



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 260/13
Reportable

In the matter between:

BAPEDI MAROTA MAMONE

Appellant

and

**THE COMMISSION OF TRADITIONAL
LEADERSHIP DISPUTES AND CLAIMS**

First Respondent

**THE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

Second Respondent

**THE MINISTER OF PROVINCIAL
AFFAIRS AND LOCAL GOVERNMENT**

Third Respondent

MOHLALETSI TRADITIONAL AUTHORITY

Fourth Respondent

**ACTING KGOSHIKGOLO
KGAGUDI KENNETH SEKHUKHUNE**

Fifth Respondent

Neutral citation: *Bapedi Marota Mamone v The Commission of Traditional Leadership Disputes and Claims & others* (260/13) [2014] ZASCA 30 (28 March 2014)

Coram: Maya, Leach, Theron and Willis JJA and Mocumie AJA

Heard: 17 February 2014

Delivered: 28 March 2014

Summary: Review – s 6(2) of the Promotion of Administrative Justice Act 3 of 2000 – review threshold – whether the Commission of Traditional Leadership Disputes and Claims ignored relevant material information placed before it when deciding that the institution of the Bapedi kingship resorts under the Sekhukhune lineage – whether such decision rationally connected to that information or justifiable on the reasons given for it.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoba J sitting as court of first instance).

The appeal is dismissed with costs that include the costs of two counsel.

JUDGMENT

Maya JA: (Leach, Theron and Willis JJA and Mocumie AJA concurring)

[1] This is an appeal against the judgment of the North Gauteng High Court (Makgoba J) dismissing an application for the review, setting aside and remittal for reconsideration of a decision taken by the first respondent, the Commission of Traditional Leadership Disputes and Claims (the commission), and ancillary relief. The commission and the fourth and fifth respondents opposed the proceedings in the court below and the second and third respondents abided the court's decision. Only the appellant and the commission are involved in this appeal, brought with the leave of this court.

[2] The appellant is a traditional authority recognised as such in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Act)¹ and s 211 of the Constitution.² It has a vested interest in the

¹ Defined under the heading 'traditional leadership' in s 1 of the Act as a customary institution or structure recognised by traditional communities.

² Under s 211(1), read with s 212 of the Constitution Act 108 of 1996, the institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution.

determination of the institution of the kingship of the Bapedi community and the lineage under which it resorts. It is represented in these proceedings by Kgoshi Mampuru Mampuru III, its traditional leader. The fourth respondent is an opposing traditional authority, represented by its traditional leader, Acting Paramount Kgoshi Kenneth Sekhukhune, in whose royal house the commission found the Bapedi kingship to resort. It was cited in the proceedings merely as an interested party and, accordingly, no order was sought against it.

[3] The commission is an organ of state established in terms of s 22(1) of the Act. It is one of the bodies created under the Act to counter the erosion of the institution of traditional leadership by past colonisation, by carrying out the Act's objectives of (a) defining the place and role of the institution within the new system of democratic governance; (b) transforming it in line with constitutional imperatives and (c) restoring its integrity and legitimacy in line with customary law and practices.³ One of its functions is to investigate and make recommendations in cases where there is doubt as to whether a kingship that was established and recognised before the commencement of the Act, was established in accordance with customary laws and customs of the relevant traditional community as they applied at the time.⁴

[4] In the exercise of that function and of its own accord, the commission initiated an investigation, which entailed public hearings involving interested parties as well as research, for the Kgagudi Sekhukhune Rhyne Thulare Sekhukhune and Mampuru Royal Houses, to determine whether the paramountcy of the Bapedi was established in

³ As stated in the Act's preamble.

⁴ In terms of s 25(2)(a)(i) of the Act.

accordance with customary laws and customs of the Bapedi traditional community.⁵ In that exercise, the commission first established that (a) the Bapedi currently have an officially recognised paramountcy; (b) Kgoshi Kgagudi Kenneth Sekhukhune is the acting paramount chief; and (c) there are 70 officially recognised senior traditional leaders⁶ within his area of jurisdiction, Sekhukhune District, Greater Tubatse, Makhuduthamaga, Fetakgomo and Marble Hall.

[5] The commission then traced the history of the Bapedi lineage and kingship, which may be summarized as follows. The Bapedi traditional community originated from a Batswana clan, Bakgatla ba Makau, which lived near the Vaal River during the 16th century. It was led by Tabane who had five sons, Diale his heir and successor, Kgwadi, Kgets, Matsibolo and Mosia. Diale left the area with his wife and followers, who would form the core of the Bapedi, and resettled at Fateng near Fort Weeber.⁷ He was succeeded by his son, Thobela, who founded the Bapedi traditional community and settled at the foot of the Leolo mountains, at Mohlake, around 1650. The chieftaincy then passed down the generations to Kabu, Thobejane, Moukwange and Mohube, respectively.

[6] Upon Mohube's death, his younger brother, Mampuru I, became regent for Mohube's young heir and successor, Moramotshwe I. Subsequently, a succession struggle ensued between Mampuru I and Morwamotshe I. Mampuru I was defeated and fled the community with his followers. Dikotope, Morwamotshe I's son, then succeeded his father.

⁵ A traditional community is defined in s 1 of the Act as a community that is subject to a system of traditional leadership in terms of that community's customs and observes a system of customary.

⁶ Defined in s 1 of the Act as 'a traditional leader of a specific traditional community who exercises authority over a number of headmen or headwomen in accordance with customary law, or within whose area of jurisdiction a number of headmen or headwomen exercise authority'.

⁷ Legend has it that he left to protect his wife and unborn child whom the community wanted to kill because the child had cried whilst still in the womb, an incident perceived as a bad omen.

His younger brother, Thulare I, however, contested the chieftaincy. Assisted by Mampuru I, Thulare I killed Dikotope and usurped the chieftaincy. He then established the Bapedi kingship by conquering several neighbouring tribal communities between 1790 and 1820. When he died the kingship passed to his heir and successor, Malekutu I. The latter was poisoned for the throne by one of his brothers, Matsebe who was then killed by another brother, Phethedi. Phethedi and Thulare I's other sons were subsequently assassinated by the Matebele of Mzilikazi in the Difaqane war.

[7] Only one of Thulare I's sons, Sekwati I, survived the invasion. He settled north-east of present day Nebo district with his followers and re-established the Bapedi monarchy, which he expanded by conquering surrounding tribal communities. As regent for Malekutu I, who died without an heir, he was expected, in terms of custom, to raise seed for the late king. Although Sekwati I had a wife and son, Sekhukhune I, he took a candle wife or a *timamollo*⁸ to bear Malekutu I's heir and successor in accordance with Bapedi custom. The candle wife duly bore a son, Mampuru II.

[8] After Sekwati I's death in 1861, Sekhukhune I challenged his half-brother for the kingship by throwing a spear at him. Mampuru II would not fight. Instead, he fled the kingdom with the royal insignia and took refuge among the Swazi tribes. Sekhukhune I then buried their father and ascended the throne. He killed all Mampuru II's followers and forcefully consolidated several communities to further expand the Bapedi kingdom. In 1879, the British colonial government, which was in power at the time, incarcerated Sekhukhune I and installed Mampuru II in his place. But,

⁸ A wife married specifically to bear an heir and successor for a deceased king.

upon Sekhukhune I's release in 1881, Mampuru II fled again and Sekhukhune I successfully reclaimed the kingship. On 13 August 1882, however, Mampuru II ambushed and killed Sekhukhune I. Surprisingly though, he fled thereafter without ascending the throne. Subsequently, on 21 November 1883, he was convicted and hanged in Pretoria for the murder.

[9] Successive regencies followed thereafter. Notably in the chain, Kgoloko, Sekhukhune I's half-brother, became regent for the latter's minor son, Sekhukhune II, until he came of age. The latter did ascend the throne in due course and was predeceased by his heir, Thulare II. Thus, after his death, his other son, Moramotshe III, became regent until he died in 1965. Mampuru II, on the other hand, was succeeded (presumably where he had settled) by Malekutu II who died in 1905. The latter's son, Malekutu III, succeeded him and ruled until death in 1958. Thereafter his son and heir, the current Kgoshi Mampuru III, took reign over the Mamone traditional community which falls under the appellant.

[10] A dispute arose in the commission's investigation between the opposing royal houses' versions concerning the status of Sekhukhune I and Mampuru II following the death of Malekutu and the rest of Thulare I's sons. According to the Sekhukhune royal house, Sekwati I refused to marry a candle wife because he had a wife and had already identified Sekhukhune I as his successor. Despite his refusal, the Bakgoma and Bakgomana⁹ took a candle wife who bore a child that Sekwati I could not have sired as he was too old, so they said. The Mampuru royal house, on the other hand, contended that according to Bapedi custom the power to marry a candle wife for a deceased king vests solely in the Bakgoma

⁹ The royal advisors.

Bakgomana and not in the regent. Who actually fathers the heir is irrelevant and the deciding factor for succession is that the child is borne by a candle wife. Sekwati I's attitude towards marrying a candle wife was, therefore, immaterial. In any event, he recognised Mampuru II as the rightful heir and even gave him the royal insignia, they argued.

[11] Against this backdrop, the commission made the following findings. It agreed with the version that according to Bapedi custom, in the case of a king who dies without an heir, the Bakgoma and Bakgomana take responsibility for identifying and marrying a candle wife and appoint someone to raise seed for the deceased king. But it matters not who sires the candle wife's child as maternity is the overriding consideration for succession. As Sekwati I was a mere regent, he had no kingship to pass to his eldest son, Sekhukhune I. It was not unusual, however, for kingship to be obtained through might and bloodshed. As such, Sekhukhune I's usurpation of the kingship accorded with common practice at that time. Mampuru II's possession of the royal insignia alone did not give him kingship and he did not ascend the throne according to custom at any stage. The commission then concluded, *inter alia*, that (a) Sekhukhune I won the succession battle against Mampuru II; (b) the Bapedi paramountcy is a kingship; and (c) the kingship resorts under the lineage of Sekhukhune I.

[12] The Mampuru (Bapedi Marota Mamone) royal house accepted these findings. It took issue only with the finding that Mampuru II never ascended the throne and its decision that the kingship resorted under the Sekhukhune lineage. Consequently, the appellant launched review proceedings in the high court. Mainly, it wanted the commission to reconsider the decision, alternatively declaratory relief vesting the

kingship in it and declaring Kgoshi Mampuru Mampuru to be the king of Bapedi.¹⁰ The application was premised on the grounds that:

‘1 The Commission in deciding on the question where the lineage in which [the] Kingship resorts 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 3 of 2000 (PAJA)].

2 The decision of the Commission regarding the choice of lineage of the kingship of Bapedi is neither rationally connected to the information before it nor to the reasons given by it as stated in section 6(2)(f)(ii)(cc) and (dd) of PAJA.’

[13] The appellant contended that the commission ignored Mampuru II’s reign during Sekhukhune I’s incarceration and that he defeated and killed him upon his release which, it argued, ended Sekhukhune I’s lineage to the kingship. The court below rejected these contentions. It took the view that the commission’s methodology met the constitutional standard and was proper,¹¹ that it considered all the evidence placed before it and that its decision was rational. The court concluded that the commission’s determination on the facts before it was unimpeachable and dismissed the application.

[14] On appeal, the appellant identified the following issues for determination:

(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;

¹⁰ The alternative relief was sought in amendment proceedings brought in terms of Uniform rule 28 after the institution of the application.

¹¹ The means employed by the commission in its investigation was, in any event, not placed in issue.

- (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.

[15] The appellant's key contentions in argument before us were that the court below: (a) ignored the commission's failure to consider the evidence of Mampuru II's reign, even if brief, which the commission conceded in its answering affidavit and was in accordance with established customary principle of male primogeniture; (b) disregarded the appellant's submission that there was no succession battle between the two protagonists as Sekwati I had already passed the kingship to Mampuru II, the only king to have ruled the whole Bapedi nation, and that kingship was a birth right which cannot be lost whether exercised or not; (c) failed to properly evaluate the customary principle of usurpation of kingship by might and bloodshed, which the commission applied inconsistently, by ignoring the evidence that Mampuru II killed Sekhukhune I to defend his kingship of the Bapedi nation and was thus the last king after Sekwati I; (d) failed to evaluate the facts within their historical context as it ignored the evidence that Mampuru II, who was favoured by the British authorities as the rightful heir to the throne by birth, refused to submit to the jurisdiction of the Boer authorities, the incumbent government upon Sekhukhune's release from jail, which favoured the latter for that reason. It was finally contended that the court below blindly deferred to the commission and accepted its findings without question as it should have found that there was no rational connection between the information at the commission's disposal and its

finding on lineage, which was not justifiable in relation to the reasons given for it.

[16] It must be pointed out at the outset that the only allegations made in the appellant's founding papers in support of its review grounds, on which the case was conducted in the court below, were that the commission (a) ignored the fact of Mampuru II's brief installation on the throne by the British authorities during Sekhukhune I's incarceration; (b) correctly found that kingship could be usurped through might and bloodshed but failed to apply this rule to Sekhukhune I's murder by Mampuru II, acting in defence of his throne; and (c) ignored historical, official records which supported these facts. Therefore, most of the contentions made in its heads of arguments and orally in court as set out in paragraph [15] above, have no foundation in its affidavits. It is trite that an applicant in motion proceedings must set out the allegations upon which it relies and make out a proper case in its founding papers. It cannot make a case on appeal that was not pleaded in its papers.¹² The appellant is thus precluded from relying on any newly raised allegations that were not made in its affidavits.

[17] Turning to the review grounds in issue, the first consideration is the standard of review of administrative action which must be applied in adjudicating this appeal.¹³ The right to administrative action that is lawful, reasonable and procedurally fair derives from s 33(1) of the Constitution. Section 33(3) of the Constitution envisages the enactment of

¹² *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D); *National Council of SPCA v Openshaw* 2008 (5) SA 339 (SCA); *Betlane v Shelley Court* 2011 (1) SA 388 (CC) at 396C.

¹³ It was not in dispute that the commission's decision constituted administrative action and that the provisions of the Promotion of Administrative Justice Act 3 of 2000, which the appellant invoked, apply.

national legislation to give effect to that right. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) is that legislation. Section 6(2) of PAJA provides, in relevant part, for the judicial review of administrative action if

‘ ...

(e) the action was taken –

...

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

...

(f) the action itself –

(ii) is not rationally connected to –

...

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;’

(It is relevant too that s 22(2) of the Act itself requires the commission to carry out its functions in a manner that is fair, objective and impartial.)

[18] The review threshold is rationality.¹⁴ The test is an objective one¹⁵ and the reviewing court asks if there is a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at.¹⁶

¹⁴ *Bel Porto School Governing Body & others v Premier, Western Cape & another* 2002 (3) SA 265 (CC) para 89; *Carephone (Pty) Ltd v Marcus NO & others* 1999 (3) SA 304 (LAC) paras 31 and 32.

¹⁵ *Pharmaceutical MNFRS of SA: In re Ex Parte President of the RSA & others* 2000 (2) SA 674 (CC) para 86.

¹⁶ *Carephone* above n14; *Trinity Broadcasting (Ciskei) v ICASA* 2004 (3) SA 346 (SCA) para 21.

Administrative action that fails to pass this threshold is inconsistent with the requirements of the Constitution and is unlawful.¹⁷ It matters not that the decision-maker acted in the belief, in good faith, that the administrative action was rational.

[19] As indicated, the only contentions in support of the appellant's case that warrant determination (and with which the court below dealt squarely) are those set out in paragraph [16] above. In regard to the allegations in (a) and (b), the court below agreed with the commission, correctly so in my opinion, (and the appellant properly accepted this finding in its papers) that Sekhukhune I legitimately usurped the kingship as it was not uncommon to do so through might and bloodshed. In the court's view, Mampuru II's coronation by the British government was inconsequential as it was a unilateral act, inconsistent with Bapedi customary law, and intended merely to fulfil that government's policy. This must be so as no evidence whatsoever was given to the commission that the Bakgoma and Bakgomana, upon which it was agreed the task of identifying the king in accordance with Bapedi customary law and custom rests, was involved in Mampuru II's enthronement. The court below further approved the commission's finding 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. I can find no fault with this finding on the evidence placed before the commission.

¹⁷ *Democratic Alliance v President of the Republic of South Africa & others* 2013 (1) SA 248 (CC) para 27; *Masetlha v President of the Republic of South Africa & another* 2008 (1) SA 566 (CC) para 81; *Pharmaceutical MNFRS of SA* above, para 90.

[20] The contention set out in (c), which counsel rightly did not argue with any vigour, is equally without merit. The commission dealt comprehensively with the historical records which purportedly supported the appellant's case and showed that the appellant's reliance on them was totally misplaced as they were irrelevant to the issues under consideration and were quoted out of context. The commission's report, which forms part of the record, succinctly described the methodology employed by the commission in its investigations, which was properly not challenged, and is replete with references to various historical texts and legislation.

[21] In short, the appellant failed to prove that the commission ignored any relevant evidence. There simply is no basis on the record to conclude that the commission's decision was not rationally connected to the information before it, or the reasons given by it. There is also no basis for the bald contention that the court below blindly deferred to the commission. It is well to keep in mind that unlike, in the case of appeals, in review proceedings

'[t]he setting of [the review] standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power [to make administrative action] has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it ...'¹⁸

[22] Lastly, it is necessary to deal briefly with an issue which, although not raised in argument before us, was nonetheless not expressly abandoned – the quest for a declarator concerning who should be the rightful heir to the Bapedi throne. Suffice to say that it was ill-conceived

¹⁸ *Pharmaceutical MNFRS of SA*, above para 90.

as it had no basis at all. The task of the commission was merely to determine the existence of the Bapedi kingship and its lineage. It made a decision solely in that regard and it is only the rationality of that decision that could be the subject of any review proceedings. And again, as was common cause in the papers, the power to identify the king rests solely with the Bakgoma and Bakgomana, in accordance with Bapedi customary law and custom.

[23] In all the premises, I am satisfied that the commission did nothing that constitutes a ground, recognised in our law, for review. The decision it made is one which a reasonable decision-maker could reach.¹⁹ The high court correctly dismissed the application and the appeal must, therefore, fail.

[24] Accordingly, the following order is made:

The appeal is dismissed with costs that include the costs of two counsel.

MML MAYA
JUDGE OF APPEAL

¹⁹ *Bel Porto* above, para 90.

APPEARANCES:

For appellant:	DS Kumalo SC (KJ Selala) Instructed by: JP Moloto & Co, Johannesburg Matsepes Inc, Bloemfontein
For 1 st respondent:	G Bofilatos SC (LM Montsho) Instructed by: Bradrish Daya Attorneys, Pretoria Webbers Attorneys, Bloemfontein