



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 035/2024

In the matter between:

KGOSI NYALALA MOLEFE JOHN PILANE

FIRST APPELLANT

**BAKGATLA BA KGAFELA TRADITIONAL
COUNCIL**

SECOND APPELLANT

**BAKGATLA BA KGAFELA ROYAL FAMILY
(MORULENG)**

THIRD APPELLANT

and

**PREMIER OF THE NORTH WEST
PROVINCE**

FIRST RESPONDENT

**RANGWANE RAMONO PILANE
LINCHWE**

SECOND RESPONDENT

KGAFELA KGAFELA II

THIRD RESPONDENT

PHENIAS TJIE

FOURTH RESPONDENT

MERAPE RAMONO

FIFTH RESPONDENT

**COMMISSION FOR INQUIRY INTO THE
TRADITIONAL LEADERSHIP DISPUTE IN
RESPECT OF BAKGATLA BA KGAFELA,**

**BATLHAKO BA LEEMA AND
BAPO I AND II COMMUNITY DISPUTE**

SIXTH RESPONDENT

**NORTH WEST PROVINCIAL HOUSE
OF TRADITIONAL LEADERS**

SEVENTH RESPONDENT

**MEC FOR LOCAL GOVERNMENT, HUMAN
SETTLEMENT AND TRADITIONAL
AFFAIRS**

EIGHTH RESPONDENT

Neutral citation: *Pilane & Others v Premier of the North West Province & Others*
(035/2024) [2025] ZASCA 126 (9 September 2025)

Coram: MOLEMELA P and MOTHLE, HUGHES and KATHREE-
SETILOANE JJA and NORMAN AJA

Heard: 7 May 2025

Delivered: 9 September 2025

Summary: Statutory interpretation – North West Traditional Leadership and Governance Act 2 of 2005 – s 10(3) – Premier’s appointment of administrator without recommendation from Royal Family – ‘unlawful.’

Section 14(3) – Powers of the Premier – Premier has no authority to withdraw recognition certificate of Kgosi without receipt of decision and reasons therefor – from statutorily recognised Royal Family – in the North West Province – to remove the Kgosi.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Reid J, sitting as a court of first instance):

1 The appeal is upheld.

2 The order of the North West Division of the High Court, Mahikeng is set aside and replaced with the following order:

‘(a) The decision of the first respondent, appointing the fourth respondent as administrator of Bakgatla Ba Kgafela (Bakgatla) traditional community is reviewed and set aside.

(b) The decision of the first respondent withdrawing the recognition certificate of the first appellant as Kgosi of the Bakgatla is reviewed and set aside.

(c) The decision of the first respondent appointing the second respondent as the interim Kgosi of the Bakgatla is reviewed and set aside.

(d) The first respondent is ordered to pay the costs of the application including those of two counsel, where so employed.’

3 The first respondent is ordered to pay the costs of the appeal including those of two counsel where so employed.

JUDGMENT

Kathree-Setiloane JA (Molemela P, Mothle and Hughes JJA and Norman AJA concurring):

[1] This is an appeal against the judgment and order¹ of the North West Division of the High Court, Mahikeng (the high court). The high court, per Reid J sitting as the court of first instance, dismissed a review application against certain decisions taken by the first respondent, the Premier of the North West Province (the Premier). The decisions that were taken by the Premier, in terms of the North West Traditional Leadership and Governance Act 2 of 2005 (the North West Act) and form the subject matter of this appeal, are as follows:

- (a) The appointment, on 26 February 2020, of the fourth respondent, Mr Tjie, as administrator to take over the powers of the second appellant, the Bakgatla Ba Kgafela Traditional Council (the Traditional Council);
- (b) The withdrawal, on 6 July 2020, of the certificate of recognition of the first appellant, Kgosi Pilane as Kgosi or senior traditional leader of the Bakgatla Ba Kgafela traditional community in Moruleng, North West Province (Bakgatla); and
- (c) The recognition of the second respondent, Mr Rangwane Linchwe as interim Kgosi of the Bakgatla.

[2] The high court dismissed the review application and found that the Premier's decisions are not reviewable, on the following basis:

'Community disputes led to the Royal Family [in Mochudi] approaching the Premier, which led to him appointing the Commission of Inquiry. The Premier acted within the scope of his powers. . . . in making the decisions that he did, as per the recommendations of the Commission of Inquiry'.

[3] The appeal is before us with leave of the high court.² It is not opposed by the respondents.³

¹ The order was made on 4 July 2023.

² The high court granted leave to appeal to this Court on 14 December 2023.

³ Where necessary, the first to eight respondents will be referred to collectively as 'the respondents' in the judgment. The first to third appellants will also, where necessary, be referred to collectively as 'the appellants'.

The facts

[4] On 15 June 2016, the Premier appointed a Commission of Inquiry (the Commission) into the succession disputes and claims of the Bakgatla, Batlhako ba Leema, and Bapo I and II traditional communities.⁴ The terms of reference which applied to the Bakgatla dispute were, amongst others, as follows:⁵

‘1.1 The role of a Paramount Chief in terms of the tradition and custom specifically in Botswana *vis a vis* in Moruleng;

1.2 The powers and procedure, if any, to appoint a senior traditional leader of the Bakgatla in Moruleng;

1.3 To determine who the rightful heir is in terms of the tradition and custom had Tidimane Pilane not acted in the manner he did which led to the appointment (the manner and procedure is not in dispute) of [Kgosi Pilane];

1.4 The merits and demerits of [Mr Linchwe’s] claim as senior traditional leader as was referred to the North West Provincial Committee during 2014;

1.5 The role of [the] senior traditional leader of the Bakgatla in Moruleng;

1.6 The correct relationship between Kgafela Kgafela II and the senior traditional leader in Moruleng under our Constitutional dispensation. . .’.

[5] On 20 August 2019, the Commission submitted a report of its findings to the Premier which he accepted on 26 August 2019. The relevant findings are as follows:

‘On Governance

187. The [Traditional Council] has failed to prepare accounts and financial statements to account for all its entities. It has also failed to ensure that its entities comply with the requirements of the Companies Act and the King Codes applicable to them. No valid reason has been provided for the failure to prepare accounts and [Annual Financial Statements] of the [Traditional Council] and its entities.

...

⁴ Proclamation 19 of 2016, *North West Provincial Gazette Extraordinary* 7657 of 15 June 2016.

⁵ This matter only concerns the Ba Kgafela. The terms of reference and the investigation relating to Batlhako Ba Leema and the Bapo disputes, are therefore irrelevant.

189. The [Traditional Council] has failed to hold its entities and their directors to account for their administration of the assets and monies of the community. From the evidence, the [Traditional Council], willingly or unwillingly, abdicated to Kgosi Pilane and directors of entities its statutory responsibility and duty to the community to safeguard and oversee its assets.

190. As the custodians of the community's assets, the directors of the entities and the [Traditional Council], including the Chairperson, have fallen short of what is expected of reasonable persons entrusted with the assets and finances of the community. The [Traditional Council] in particular has not exercised any meaningful oversight over its chairperson and the [Bakgatla] companies. They have failed to comply with the applicable obligatory provisions of the [North West Act] and the Code of Conduct, and to ensure that the companies of the [Bakgatla] comply with the provisions of the Companies Act 2005 and regulations, and the principles of the King Codes as applicable to each entity. For the same reason, the [Traditional Council] is unsurprisingly unable to provide a proper account for these entities in its own accounts and [Annual Financial Statements].

191. The [Traditional Council] has failed to submit its accounts and financial statements for audit by the Auditor-General as it is obliged to do by sec 31(1) of the [North West Act]. No valid reason was given for this failure to comply with the law. . .

192. Members of the [Traditional Council] have failed to hold each other to account to the [Traditional Council] and to the community. . .

193. Members of the [Traditional Council] lack the financial and commercial skills to effectively hold Kgosi Pilane and persons involved with the entities of the [Bakgatla] to account for their management and administration of the assets and financial benefits deriving therefrom. The level of skills of members of the [Traditional Council] understandably affects their ability and effectiveness to engage with the often-complex transactions that the [Bakgatla], through the Kgosi, have concluded with third parties. The Department has not taken meaningful steps, if any, to provide skills to members of the [Traditional Council] to enable them to perform their functions and discharge their duties properly and effectively.

194. Kgosi Pilane has failed since December 2012 to convene meetings of the community as he is obliged to do by sec 18(1)(g) of the [North West Act]. As a result, the [Traditional Council] has not accounted to the community about the administration of their assets and the financial matters relating thereto, including the application of income derived from transactions with third parties.

195. Notwithstanding the power and duty to take steps to ensure proper administration and good governance in terms of sections 9(3); 10(2); 34(3) and 35 [of the North West Act], the Premier and the Department have failed to take any measures to support the [Traditional Council] in the administration

of assets of the community. They have also failed to hold the [Traditional Council] and the Kgosi to account for the administration of the finances of the community.

...

[6] Following upon its findings, the Commission made recommendations to the Premier. Those that are relevant to the appeal are as follows:

‘7. The Premier must exercise his powers in terms of sec 9(3) of the [North West Act] to –

7.1. Instruct Kgosi Pilane to resign from the positions that he holds in the [Bakgatla] and associate entities within 30 calendar days of the instruction from the Premier or such other longer time as the Premier may consider but not exceeding 60 calendar days.

7.2. Instruct Kgosi Pilane to resign from all positions that he holds in BBK and associate entities within 30 calendar days of the instruction from the Premier, or such other longer time as the Premier may consider but not exceeding 60 calendar days.

7.3. Instruct members of the [Traditional Council] to convene a meeting of the community for the purpose of appointing persons that will represent the community in the [Bakgatla] and associate companies, such persons not to include Kgosi Pilane. The [Traditional Council] should be required to report its choice to the Premier within 60 days of the instruction.

...

8.1. Appointment of an Administrator to take over the affairs of the [Traditional Council] –

8.1.1. The Premier should act in terms of section 9(3) and 10(2) to urgently appoint an Administrator to take control of the affairs of the [Traditional Council].

8.1.2. The Administrator must have the power to exercise and perform any power, authority or function conferred or imposed by law, including customary law, upon the [Traditional Council] and shall be deemed to have been exercised or performed by the [Traditional Council].

8.1.3. The Administrator should be competent and have the power to exercise any power, authority or perform functions that would ordinarily be conferred upon the Traditional Council in respect of the subsidiary companies and shall be deemed to have been exercised or performed by the Traditional Council.

8.2. The appointment of an Administrator should be reviewed by the Premier after a period of 180 days and extended as the Premier may decide.

...

[7] On 26 February 2020, the Premier, purportedly acting on the Commission's recommendations to act in terms of s 9(3) and s 10(2) of the North West Act, appointed Mr Tjie as the administrator of the Bakgatla. The appointment was for a period of six months effective from 6 January 2020, with the terms of reference set out in the letter of appointment. The appointment had been extended from time to time.

[8] On 25 May 2020, the Premier wrote a letter to the third appellant, the Bakgatla Royal Family in Moruleng, enquiring into the procedural fairness of the dismissal of employees from five of its entities, the circumstances surrounding the liquidation of Lexshell 703 (Pty) Ltd (Lexshell), and the signing of a contract on 16 March 2020 between the Bakgatla and Ikwezi Vanadium (Pty) Ltd (Ikwezi), without involving Mr Tjie.

[9] The Royal Family in Moruleng responded by, amongst others, stating that it was unable to respond to the allegations as the Premier had not identified the dismissed employees in his letter, and that it was not a shareholder of Lexshell. It, however, advised that it was aware of the August 2019 decision of Lexshell's directors, to place it under liquidation. As to the contract between Ikwezi and the Bakgatla, it said that it had been informed by Kgosi Pilane, and members of the Traditional Council, that Ikwezi was granted a prospecting right in respect of the farm Haakdoornfontein 12 JQ in March 2019. A dispute arose between Ikwezi and members of the Bakgatla. Ikwezi approached Kgosi Pilane and the Traditional Council to mediate the dispute, but this was rejected by the Bakgatla due to pending litigation.

[10] On 15 June 2020, the Premier addressed a letter to Kgosi Pilane in which he raised the same issues raised in his letter of 25 May 2020, to the Royal Family in Moruleng. He advised Kgosi Pilane that: (a) these issues were brought to his attention by the Royal Family who considered them to be grounds for his removal as Kgosi in terms of s 14(1)(d) of the North West Act; (b) the Royal Family referred the matter to him in terms of s 14(2); and (c) he was considering to invoke s 14(3) to withdraw his certificate of recognition as Kgosi.⁶ The Premier afforded Kgosi Pilane an opportunity to make written representations on why he should not withdraw his recognition certificate on the basis of the decision and reasons provided by the Royal Family.

[11] Kgosi Pilane responded on 22 June 2020 by, amongst others, raising the absence of jurisdictional facts for his removal as Kgosi in terms of s 14(1)(d) of the North West Act. He also challenged the Premier to make available the Royal Family's decision and prove that the requirements of s 14(1)(d) of the North West Act had been met.

⁶ Section 14 provides as follows:

'(1) A kgosi or kgosigadi may be removed from office on the grounds of—

(a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;
(b) mental infirmity which, based on acceptable medical evidence, makes it impossible for that kgosi or kgosigadi to function as such;

(c) wrongful appointment or recognition; or

(d) a transgression of customary rule, principle or code of conduct that warrants the removal from office.

(2) Whenever any of the grounds referred to in subsection (1) come to the attention of the Royal family and the Royal family decides to remove the kgosi or kgosigadi, the Royal family must within a reasonable time inform the Premier of such decision and the reasons therefor.

(3) The Premier shall upon receipt of such decision and reasons therefor, withdraw the certificate of recognition of such a kgosi/kgosigadi by—

(a) publishing a notice of withdrawal of recognition of such kgosi/kgosigadi in the *Gazette*;

(b) informing the Royal family concerned, the kgosi/kgosigadi concerned and the Provincial House of Traditional Leaders of such removal.

(4) The Royal family shall after taking a decision to remove a kgosi or kgosigadi, identify a successor in accordance with the applicable customs and customary law and the provisions of this Act.'

[12] Subsequent to the Premier filing the rule 53 record, it emerged that the Premier's decision to withdraw Kgosi Pilane's recognition certificate was based on a complaint received, on 25 September 2019, from the Royal Family in Mochudi, Botswana and not the Royal Family in Moruleng, North West Province. I deal later in the judgment with the question of why the Bakgatla have royal families in both Moruleng and Mochudi.

[13] On being challenged by Kgosi Pilane to make available the decision of the Royal Family referenced in his letter, the Premier furnished Kgosi Pilane with the minutes of a meeting of the Royal Family in Mochudi which was held on 15 May 2020. As is apparent from these minutes, the Royal Family in Mochudi resolved, at that meeting, that the third respondent, Kgosisikgolo Kgafela Kgafela II, should write a letter to the Premier, at the time,⁷ demanding that he withdraw the certificate of recognition of Kgosi Pilane. The agenda of that meeting records that an urgent meeting was held on 15 May 2020, to consider the Premier's failure to comply with the demand of the Royal Family in Mochudi, in its letter dated 25 September 2019. It furthermore records that:

'In the meantime, Kgosi [Pilane] has continued to violate custom in that on 16 March 2020 he had caused the signing of the contract by his Traditional Council and Dikgosana with Ikwezi Vanadium (Pty) Ltd without informing the Tribe, the Paramount Chief, the Royal Family and the Honourable Premier in breach of the process of the Commission (Administrator) which commenced on 6 January 2020; thereby undermining Bakgatla Custom, the Paramount Chief, the Tribe, the Royal Family, the Administrator and the Honourable Premier which is a more compelling reason why the Honourable Premier must now act as demanded in the previous letter.

Failure to act in accordance with the aforesaid letter continues to prejudice the Tribe and undermines key recommendations of the [Commission's] report.

...

⁷ The Premier at the time was Professor Job Mokgoro.

We, as the Royal Family in terms of section 14 (1) of the [North West Act] inform you [the Premier] that the incident mentioned above warranted a meeting of the Royal Family and request you to remove Kgosi Pilane in terms of section 14(1)(d) of the Act as previously demanded in our letter of 25 September 2019.'

[14] The Premier sent an identical letter, to the one sent to the Royal Family in Moruleng on 15 May 2020, to the Royal Family in Mochudi on 25 May 2020. The Royal Family in Mochudi met on 3 June 2020 to respond to this letter. The minutes of that meeting record that:

'Subsequent to their discussions the Royal Family considered that the issues in the Premier's letter are serious and justify their numerous demands to the Premier to withdraw Kgosi [Pilane's] Letter of Designation (Certificate of Recognition) and endorse the name of [Mr Linchwe] as an interim measure.'

[15] On 7 July 2020, the Premier withdrew the certificate of recognition of Kgosi Pilane as Kgosi of the Bakgatla in Moruleng in terms of s 14(3) of the North West Act. He issued a certificate of recognition, on the same day, to Mr Linchwe.⁸

[16] This is an appropriate point to deal with why the Premier sent the letters of 15 May 2020 and 25 May 2020 to the royal families in Moruleng and Mochudi, respectively. Historically, the Bakgatla were one tribe living in Saulspoort, now Moruleng, in the North West Province. In the mid-1800's, Kgosi Kgosikolo Kgamanyane Pilane, the Paramount Chief of the Bakgatla migrated west with at least half the community. They settled in Mochudi, Bechuanaland, a British Protectorate which became Botswana in 1966. The remainder of the Bakgatla remained in Saulspoort. When Paramount Chief Kgamanyane Pilane migrated, he appointed his brother Merafe Ramono (the fifth respondent) to hold the fort for him in Moruleng.

⁸ Proclamation 9 of 2020, *North West Provincial Gazette Extraordinary* 8125 of 7 July 2020.

Paramount Chief Kgamanyane Pilane was succeeded by Paramount Chief Linchwe I who was succeeded by Kgosi Kgafela, then Kgosi Molefi and finally Kgosi Linchwe II who died in 2007. He was succeeded by Kgosi Kgafela Kgafela II.

[17] Who the rightful leader of the two sections of the Bakgatla is, has been a point of contention for decades. In *Pilane v Pheto and Another*,⁹ the high court held:

‘The Paramount Chief in Mochudi rules both sections in Mochudi and Moruleng of the [Bakgatla] but does so with the Kgosi representing him over Moruleng. This function is at present discharged by [Kgosi Pilane]. The two villages are not independent, but are inter-dependent both in substance and in form. The communities are substantially inter-twined. This long-standing position remains in force and applicable even today. The fact that one village is in Mochudi, Botswana and the other in Moruleng, South Africa neither inhibits nor prevents the exercise of traditional laws and customs of the [Bakgatla] for the two communities. As Landman J so eloquently put it in the unreported judgment Nyala John Molefe Pilane and Another, case no 263/2010, “The [Bakgatla] Traditional Community or tribe straddles the border of South Africa and Botswana.”

The Paramount Chief in Mochudi has vested powers to appoint and enthrone the Kgosi to rule over the traditional community in the North West Province, Moruleng by virtue of his office and status as Kgosi Kgafela. The Paramount Chief is also consulted on and approves any material governance issues in Moruleng. On 6 April 1996, the late Paramount Chief Linchwe II appointed and enthroned [Kgosi Pilane] as the Kgosi/Chief or Senior Traditional Leader of the Traditional Community in Moruleng. The installation by the Paramount Chief was subsequent to the approval by both the members of the Royal Family of the [Bakgatla], and the members of the Traditional Community resident in the North West Province in a properly constituted community meeting in terms of customary law and custom.’

[18] The appellants assert, to the contrary, that Kgosi Kgafela Kgafela II is not the Paramount Chief of the Bakgatla in Moruleng. They also state that there is

⁹ *Pilane and Another v Pheto and Others* [2011] ZANWHC 63 paras 7 and 8.

no Bakgatla custom which authorises either the Royal Family in Mochudi or Kosikgolo Kgafela Kgafela II to appoint a traditional leader for the Bakgatla in Moruleng.

[19] Despite these contending positions on the papers, for purposes of this appeal, this Court is not required to decide whether Kgosi Kgafela Kgafela II is the Paramount Chief of the Bakgatla in Moruleng, and whether he is authorised by custom to appoint a traditional leader for the Bakgatla in Moruleng. Nor are we required to decide what the relationship between the two royal families is. What is common cause though, is that over the decades the royal families of the Bakgatla had split, and that there is a group of the royal family that resides in Moruleng, South Africa and the other in Mochudi, Botswana.

[20] The issues for determination are:

- (a) Whether the Premier's decision appointing Mr Tjie, as administrator, was lawful?
- (b) Whether the Premier's decision to withdraw the certificate of recognition of Kgosi Pilane based on the resolution of a royal family outside South Africa was lawful?
- (c) Whether the Premier's designation and recognition of Mr Linchwe as interim Kgosi was lawful?

Legality of the appointment of Mr Tjie as administrator

[21] In appointing Mr Tjie, the Premier acted upon the recommendation of the Commission that he should act in terms of ss 9(3) and 10(2) of the North West Act. Section 9 of the North West Act outlines the powers and functions of a traditional council and provides as follows:

‘(1) The traditional council of any traditional community, shall subject to the provisions of this Act, the Constitution and/ or any other law–

(a) administer the affairs of the traditional community in accordance with customs and tradition, and perform such other functions conferred by customary law and customs, consistent with statutory law and the Constitution;

(b) promote the interest, advancement and well-being of members of the traditional community;

(c) subject to the provisions under this Act, administer the finances of the traditional community;

(d) perform such roles and functions as may be delegated or assigned to it by or under any law;

(e) assist, support and guide traditional leaders in the performance of their functions;

(f) support municipalities in the identification of community needs;

(g) facilitate and ensure involvement of its traditional community in the development or amendment of the integrated development plan of a municipality in whose area that community resides;

(h) participate in the development of policy and legislation at local level through public hearings and active participation in local structures;

(i) participate in developmental programmes of municipalities, provincial and national spheres of government;

(j) promoting indigenous knowledge systems for sustainable development and disaster management;

(k) alerting any relevant municipality to any hazard or calamity that threatens the area of jurisdiction of the traditional council in question, or the well-being of people living in such area of jurisdiction, and contributing to disaster management in general; and

(l) share information and cooperate with other traditional councils within the province.

(2) The functions assigned to any traditional council in terms of this section shall be performed under the supervision of the North West Provincial Government.

(3) The Premier may take steps not inconsistent with this Act, to ensure proper administration and good governance by traditional councils.’

[22] In terms of s 10(1)¹⁰ of the North West Act a traditional council and Kgosi/Kgosigadi, who is recognised in accordance with the law and customs of a particular traditional community as its hereditary head,¹¹ shall endeavour to perform their roles and functions in the best interest of their traditional community, and be responsible to the Premier for the efficient and effective performance of the functions assigned to them. Section 10 (2) empowers the Premier, subject to the provisions of the Act and the Constitution, and with due observance of the traditions applicable in a traditional community, to take such steps as may be necessary to ensure the due performance of those functions by a traditional council.

[23] Section 10(3)(a) of the North West Act authorizes the Premier, on the recommendation of the Royal Family, to appoint any person to assist the traditional council concerned to perform the functions assigned to it in terms of the Act, if satisfied that a traditional council is unable to perform those functions in an efficient and effective manner, or in a manner which is conducive to good governance and administration. The Premier may not act under this section unless he receives a recommendation from the Royal Family that the traditional council is unable to

¹⁰ Section 10 of the North West Act provides:

'(1) A traditional council and kgosi/kgosigadi shall endeavour to perform their roles and functions in the best interest of their traditional community and be responsible to the Premier for the efficient and effective performance of the functions assigned to such traditional council and kgosi/kgosigadi in terms of this Act.

(2) The Premier may, subject to the provisions of this Act and the Constitution and with due observance of the traditions applicable in a traditional community, take such steps as may be necessary to ensure the due performance of the functions referred to in subsection (1).

(3)(a) On the recommendation of the Royal Family the Premier may, if satisfied that a traditional council is unable to perform the functions assigned to it in terms of the Act in an efficient and effective manner or in a manner which is conducive to good governance and administration, appoint any person to assist the traditional council concerned to perform the functions assigned to such traditional council.

(b) An officer appointed in terms of paragraph (a) shall be competent to exercise and perform any power, authority or function conferred or imposed by law upon any such traditional council and shall be deemed to have been exercised or performed by such traditional council.

(c) The appointment of any officer in terms of this section shall be reviewed after a period of 180 days.'

¹¹ Section 1 of the North West Act defines 'kgosi/kgosigadi' to mean: 'The person who in accordance with the laws and customs of a particular traditional community is recognised as the hereditary head of such traditional community and who is a citizen of the Republic of South Africa'.

perform the functions assigned to it in the manner contemplated in the section. Royal Family is defined in s 1 of the North West Act to mean 'the core customary institution or structure consisting of immediate relatives of the ruling family within a 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'.

[24] The appellants take issue with the legality of the Premier's decision to appoint Mr Tjie as administrator. They do so on the basis that the appointment was not done in accordance with s 10(3)(a) of the North West Act, as the Premier had not received a recommendation from the Royal Family in Moruleng to do so. They also argue that the Premier was not authorised, under this provision, to appoint Mr Tjie to take over all the functions of the Traditional Council. It only authorized him to appoint Mr Tjie to assist the Traditional Council to perform the functions assigned to it. In addition, the appellants contend that contrary to the recommendations of the Commission on which the Premier purportedly acted, he granted Mr Tjie broader powers than those afforded to the Traditional Council in terms of s 9(1) of the North West Act.

[25] At the hearing of the appeal, counsel for the appellants handed up documents to the Court that were received from the eighth respondent, the Office of the Member of the Executive Committee for Local Government, Human Settlement and Traditional Affairs, North West Province (the MEC). It emerged from these documents that, on 5 July 2024, the MEC sent a letter to the Bakgatla Traditional Administration. In it, he advised that Mr Tjie's appointment as administrator terminated on 31 March 2024, and that the Provincial Government has, in line with the discretion contemplated in s 22(8) of the Traditional and Khoisan Leadership

Act 3 of 2019 (the Traditional and Khoisan Leadership Act),¹² ‘taken a considered decision not to extend such appointment, but rather make a comprehensive review of the situation of the [Bakgatla]’. The letter concludes:

‘Thus effective from the expiry date of Mr Tjie’s extended appointment as referred to above, the Traditional Council of the [Bakgatla] is to exercise its powers and perform its functions as enshrined in s 20 of the [Traditional and Khoisan Leadership Act].’

This decision is now subject to a court challenge under case no 2630/24 in the high court.

[26] Consequently, the relief which the appellants seek to review and set aside the Premier’s appointment of Mr Tjie, as administrator, of the Bakgatla has become moot. It is a trite principle of the law that a case is moot and not justiciable where there is no longer a live dispute or controversy between the parties, and a court’s judgment will have no practical legal effect on them.¹³ Mootness is, however, not an absolute bar to the justiciability of an issue. An appeal court has the discretion to determine an issue which is moot where it is in the interests of justice to do so. As held by the Constitutional Court in *Independent Electoral Commission v Langeberg Municipality*,¹⁴ ‘[a] prerequisite for the exercise of the discretion is that any order which [the court] may make will have some practical effect either on the parties or on others. Other relevant factors include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and

¹² This Act was preceded by the Traditional Leadership and Governance Framework Act 41 of 2003, which was repealed by s 65 of the Traditional and Khoisan Leadership Act with effect from 1 April 2021.

¹³ *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 21. See also *Normandien Farms (Pty) Limited v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Limited and Others* [2020] ZACC 5; 2020 (6) BCLR 748 (CC); 2020 (4) SA 409 (CC) para 47.

¹⁴ *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) para 11. See also *Road Traffic Management Corporation v Tasima (Pty) Limited; Tasima (Pty) Limited v Road Traffic Management Corporation* [2020] ZACC 21; 2020 (10) BCLR 1227 (CC); (2020) 41 ILJ 2349 (CC); [2020] 12 BLLR 1173 (CC); 2021 (1) SA 589 (CC) para 127.

the fullness or otherwise of the argument advanced'.¹⁵ Another consideration is whether the issue is a discrete legal one of public interest that would affect matters in the future on which the adjudication of the Court is required.¹⁶

[27] The question of the legality of the Premier's appointment of Mr Tjie as administrator is an important matter of public interest. The leadership and succession conflicts between the two groups of the Bakgatla community – the one in South Africa and the other in Botswana – have played out in our courts for several decades now. The Premier's appointment of Mr Tjie to take over the functions and duties of the Traditional Council in Moruleng has a direct bearing on this conflict. Whether this decision is lawful is a discrete legal issue that turns on the interpretation of s 10(3) of the North West Act and common cause facts. This is principally because the answering affidavit does not contain the version of the Premier on the process he followed in appointing Mr Tjie, and the factors he considered in doing so. The answering affidavit in the review application was not deposed to by the Premier, but rather by an administrator in his office. Although he deposed to a confirmatory affidavit, the answering affidavit is bereft of the Premier's version on these aspects.

[28] A determination of this issue would, in my view, affect matters in the future on which the adjudication of this Court is required. The MEC's decision not to extend the appointment of Mr Tjie is already the subject of a challenge in the high court. That court is also more than likely to await the judgment of this Court, before

¹⁵ Ibid.

¹⁶ *Centre for Child Law v The Governing Body of Hoërskool Fochville and Another* [2015] ZASCA 155; 2016 (2) SA 121 (SCA); [2015] 4 All SA 571 (SCA) para 14. See also *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24; [2018] 11 BLLR 1035 (CC); 2018 (11) BCLR 1411 (CC); (2018) 39 ILJ 2646 (CC); 2019 (1) SA 73 (CC) para 81.

it determines the issue. Should it do so before judgment in this matter is handed down, then that decision is likely to come on appeal to this Court.

[29] It is also essential for the stability of the Bakgatla that there is certainty on the law in relation to the powers of the Premier to appoint a person to assume all the functions of a traditional council. A determination on this issue will also have an impact on any future decision of the Premier to capacitate a traditional council for the reasons contemplated in s 10(3) of the North West Act, and the role of traditional leadership structures in that decision. I, therefore, consider it to be in the interests of justice to exercise my discretion in favour of determining the issue.

[30] The high court found that the Premier's decision was not unlawful because he was entitled to act on the findings and recommendations of the Commission which was lawfully established. However, that was not the issue before the high court. It was required to determine whether Mr Tjie's appointment was in accordance with s 10(3) of the North West Act. It erred in failing to do so.

[31] It is to the interpretation of this provision that I now turn. In doing so, I remain mindful that the proper approach to statutory interpretation is a unitary exercise that involves a consideration of the text, context and purpose of the statutory position.¹⁷ On a proper interpretation of s 10(3) of the North West Act, the Premier may only appoint a person to assist the traditional council concerned to perform the functions assigned to it, on the recommendation of the Royal Family that the traditional council is unable to perform the functions assigned to it in terms of the Act in an

¹⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18 and *AmaBhungane Centre for Investigative Journalism NPC v President of the Republic of South Africa* [2022] ZACC 31; 2023 (2) SA 1 (CC); 2023 (5) BCLR 499 (CC) para 36.

efficient and effective manner. The Premier may only exercise his discretion in favor of appointing such a person after he has applied his mind to the recommendation, and is objectively satisfied that the Traditional Council concerned is unable to perform the functions assigned to it in an efficient and effective manner, as contemplated in ss 9 (1) and (2) of the North West Act.

[32] The purpose of s 10(3) is to allow the Premier to provide appropriate support and capacity building to a traditional council that is unable to perform its functions in the manner contemplated in ss 9(1) and (2) of the North West Act. This is in line with the broader purpose of the Act that is reflected in its preamble: the need to provide appropriate support and capacity building to the institution of traditional leadership. As indicated, the Premier may only appoint a person to assist a traditional council on a recommendation, to that effect, from the Royal Family of a traditional community. This is to ensure that traditional communities are administered in a way that is consistent with customary law and the broader framework of the Act.

[33] As a member of the executive, the Premier was constrained by the principle that he may perform no function beyond that which is conferred on him by law.¹⁸ This is central to the principle of legality and the incidence of the rule which is foundational to a just and stable society.¹⁹ The Premier, however, exceeded the bounds of the law as he appointed Mr Tjie in the absence of a recommendation of the Royal Family in Moruleng. Additionally, instead of appointing Mr Tjie to

¹⁸ *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) para 56; and *Gauteng Gambling Board and Another v MEC for Economic Development, Gauteng Provincial Government* [2013] ZASCA 67; 2013 (5) SA 24 (SCA); [2013] 3 All SA 370 (SCA) para 1.

¹⁹ *Affordable Medicines Trust and Others v Minister of Health and Another* [2005] ZACC 3; 2006 (3) SA 247(CC); 2005 (6) BCLR 529 (CC) para 49.

capacitate or assist the Traditional Council, he effectively usurped its powers and dissolved or disbanded it. This much is clear from the terms of reference which are set out in the appointment letter of Mr Tjie, dated 26 February 2020. Although capacitating a traditional council is a core purpose of the Premier's power under s 10(3) of the North West Act, the terms of reference are silent on this aspect. They only require the administrator to '[i]nitiate a process that will capacitate the incoming traditional council and to develop policies, a manual and systems for traditional councils'. The Premier not only exceeded his powers under s 10(3) of the North West Act, but he also defeated its objective which is to appoint a person to assist a traditional council that is unable to perform its functions efficiently and effectively.

[34] Sections 9(3) and 10(2) of the North West Act expressly empower the Premier to take steps to ensure the 'proper administration and good governance by [the] traditional council'. The exercise of that power must be done with due observance of the traditions applicable in a traditional community, the provisions of the Act and the Constitution. These provisions read with s 10(3) of the North West Act, do not authorise the Premier to usurp the powers of a traditional council, dissolve it, and then replace it with an administrator. Yet the Premier did precisely this. Accordingly, the Premier's decision to appoint Mr Tjie is inconsistent with the prescripts of s 10(3) of the North West Act, and ought to have been set aside on review by the high court.

The withdrawal of the certificate of recognition of Kgosi Pilane

[35] As it did in respect of the Premier's decision to appoint Mr Tjie, the high court found in relation to this challenge, that the Premier's decision to appoint the Commission and implement its recommendations was not unlawful. It, however, erred as this issue was not before it for determination. The challenge in the review

application, before the high court, concerned the legality of the Premier's decision to withdraw Kgosi Pilane's certificate of recognition issued to him in terms of s 13(3) of the North West Act. This required the high court to examine whether, in doing so, the Premier acted in accordance with the powers conferred on him in terms of s 14 of the North West Act. Although the high court concluded that the Premier did comply with the provisions of this section, the judgment lacks any analysis of his powers under the Act, and the facts it considered in support of the decision.

[36] The high court also erred in concluding that the Premier's decision to withdraw the recognition certificate of Kgosi Pilane was founded on the recommendations of the Commission. The Commission made no such recommendation. It merely recommended that the Premier should exercise his powers in terms of s 9(3) of the North West Act to 'instruct Kgosi Pilane to resign from the positions that he holds in the [Bakgatla] and associate entities within 30 calendar days of the instruction from the Premier or such other longer time as the Premier may consider but not exceeding 60 calendar days'.²⁰ Notably, the decision to withdraw the recognition certificate emanated from the Premier and the Royal Family in Mochudi, Botswana.

[37] The appellants contended, correctly so, during argument that the Premier was not authorised under s 14 of the North West Act to act upon a resolution purportedly taken by the Royal Family in Mochudi, Botswana, to withdraw Kgosi Pilane's recognition certificate. They argued that in terms of s 14 of the North West Act, only the Royal Family in Moruleng had the authority to remove Kgosi Pilane. Section 13 of the North West Act deals with the recognition of traditional leaders in a traditional

²⁰ Paragraph 7.1 of the Commission's recommendations.

community. The Royal Family has the sole power under s 13(2) of the Act to designate a Kgosi/Kgosikgadi to bogosi or leader of a traditional community in accordance with its customary laws and customs. In terms of s 13(3), the Premier is conferred a discretion to recognise a person designated as Kgosi/Kgosikgadi of a traditional community. Where the Premier exercises the discretion to do so, he or she shall issue the person so recognised as Kgosi/Kgosigadi with a certificate of recognition.²¹

[38] Section 14 of the North West Act provides for the removal of a Kgosi or Kgosigadi and reads as follows:

‘(1) A kgosi or kgosigadi may be removed from office on the grounds of–

(a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;

(b) mental infirmity which, based on acceptable medical evidence, makes it impossible for that kgosi or kgosigadi to function as such;

(c) wrongful appointment or recognition; or

(d) a transgression of customary rule, principle or code of conduct that warrants the removal from office.

(2) Whenever any of the grounds referred to in subsection (1) come to the attention of the Royal family and the Royal family decides to remove the kgosi or kgosigadi, the Royal family must within a reasonable time inform the Premier of such decision and the reasons therefor.

²¹ Section 13 of the North West Act provides:

‘(1) Bogosi of a traditional community shall be in accordance with the customary law and customs applicable in such a traditional community.

(2) The designation of a kgosi/kgosigadi to bogosi of a traditional community shall be made by the Royal family in accordance with its customary law and customs.

(3) The Premier may recognise a person designated as contemplated in subsection (1) as kgosi/kgosigadi of a particular traditional community.

(4) The Premier shall issue a person recognised as kgosi/kgosigadi with a certificate of recognition.

(5) The Premier shall issue a notice in the *Gazette* recognising a kgosi/kgosigadi and such notice shall be served on the Provincial House of Traditional Leaders for their information.’

(3) The Premier shall upon receipt of such decision and reasons therefor, withdraw the certificate of recognition of such a kgosi/kgosigadi by—

(a) publishing a notice of withdrawal of recognition of such kgosi/kgosigadi in the *Gazette*;

(b) informing the Royal family concerned, the kgosi/kgosigadi concerned and the Provincial House of Traditional Leaders of such removal.

(4) The Royal family shall after taking a decision to remove a kgosi or kgosigadi, identify a successor in accordance with the applicable customs and customary law and the provisions of this Act’.

[39] Where the Royal Family decides to remove the Kgosi on the grounds referred to in s 14(1) of the North West Act, it is required, within a reasonable time, to inform the Premier of its decision and the reasons for it. In terms of s 14(3), the Premier can only withdraw the recognition certificate after, amongst others, receipt of such decision and the reasons therefor from the Royal Family concerned. To reiterate, ‘Royal Family’ is defined in s 1 of the North West Act as ‘the core customary institution or structure consisting of immediate relatives of the ruling family within a 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’. ‘Traditional community’ is defined to mean a traditional community recognised as such in terms of s 3 of the Act.

[40] Section 2 of the North West Act provides that it applies only within the boundaries of the North West Province and governs traditional leadership within the province, and is subject to the Constitution and the Traditional Leadership and Governance Framework Act 41 of 2003.²² Properly construed, s 3 of the North West Act only empowers the Premier to recognise a community as a traditional

²² See fn 12.

community under the Act if that traditional community falls within the boundaries of the North West Province. It follows from this that a 'Royal Family' as defined in the Act refers to a royal family within a traditional community falling within the boundaries of the North West Province. It is thus the Royal Family in Moruleng that has statutory recognition under the North West Act and not the Royal Family in Mochudi.

[41] Since the Premier's decision to withdraw Kgosi Pilane's certificate of recognition was taken in terms of his powers under the North West Act, he was only entitled to do so on receipt of the decision of the Royal Family in Moruleng. Consequently, the Premier's reliance on the resolution of the Royal Family based in Mochudi, Botswana, outside the boundaries of the North West Province, is inconsistent with the provisions of the North West Act. The high court, accordingly, erred in not setting aside this decision on review.

[42] It is important to bear in mind that the statutory recognition of the Royal Family in Moruleng does not preclude Kgosi Kgolo Kgafela Kgafela II and the Royal Family in Mochudi from being recognised as the traditional leadership of the traditional community for purposes of performing certain public functions.²³ In this regard, although the North West Act applies only within the boundaries of the North West Province and governs traditional leadership within the Province, s 2(3) provides that: '[n]othing contained in [the] Act may be construed as precluding members of a traditional community from addressing a traditional leader by the traditional title accorded to him or her by custom, but such traditional title does not derogate from, or add anything to, the status, role and functions of a traditional leader

²³ *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC) paras 43-45. Notably, the Constitutional Court did not, in this matter, afford the status of 'paramount chief' to Kgosi Kgolo Kgafela Kgafela II.

as provided for in [the] Act'. In addition, s 2(4) provides that '[t]raditional leaders may acknowledge or recognise the different levels of seniority amongst themselves in accordance with custom, and none of the definitions contained in section 1 must be construed as conferring, or detracting, from, such seniority'. Since no legislation in South Africa gives recognition to the concept 'paramount chief', the form of address 'Kgosikgolo' does not accord Kgosikgolo Kgafela Kgafela II and the Royal Family in Mochudi a senior status over the Royal Family in Moruleng.

Recognition of the interim Kgosi

[43] The Premier appointed Mr Linchwe as interim-khosi of the Bakgatla on the recommendation of the Royal Family in Mochudi, when it was the core prerogative of the Royal Family in Moruleng to do so under s 16(1) of the North West Act.²⁴ The Premier, therefore, acted unlawfully in issuing Mr Linchwe with a certificate of recognition. Accordingly, the high court erred in not setting aside this decision on review. It should have been set aside for the further reason that on Kgosi Pilane's reinstatement, there was no need for the appointment or recognition of an acting or interim Kgosi as there was no vacancy that had to be filled. For all these reasons, the appeal against the order of the high court must succeed.

Costs

[44] This review examines the exercise of the Premier's powers under the North West Act. As a government official with statutory powers, the Premier was required

²⁴ Section 16 provides as follows regarding the recognition of an acting kgosi/kgosigadi:

'(1) The identification of an acting kgosi/kgosigadi to bogosi of a traditional community shall be made by the Royal family in accordance with its customary law and customs.

(2) The Premier may recognise a person identified as contemplated in subsection (1) as an acting kgosi/kgosigadi of a particular traditional community.

(3) The Premier must issue a person recognised as an acting kgosi/kgosigadi with [a] certificate of recognition.

(4) The Premier must issue a notice in the *Gazette* recognising an acting kgosi/kgosigadi and such notice must be served on the Provincial House of Traditional Leaders for their information'.

to take the court into his confidence and give a full explanation of the facts he took into account and the process he followed, in so far as the legality of his decisions were concerned. He chose, instead, not to depose to an answering affidavit but only to a confirmatory one. The answering affidavit was deposed to by a functionary in the Province. It is, however, bereft of the Premier's version. The Premier has accordingly failed in his duty to the court.²⁵ I consider this to be a sufficient basis to order costs against the Premier in the high court and in this Court.

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

- 1 The appeal is upheld with costs.
- 2 The first respondent is ordered to pay the costs, including those of two counsel where so employed.
- 3 The order of the North West Division of the High Court, Mahikeng is set aside and replaced with the following order:
 - '(a) The decision of the first respondent appointing the fourth respondent as administrator of the Bakgatla Ba Kgafela (Bakgatla)' traditional community is reviewed and set aside.
 - (b) The decision of the first respondent withdrawing the recognition certificate of the first appellant as Kgosi of the Bakgatla is reviewed and set aside.
 - (c) The decision of the first respondent appointing the second respondent as the interim Kgosi of the Bakgatla is reviewed and set aside.
 - (d) The first respondent is ordered to pay the costs of the application including those of two counsel, where so employed.'

²⁵ *Kalil v Mangaung Municipality* [2014] ZASCA 90; 2014 (5) SA 123 (SCA) paras 31,32 and 34.

A handwritten signature in black ink, appearing to read 'F. Kathree-Setiloane', with a long horizontal flourish extending to the right.

F KATHREE-SETILOANE
JUDGE OF APPEAL

Appearances:

For the appellants:	Z Z Matebese SC with H L Kelaotswe
Instructed by:	Bhadrish Daya Attorneys, Pretoria
	MM Hattingh Attorneys, Bloemfontein

For the respondents:	No Appearance
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