

DETERMINATION ON BAKWENA BA MOPELI PARAMOUNTCY

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INTRODUCTION

1.1 CONSTITUTIONAL PROVISIONS

- (α) Chapter 12 (Sections 211 and 212) of the Constitution of the Republic of South Africa Act 106 of 1996 (“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.

- (β) 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 hereinabove, 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 this investigation is on the paramountcy of Bakwena ba Mopeli.
- 2.4 The investigation is to determine whether the paramountcy of Bakwena ba Mopeli was established in accordance with customary law and customs. This investigation is conducted by the Commission of its own accord.

3.

METHODOLOGY

3.1 The determination focuses on the paramountcy of Bakwena ba Mopeli.

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. The paramountcy was expected to respond specifically to the said questions at the hearing. During this stage the hearing was held jointly with Batlokwa ba Mota.

3.3 During both stages the procedure adopted at the hearings was as follows:-

3.3.1 Public hearings in which selected members of Bakwena ba Mopeli 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).

4.

HISTORICAL BACKGROUND

- 4.1 Bakwena trace their origin to Kwena who lived round about 1450. Kwena fathered three sons namely: Kgabo, Ngwato and Ngwaketsi.
- 4.2 Kgabo had one son Masilo II (also known as Mosito).
- 4.3 Masilo II had two sons, Motjhudi (Mokotedi) and Napo, the father of Motebang, Disema and Molapo.
- 4.4 Motebang lived at Tebang, near the present day Heidelberg. He was succeeded by his son Molemo.
- 4.5 After the death of Molemo, his sons Tsholo and Tsholwane left the area. They were succeeded by their sons Tshotelo and Kadi (Monaheng), respectively. They settled near present day Bethlehem where they lived side by side with Bafokeng of Mangole.

- 4.6 Later, Monaheng settled at Fothane near Fouriesburg. He subjugated Bafokeng of Komane and some San people who already occupied that area.
- 4.7 He was later rejoined by Tshotelo. Monaheng placed Tshotelo at Kaffir Kop, to rule under his authority. The people of Tshotelo (also known as Bamodibedi), though senior to the people of Monaheng (Bamonaheng) by birth, became subordinate in terms of traditional leadership status.
- 4.8 Bamonaheng moved from Fouriesburg across the Caledon river to the present day Lesotho.
- 4.9 Monaheng fathered six sons, namely; Ntsane, Motlohelwa, Motlwang, Mokotedi, Mokgeseng and Monyane.
- 4.10 The descendants of Motlwang played a pivotal role in the history of Bakwena.
- 4.11 Motlwang fathered Mokgatjhane. Mokgatjhane in turn fathered Moshweshwe and Paulos Mopeli.

- 4.12 Moshweshwe established the Basotho kingship through conquering and subjugating various traditional communities, including Mankwane, Mahlubi, Bakwena, Makgwakgwa, Batlounge, Bataung and Bahlakwana.
- 4.13 The aforementioned traditional communities, acknowledged Moshweshwe to be their leader and king. They were absorbed to form the Basotho nation, and shared sesotho customs, language and culture.
- 4.14 Moshweshwe welded together fragmented Basotho communities round about 1818, during the Mfecane Wars. He built them together into a unified people. Thus the Basotho kingship was born. Lesotho was established in 1823.
- 4.15 Moshweshwe placed Paulos Mopeli as *morena wa sebaka*¹ at Mabilela, east of present day Ladybrand.
- 4.16 The wars between Basotho and the Voortrekkers (1865 – 1868) dispossessed Lesotho of much of its territories, including Mabilela.

¹ territorial traditional leader

- 4.17 Mopeli found himself landless. In the quest to regain territory, he approached the Volksraad of the Orange Free State led by President Brand.
- 4.18 The wish that Mopeli had was eventually granted. He was allocated a portion of land to live together with his followers at the then Wietsieshoek (Qwaqwa today). He was allowed to stay on this piece of land so long as he and his followers remained subjects of the government of the Republic of the Orange Free State.
- 4.19 Subsequently, Paulus Mopeli applied to the then government for recognition as chief (*morena*) over his people – Bakwena ba Mopeli.

CUSTOMARY LAW OF SUCCESSION

5.1 Succession to the Kingship of Bakwena

- 5.1.1 The customary succession to Bakwena kingship is based on information presented during the hearings and from a book by Ellenberger².
- 5.1.2 Customary succession is based on a system of male primogeniture.
- 5.1.3 The status of a wife within a polygamous marriage determines succession to kingship.
- 5.1.4 Amongst the wives of a *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.

²*The History of Basutho*, Morija printing works, Lesotho (1912) reprint (1997)

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.

THE SPLIT

- 6.1 After the dispossession of Mabohelela, Mopeli did not return to the authority of his elder brother, Moshweshwe. He chose to establish himself under the authority of the Voortrekkers.
- 6.2 Mopeli requested land from President Brand. In response to his request, Basotholand Records by George Theal reflect the following entry:-

“Die Volksraad kennis genomen hebbende van die vershillende aansoeken door den Basuto kaptein Paulus Mperi sedert de gewone Raadzitting in 1866 aan den Staatpresident gedaa, om met zyn vlok tot onderdanen van den Staat te worden aangenomen, en een stuk grond ter bewoning to onvengen.....

Die kaptein Paulus Mopeli met zijne onderhooide kapteins Rhalitokwi akis Afrika, Ligaan, Rhamontsing, Ramafiking, Moteka, etc (ten more names are mentioned) en hul volk worden aangenomen als onderdaden van den Oranje Vrijstaat.”

- 6.3 The essence of the response was that Mopeli and his people were granted land on which to stay as subjects of the Orange Free State.
- 6.4 Subsequently, an agreement was signed on 1 June 1867, in terms of which a portion of Qwaqwa was made available to Mopeli and his people for residential purposes only. They did not own the land.

- 6.5 Mopeli had several *marenana*³ under his authority consisting mostly of his sons and advisors.
- 6.6 Mopeli died in 1897 and was buried on Thaba Bosiu in Lesotho the historical resting place of the Basotho royal family.
- 6.7 Rantsane Mopeli, his eldest son and heir, left to bury his father in Lesotho. He never returned. However, his progeny continued to rule in Qwaqwa as *marena*.
- 6.8 Paulus Mopeli was succeeded by Ntsane I, the son of Rantsane, in 1898. He ruled for twenty years. Ntsane I was succeeded by his eldest son Ramatshediso Charles Mopeli, who died in 1962. Ramatshediso Charles Mopeli was succeeded by Ntsane II, who died in 1965. *Mofumahadi* Mampoi Mopeli became regent for her son Motebang Mopeli, who ruled from 1978 to 1993.
- 6.9 In 1993 *Mofumahadi* Mathokwana Mopeli became regent for her son, Thokwana Mopeli.

³headmen

IMPACT OF LEGISLATION

7.1 Colonial Era

7.1.1 Before the advent of colonisation communities were ruled by “chiefs”. 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 chief ruled by popular mandate. He took decisions with his councillors who were normally members of the extended royal family.

7.1.2 The constitutional development of Bakwena ba Mopeli commenced when Bakwena were settled in Witzieshoek in 1868. According to Ordinance No.3 of 1866, Bakwena ba Mopeli, were accepted as ordinary subjects and citizens of the Orange Free State republic within its political framework.

- 7.1.3 The Orange Free State government wanted more control over the people of Witzieshoek and for this purpose substituted the said Ordinance 3 of 1868 by Proclamation 827 of 1897, later embodied in Act 9 of 1898 of the Orange Free State. 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.
- 7.1.4 Ordinance No. 6 of 1907 established a Reserve Council on which Bakwena were represented. It was chaired by a White official. The Reserve Council was abolished in 1953.
- 7.1.5 In terms of section 1 of the Black Administration Act, the Governor-General became supreme chief of all Africans in the Union, section 2 empowered the Governor-General *inter-alia* to recognise or appoint any person as a chief of a Black tribe and could make regulations prescribing the duties, powers, privileges and conditions of service of chiefs so recognised or appointed as well as acting chiefs and acting headmen. The Governor-General could

depose any chief so recognised or appointed. He could also establish or disestablish tribes (sections 3 to 5).

7.1.6 During both the colonial and apartheid eras the Black Administration Act, did not recognise the institution of *borena bo boholo* as such. However, the institution of traditional leadership was recognised. All African traditional leaders were referred to as chiefs or headmen.

7.1.7 With regard to Bakwena to the Black Administration Act, was promulgated long after the Orange Free State Republic had crushed their chieftom.

7.2 **Apartheid and Homeland Era**

7.2.1 From 1927 to 1951, traditional leaders and their councils played a minor role in district administration. Chiefs 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.

7.2.2 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.

7.2.3 In 1951 matters took another turn. The National Party government literally re-discovered and re-designed tribal authorities to form the building blocks of its homeland constitutional structures. With that end in view the Black Authorities Act, 68 of 1951 (“the Black Authorities Act”) was adopted. It provided for:-

(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 (chief);

(b) Charles Mopeli of Bakwena ba Mopeli was one of the first two traditional leaders who

established tribal authorities in terms of the Act on 19 June 1953 (the Bakwena Tribal Authority in terms of G.N 1274).

(c) Tribal authorities belonging to the same district were grouped together into regional authorities;

(d) Proclamation R182 of 1962 granted the Bakwena tribal authorities the status of regional authorities;

(e) In 1985 Bakwena ba Mopeli were subdivided into seven tribes. (see Qwaqwa Official Gazette No. 8 of 21 February 1985). The former chief were elevated to the status of paramount chiefs and the hereditary headmen were in turn elevated to chiefs.

7.2.4 In terms of the Black Administration Act, a number of regional authorities were grouped together to form 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 was assigned to the territorial authority.

7.2.5 Section 1 of the National States Constitution Act, 21 of 1971 converted the Basotho ba Borwa territorial authority into a Legislative Assembly.

7.2.6 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 elected by voters.

7.3 **Post-Apartheid Era**

7.3.1 Section 212 of the Constitution provides for the status, role and recognition of the institution of traditional leadership.

7.3.2 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.

7.3.3 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.”

7.3.4 The Commission on Traditional Leadership Disputes and Claims in particular, is mandated to regularise and restore the dignity of the institution of traditional leadership. The Framework Act enjoins the government of the provinces (including the Free State) to enact legislations to provide for matters peculiar to the provinces. The Legislative Assembly of the Free State has accordingly enacted the Free State Traditional Leadership and governance Act, 8 of 2005.

8.

CURRENT STATUS

8.1 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.

- 8.2 Bakwena have a recognised paramountcy.
- 8.3 *Mofumahadi* MmaThokwana Mopeli is regent for her son, Thokwana Mopeli.
- 8.4 There are seven senior traditional leaders who pay allegiance to her.
- 8.5 Her area of jurisdiction comprises the villages of Namahali, Mabilela, Monontsha, Bolata, Matsieng, Thaba-Tshoeu and Thaba-Bosiu.

9.

DETERMINATION

9.1 **Issues to be Determined**

9.1.1 The issues are:-

- (a) whether in the course of the history of Bakwena ba Mopeli, a kingship was established; and
- (b) if it was established, by whom, how, and when; and
- (c) whether the kingship has since been passed on from one generation to another according to the custom of Bakwena ba Mopeli.
- (d) whether the position of the paramount chief of Bakwena ba Mopeli was established in terms of customary law and customs.

9.2 **Analysis of Issues**

9.2.1 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.

9.3 **Analysis of Evidence**

- 9.3.1 Moshweshwe, a descendant of Kwena, established the Basotho kingship through subjugating, conquering and skillfully welding together diverse elements under his authority. Under his leadership Basotho embraced a common language and culture.
- 9.3.2 Lesotho was officially established as a kingdom in 1823. Its boundaries were indeterminate.
- 9.3.3 King Moshweshwe posted his half brother, Paulus Mopeli, to Mabilela, an area resorting under his jurisdiction. Mopeli ruled at Mabilela as a subordinate *morena* under King Moshweshwe.
- 9.3.4 The arrival of the Voortrekkers in the then *Republiek van die Oranje Vrystaat* heralded protracted battles and skirmishes between Basotho and the Boers. A conflict between the two sides was caused mainly by territorial disputes. Mabilela area was duly conquered. It fell under the jurisdiction of the Orange Free State.
- 9.3.5 Mopeli and his people found themselves landless, in the midst of a hostile and encroaching power.

Instead of appealing or going back to King Moshweshwe, his brother, Paulus Mopeli decided to request land from his conquerers, the Boers.

9.3.6 The wish that Mopeli had was eventually granted. He was allocated a portion of land to live together with his followers at the then Witsieshoek. He was allowed to stay on this piece of land so long as he and his followers remained subjects of the government of the Republic of the Orange Free State.

9.3.7 Subsequently, Paulus Mopeli applied to the then government for recognition as chief (*morena*) over his people – Bakwena ba Mopeli. In 1942 Paulus Mopeli was officially recognised as chief over his followers (Bakwena ba Mopeli). Up to this stage Paulus Mopeli did not overtly harbour ambitions to reign over either Bakwena falling outside his area of jurisdiction or Basotho in general.

9.3.8 With the advent of the apartheid ideology, the people

of Mopeli were used as a building block for the creation of a homeland, with the ultimate aim of establishing an 'independent state'.

Mopeli people were used as a building block for the creation of a homeland, with the ultimate aim of establishing an 'independent state'.

9.3.9 Basotho people who did not qualify to stay in White South Africa were forcibly ejected out of the Republic of South Africa and resettled in Witsieshoek.

9.3.10 Consequently, the demographics of Witsieshoek changed. Paulus Mopeli found himself having authority over people who were initially neither his followers nor of the Bakwena clan.

9.3.11 In keeping with the newly founded and politically engineered Basotho traditional community, the status of Mopeli had to be elevated.

9.3.12 Motebang Mopeli was officially appointed as paramount chief of Bakwena in 1988. The Bakwena ba Mopeli paramountcy thus was created.

9.4 The Commission finds that:-

9.4.1 In terms of history and genealogy, Bakwena resorting under Mopeli, in Qwaqwa, are inextricably bound to the lineage of King Moshweshwe I in Lesotho. They share similar cultural and linguistic affinities.

9.4.2 On family issues and ritual ceremonies, they continue to consult their seniors in the house of Moshweshwe in Lesotho.

9.4.3 At no stage, did Paulos Mopeli or any of his successors establish a kingship.

10.

CONCLUSION

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

10.1.1 The status of a traditional leader should be determined by the rank that he occupies within the traditional community as a whole.

10.1.2 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.

10.2 In terms of the customary law and the Framework Act, Bakwena ba Mopeli paramountcy is not a kingship.