

DETERMINATION ON BATLOKWA BA MOTA PARAMOUNTCY

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INTRODUCTION

1.1 CONSTITUTIONAL PROVISIONS

- (a) Chapter 12 (sections 211 and 212) of the Constitution of the Republic of South Africa, (“the Constitution”) provides for the recognition of the institution of traditional leadership, its status and role according to customary law, subject to democratic principles. It is common cause, however, that over the years the institution of traditional leadership has been undermined, distorted and eroded.

- (b) Some of the main causes of this distortion were imperialism and colonization; repressive laws, in particular, the Black Administration Act, 38 of 1927 (“the Black Administration Act”) and Apartheid laws which provided for the creation of territorial authorities, self-governing states and pseudo-independent enclaves.

1.2 **ESTABLISHMENT OF THE COMMISSION**

- (α) In order to restore the dignity of this institution, the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims.
- (β) The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.3 **FUNCTIONS OF THE COMMISSION**

- (a) In terms of section 25(1) the Commission operates nationally and has authority to decide on any traditional leadership disputes and claims contemplated in subsection (2) and arising from any province. Accordingly, in terms of section 25(2)(a) of the Framework Act, the Commission has authority to investigate either on request or of its own accord the following:-
 - (i) a case where there is doubt as to whether a kingship, senior traditional leadership or headmanship was established in accordance with customary law and customs;

- (ii) a traditional leadership position where the title or right of the incumbent is contested;
- (iii) claims by communities to be recognised as traditional communities;
- (iv) the legitimacy of the establishment or disestablishment of "tribes";
- (v) disputes resulting from the determination of traditional authority boundaries and the merging or division of "tribes".
- (vi) where good grounds exist, any other matters relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927.

(b) In terms of section 28(7) of the Framework Act, the Commission must in terms of section 25(2), investigate the position of paramountcies and paramount chiefs that had been established and recognised, and which were still in existence and recognised, before the commencement of

this Act, before the Commission commences with any other investigation in terms of section 25(2).

(c) Furthermore, when considering a dispute or claim, the Commission is obliged in terms of section 25(3)(b)(i) to be guided by the criteria set out in section 9(1)(b) and such other customary norms and criteria relevant to the establishment of a kingship.

(d) In order to satisfy itself whether a kingship exists, the Commission has to take into cognisance the following considerations:-

(i) the need to establish uniformity in the Republic in respect of the status afforded to a king or queen;

(ii) whether a recognised kingship exists:-

(aa) that comprises the areas of jurisdiction of a substantial number of senior traditional leaders that fall under the authority of such a king or queen;

(bb) in terms of which the king or queen is regarded and recognised in terms of customary law and customs as a traditional leader of higher status than

the senior traditional leaders referred to
in subparagraph (aa); and

(cc) where the king or queen has a customary
structure to represent the traditional
councils and senior traditional leaders
that fall under the authority of the king or
queen; and

(iii) the functions that will be performed by the king or
queen.

2.

FOCUS

2.1 Having defined the functions of the Commission in general
under paragraph 1.3 here in above, this investigation is limited
to section 25(2)(a)(i).

2.2 Section 28(7) of the Framework Act enjoins the Commission to
investigate, in terms of section 25(2), the position of
paramountcies and paramount chiefs that had been
established and recognised, and which were still in existence
and recognised, before the commencement of this Act, before
the Commission commences with any other investigation in
terms of section 25(2).

2.3 The focus of the investigation is the Batlokwa ba Mota paramountcy.

2.4 The investigation is to determine whether Batlokwa ba Mota paramountcy was established in accordance with customary law and customs. The investigation is conducted by the Commission of its own accord.

3.

METHODOLOGY

3.1 The determination focuses on the paramountcy of Batlokwa ba Mota.

3.2 In the process of its investigation, the Commission conducted public hearings in two stages:-

3.2.1 The first stage was used to gather evidence and information.

3.2.2 The second stage was held after the Commission had conducted its own research. The purpose of this second stage was to canvas information gathered during the research of the Commission.

- 3.2.3 The royal house had been furnished with a set of questions arising from the research of the Commission. They were expected to respond specifically to the said questions at the hearing. During this stage the hearing was held jointly with Bakwena ba Mopeli.
- 3.3 During both stages the procedure adopted at the hearings was as follows:-
- 3.3.1 Public hearings in which selected members of Batlokwa ba Mota royal house and others appointed by them testified under oath and referred the Commission to supplementary research material;
- 3.3.2 This was followed by an opportunity for commissioners to raise questions and seek clarity from the presenters;
- 3.3.3 Interested parties were afforded an opportunity to challenge the version of the royal house and state their case;
- 3.3.4 Members of the public were permitted to pose questions to the presenters and make comments. (This was only applicable to the first stage).

HISTORICAL BACKGROUND

- 4.1 Batlokwa are said to be the descendants of Bahurutse who came down from Ethiopia and settled in present-day Botswana. Batlokwa trace their early ancestry to Mogale (1280), Mokgatla (1430) and Tabane (1550).
- 4.2 Tabane fathered five sons, Diale (Matlaisane), Kgetsi, Kgwadi (Motlokwa), Matsibolo, and Mosia. Each broke away to form Bapedi, Makgolokwe, Batlokwa, Baphuti and Basia respectively.
- 4.3 Eight generations later, from Kgwadi, Makoro fathered Mokotjo the father of Sekonyela and Mota.
- 4.4 Sekonyela occupied the mountain fortress called Jwalaboholo, just outside Ficksburg. In November, 1853 Moshweshwe attacked and defeated Batlokwa ba Sekonyela.
- 4.5 Sekonyela fled with his followers to the present-day Bloemfontein. He later obtained land in the Herschel district of the Eastern Cape where he died in 1856.

- 4.6 The people under Sekonyela disintegrated, some went to Lesotho, others to Mount Fletcher and Herschel in the Eastern Cape.
- 4.7 Mota, a younger brother to Sekonyela, was not at Jwalaboholo when Moshweshwe attacked. He arrived later, gathered survivors, traveled through Lesotho and settled around Bergville in Natal.
- 4.8 Mota left Natal to settle at Sefate near Harrismith, at the insistence of Sir Theophilus Shepstone, the then Secretary of Native Affairs. In 1861 he moved back to Thintwapas in Natal and eventually settled at Escourt where he died in 1868.
- 4.9 Mota fathered three sons, Hlubi, Patso and Moropotsana.
- 4.10 Moropatsana, better known as Koos, together with his brother Patso remained at Thintwapas with his followers.
- 4.11 The Natal government blamed Batlokwa for an invasion of Natal. Mota was forced to leave, and Patso remained.

4.12 Koos Mota died on 2 February 1931. His successor, Silas, died in September of the same year. His senior wife, Eva, became regent up to 1942 when the rightful heir, Wessels Mota, assumed his position.

4.13 Wessels Mota died on the 13 August 1988 and was succeeded by his son, Lekunutu Mota, the current paramount chief of Batlokwa ba Mokotleng.

5.

CUSTOMARY LAW OF SUCCESSION

5.1 Succession to the Kingship of Batlokwa

5.1.1 The customary succession to Batlokwa kingship is based on information presented during the hearings and from a book by Ellenberger¹.

5.1.2 Customary succession is based on a system of male primogeniture. A female cannot succeed.

5.1.3 The status of a wife within a polygamous marriage determines succession to kingship.

¹*The History of Basutho*, Morija printing works, Lesotho (1912) reprint (1997)

- 5.1.4 Amongst the wives of *morena*, there is a *mofumahadi* a wife whose *bohali (lobola)* is derived from contributions made by the community. In a polygamous marriage, she is the first wife.
- 5.1.5 *Mofumahadi* is married to bear an heir to the throne.
- 5.1.6 The heir to the throne is the first born son of *mofumahadi*. He assumes traditional leadership at the death of his father.
- 5.1.7 However, if the above customary law of succession fails to provide an heir, the following customary practices are resorted to:-
- (a) if a *mofumahadi* cannot bear an heir, a surrogate wife a *hlatswadirope* is married to bear an heir;
 - (b) where a *mofumahadi* dies without issue, one of her sisters, or close relatives is provided as a *seantlo* to bear children on her behalf;

- (c) in the event of the death of an incumbent without issue the royal family appoints someone to raise seed on behalf of the deceased;
- (d) if an incumbent dies while his successor is still a minor, a younger brother of the deceased becomes regent;
- (e) where an heir dies before marriage, a *mofumahadi* is married on behalf of the deceased to bear an heir. The royal family appoints someone to father the heir.

6.

IMPACT OF LEGISLATION

6.1 Colonial Era

6.1.1 Before the advent of colonisation communities were ruled by “chiefs” (traditional leader). The basic political unit in African life was a traditional community. The institution of traditional leadership was regulated mainly by the customary law and

practices of a traditional community. The traditional leader ruled by popular mandate. He took decisions with his councillors who were normally members of the extended royal family.

6.1.2 The constitutional development of Batlokwa ba Mota, commenced when they were settled in Witzieshoek in 1875.

6.1.3 The Orange Free State government wanted more control over the people of Witzieshoek and for this purpose substituted Ordinance 3 of 1868 by Proclamation 827 of 1897, later embodied in Act 9 of 1898. In terms of this Act the government could appoint and dismiss traditional leaders at will and could prescribe their functions. Tribal authorities were of lesser importance.

6.1.4 Ordinance No. 6 of 1907 established a Reserve Council on which both Batlokwa and Bakwena were represented. It was chaired by a White official, and was abolished in 1953.

6.1.5 In terms of section 1 of the Black Administration Act, 38 Of 1927, the Governor-General became

supreme traditional leader of all Africans in the Union. Section 2 thereof, empowered the Governor-General *inter-alia* to recognise or appoint any person as a traditional leader of a Black tribe and could make regulations prescribing the duties, powers, privileges and conditions of service of traditional leaders so recognised or appointed as well as acting traditional leaders and acting headmen. The Governor-General could depose any traditional leader so recognised or appointed. He could also establish or disestablish tribes (sections 3 to 5).

6.1.6 During both the colonial and apartheid eras the Black Administration Act did not recognise the institution of kingship (*borena boboholo*) as such. However, the institution of traditional leadership was recognised. All African traditional leaders were referred to as traditional leaders or headmen.

6.1.7 With regard to Batlokwa, the Black Administration Act, was promulgated long after the Orange Free State Republic had crushed their chieftainship.

6.2 **Apartheid and Homeland Era**

- 6.2.1 From 1927 to 1951, traditional leaders and their councils played a minor role in district administration. Traditional leaders were paid a quarterly stipend and some functions, mainly aimed at maintaining law and order, were assigned to them. These functions eventually came to be legalized by Regulations Prescribing the Duties, Powers, Privileges and Conditions of Service of chiefs and headmen, initially Government Notice 2252 of 1928 and later Proclamation No. 110 of 1957.
- 6.2.2 These regulations remained in force and only came to be repealed by virtue of provincial legislation on traditional leadership enacted in pursuance of the Framework Act.
- 6.2.3 In 1951 matters took another turn. The National Party government re-discovered and re-designed tribal authorities to form the building blocks of its homeland system. With that end in view the Black Authorities Act, 68 of 1951 (“the Black Authorities Act”) was adopted. It provided for the following:-

- (a) The recreation and activation of tribal authorities, consisting of a group of administrative areas (formerly called locations) owing allegiance to a senior traditional leader.
- (b) Wessels Mota of Batlokwa ba Mokotleng was one of the first two traditional leaders who established tribal authorities in terms of the Act, on 19 June 1953. (Batlokwa tribal authority in terms of G.N 1273);
- (c) Tribal authorities belonging to the same district were grouped together into regional authorities;
- (d) Proclamation R182 of 1962 granted the Batlokwa tribal authorities the status of regional authorities;
- (e) In 1985 Batlokwa ba Mota, were subdivided into three tribes (see Qwaqwa Official Gazette No. 8 of 21 February 1985). The former chief was elevated to the status of

paramount chief and the hereditary headmen were in turn elevated to chiefs.

- 6.2.4 In terms of the Black Administration Act, a number of regional authorities were grouped together into a territorial authority. In the case of Qwaqwa there were as stated two regional authorities and the government established the Basotho ba Borwa Territorial Authority in terms of Proclamation R58 of 1969. It consisted of the two paramount chiefs and six councillors from each tribal authority. The powers, functions and duties of the regional authority were assigned to the territorial authority.
- 6.2.5 Section 1 of the National States Constitution Act, 21 of 1971 converted the Basotho ba Borwa Territorial Authority into a Legislative Assembly.
- 6.2.6 Eventually, Qwaqwa was granted self-government by Proclamation R203 of 1974. The Legislative Assembly consisted of 60 members, 40 of whom were nominated by the two tribal authorities and 20 were elected by voters.

6.3 **Post-Apartheid Era**

6.3.1 Section 211(1) of the Constitution provides for the status role and recognition of the institution of traditional leadership according to customary law and subject to the constitution.

6.3.2 To this end national legislation may provide for the status and role of traditional leadership as an institution at local level on matters affecting local communities. This culminated in the promulgation of the Traditional Leadership and Governance Framework Act 41 of 2003 (The Framework Act).

6.3.3 The objective of the Framework Act is:

“To provide for the recognition of traditional communities; to provide for the establishment and recognition of traditional councils; to provide a statutory framework for leadership positions within the institution of traditional leadership, the recognition of traditional leaders and the removal from office of traditional leaders; to provide for houses of traditional leaders; to provide for the functions and roles of traditional leaders; to

provide for dispute resolution and the establishment of the Commission on Traditional Leadership, Disputes and Claims; to provide for a code of conduct; to provide for amendments to the Remuneration of Public Office Bearers Act, 1998; and to provide for matters connected therewith.”

6.3.4 The Commission on Traditional Leadership Disputes and Claims in particular, is mandated to regulate and restore the dignity of the institution of traditional leadership.

6.3.5 The Framework Act, requires the government of the provinces to enact legislation to provide for matters peculiar to the provinces.

7.

CURRENT STATUS

7.1 In terms of section 28(1) any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been

recognised as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26.

7.2 Batlokwa ba Mota are an officially recognised paramountcy;

7.3 Lekunutu Cavandish Mota is the paramount chief of Batlokwa ba Mota;

7.4 There are three senior traditional leaders under his authority;

7.5 His area of jurisdiction comprises the villages of Dinkweng, Phomolong and Thibella.

8.

DETERMINATION

8.1 Issues to be Determined

8.1.1 The issues are:-

(a) whether in the course of the history of Batlokwa ba Mota, a kingship was established;

(b) if it was established, by whom, how, when; and

- (c) whether the kingship has since been passed on from one generation to another according to the custom of Batlokwa;
- (d) whether the position of the paramount chief of Batlokwa ba Mota was established in terms of customary law and customs.

8.2 **Analysis of Issues**

8.2.1 In pursuit of uniformity in the Republic in terms of the Framework Act the Commission takes cognisance of the following principles:

- (a) The establishment of an independent traditional community under one leader.
- (b) Welding together diverse cultural and linguistic elements or communities each with its own recognisable traditional leader under one principal traditional leader.
- (c) The traditional community should not have lost its independence through indigenous political processes which resolved

themselves during the centuries before colonial intrusion.

- (d) The principal traditional leader should rule over the entire traditional community with linguistic and cultural affinities rather than a section thereof.

8.3 **Analysis of Evidence**

8.3.1 Kgwadi, one of the first sons of Tabane, is the founder of Batlokwa.

8.3.2 Sekonyela, who was a descendant of Kgwadi, established himself at the mountain fortress of Jwalaboholo.

8.3.3 Moshweshwe attacked and defeated Batlokwa ba Sekonyela. Sekonyela fled with his followers to the present Bloemfontein. He later obtained land in the Herschel district and died there.

8.3.4 The people under Sekonyela disintegrated, some went to Lesotho, others to Mount Fletcher and Herschel in the Eastern Cape.

8.3.5 Mota had three sons, namely, Hlubi, Patso, and Moropotsana.

8.3.6 Moropotsana, the youngest son of Mota was better known as Koos.

8.3.7 Mota was forced to leave Natal at the insistence of the Natal government. He left his two elder brothers behind.

8.3.9 In April 1924 Koos Mota the then headman of Batlokwa ba Mota applied for recognition as chief of Batlokwa, and his application was refused. It was only in 1942 when Wessels, son of Koos Mota was recognised as a chief.

8.3.10 He was succeeded by his son Lekunutu Mota, the incumbent.

8.4 The Commission finds that:-

8.4.1 At no stage during the course of the, history did Batlokwa ba Mota establish a kingship.

8.4.2 Batlokwa who settled in Qwaqwa constitute one of the branches of Batlokwa, namely, Batlokwa ba Mota, Batlokwa ba Mokgalong, Batlokwa ba Morakadu,

Batlokwa ba Makalakeng, Batlokwa ba Nasatse Patso,
Batlokwa ba Lehana and Batlokwa ba Masene.

8.4.3 The above mentioned branches of Batlokwa still share similar cultural and linguistic elements in their respective areas. Therefore, a splinter group cannot claim cession from the rest.

8.4.4 Batlokwa ba Mota the present paramountcy emanates from one of the junior houses within the Mota lineage. See annexure “BK1” (genealogy)

8.4.5 The elevation of Wessels Mota to the position of paramount chief in 1988, was in keeping with the newly created and politically engineered Basotho homeland and not in terms of custom.

9.

CONCLUSION

9.1 The official recognition of the institution of *borena bo boholo* was not in line with customary law and customs of the traditional community of Batlokwa in that:-

- 9.1.1 The status of a traditional leader should be determined by the rank that he occupies within the traditional community as a whole.
- 9.1.2 The rank is determined by well established customary laws common to most of the indigenous people of South Africa, being the status of the mother, male primogeniture and the performance of specific rituals.
- 9.2 In the circumstances, the Commission finds that in terms of customary law and the Framework Act, Batlokwa ba Mota paramountcy is not a kingship.