised four points in *limine*. Although crafted as such, not all the points in *limine* raised by the respondents are questions of law. They are dealt with below as preliminary points, to the extent that some may be dispositive of the matter.

[25] First, the respondents contend in respect of the application for recusal, that there was no sitting of the Commission on 31 March 2019 as the Commission completed its work on 20 February 2019 and the previous application for recusal had been dismissed.

[26] There is no merit to this contention. The letter addressed by the Commission to the applicants in response to the application for recusal is dated 31 March 2019. It records the outcome of that application.

[27] The second point is that the relief sought by the applicants in respect of the recusal of the third to fifth respondents, and the setting aside of the proceedings before the Commission, has become moot by virtue of the submission of the Commission's report to the Premier. It seems to me that the 'horse has bolted' as the Commission has been terminated. The Commission has completed its work and the proceedings completed. They cannot be stopped.

[28] Nothing can be achieved in seeking the recusal and setting aside proceedings where the same members have in any event, been relieved of their duties by passage of time. This was also conceded by the applicants.

[29] The respondents contend that there is no basis for the constitution of a new Commission. In this regard, they aver that the first applicant's conduct amounts to abuse of the process of the court. The basis for this contention appears to the first applicant's allegations of bias and incompetence on the part of the Commission, as well as his decision to no longer participate in the proceedings before the Commission.

[30] It cannot be that in asserting his rights and seeking to review the proceedings and certain decisions of the first respondent, the applicants have made themselves guilty of abusing the process of the court. They are entitled to approach the court and seek a determination.

[31] Lastly, the respondents contend that the first applicant has no valid authority to institute the proceedings before the Commission and this review application.

[32] The difficulty with this submission is dual. The first difficulty is that the first to fifth respondents were not participants in the proceedings during the Commission of inquiry. They can thus, not legitimately raise objections on behalf of the parties before the Commission. If anything, this may lend credence to the applicants' contention that the panel members acted both as players and referees in the proceedings.

[33] Secondly, it is trite that a litigant who has an interest in a matter affecting a class of persons which he is part of does not require authority. In the present proceedings, the first respondent is not representing the community as Kgosi, but is himself a claimant. Surely he is permitted to advocate his own cause.

[34] In *Patz v Greene*[1] the court established the rule that where the Legislature intends to protect the interests of a particular group of persons, then if a litigant is part of that group, he or she does not have to prove that he has authority to protect the interests of a particular class of persons. 'It is enough if the prohibition is in the interests of a class of persons of which he is a member, and if the prohibition is impliedly in the interests of such class'.[2]

[35] While I do not agree with the respondents that the resolution issued by the second respondent is specific to the application which was to be lodged against the Premier and the North West Committee on Traditional Leadership Disputes and Claims which was heard in 2017, that contention has been obviated by a further resolution by the second applicant authorising the first applicant to depose to affidavits and act on their behalf in these proceedings. It is clear from that resolution that there is a continuous nexus between applicants consider the establishment of the Commission of Inquiry and ultimately the present application.

[36] With regard to the merits, the respondents deny that the delays in

[1] 1907 TS 427.
[2] See also in this regard: *Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd*[?] 1933 AD 87.

the proceedings were occasioned by any conduct on their part. They aver that there were instances where postponements were postponements were at the instance of the applicants. In this regard they refer this Court to a letter dated 8 February 2019 in which the applicants indicated the unavailability of their legal representatives for proposed dates. This letter relates to proposed dates for scheduling of future sittings. It does not seek to prove that the proceedings were postponed at the instance of the applicants.

[37] It is further the respondents' contention that the first applicant had abandoned the proceedings despite the fact that the Commission was established as a result of his rejection of the recommendations of the North West Committee on Traditional Leadership Disputes and Claim. This contention is not accurate. It is common cause that the Commission was established pursuant to an order of this Court on 26 January 2017 per Gura J. In terms of that order, the recommendation, approval and consequently appointment of the sixth respondent as a senior leader of the second applicant was set aside. By the respondents' own admission, the 'appointment of the Commission was to give effect to that court order'.

[38] I have difficulty in accepting the respondents' reliance on section

38(2)(b) of the Governance Act for the contention that the Commission was within its powers to end the proceedings as the applicants had abandoned the proceedings. Section 38(2)(b) merely states that such conduct "shall not in any way invalidate the proceedings before or the findings of the commission". It does not confer powers to the Commission in the manner described by the respondents. In any event, the Commission did not end, as it continued to entertain and rule on an application for recusal by the applicants, which decision was communicated on 31 March 2019. The respondents' submission that the letter of 31 March 2019 was merely sent out of courtesy is at odds with the respondents' further submissions that the Commission entertained the recusal application, despite having completed its mandate. In reality, it had not, and even if it had, the applicants were not made aware of this fact.

[39] Regarding the validity of the extensions, the respondents deny that the extensions are null and void. They contend that the two extensions of the Commission's term of office (from 23 October 2018 to 31 December 2018, and 22 January 2019 to 31 March 2019) were extended together with other commissions. They contend that the reference to 'Government Gazette' was merely an

error and that the extensions were correctly gazetted in the Provincial Gazette as they pertain to disputes affecting the North West province.

[40] Notably, the respondents aver that paragraph 18 of the directives pertaining to questioning of witnesses is not applicable. In this regard the respondents undertook to present argument during the hearing of the matter. Having opted not to make any submissions and to abide by the decision of the Court, in the absence of evidence to the contrary, the applicants' assertions remain unchallenged in this regard.

[41] It is further the respondents' contention that the Commission was not aware that the issues raised by the applicants were not addressed by the Premier hence it gave a directive that the parties should prepare heads of argument. The applicants can thus not be faulted for failing to comply with a directive which was made in accordance with an incorrect understanding of the facts by the Commission.

[42] On the hearing of the matter, Ms Mongale, submitted on behalf of the first to fifth respondent that her instructions were to abide by the decision of the court, and thus had no further submissions to make.

DISCUSSION

[43] At the centre of the present application is the question whether the court has the power to review and set aside the report and recommendations of the Commission as sought by the applicants. In *Fay, Richwhite and* Co *Ltd v Davidson*[3] the court held:

> "There is no doubt that if in its ruling the Commission had fallen into a material error of law, or had laid down a procedure transgressing the principles of natural justice, or had reached a decision not open to a reasonable tribunal, a judicial review remedy would be viable."

[44] This was reaffirmed by the New Zealand Court of Appeal in *Peters v Davison*[4] where the court remarked that a Commission 'is not empowered to make erroneous decisions on questions of law during the course of its inquiry.'

[45] Both decisions were adopted into our law, and cited with approval in *Corruption Watch and Another v The Arms Procurement Commission and Others (Corruption Watch)*[5].

[3] [1995] 1 NZLR 51.
[4] [1999] 2 NZLR 164; (1998) 18 NZTC 14, 027.
[5] (81368/2016) [2019] ZAGPPHC 351; [2019] 4 All SA 53 (GP); 2019 (10) BCLR 1218 (GP); 2020 (2) SA 165 (GP); 2020 (2) SACR 315 (GP) (21 August 2019).

[46] Applying this principle to the present case, it is clear that the Commission acted arbitrarily in the exercise of its powers, in the conduct of the proceedings, in its considerations in compiling the report, and in its recommendations contained in the report to the Premier. I must state in this regard that it does not matter what the recommendations of the may have been. What matters is that they were made in the improper exercise of power by the Commission, not in consonance with the rule of law.[6]

[47] It is clear that the some aspects of the relief sought by the applicants have been overtaken by events. It is thus not necessary to deal with the issue of the recusal of the members of the Commission, as well as the proceedings of the Commission as their term has come to an end and the proceedings terminated.

[48] At the hearing of the matter, Mr Seleka conceded that the issue of the recusal has become moot. What appears to be the case is that the termination of the proceedings as well as the report, and its approval by the Premier were not communicated to the applicants. For that reason the findings of the Commission are susceptible to

[6] See in this regard: *Pharmaceuticals Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC).

be set aside on the ground of procedural impropriety.

[49] The domino effect of the setting aside of the findings and recommendations of the Commission is that their approval by the Premier on 21 August 2019, was premature and cannot stand. The recommendations were based on a flawed report which was marred by irregularities as stated above. The effect thereof is that the Commission did not discharge its mandate.

[50] The respondents cannot approbate and reprobate. They cannot on the one hand, contend that all the issues raised by the applicants were addressed, while on the other, pleading ignorance as the correspondence was between the applicants and the office of the Premier.

[51] This submission by the respondents appears to be a concession that the directive issued by the Commission was not warranted. It was given on the premise that all the issues raised by the applicants had been addressed. It is further a concession that the Commission was not always in control of its own processes.

[52] *In Corruption Watch*[7] the court noted that commissions of inquiry exercise public power. Thus, their decisions must be rationally

[7] Ibid.

related to the purpose for which the power was given. In this case, the purpose of establishing the Commission was to gather the facts necessary to the determination of the chieftancy of the Barolong Boo Ratlou Boo Seitshiro and establish the membership of the royal family. Its role was to uncover the truth. I dare add that this ought to be done in as comprehensive and inclusive a manner, as possible. This is in line with the rule of law and the exercise of public power. It plainly failed to do this.

[53] I am however disinclined to grant an order directing the Premier to compose a Commission of Inquiry. That, in my view, would be venturing into the province of the administrator, and courts are, and ought to be loathe to discharge the responsibilities assigned to another arm of the state because of the application of the doctrine of *trias politica* (separation of powers).

COSTS

[54] The applicants seek attorney and client costs against the first to fifth respondents including the costs of two counsel. They contend that the conduct of the respondents justifies a punitive costs order against them. They aver that it is the Commission that is to blame for the delays in the proceedings, which according to the applicants

were to accommodate the sixth respondent as the Commission proved to be lenient to him.

[55] They argue that the various postponements granted by the Commission were not warranted and came at a huge cost to the applicants, as they, each time, were ready to proceed with the hearing, only to be confronted with requests for postponement, and in some instances, unfair treatment from the panel members.

[56] Save for arguing against the costs of two counsel, Ms Mongale for the respondents did not seriously oppose this aspect of the relief conceding as she did, that costs are within the discretion of the court.

[57] Attorney and client costs are not awarded lightly. There must be cogent reasons why a court decides to award attorney and client costs. Such reasons are not exhaustive and may include a party's failure to file papers, an attempt to trifle with the court, and an abuse of the process of court.

[58] In this case the respondents actively opposed every application by the applicants including the interlocutory application even though it was precipitated by the respondent's own conduct as they failed to

apprise the applicants of the outcome of the inquiry. In my view, such conduct warrants a punitive costs order as prayed for by the applicant.

[59] The court must consider whether it was proper or reasonable for the applicants to employ the services of two counsel. This would ordinarily be influenced to some degree by the complexity of the matter and the amount of preparation required. There can be no doubt that this matter raises important questions of law, particularly in the development of our African jurisprudence. The amount of intellectual material to be considered also justifies the decision. I am thus, firmly of the view that the employment of two counsel was necessary in the circumstances.

ORDER

[60] In the result, I make the following order:

(1) The late filing of the first to fifth respondent's answering affidavit is condoned.

(2) The report of the first respondent entitled "Commission of Inquiry report on the traditional leadership dispute and claims of the Barolong Boo Ratlou Boo Seitshiro by Mr

Pogiso George Mosetlhi Matlhaku", submitted to the second respondent, and the recommendations contained therein, are reviewed and set aside.

(3) *The decision of the second respondent on 21 August 2019, based on and approving the report by the first respondent entitled " Commission of enquiry report on the traditional leadership dispute and claims of the Barolong Boo Ratlou Boo Seitshiro by Mr Pogiso George Mosetlhi Matlhaku" and the recommendations thereto, is reviewed and set aside.*

(4) *The first to fifth respondents shall pay the costs of the application on a scale as between attorney and client, jointly and severally, the one paying the other to be absolved, such costs to include costs consequent upon the employment of two counsel.*

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S MFENYANA

JUDGE OF THE HIGH COURT

NORTHWEST DIVISION, MAHIKENG

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For the 6th respondent	:	No appearance
Date reserved	:	25 May 2023
Date of judgment	:	06 March 2024