THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 295/20

In the matter between:

MOIPONE MOROKA	**APPELLANT**

and

PREMIER OF THE FREE STATE	**FIRST RESPONDENT**
COMMISSION OF TRADITIONAL LEADERSHIP DISPUTE AND CLAIMS	**SECOND RESPONDENT**
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**THIRD RESPONDENT**
MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**FOURTH RESPONDENT**
FREE STATE HOUSE OF TRADITIONAL LEADERS	**FIFTH RESPONDENT**
MAROKA SIBONELA KINGSLEY	**SIXTH RESPONDENT**

Neutral citation: *Moipone Moroka v Premier of the Free State Province and Others* (295/2020) [2022] ZASCA 34 (31 March 2022)

Coram: **PETSE AP AND MBHA, MOKGOHLOA, MOTHLE AND HUGHES JJA**

Heard: 07 September 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 31 March 2022.

Summary: Customary law – whether the Premier contravened section 21(2)(*b*) of the Traditional Leadership and Governance Framework Act 41 of 2003 when he referred the dispute in respect of the senior traditional leadership to the Commission before the Free State House of Traditional Leaders could deal with the dispute – decision of the Commission on Traditional Leadership Dispute and Claims – whether the Commission had authority to investigate and make recommendations in respect of a dispute which arose after 1 September 1927 in terms of s 25(2)*(viii)* of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 (the Amendment Act) – whether the Commission had authority to deal with the dispute which was submitted to it after six months from the date of coming into operation of the Amendment Act – the Commission had no such authority.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Jordaan J with Murray AJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'2.1 The findings and recommendations of the Commission on Traditional Leadership Disputes and Claims (the Commission) concerning the senior traditional leadership position of the Barolong Boo Seleka published on 29 February 2016 are reviewed and set aside.

2.2 The decision of the Premier of the Free State Province accepting the findings and recommendations of the Commission is reviewed and set aside.

2.3 The first respondent is ordered to pay the costs of this application.'

JUDGMENT

Mokgohloa JA (Petse AP and Hughes JA concurring):

[1] The issue in this appeal concerns the lawfulness of the decision taken by the first respondent, Premier of the Free State (the Premier) to refer the dispute regarding the senior traditional leadership of Barolong Boo Seleka to the second respondent, Commission of Traditional Leadership Disputes and Claims (the Commission) before affording the Free State House of Traditional Leaders (the House) an opportunity to deal with the dispute in terms of s 21(2)*(b)* of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Act). The Free State Division of the High Court, Bloemfontein (the high court) found that the Premier did not contravene the Act and dismissed the application with costs.

[2] Dissatisfied with the decision of the high court, the appellant (Ms Moipone Moroka), sought leave to appeal and raised a further ground of appeal that the

Commission had no authority to investigate and make recommendations to the Premier regarding the Barolong Boo Seleka senior traditional leadership. She relied on s 25(5) of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 (the Amendment Act). Based on this, the high court granted leave to this court.

[3] There are two preliminary issues that I need to deal with before dealing with the merits of this matter. These are: (a) whether the appeal has become moot, and (b) whether this court can entertain an issue that is raised for the first time on appeal.

[4] Before the hearing of this appeal, the parties were directed in writing to file written submissions answering the following: 'the sixth respondent in this case, Sehunelo Kingsley Moroka, having passed away on 15 August 2020, does this then not mean it is open to the Barolong Boo Seleka Royal Family to nominate another person to fill the vacancy? And if the nomination process needs to start all over again in accordance with the prescripts of the Free State Traditional Leadership and Governance Act 8 of 2005, does that not mean that the appeal has become moot?' Both the appellant and the first respondent delivered written submissions.

[5] In his written submissions and at the hearing of the appeal, the Premier argued that the matter has become moot in that the son of the sixth respondent, Mr Letshego Archibald Moroka, has already been identified as a legitimate successor. Furthermore, that the Premier has appointed Mr Samuel Lehulere Moroka (Letshego's uncle) as a regent until Letshego is ready to ascend the throne.

[6] The appellant, on the other hand, contended that the findings and recommendations of the Commission did not mention the name of Kingsley Moroka. According to the appellant, the findings of the Commission were, in essence, confined to the identification of the rightful ruling house of the Barolong Boo Seleka as the house of Richard Maramantsi. Consequently, while it may be open to the Barolong Boo Seleka Royal Family to nominate another person to fill the vacancy, the

Commission's report dictated that such person should come from the house of Richard Maramantsi and not the family of Kgosi Tsipinare that had for at least 137 years been the royal family of Barolong Boo Seleka.

[7] I find the appellant's contention to have merit. Her attack on the findings and recommendation of the Commission was not in respect of a specific person recommended but of the house or bloodline the traditional leadership had to follow. Therefore this issue is still alive and has to be dealt with.

[8] Regarding the argument raised for the first time on appeal, the most common situation when an appeal court may consider an argument raised for the first time on appeal is where the argument involves a question of law. Such argument must be apparent from the record, which could not have been avoided if raised at the proper juncture. In the context of the facts of this case, both the timing of the referral of the dispute to the Commission by the Premier and the date of commencement of chapter 6 of the Act are not only sufficiently canvassed on the papers but are, most importantly, also common cause. The attack on the Commission's authority is a point of law and this court can deal with it. Furthermore, this court's consideration of the new point of law will not occasion unfairness to the parties. Thus, the interests of justice do not militate against the consideration of the new argument raised by the appellant for the first time on appeal. I now turn to deal with the merits of the appeal.

[9] The dispute in this case arose against the backdrop of contestations in relation to various kingships or queenship by traditional leaders around the country. In order to attempt and resolve these contestations, Parliament, acting in terms of s 22 of the Act, established the Commission on Traditional Leadership and Disputes and Claims (the Commission). In terms of s 23(1)*(a)* of the Act, the Minister,[1] after consultation with the National House of Traditional Leaders, must appoint a chairperson and not more than four persons for a period not exceeding five years as members of the

[1] In terms of s 1 of the Act the Minister, for the purposes of the Act, is the national Minister responsible for traditional leadership matters.

Commission. Such members must have knowledge of customary law, customs and the institution of traditional leadership. The Commission's functions included the investigation and resolution of traditional leadership claims and disputes in the Republic.

[10] On 1 February 2010, the Act was amended extensively in terms of the Amendment Act. The functions of the Commission regarding resolution of traditional leadership disputes were altered so that the Commission could only deal with disputes dating from 1 September 1927. I shall return to this Amendment Act later.

[11] The factual background of this matter can be summarised as follows. There appears to be a lengthy history of leadership contestation between the Barolong Boo Seleka Royal Family and the Barolong Boo Seleka Royal Khuduthamaga. This contestation dates back to the 1880s when the traditional leadership moved from one lineage to another. During the 1880s, Kgosi Moroka II married a woman by the name of Nkhabele who came with a child named Tshipinare. Therefore, Tshipinare became the stepson to Kgosi Moroka II. Tshipinare grew up to be a brave warrior and saved his stepfather Kgosi Moroka's life in the war against the BaSotho. As a result, Kgosi Moroka II decided that Tshipinare should be his successor. It is from this time that the traditional leadership of the Barolong Boo Seleka vested in the Tshipinare's lineage until the passing on of Kgosi Ramokgopa Moroka in 2011.

[12] After the passing of Kgosi Ramokgopa, the royal family identified Kgosana Gaopalelwe Moroka, the appellant's brother, as a successor. However, Kgosana Gaopalelwe had, at that stage, not yet reached maturity and his mother, Kgosigadi AGG Moroka, the appellant's mother, was identified as the Regent. It seems that the other faction, led by the sixth respondent, the late Kingsley Sehunelo Moroka, objected to this and wrote a letter to the Premier in pursuit of its objection. The Premier responded in a letter dated 18 October 2011 as follows:

'4. Regarding the matter at hand I wish to respond as follows:

The Act (the Free State Traditional Act of 2005) defines the "Royal Family" as "the core customary institution or structure consisting of immediate relatives of the ruling family within

the traditional community who have been identified in terms of custom, and includes, where applicable, other family members "who are close relatives of the ruling family". According to section 18 therefore only immediate relatives of the ruling Moroka Family of the late Kgosi Ramokgopa Moroka are entitled to identify the successor of the Chieftaincy. The Royal Family of Moroka has identified Kgosana Gaopalelwe Moroka as the successor to the Chieftaincy of the Barolong Boo Seleka, however according to the Royal Family Kgosana Gaopalelwe Moroka has not yet reached a matured age and is not yet ready to be installed as Kgosi. The Royal Family will inform the Premier when Kgosana Gaopalelwe Moroka is ready to take over. The Premier will recognize Kgosana Gaopalelwe Moroka as Kgosi by way of a notice in the Provincial Gazette and by issuing of a certificate of recognition to him.
5. In the light of the above, it would appear that your resolution of 25 August 2010 in which you resolved to relieve Kgosigadi AGG Moroka of all her responsibilities and duties in Barolong Boo Seleka is in conflict with the Free State Traditional Leadership and Governance Act No.8 of 2005.This also applies to your decision of 21 November 2010 to recognize SK Moroka (sixth respondent) as the rightful leader of Barolong Boo Seleka Tribe. Both these resolutions can only be taken by the Royal Family as defined in the Act.'

[13] It is not clear as to what happened after the Premier's letter of 18 October 2011 but ultimately, Kgosi Gaopalelwe Moroka ascended the throne until his passing in July 2013, after which the dispute resurfaced. It is this dispute that the Premier referred to the Commission for investigation and this was done without affording the House an opportunity from the outset to deal with the dispute in terms of s 21 of the Act. This is evident from the minutes of the meeting of the Free State House of Traditional Leaders held on 30-31 January 2014, which records the following:
'It was unanimous that it was wrong that the House was not included in the initial stages of the dispute but appreciated that there are moves by the department to advice Premier to establish the commission or to the refer the matter to the Commission on traditional leadership disputes and claims to investigate and recommend. … The House was unanimous that the only known royal leaders of Barolong boo Seleka to them has been the current royal family until this dispute The House is in agreement that the matter will best be resolved by the neutral body which is the commission. … The House recognises the current royal family and will abide by findings and determination as recommended by the commission'.

However, once the Free State House of Traditional Leaders was consulted, it endorsed the proposed referral of the dispute to the Commission by the Premier as is apparent from the excerpt from its minutes quoted above.

[14] The reason for not affording the House an opportunity to resolve the dispute initially, is captured in a letter written by the chairperson of the House to the HOD of the Department of Cooperative Governance and Traditional Affairs (COGTA) on 3 February 2014 which reads:

'6. On 30 – 31 January 2014 the full sitting of the House argued that the involvement of the House in this dispute resolution might have created doubts of biasness because some of the family members who are involved in the succession dispute are members of the House and considering that a number of interventions did not yield success; the sitting concurred with the resolution that the matter must be resolved by the neutral body.'

[15] Furthermore, and on 18 March 2014, the HOD of COGTA, directed by the Premier, wrote a letter to the chairperson of the Commission requesting it to investigate and recommend the rightful successor for the position of a senior traditional leader of Barolong Boo Seleka. In this letter, the HOD stated that the names of Ms Moipone Maria Moroka (the appellant) and the late Kingsley Sehunelo Moroka (the sixth respondent) were forwarded to the Premier by the opposing groups as the possible successors to Kgosi Gaopalelwe Moroka. The letter further stated that attempts by COGTA and the Free State House of Traditional Leaders to resolve the dispute had failed.

[16] Section 21(2)*(a)* of the Act provides that disputes relating to senior traditional leadership must first be referred to the relevant House, which House must, in accordance with its internal rules and procedures, seek to resolve the dispute. It is only if the House is unable to resolve the dispute that such dispute must be referred to the Commission. As already indicated above, the dispute in this matter was referred to the House to deal with it after the House had initially been overlooked. However, nothing turns on this for on balance, in my view, the Premier substantially complied with the prescripts of s 21(2)*(a)* of the Act.

[17] As requested by the Premier, the Commission met, investigated the dispute and made its findings that the rightful ruling house is the house of Setilo whose descendants were from the house of Ramantshi Richard. The Commission, therefore, recommended that the royal house identify a candidate from the house of Setilo to succeed Kgosi Gaopalelwe Moroka. The Commission's recommendation had the far-reaching effect of wresting the traditional leadership from the house of Tshipinare which had ruled from the 1880s. Of importance in this regard is the question posed by the Commission itself: can the chieftainship be reversed and, if so, after how long? Curiously, the Commission refrained from answering this question and instead left it to the Premier to answer. Based on this report, the Premier, without answering the question posed by the Commission, advised the royal family that he recognises the sixth respondent as the senior traditional leader of Barolong Boo Seleka.

[18] This then raises the question whether the Commission had the authority to investigate the dispute. The authority and functions of the Commission are provided for in s 25 of the Amendment Act as follows:

'Functions of Commission

(1) The Commission operates nationally in plenary and provincially in committees and has authority to investigate and make recommendations on any traditional leadership dispute and claim contemplated is subsection (2).

(2)(a) The Commission has authority to investigate and make recommendations on –

…

(viii) all traditional leadership claims and disputes dating from 1 September 1927 to the coming in operation of Provincial Legislation dealing with traditional leadership and governance matters; and

…

(5) Any claim or dispute contemplated in this Chapter submitted after six months after the date of coming into operation of this chapter may not be dealt with by the Commission.'

[19] The appellant contended that the Commission had no authority to investigate the dispute because the dispute did not arise from what transpired on 1 September 1927 or thereafter but rather from what transpired in the 1880s, long before the cut-

off date, ie 1 September 1927. The Premier, on the other hand, argued that the dispute did not arise in the 1880s, but in 2011 when Kgosi Ramokgopa died. The Premier submitted that in trying to resolve the dispute, the Commission had to look into the evidence dating back prior to 1 September 1927; this, however, does not, so went the argument, imply that the dispute itself arose before 1 September 1927. I agree with the Premier's submission. The dispute arose in 2011 when the rival group led by Kingsley Moroka opposed the appointment of Kgosi Gaopalelwe Moroka as the successor to Kgosi Ramokgopa.

[20] The appellant contended further that the Commission had no authority to investigate the present dispute as it was not submitted to the Commission within six months after the coming into operation of the Amendment Act on 1 February 2010.

[21] The cardinal question relating to s 25(5) of the Amendment Act is the phrase 'may not'. The appellant argued that this phrase means 'shall not' whilst the respondent argued otherwise. The basic tenet of statutory interpretation is that the words used in the statute must be given their ordinary meaning unless a contrary intent is manifest from the statute itself. In doing so, the language used is construed in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; and the apparent purpose to which it is directed[2].

[22] I agree with the first respondent's submissions that as a general rule the word 'may' in a statute confers the power to exercise a discretion. However, in the present matter the power to exercise a discretion is couched in the negative which, in my view, in effect, takes away the power to exercise a discretion. Simply put, on a purposive and contextual construction of s 25(5), the phrase 'may not' means that the Commission did not have the necessary authority to deal with the dispute referred to it after six months of coming into operation of the Amendment Act. As stated earlier, the Amendment Act came into operation on 1 February 2010. The dispute in question

[2] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)

was referred to the Commission in 2014. Therefore the Commission had no authority to deal with this dispute and the appeal should consequently succeed on this point.

[23] In the result, the following order is made:

1The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

‘2.1 The findings and recommendations of the Commission on Traditional Leadership Disputes and Claims (the Commission) concerning the senior traditional leadership position of the Barolong Boo Seleka published on 29 February 2016 are reviewed and set aside.

2.2 The decision of the Premier of the Free State Province accepting the findings and recommendations of the Commission is reviewed and set aside.

2.3 The first respondent is ordered to pay the costs of this application.’

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F E MOKGOHLOA
JUDGE OF APPEAL

Mbha JA dissenting (Mothle JA concurring):

[24] I have read the judgment written by my colleague Mokgohloa JA (the majority). Regrettably, I am unable to agree, with respect, with the majority’s approach in dealing with the issues central to this appeal and the majority’s proposed outcome thereof. I am of the view that the court a quo’s findings of fact, and its conclusion that the Free State House of Traditional Leaders (the House) properly dealt with the leadership dispute of the Barolong before it was referred to the Commission, were correct and were based on the undisputed evidence before it. Consequently, such findings are unassailable and cannot be disturbed. In addition, the appellant failed to

satisfy the requisite and applicable test governing the raising of new points of law on appeal.

[25] I will also demonstrate in this judgment that the Commission was legally competent and properly authorised to deal with the Barolong traditional dispute. Properly interpreted, s 25(5) of the Act did not proscribe the Commission from accepting the referral to deal with the dispute. In addition, the appellant, by participating and cooperating with the Commission as it dealt with the said dispute tacitly, if not expressly, consented that the Commission was empowered and authorised to investigate and resolve the dispute. By so doing, the appellant effectively submitted to the jurisdiction of the Commission.

[26] The majority has correctly set out the background to the dispute with reference to the historical biography of the Barolong and properly located the genesis of the dispute. I do not, therefore, intend to repeat that narration. However, for this judgment, it is important to set out and highlight the essential grounds on which the appellant premised her application in the court a quo.

[27] The appellant instituted review proceedings to set aside the findings and recommendations of the Commission dated 29 February 2016 and the decision of the Premier dated 2 November 2017 accepting the findings and recommendations of the Commission. The review application was premised on the following grounds:

(a) That there was non-compliance with the provisions of s 21(2) of the Traditional Leadership Governance Framework Act 41 of 2003 (the Act), in that the dispute was never referred to the House before being referred to the Commission; and

(b) That the Commission's decision was arbitrary and did not take into account all relevant facts. Furthermore, the Commission failed to properly interpret and apply the provisions of s 25(3)*(a)* of the Act, which enjoined the Commission, when considering a dispute or claim, to consider and apply customary law and the customs of the relevant traditional community as they were when the event that gave rise to the dispute or claim occurred.

[28] In its judgment delivered on 19 September 2021, the court a quo found that there was no merit to the appellant's ground for review based on the alleged breach of s 21(2) of the Act that the dispute was never dealt with in the House before it was referred to the Commission for investigation and resolution. In arriving at this finding, the court a quo referred to the long history of the Barolong dispute and the correspondence from the House in which the latter had ultimately resolved that the dispute be referred to the Premier, after its attempts to resolve it, had yielded no positive outcome.

[29] The court a quo referred to a letter dated 3 February 2014, by Mr Morena L S Moloi (Mr Moloi), chairperson of the House, to the HOD: Cooperative Governance and Traditional Affairs (CoGTA). The Premier provided this letter in his Notice of Compliance in terms of Rule 53 of the Uniform Rules of Court. The following excerpts from the letter, which the court a quo quoted verbatim, are relevant:

(a) In paragraph 4, Mr Moloi wrote that after the death of Kgosi G Moroka in July 2013, the same conflict resurfaced 'prompting the Department of Cooperative Governance, representatives of the *Free State House of traditional leaders* and State law advisors, in August 2013, to meet the clashing Barolong Boo Seleka Royal Family and the Barolong Boo Seleka Khuduthamaga to *discuss amicable ways to resolve the dispute*. The meeting resolved that the matter should be referred to the Premier to either:

4.1 Establish the commission of enquiry in terms of s 127*(e)* of the Constitution of South Africa or

4.2 Refer the matter to the Commission to investigate and make recommendations'. (Emphasis added.)

(b) In paragraph 5, Mr Moloi stated that during its sitting on 21 January 2014, the executive committee of the House acknowledged that the Barolong succession dispute has been going on for a number of years and has been addressed on numerous platforms; 'while numerous attempts by the House and the department of CoGTA to resolve it proved unsuccessful'. Mr Moloi further indicated that in the meeting, the House unanimously decided that the situation in Thaba Nchu (among

the Barolong), was negatively affecting the institution of traditional leadership and service delivery and needed urgent resolution. On that day, the executive committee of the House resolved that the dispute be referred to the Premier for intervention, in line with the resolution that was taken on 27 August 2013 between the House, the department of CoGTA and the two factions within the Barolong and, importantly, to include the item in the order paper of the full sitting of the House for further discussion.

(c) In paragraph 6, Mr Moloi indicated that on '30-31 January 2014, the full sitting of the House argued that the involvement of the House in this dispute resolution might have created doubts of biasness because some of the family members who are involved in the succession dispute are members of the House and *considering that a number of interventions did not yield success*, the sitting concurred with the resolution that the matter must be *resolved by the neutral body*'. (Emphasis added.)

(d) In paragraph 7 of the letter, Mr Moloi wrote that '[t]aking into account that the available provincial avenues to resolve the dispute have been exhausted, the Free State House of Traditional Leaders humbly requests the Premier to consider one of the options referred to in paragraphs 4.1 and 4.2 above to, resolve [the] Barolong boo Seleka succession dispute'.

[30] The court a quo also referred to a letter dated 18 March 2014 written by Mr Duma (HOD: Cooperative Governance and Traditional Affairs), which stated the following:

'(ii) . . . On 19 July 2013, two names of Ms Moipone Maria Moroka (the appellant) and Mr Kinsley Sehunelo Moroka (sixth respondent) were forwarded to Premier from both opposing groups of which the matter constituted a dispute.

(iii) All endeavours of the department and the Free State House of Traditional Leaders to resolve the matter amicably weren't fruitful, thus the Premier couldn't exercise his powers to appoint a successor. There is therefore a void in the functioning of that traditional council and thereby necessitating an urgent intervention to break the stalemate in that traditional community.

(iv) The department has found it prudent to request the Commission on Traditional Leadership Disputes and Claims investigate the matter and advise the Premier.'

[31] Based on the aforementioned undisputed evidence, the court a quo rejected the appellant's contention that the Premier circumvented the provisions of s 21(2) of the Act by making his decision before the House had an opportunity to attempt to resolve the dispute. In my view, it is clear, as appears from Mr Moloi's aforesaid letter, which the House had on numerous occasions unsuccessfully attempted to resolve the matter.

[32] Since the preparation of her judgment, Mokgohloa JA has now, in her latest judgment, accepted that the Barolong traditional dispute was indeed referred to the House, which ultimately attempted to resolve it. This acceptance is not without significance. It bears mentioning that this was a primary issue for determination, which served before the court a quo. As stated earlier, the court a quo dismissed the appellant's contention that the Premier circumvented the provisions of s 21(2) by making his decision before the House had the opportunity to attempt to resolve the dispute.

[33] The belated acceptance by Mokgohloa JA serves, with respect, to underscore the patent prejudice that will be suffered by the Premier as a result of permitting a completely new point of law of jurisdiction to be raised in this appeal, which I address in the paragraphs immediately below.

[34] I have set out in a fair amount of detail the appellant's cause of action, from which it will be noted that her complaint was based entirely on non-compliance and breach of the provisions of s 21(2) of the Act. However, on appeal, the appellant raised a new ground of appeal, namely that the Commission had no authority to investigate and make recommendations to the Premier regarding the dispute of traditional leadership of the Barolong. In this respect, the appellant sought to rely on s 25(5) of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 (the Amendment Act), which provides that any dispute submitted six months after the coming into operation of the applicable chapter, ie on 1 February 2010, may not be dealt with by the Commission.

[35] The majority accepts quite rightly, in my view, that the attack on the Commission's authority and jurisdiction is a new point of law. However, I differ with the majority's approach in dealing with the new issue raised namely, that 'consideration of the new point of law will not occasion unfairness to the parties'.[3]

[36] The law governing the raising of a new point of law on appeal is trite. In *Provincial Commissioner, Gauteng South African Police Services and Another v Mnguni,*[4] this court expressed itself as follows:

'It is indeed open to a party to raise a new point of law on appeal for the first time, with the provision that it does not result in unfairness to the other party; that *it does not raise new factual issues* and does not cause prejudice. In *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) Ngcobo J said the following (para 39):

"The mere fact that a new point of law is raised on appeal is not itself sufficient reason for refusing to consider it. If the point is covered by the pleadings and its consideration on appeal involves no unfairness to the party against whom it is directed, this Court may in the exercise of its discretion consider the point. Unfairness may arise, where for example, a party would not have agreed on material facts, or on only those facts stated in the agreed statement of facts had the party been aware that there were other legal issues involved and that "[it] would similarly be unfair to the party if the law point and all its ramifications were not canvassed and investigated at trial."' (Emphasis added.)

[37] In developing the jurisprudence on this matter, the Constitutional Court has laid a further requirement that it must be in the interests of justice that the new point of law be entertained. The court in *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another (Mighty Solutions)*,[5] per Van der Westhuizen J, expressed itself as follows in this regard:

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[3] See para 5 of the majority judgment.

[4] *Provincial Commissioner, Gauteng South African Police Services and Another v Mnguni* [2013] ZASCA 2; [2013] 5 BLLR 421 (SCA); [2013] 2 All SA 262 (SCA); (2013) 34 ILJ 1107 (SCA) para 27. See also *Nwafor v Minister of Home Affairs and Others* [2021] ZASCA 58 para 29.

[5] *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34; 2016 (1) SA 621 (CC); 2016 (1) BCLR 28 (CC) para 62.

'It would hardly be in the interests of justice for an appeal court to overturn the judgment of a lower court on the basis that Court was never asked to decide. As lawyers always say, "on this basis alone" this Court should not entertain the enrichment argument.'

The enrichment argument had been raised for the first time in the Constitutional Court.

[38] Van der Westhuizen J continued as follows in para 63:

'In *Lagoonbay* this Court stated that it must be in the interests of justice, which takes into account the public interest and whether the matter has been fully and fairly aired, to hear a new argument for the first time. In this case the issue was not properly raised on either the facts or the law.'

[39] The appellant has, in my view, failed to meet each and every element of the test I have explained above. The new point of law is not foreshadowed in the pleadings, and neither was any fact whatsoever pertaining thereto referred to in the court a quo.

[40] I must, however, point out that in the Commission's report published on 29 February 2016, the Commission recorded that s 25(5) of the Act, as amended, provides that any claim or dispute contemplated in this chapter submitted after six months after the date of coming into operation of this chapter may not be dealt with by the Commission.

[41] However, it must be noted that this is stated by the Commission generally as part of the explanation of its statutory mandate to deal with issues and disputes pertaining to traditional leadership. In this regard, the Commission refers expressly to specific provisions in the Act governing its establishment, purpose and operation. It is also significant to note that the Commission does not state or acknowledge that it did not have the necessary power or capacity to deal with the traditional leadership of the Barolong dispute that was validly referred to it to investigate and make recommendations in relation thereto. It cannot, therefore, by any means be

maintained that the issue of the Commission's power to investigate the dispute was squarely raised in the pleadings.

[42] What is crying out for an explanation, in my view, is that whilst the Commission published its final report on 29 February 2016, the appellant only initiated her review application on 4 September 2018. It is common cause that the Commission never filed any papers and was never represented in the court a quo. Neither was it before us in this appeal. There is no explanation why the appellant initiated her application, clearly involving the Commission after it had already ceased to exist. The Premier does not, as a result, have the benefit of the Commission's stance as to why it proceeded to entertain the dispute. Accordingly, I find that the Premier has been prejudiced by all these events in the conduct of his case.

[43] In *Mphephu v Mphephu-Ramabulana and Others,*[6] this court had occasion to consider the establishment, aim and purpose of the Commission, both under the old 2003 Act and the 2009 Amendment Act. It affirmed the Commission's competency to deal with traditional leadership disputes and claims, as in this case. Importantly, the court noted that the Commission's additional lifespan of five years, which was due to expire in 2016, was extended to 31 December 2017 by way of proclamation by the President. I will later deal with the significance of the fact that the Commission is no longer in existence. That the Commission was legally competent to deal with the Barolong traditional leadership dispute, is therefore without any doubt. It follows that the Commission had the authority to accept relevant referrals to investigate, for as long as such investigations could be finalised within its prescribed lifespan. The words 'may not' within s 25(5) must therefore be read in that context.

[44] I make the following example, to show the impracticality of interpreting this section in the manner supported by my colleagues: if the Commission received only two referrals within the six-month laid down period and completed the investigations

[6] *Mphephu v Mphephu-Ramabulana and Others* [2019] ZASCA 58; [2019] 3 All SA 51 (SCA); 2019 (7) BCLR 862 (SCA).

in that same year, this would mean that for the remaining four years the Commission would not be able to do any other work for which it was constituted. Surely this could never have been the intention of the legislature.

[45] In light of what is stated in the preceding paragraph, it follows that the majority's reliance on s 25(5) of the Amendment Act, as a basis for holding that the Commission lacked competency to deal with the Barolong traditional leadership dispute, is, with respect, erroneous. Interpreted purposefully and contextually[7] in relation to the stated aims and objectives of the Commission as set out in the rest of the enabling Act, it becomes immediately apparent that the Commission was well within its powers when it accepted the referral of the dispute within the legislated period of its lifespan.

[46] As I have stated in paragraphs 37 and 38, in *Mighty Solutions* the Constitutional Court specifically cautioned against an appeal court overturning a judgment of a lower court 'on the basis that Court was never asked to decide'. Accordingly, it is not in the interest of justice to entertain the new point of law relating to jurisdiction. The acceptance by the majority, that the House ultimately attempted to resolve the dispute, underscores the warning by the Constitutional Court in *Mighty Solutions*. All these factors, cumulatively taken, buttress the conclusion that it will not be in the interest of justice to interface this new point of law into this appeal. In addition, I have pointed out that the Commission, a body that was established to resolve small traditional leadership disputes, no longer exists. It is common cause that the Commission expended time and resources investigating the dispute and that the appellant fully and willingly participated in such investigation. Importantly, the report of the Commission, particularly its contents, has not been reviewed and set aside. The report still stands.

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[7] In *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 28, the Constitutional Court said '. . . (a) that statutory provisions should always be interpreted purposively; (b) the relevant statutory provision must be properly contextualised'.

[47] In any event, and as I will demonstrate in the paragraphs that follow, the appellant acquiesced both expressly and tacitly in affirming the Commission's authority to investigate and resolve the traditional leadership dispute of the Barolong and submitted to its jurisdiction. The appellant's belated attempt to rely on s 25(5) of the Amendment Act is accordingly without merit and cannot be sustained.

[48] Attached to the appellant's founding affidavit is a letter dated 16 November 2017, written on behalf of the appellant by her attorneys to the Premier, in which the complaint is highlighted that the Commission erred in various ways in its investigation of the dispute. For example, it is alleged that the Commission was biased and applied a double standard in accepting the sixth respondent's submissions and rejecting those in favour of the appellant. Significantly, nowhere in the six-page letter written on behalf of the appellant is any issue raised regarding the Commission's authority to investigate the dispute. On the contrary, the Commission's authority is affirmed in clear, expressed terms in the said letter. It is appropriate to quote from the relevant parts of the letter. It reads:

'1. Section 25 of the Traditional Leadership and Governance Act 2003. . . provides for the operation of the Commission. The Commission has mandate in terms of section 25(vii) for all traditional leadership claims and disputes dating from 1 September 1927 to the coming into operation of the provincial legislation dealing with traditional leadership and governance matters. *In the present case the Commission had to deal with the traditional leadership of the Barolong Boo Seleka*.' (Emphasis added.)

[49] The contents of the Commission's report put it beyond any doubt that the appellant co-operated and consciously participated from beginning to end in all the activities of the Commission as it investigated the dispute. In paragraph 5 of the report, the appellant is positively identified and mentioned as one of the three parties involved in the dispute. The other two are Mr Sehunelo Kingsley Moroka, the sixth respondent, and Mr Lebogang Hilary Moroka, the seventh respondent.

[50] The submissions made by all three parties, including the appellant, are recorded from pages 42 to 50 of the report. The Commission's findings and

recommendations are contained in pages 55 and 56. Importantly, the appellant was party to the decision that the dispute be referred to the Commission. In Mr Moloi's letter dated 3 February 2014, already referred to in this judgment, it is expressly stated that the executive committee of the House resolved that:

'The dispute be referred to the Premier for intervention in line with the resolution that was taken on 27 August 2013 between the House representatives, the Head of Department of CoGTA, Barolong Boo Seleka Royal Family and Barolong Boo Seleka Royal Khuduthamaga.'

Furthermore, in the letter of the HOD of CoGTA dated 18 March 2014, addressed to the Commission, requesting it to formally intervene, it is expressly mentioned that '. . . two names of Ms Moipone Maria Moroka (the appellant) and Mr Kinsley Sehunelo Moroka (the sixth respondent) were forwarded to the Premier from both opposing groups of which the matter constituted a dispute'.

[51] In my view, considering the appellant's conduct as described above, and the particular circumstances of the matter, specifically how it evolved until it was referred to the Commission, this matter is on all fours with our various case law dealing with tacit consent and submission to jurisdiction. In most of these cases, parties were found to have consented by way of conduct, either by joining issue with the plaintiff, filing pleas or failing to raise an exception to jurisdiction before the closing of pleadings.[8]

[52] I found the facts in *Purser and Another v Sales and Another*[9] of particular interest. Briefly, this court dealt with a defendant who filed a plea on the merits and participated from start to the end of a trial and only raised the issue of jurisdiction of the court when the plaintiff attempted to enforce the judgment. Mpati AJA agreed with the conclusion by Theron J in *William Spilhaus & Co (MB) (Pty) Ltd v Marx,*[10] where the court held that a defendant who pleads to the main claim without objecting to jurisdiction, must *after litis contestatio* be considered to have bound himself

[8] *Zwelibanzi Utilities v TP Electrical Contractors* [2011] ZASCA 33; *Fairvest Property Holdings v Valdimax CC t/a Fish and Chips Co and Others* 2020 (3) SA 202 (GJ).
[9] *Purser v Sales; Purser and Another v Sales and Another* 2001 (3) SA 445 (SCA) para 18.
[10] *William Spilhaus & Co (MB) (Pty) Ltd v Marx* 1963 (4) SA 994 (C) at 1001G-1002B-C.

irrevocably to accept the jurisdiction of the court even when failure to raise the question of jurisdiction derives from a mistake on his part.

[53] I do not have the slightest hesitation in finding that the appellant's conduct as described above, considered in context, leads ineluctably to the conclusion that she affirmed the Commission's authority in investigating and resolving the dispute. Clearly, as she was unhappy with the outcome and the findings of the Commission, she then, as an afterthought and quite opportunistically, raised the issue of lack of authority of the Commission. Her conduct cannot be countenanced and must be frowned upon by this court.

[54] I deem it expedient to deal, at this point, with the specific issue of interpretation of s 25(5) raised by my esteemed brother Petse AP in his concurring judgment (the concurring judgment), which was circulated after this dissenting judgment had been prepared. The gist of the point raised, in summary is this: no organ of state or public official may act contrary to or beyond the scope of their powers as laid down in the law; the Commission, which is a creature of statute, namely the Traditional Leadership and Governance Framework Act 41 of 2003, was expressly proscribed by s 25(5) to accept and deal with the Barolong traditional leadership dispute referred to it; and the phrase 'may not' in s 25(5) meant that the Commission had no discretion whatsoever to choose to accept the referral.

[55] The concurring judgment quite rightly refers to *Endumeni,*[11] which sets out the important tool in any interpretation exercise, being the language of the provision itself in the light of its context and purpose, all of which constitute a unitary exercise. However, the concurring judgment omits, with respect, to mention and apply, as I will demonstrate hereunder, the additional prescript laid down in *Endumeni.* According to this additional prescript, the interpretation of a legislative provision must be done

[11] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

having regard to the context provided by reading '*the document as a whole and the circumstances attended upon its coming into existence'*.[12] (My emphasis.)

[56] A simple reading of the concurring judgment reveals that it completely omits to refer, as a whole, to the purpose of both the governing Act and of the provision of s 25(5). The aspect of context, other than being recognised as an important component of the tool, is not given any elucidation at all. Thus, the concurring judgment has simply looked and considered s 25(5) by only concentrating on the language, specifically, the words used therein.

[57] The aforementioned method of interpretation is long established in our law. In *Jaga v Dongës N. O and Another; Bhana v Dongës and Another*,[13] Schreiner JA stressed that '[c]ertainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context . . . Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background'. At page 664 Schreiner JA quoted with approval what was said by Lord Greene in *Re Bidie* (194, Ch 121) who stated that '[t]he method of construing statutes that I myself prefer is not to take out particular words and attribute to them a sort of *prima facie* meaning which may have to be displaced or modified, it is to read the statute as a whole and ask myself the question: "In this statute, in this context relating to this subject matter, what is the true meaning of that word?"'.

[58] This approach has been affirmed in various cases in our courts. In *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others,*[14] this court noted that the Constitutional Court has 'rejected the idea of the

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[12] See fn 9 above para 18.
[13] *Jaga v Dongës N. O and Another; Bhana v Dongës and Another* [1950] 4 All SA 414 (A); 1950 (4) SA 653 (A) at 663.
[14] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA) para 46.

plain meaning of the text or its primacy, since words without context mean nothing, and context is everything'. At paragraph 50, this court recognised that *Endumeni* gave 'expression to the view that the words and concepts used in a contract and their relationship to the external world were not self-defining'. *Endumeni* emphasised, the court noted, that the meaning of a contested term in a contract or provision of a statute, is properly understood not simply by selecting standard definitions of particular words often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose.

[59] I have earlier dealt with the aim, purpose and objective of establishing the Commission. This can only be determined by reading the entire enabling legislation as a whole.[15] The Commission's sole mandate, function and purpose was to deal with traditional leadership disputes. As this court held in *Mphephu*, it initially had a five year lifespan from 2005 until 2010. The second five year lifespan lasted until 2016, which was then extended to December 2017. As of now, the Commission no longer exists. It is not disputed that in its investigation of the dispute in this case, the Commission observed the prescripts of s 25(3)*(a)* of the Amendment Act obliging it to consider and apply customary law and the customs of the Barolong people as they applied when the events occurred that gave rise to the dispute. As I have pointed out earlier, all of this important contextual background has, with respect, been pointedly ignored in the concurring judgment in interpreting s 25(5).

[60] In the circumstances, I assert my earlier stance that properly interpreted, and based on the particular circumstances of this case, s 25(5) cannot be interpreted to have prevented the Commission from accepting the referral of the Barolong traditional leadership dispute in order to investigate and resolve the same.

[61] For these reasons, I would have dismissed the appeal with costs.

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[15] *Sigcau v Minister of Cooperative Governance and Traditional Affairs and Others* [2017] ZASCA 80.

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B H MBHA
JUDGE OF APPEAL

Petse AP (Mokgohloa and Hughes JJA concurring):

[62] I have had the advantage of reading with care the two judgments penned by my colleagues Mokgohloa JA (the main judgment) and Mbha JA (the dissenting judgment). I agree with the conclusion reached in the main judgment and the order that it proposes. Regrettably, I find myself in respectful disagreement with the dissenting judgment and the proposed outcome.

[63] The background facts have been set out in the main judgment and, to the extent necessary, supplemented in the dissenting judgment in sufficient detail to promote a better understanding of what is at issue in this matter. Thus, there will be little virtue in rehashing them in this judgment. I shall state the reasons for my disagreement with the dissenting judgment as briefly as possible.

[64] At the outset it is necessary to reiterate that my disagreement with the dissenting judgment stems from its conclusion and the reasoning underpinning that conclusion. The edifice of the dissenting judgment rests on three cardinal pillars. First, the legal point that the appellant raised for the first time on appeal was not foreshadowed, still less, canvassed on the papers. Therefore, concludes the judgment, it is not in the interests of justice to entertain it on appeal. Second, the antagonists had themselves consented to the dispute between them being referred to the Commission for resolution. Third, by submitting the dispute to the Commission whilst fully aware that the Commission was not empowered to deal with disputes referred to it after the cut-off date, namely 2 July 2010, the appellant thereby

acquiesced in the Commission entertaining the dispute and is, as a result, precluded from objecting to the legal competence of the Commission to entertain the dispute. In support of the latter proposition, the dissenting judgment cites the decision of Theron J in *William Spilhaus & Co (MB) (Pty) Ltd v Max*.[16] *William Spilhaus* was referred to with approval by this court in *Purser v Sales; Purser and Another v Sales and Another.*[17] In my view none of these pillars can bear close scrutiny.

[65] The main judgment has adequately dealt with the first one of the three bases mentioned in the preceding paragraph. Consequently, it is only the second and third bases that will be the central focus of this judgment.

[66] Insofar as the second basis is concerned, that is, the appellant's acquiescence in the Commission entertaining the dispute, I consider that *William Spilhaus* does not avail the respondents in the context of the facts in this case as it dealt with an entirely different question to the one confronting us in this matter. In *William Spilhaus*, the court was dealing with a case where the defendant sought to object to the jurisdiction of the magistrates' court after it had already pleaded to the claim by delivering a plea thereto. In considering the question whether or not it was still open to the defendant to do so, the court, in essence, held that a defendant who elects to plead to a claim without raising an objection to the jurisdiction of the court, whilst aware at the time of filing a plea that the court lacked jurisdiction, is precluded from objecting to the jurisdiction of the court after he has filed a plea in circumstances where the court has material jurisdiction in regard to the plaintiff's claim. By failing to file a plea contesting the court's jurisdiction, such a party is taken to have consented to the jurisdiction of the court that otherwise lacked the requisite jurisdiction in respect of the defendant.

[67] Submission by a litigant to a court's jurisdiction may be inferred from the conduct of that litigant in not objecting to the jurisdiction of the court concerned in

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[16] *William Spilhaus & Co (MB) (Pty) Ltd v Max* 1936 (4) SA 994 (C) at 1001G-1002B-C (*William Spilhaus*).
[17] *Purser v Sales; Purser and Another v Sales and Another* 2001 (3) SA 445 (SCA) para 18 (*Purser*).

circumstances where the court is otherwise competent to adjudicate the dispute. In *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another*[18] it was put thus:

'Submission to the jurisdiction of a court is a wide concept and may be expressed in words or come about by agreement between the parties. . . It may arise through unilateral conduct following upon citation before a court which would ordinarily not be competent to give judgment against that particular defendant. . . Thus where a person not otherwise subject to the jurisdiction of a court submits himself by positive act or negatively by not objecting to the jurisdiction of that court, he may, in cases such as actions sounding in money, confer jurisdiction on that court.'

[68] In *MV Alina II (no 2): Transnet Ltd v Owner of MV Alina II*[19] this court said that the question of submission 'to the court's jurisdiction' is a factual enquiry. It went on to say the following:

'Submission may arise from conduct in litigation commenced against a person before a court that lacks jurisdiction in respect of that person or that claim.'[20] (Footnotes omitted.)

It is important to emphasise that the court to whose jurisdiction the litigant is said to have submitted must otherwise have the legal competence to adjudicate the subject matter of the litigation even though it lacks jurisdiction over the person who is party to the proceedings.[21]

[69] The point here is that barring the belated objection to the jurisdiction of the court, the court in *William Spilhaus* was otherwise competent to entertain and determine the dispute between the parties. In contrast, the situation in this case is fundamentally different. The Commission whose report took centre stage in the review proceedings instituted by the appellant in the high court is a creature of statute, namely the Traditional Leadership and Governance Framework Act.[22] Thus, it could

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[18] *Mediterranean Shipping Co v Speedwell Shipping Co Ltd and Another* 1986 (4) SA 329 (D) at 333E-G.
[19] *MV Alina II (no 2): Transnet Ltd v Owner of MV Alina II* 2011 (6) SA 206 (SCA) para 16.
[20] Ibid para 14.
[21] Compare: *Bonugli and Another v Standard Bank of South Africa Ltd* 2012 (5) SA 202 (SCA) paras 18-21.
[22] Traditional Leadership and Governance Framework Act 41 of 2003.

only exercise such powers and perform such functions expressly – or by necessary implication – conferred upon it by its empowering legislation.

[70] It is trite that no organ of state or public official may act contrary to or beyond the scope of their powers as laid down in law.[23] Although made in a different context, the remarks of the Constitutional Court in *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*[24] are instructive. There, the court said the following:

'[A] local government may only act within the powers lawfully conferred upon it. There is nothing startling in this proposition - it is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful. The rule of law - to the extent at least that it expresses this principle of legality - is generally understood to be a fundamental principle of constitutional law.'

Accordingly, what is stated in the passages cited from *William Splihaus* and relied upon in the dissenting judgment cannot, to my mind, be taken as authority for the view expressed by my colleague Mbha JA in his judgment in the context of the facts of this case.

[71] What occurred in this matter is not just an instance of a party failing to raise an objection to jurisdiction, coupled with that party's subsequent participation in the proceedings which is what happened in *Purser*. Rather, the issue is whether the appellant's consent to the 'jurisdiction' of the Commission vested the Commission with legal competence to investigate a dispute or claim referred to it six months after the coming into operation of chapter 6 which is what s 25(5), located in chapter 6, explicitly proscribes. This is a fundamental distinction between this case and those relied upon in the dissenting judgment on this score.

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[23] *Affordable Medicines Trust and Others v Minister of Health of RSA and Another* [2005] ZACC 3; 2006 (3) SA 247 (CC); para 49 and paras 75 to 77; *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4;; 2010 (2) SACR 101 (CC) paras 49-50; *Electronic Media Network Ltd and others v e.tv (Pty) Ltd and others* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) paras 25, 110-112; *Minister of Constitutional Development and Another v South African Restructuring and Insolvency Practitioners Association and Others* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) paras 27-29.

[24] *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 56.

[72] It has long been recognised in our constitutional democratic order that public power can only be exercised if it is sourced in law. This is what the doctrine of legality entails. In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another*[25] Langa CJ put it thus:

'The doctrine of legality, which requires that power should have a source in law, is applicable whenever public power is exercised. . . Public power . . . can only be validly exercised if it is clearly sourced in law.'[26]

Accordingly, that the parties consented to the referral of the dispute or claim to the Commission cannot confer jurisdiction on the Commission where it has none in terms of the Act. The Commission simply did not have the legal competence to entertain disputes submitted to it after six months after the date of coming into operation of chapter 6. Differently put, it could not arrogate to itself the power to do so in the face of clear and unambiguous statutory provisions to the contrary.

[73] The conclusion reached in the preceding paragraph brings me to the third and last of the three bases to which reference is made in paragraph 3 above. This point necessarily raises the issue of the meaning to be ascribed to s 25(5) of the Act. As already mentioned above, s 25(5) is located in chapter 6 of the Act. Chapter 6, which is headed 'Dispute and Claim Resolution and Commission on Traditional Leadership Disputes and Claims', deals, amongst other things, with the functions of the Commission. Section 25(4) provides that:

'Subject to subsection (5) the Commission–

(a) may only investigate and make recommendations on those disputes and claims that were before the Commision on the date of coming into operation of this chapter; and

(b) must complete the matters contemplated in paragraph *(a)* within a period of five years, which period commences on the date of appointment of the members of the

[25] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) para 86.

[26] See also: *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) A 674 (CC) (2000 (3) BCLR 241) para 20 in which it was stated that '[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.'

Commission in terms of section 23, or any such further period as the Minister may determine.'

Subsection (5), in turn, reads:

'Any claim or dispute contemplated in this Chapter submitted after six months after the date of coming into operation of this chapter may not be dealt with by the Commission.'

[74] There are two important points that must be made about s 25(5). The first is that chapter 6 took effect on 1 February 2010. The second is that it is common cause between the disputants that the dispute that precipitated the review proceedings in the high court was referred to the Commission by the Premier only on 4 February 2014, some four years after chapter 6 had taken effect. The significance of this date is that it unequivocally demonstrates that the dispute was submitted to the Commission long after six months after the date of coming into operation, on 1 February 2010, of chapter 6 of the Act. Thus, the Commission had no authority to accept the referral and, pursuant thereto, to investigate the dispute.

[75] Before us some play was made in argument by counsel for the Premier that s 25(5) says that 'any claim or dispute contemplated in [Chapter 6] submitted after six months after the date of coming into operation of this chapter *may not* be dealt with by the Commission'. (My emphasis.) Emphasising the italicised words 'may not', counsel for the Premier argued that the section was couched in permissive terms and in effect conferred a discretion on the Commission as to whether or not it could entertain a claim or dispute submitted to it 'after six months after the date of coming into operation' of chapter 6 of the Act, that is 1 February 2010.

[76] The contention advanced by counsel for the Premier requires that an interpretive exercise be undertaken. As I see it, the outcome of this appeal hinges on the answer to the antecedent question that requires to be addressed first before all else is considered. This question is: was the Commission acting within the bounds of the Act when it entertained the claim or dispute submitted to it by mutual agreement

between the parties long after the cut-off date having regard to the provisions of s 25(5) quoted in paragraph 12 above? In my view the answer must be No.

[77] Before elaborating on why the Commission should have declined to accept the referral to it of the dispute, it is necessary to briefly say something about the principles of statutory interpretation. As has been said in a long line of cases both of the Constitutional Court and this court, the logical point of departure in any interpretive exercise is the language of the provision itself in the light of its context and purpose all of which constitute a unitary exercise.[27]

[78] Although the use of the word 'may' in s 25(5) of the Act might be thought to imply that the Commission had a discretion whether or not to deal with any claim or dispute submitted to it after six months after the date of coming into operation of chapter 6 of the Act, this cannot be so. On a proper reading of s 25(5) in its contextual setting and the overarching scheme of the Act as a whole it becomes manifest that the Commission is precluded from investigating claims or disputes referred to it six months after the commencement of chapter 6 of the Act.

[79] That the word ‘may’ can, depending on the text, context and purpose of the statutory provision under consideration, be interpreted to mean 'must' is not novel. There is a long line of cases of the Constitutional Court in which the word 'may' was interpreted to mean 'must'.

[80] In *Van Rooyen and Others v The State and Others (General Council of the Bar Intervening)*[28] the court had occasion to consider the meaning of ‘may’ in s 13(3)(*a*A)[29]

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[27] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); para 18. See also *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 para 18; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC) para 18.

[28] *Van Rooyen and Others v The State and Others (General Council of the Bar Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC). See also *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC) para 73.

[29] Section 13(3)(*a*A) reads:

‘The Minister, on the advice of the Commission, may provisionally suspend a magistrate from office if-

of the Magistrates' Act.[30] There, the question was whether the Minister of Justice was vested with a discretion not to suspend a magistrate on the recommendation of the Magistrates Commission since the section provided that the minister 'may' confirm a recommendation by the Magistrates' Commission that a magistrate be suspended. Chaskalson CJ answered the question in the negative and said the following:

'As far as the Act is concerned, if 'may' in s 13(3)(aA) is read as conferring a power on the Minister coupled with a duty to use it, this would require the Minister to refer the Commission's recommendation to Parliament, and deny him any discretion not to do so. . . In my view this is the constitutional construction to be given to s 13(3)(aA). On this construction, the procedure prescribed by s 13(3) of the Act for the removal of a magistrate from office is not inconsistent with judicial independence.'[31]

[81] Almost four decades ago in *Schwartz v Schwartz*[32] this court said the following of the word 'may':

'A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied.'

[82] To conclude on this aspect, it is instructive, when construing the provisions of s 25(5) of the Act, to have regard to the comparable provisions of s 58(A)4 of the South African Schools Act[33] (the Schools Act) which were considered by the Constitutional Court recently in *Moodley v Kenmont School and Others*.[34] Section 58(A)4 of the Schools Act provides that 'the assets of a public school may not be attached as a result of any legal action taken against a school.' In *Moodley* the

(i) the Commission, after affording the magistrate a reasonable opportunity to be heard regarding the desirability of such provisional suspension, is satisfied that reliable evidence exists indicating that an allegation against that magistrate is of such a serious nature as to make it inappropriate for the magistrate to perform the functions of a magistrate while the allegation is being investigated; and

(ii) an investigation has been instituted by the Commission into such magistrate's fitness to hold office.'

[30] Magistrates' Act 90 of 1993.

[31] Footnote 11 paras 181-182.

[32] *Schwartz v Schwartz* 1984 (4) SA 467 (A) at 473-474.

[33] South African Schools Act 84 of 1996.

[34] *Moodley v Kenmont School and Others* [2019] ZACC 37; 2020(1) SA 410 (CC) (*Moodley*).

Constitutional Court recognised that in its current formulation s 58(A)4 proscribed in absolute terms the attachment of the assets of public schools[35] despite the use of the word 'may' in the statutory provision there under consideration.

[83] Insofar as the provisions of s 25(5) of the Act are concerned, it is significant that the word ‘may’ is coupled with the word ‘not’ which is a clear indication that the Commission was not empowered to deal with claims or disputes submitted to it after the cut-off date. And yet, this is precisely what the Commission did in the face of a clear prohibition not to do so. It bears emphasising that s 58(A)4 of the Schools Act, just like s 25(5) of the Act in this case, the word ‘may’ is coupled with the word ‘not’, both of which, when used together, express a negative. In my view, the fact that the appellant raised that issue only belatedly on appeal rather than squarely before the high court, does not matter. This must be so because the appellant's acquiescence in the Commission's investigation of the dispute could not invest the Commission with authority it did not have. Nor can the Commission's failure to address this aspect – to which it had itself adverted in its report – assist the respondents. The reason for this is not far to seek. The supremacy of the Constitution and the rule of law are some of the foundational values of our democratic order.[36]

[84] To sum up, as the powers of the Commission were derived from the Act in terms of which it was established, it could therefore only exercise such public powers and perform such public functions that could be sourced in the Act itself. There is nothing novel about this. Indeed, this is a well-entrenched principle of our law.[37] And its logical corollary must be that the Commission was precluded from doing anything proscribed by s 25(5) of the Act.

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[35] *Moodley* paras 25-26; and 30-31.
[36] See s 1(d) of the Constitution of the Republic of South Africa, 1996.
[37] See, for example, in this regard, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 58. See also: *Naidoo and Another v E P Properties (Pty) Ltd* [2014] ZASCA 97 para 27.

[85] It is for all the foregoing reasons that I concur in the judgment of my colleague Mokgohloa JA.

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X M PETSE
ACTING PRESIDENT
SUPREME COURT OF APPEAL

APPEARANCES:

For appellant:	Q Pelser SC
Instructed by:	Hurter Spies Inc, Centurion Rossouws Attorneys, Bloemfontein
For respondent:	A Laka SC (with him T L Manye) (heads of argument prepared by Z Z Matebese SC with him T L Manye)
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