

**DETERMINATIONS ON THE POSITION OF THE PARAMOUNT
CHIEFS**

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**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF BATLOKWA BA MOTA**

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DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF OF BATLOKWA BA MOTA

1.

INTRODUCTION

1.1 Establishment of the Commission

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims (“the Commission”).

1.1.2 The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.2 Functions of the Commission

1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to decide on any traditional leadership disputes and

claims contemplated in section 25(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 considerations of events that may have arisen before 1 September 1927.”

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and customs of the relevant community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection 25(2) (a)(vi).

2.

FOCUS

2.1 The focus of this investigation is the position of the paramount chief of Batlokwa ba Mota, Lekunutu Cavandish Mota, as envisaged in section 28(7) of the Framework Act. It provides thus:

“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 that section.”

2.2 Having issued a determination that in terms of customary law and customs and the Framework Act, the paramountcy of Batlokwa ba Mota is not a kingship, this investigation focuses on the second part of section 28(7): the position of the paramount chief of Batlokwa ba Mota, Lekunutu Cavandish Mota (“the paramount chief”).

2.3 Section 8 of the Framework Act recognises three leadership positions within the institution of traditional leadership namely, kingship, senior traditional leadership and headmanship. The enquiry is whether the paramount chief holds any traditional leadership position in terms of the said provision. If so, what is the nature of the position.

3.

METHODOLOGY

3.1 The investigation was conducted as follows:

3.1.1 The Commission sent a letter dated 29 May 2008 to the paramount chief informing him how further investigation in terms of section 28(7) of the Framework Act was to be conducted;

3.1.2 Subsequently, a letter dated 1 August 2008 was sent to the paramount chief informing him of the hearing to be held on 26 August 2008. The hearing was intended to

afford the paramount chief the opportunity to present further evidence.

3.1.3 Attached to the letter were a set of questions to which the paramount chief was to respond in writing. He was expected to respond thereto on or before 24 August 2008.

3.1.4 The paramount chief indicated through a letter dated 28 August 2008 that he would be available to participate in the envisaged hearing. Attached to the letter were responses to the set of questions.

3.1.5 The Commission held a public hearing on 26 August 2008 in the Floreat Hall, Civic Centre, Bloemfontein where:

(a) The paramount chief was given an opportunity to expand, explain or contextualize his responses;

(b) The paramount chief was represented by Morena Pienaar Molefe. He placed on record that the paramount chief was not available and thus

requested a postponement of the hearing. It request was accepted;

- (c) The hearing was adjourned to 20 October 2008 but due to unforeseen circumstances, the hearing was further postponed to 1 December 2008.

3.1.6 A public hearing was accordingly held on 1 December 2008 where:

- (a) The paramount chief was given an opportunity to expand, explain and contextualize his responses;
- (b) The paramount chief made a presentation;
- (c) The Commissioners were given an opportunity to ask clarity seeking questions;
- (d) After the presentation the paramount chief was given a cut-off date of December 2008 to make further inputs if he so desired.

CURRENT STATUS

4.1 Lekunutu Cavandish Mota is the paramount chief of Batlokwa ba Mota, appointed as such in terms of section 2(1) of the Qwaqwa Administration Authorities Act, 6 of 1983, in August 1988.

4.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“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.”

4.3 Section 28(7) enjoins the Commission to commence its investigation with the position of the existing and recognised paramountcies and paramount chiefs.

- 4.4 Determinations on the twelve existing paramountcies were issued over two days, 29 to 30 April 2008, at Kopanong Conference Centre in Benoni. In its determination on the paramountcy of Batlokwa ba Mota, the Commission made a finding that Batlokwa ba Mota paramountcy is not a kingship.
- 4.5 In issuing its determination, the Commission made it clear that the determination focused only on the position of the paramountcy, to the exclusion of the position of the paramount chief of Batlokwa ba Mota.
- 4.6 In order to comply with section 28(7), it is therefore incumbent upon the Commission to investigate the position of the paramount chief of Batlokwa ba Mota.

5.

HISTORICAL BACKGROUND

- 5.1 **The emergence of the traditional leadership of Batlokwa Ba Mota**

- 5.1.1 Lekunutu Cavandish Mota, the paramount chief of Batlokwa ba Mota, is a descendant of Mota, the younger brother to Sekonyela. Sekonyela was a leader of Batlokwa.
- 5.1.2 Sekonyela occupied the mountain fortress called Jwalaboholo, just outside Ficksburg. In November 1853 Moshweshwe attacked and defeated Batlokwa ba Sekonyela. Sekonyela fled with some of his followers to the present-day Bloemfontein. He later obtained land in the Herschel district in the Eastern Cape where he died in 1856.
- 5.1.3 Batlokwa dispersed: some went to Lesotho, others to Mount Fletcher and Herschel in the Eastern Cape whilst others remained at Jwalaboholo.
- 5.1.4 Mota, a younger brother to Sekonyela, was not at Jwalaboholo when Moshweshwe attacked. He arrived later, gathered survivors, left Jwalaboholo and settled around Bergville in Natal. He established a traditional community known as Batlokwa ba Mota.

- 5.1.5 Mota fathered three sons, Hlubi, Patso and Moropotsana (better known as Koos). They resided at Thintwapas.
- 5.1.6 At the insistence of Sir Theophilus Shepstone, the then Secretary of Native Affairs, Mota left Natal to settle at Sefate near Harrismith. In 1861, Mota moved back to Natal in Thintwapas and eventually settled at Escourt where he later died.
- 5.1.7 Hlubi left with his followers to settle in Nquthu. Koos and his brother Patso remained at Thintwapas with their followers. The Natal Government blamed Batlokwa for the invasion of Natal by Basotho. Koos was forced to leave Thintwapas for Sefate. Patso left for Swinburne.
- 5.1.8 In 1872, Koos Mota requested land for residence in Qwaqwa from the Orange Free State government. He was granted permission to settle in Qwaqwa with his followers as subjects of the Orange Free State. Thus, Koos Mota became the first traditional leader of the community later known as Batlokwa ba Mota.

- 5.1.9 Koos Mota fathered Silas, also known as Sekhukhune. In April 1924, Koos Mota unsuccessfully applied for recognition as chief of Batlokwa of Wetsieshoek/Batlokwa ba Mota. It was only on 21 May 1929 that he was so recognised. He died on 2 February 1931.
- 5.1.10 His son, Silas, succeeded him. Silas fathered Wessels Mota. He died in September 1931. Eva, the wife of Silas was regent for her son Wessels Mota, until he assumed his rightful position in 1942. He fathered Lekunutu Cavandish Mota.
- 5.1.11 In 1985 Batlokwa ba Mota were subdivided into three 'tribes'; Phomolong, Thibella and Rietpan. The chief was elevated to the status of paramount chief and hereditary headmen were in turn elevated to chiefs.
- 5.1.12 In 1985, Wessels Mota was appointed paramount chief of Batlokwa ba Mota in terms of section 2(1) of the Qwaqwa Administration Authorities Act, 6 of 1983.

5.1.13 Wessels Mota died on 13 August 1988 and was succeeded by Lekunutu Cavandish Mota as paramount chief of Batlokwa ba Mota.

5.1.14 On 1 December 2008, Lekunutu Cavandish Mota, made the following presentation:-

(a) During the wars of turmoil Batlokwa eventually settled at Jwalaboholo under the leadership of Sekonyela. In the absence of Mota, the younger brother to Sekonyela, Moshoeshoe attacked Batlokwa.

(b) Sekonyela fled like a coward thereby deserting his people. After the battle, Mota returned to find Batlokwa without a leader. He filled in the vacuum left by Sekonyela and departed for Mooi River with Batlokwa where he later died.

5.1.15 The rest of the evidence tendered by the paramount chief is mostly common cause to that of the Commission's own research and therefore will not be rehashed herein.

5.1.16 Having made a determination that the paramountcy of Batlokwa ba Mota is not a kingship, the only other leadership positions available within the traditional leadership institution of Batlokwa ba Mota, in terms of the Framework Act, are senior traditional leadership and headmanship.

6.

CUSTOMARY LAW AND CUSTOMS FOR IDENTIFYING A SENIOR TRADITIONAL LEADER AND HEADMAN / HEADWOMAN FOR BATLOKWA

6.1 Succession to the traditional leadership of Batlokwa

6.1.1 Customary succession among Batlokwa is governed by the principle of male primogeniture. Ordinarily females would not succeed.

6.1.2 The status of a wife within a polygamous marriage determines succession to traditional leadership:

- (a) Among *morena*'s wives, there is a *mofumahadi*, a wife whose *bohadi* is paid for by the community. In a polygamous marriage, she is the first wife.
- (b) *Mofumahadi* is married to bear an heir to the throne.
- (c) The heir to the throne is the first born son of *mofumahadi*. He assumes traditional leadership at the death of his father.

6.1.3 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* (substitute wife) to bear children on her behalf;

- (c) In the event of the death of a *morena* without an heir the royal family appoints someone to raise seed on behalf of the deceased;
- (d) If a *morena* 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 raise seed on behalf of the deceased.

6.1.4 During the hearing of 1 December 2008 the following information emerged regarding the customary law of succession of Batlokwa ba Mota:

- (a) A senior traditional leader is installed according to the family law of succession;
- (b) A child born out of wedlock cannot succeed to the position of traditional leadership;

- (c) A *morena* has no powers to supersede customary law on issues of succession;
- (d) A *morena* first has to get married before he assumes a position of traditional leadership;
- (e) A *morena* may allocate land within his area of jurisdiction and offer it to his next of kin to rule on his behalf. He, however, does not have power to grant his next of kin a position similar to his;
- (f) Women take the role of regency, for example, Eva, was regent for her minor son Wessels Mota;
- (g) If there is no son in the great house, the next senior house takes over.

DETERMINATION

7.1 Issues to be determined

7.1.1 Whether the paramount chief of Batlokwa ba Mota, Cavandish Lekunutu Mota, holds any traditional leadership position in terms of section 8 of the Framework Act.

7.1.2 If so, what is the nature of the position? By whom, how and when was it established?

7.1.3 Has the leadership position been passed on from one generation to the next according to the customary law and customs of Batlokwa?

7.2 Analysis of issues

7.2.1 In order for an individual to be recognised as a traditional leader he/she has to qualify in terms of the customary law and customs of the traditional community. Once recognised, the position is passed on

to the successor in terms of customary law and customs.

7.2.2 It was not unusual for the son of a traditional leader to break away with his followers from the mainstream traditional community, acquire his own area of jurisdiction and establish his own traditional leadership.

7.2.3 The status of such traditional leader cannot be higher than that of the original traditional leadership.

7.2.4 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and customs of the traditional community.

7.2.5 The traditional leader may not establish or create a multiplicity of traditional leaderships equal in status to his. Customary law and customs of Batlokwa do not allow a multiplicity of traditional leaders emanating from one traditional leader.

7.2.6 A *morena* may only establish a traditional leadership below his status.

7.3 **Analysis of evidence**

7.3.1 Lekunutu Cavandish Mota is a descendant of Koos Mota who was the first traditional leader of the community which later became known as Batlokwa ba Mota. Mota fathered Hlubi, Patso and Koos.

7.3.2 Batlokwa were dispersed during the Difaqane; some went to Lesotho, others to Mount Fletcher, Herschel and Mooi River. Mota and his followers settled at Mooi River. Due to conflicts between Batlokwa and the colonialists, Mota and his sons were forced to separate.

7.3.3 Koos subsequently requested land in Qwaqwa, where he eventually settled with his followers. In so doing, he assumed the position of the traditional leader of Batlokwa ba Mota. Thus Koos Mota was the first traditional leader of the community which later became known as Batlokwa of Witsieshoek/ Batlokwa ba Mota.

7.3.4 Koos Mota died in 1931 and was succeeded by Silas and Wessels respectively. In 1985, Wessels was appointed as the first paramount chief of Batlokwa ba Mota.

7.3.5 The Commission has already found that such appointment was irregular in that it was not in accordance with customary law and customs of Batlokwa.

7.3.6 This irregularity continued with Lekunutu Cavandish Mota who was appointed in August 1988.

7.3.4 The Commission finds that:

(a) When Koos Mota left Sefate, near Harrismith, and acquired land in Qwaqwa with his followers, he became the first leader of the traditional community that settled in this area.

(b) Thus Koos Mota was the first traditional leader of the community known as Batlokwa ba Mota.

- (c) According to customary law and customs of Batlokwa, the nature of the position Koos Mota could hold is that of *morena*, below the level of *Morena e moholo*. In terms of the Framework Act, the position is that of senior traditional leader.

- (d) Koos Mota held the position of senior traditional leader. According to the customary law and customs of Batlokwa, the descendants of Koos therefore, could only inherit the position of senior traditional leader.

- (e) The nature of the position that the paramount chief holds could only emanate from that which Koos held and the equivalent position, in terms of the Framework Act is that of senior traditional leader.

8.

CONCLUSION

In terms of customary law and customs of Batlokwa and the Framework Act, the nature of the position of the paramount chief of Batlokwa ba Mota, Lekunutu Cavandish Mota, is that of senior traditional leader.

**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF BAKWENA BA MOPELI**

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**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF BAKWENA BA MOPELI**

1.

INTRODUCTION

1.1 Establishment of the Commission

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Dispute and Claims (“the Commission”).

1.1.2 The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.2 Functions of the Commission

1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to

decide on any traditional leadership dispute and claim contemplated in section 25(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'; and

(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. ”

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to section 25(2)(a)(vi).

2.

FOCUS

2.1 The focus of this investigation is the position of the late paramount chief of Bakwena ba Mopeli, Motebang Mopeli, as envisaged in section 28(7) of the Framework Act. It provides thus:

“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 that section.”

2.2 Having issued a determination that the paramountcy of Bakwena ba Mopeli is not a kingship in terms of the Framework Act, this investigation focuses on the second part of section 28(7): the position of Thokoana Mopeli the successor-in-title to the position of paramount chief of Bakwena ba Mopeli (“the paramount chief”).

2.3 Section 8 of the Framework Act recognises three leadership positions within the institution of traditional leadership namely, kingship, senior traditional leadership and headmanship. The enquiry is whether the paramount chief holds any traditional leadership position in terms of the said provision. If so, what is the nature of the position.

3.

METHODOLOGY

3.1 The investigation was conducted as follows:

3.1.1 The Commission sent a letter dated 29 May 2008, to the acting paramount chief informing her how further investigation was to be conducted in terms of section 28(7) of the Framework Act.

3.1.2 Subsequently, a letter dated 1 August 2008 was sent to the acting paramount chief informing her about the hearing to be held on 26 August 2008. The hearing was intended to afford the acting paramount chief an opportunity to present further evidence.

- 3.1.3 Attached to the letter were a set of questions to which the acting paramount chief was expected to respond in writing on or before 24 August 2008.
- 3.1.4 The acting paramount chief did not respond to the set of questions.
- 3.1.5 The Commission nevertheless proceeded to hold a public hearing on 26 August 2008, in the Floreat Hall, Civic Centre, Bloemfontein where:
- (a) The acting paramount chief was given an opportunity to expand, explain and contextualize her responses;
 - (b) Morena Matheadira Mopeli, on behalf of the acting paramount chief, placed on record the following:
 - (i) the acting paramount chief would not participate in the public hearing;

(ii) the acting paramount chief intended to institute review proceedings to set aside the decision of the Commission on the position of the paramountcy of Bakwena ba Mopeli issued on 29 to 30 April 2008.

3.1.6 The Commission informed Morena Matheadira Mopeli and the delegation that it would proceed with the investigation and issue a determination based on its own research as well as evidence gathered during the investigation into the position of the Bakwena ba Mopeli paramountcy to the extent that it was relevant.

4.

CURRENT STATUS

4.1 Mathokoana Mopeli is regent for her son Thokoana Mopeli, the successor-in-title to the position of paramount chief of Bakwena ba Mopeli.

4.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“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.”

- 4.3 The Framework Act does not make provision for the appointment of the successor-in-title following the death of the traditional leader. There is therefore no legislation in terms of which the successor-in-title may be appointed. Hence the focus in this determination is on the late paramount chief, Motebang Mopeli.
- 4.4 Section 28(7) enjoins the Commission to commence its investigation with the position of the existing and recognised paramountcies and paramount chiefs.
- 4.5 Determinations on the twelve existing paramountcies were issued over two days, 29 to 30 April 2008, at Kopanong Conference Center in Benoni. In its determination on the paramountcy of Bakwena ba Mopeli, the Commission made a finding that Bakwena ba Mopeli is not a kingship.

4.6 In issuing its determination, the Commission made it clear that the determination focused only on the position of the paramountcy, to the exclusion of the position of the paramount chief of Bakwena ba Mopeli.

4.7 In order to comply with section 28(7), it is therefore incumbent upon the Commission to investigate the position of the paramount chief of Bakwena ba Mopeli.

5.

HISTORICAL BACKGROUND

5.1 The emergence of the traditional leadership of Bakwena ba Mopeli

5.1.1 Thokoana Mopeli is a descendant of Paulus Mopeli. Moshweshwe placed Paulus Mopeli as *morena wa sebaka* (territorial chief) at Maboletla, east of present day Ladybrand, to rule a section of his people.

- 5.1.2 Following the 1866 to 1868 wars (the Frontier Wars) between Basotho and Boers, Paulus Mopeli was forced to leave Maboalela.
- 5.1.3 Paulus Mopeli found himself landless. In the quest to acquire territory he approached the Volksraad of the Orange Free State led by President Brand in 1867.
- 5.1.4 The quest for territory was eventually granted to Paulus Mopeli. He was allocated a portion of land to live together with his followers at the then Witsieshoek (Qwaqwa). He was allowed to settle on this piece of land so long as he and his followers remained subjects of the government of the Orange Free State.
- 5.1.5 Subsequently, Paulus Mopeli applied to the then government for recognition as chief (*morena*) over his people, Bakwena ba Mopeli.
- 5.1.6 The application was granted. Thus, the traditional leadership of Bakwena ba Mopeli was officially recognised.

- 5.1.7 Paulus Mopeli died in 1897, his son Rantsane took his body for burial in Lesotho. After the burial, Rantsane was prohibited by the Volksraad from returning to the Free State to succeed his father. Therefore, Rantsane's son, Ntsane, succeeded his grandfather to the throne in 1898.
- 5.1.8 Ntsane ruled for twenty years. His son, Ramatshediso Charles Mopeli, succeeded him and he died in 1962. Ramatshediso 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. In 1993, *Mofumahadi* Mathokwana Mopeli became regent for her son Thokwana.
- 5.1.9 In 1985, the Qwaqwa Traditional Authorities Act No. 6 of 1983, elevated the Bakwena ba Mopeli from a senior traditional leadership to a paramountcy. Thus, Motebang Mopeli was the first paramount chief of Bakwena ba Mopeli.
- 5.1.10 Having made a determination that the paramountcy of Bakwena ba Mopeli is not a kingship, the only other

leadership positions available within the traditional institution of Bakwena ba Mopeli, in terms of the Framework Act, are senior traditional leadership and headmanship.

6.

CUSTOMARY LAW AND CUSTOMS FOR IDENTIFYING A SENIOR TRADITIONAL LEADER AND HEADMAN/HEADWOMAN FOR BAKWENA BA MOPELI

6.1 Succession to the traditional leadership of Bakwena ba Mopeli.

6.1.1 Customary succession among Bakwena ba Mopeli is governed by the principle of male primogeniture. Ordinarily females would not succeed.

6.1.2 The status of a wife within a polygamous marriage determines succession to traditional leadership;

(a) Among *morena*'s wives, there is a *mofumahadi*, a wife whose *bohali (lobola)* is paid for by the

community. In a polygamous marriage, she is the first wife.

(b) *Mofumahadi* is married to bear an heir to the throne.

(c) The heir to the throne is the first born son of *mofumahadi*. He assumes traditional leadership at the death of his father.

6.2 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* (substitute) to bear children on her behalf;

- (c) In the event of the death of a *morena* without an heir the royal family appoints someone to raise seed on behalf of the deceased;
- (d) If a *morena* 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 raise seed on behalf of the deceased;
- (f) A child born out of wedlock cannot succeed to the position of traditional leadership;
- (g) A *morena* may allocate land within his area of jurisdiction and offer it to his next of kin to rule on his behalf. He, however, does not have power to grant his next of kin a position similar to his;
- (h) A *morena* has no powers to supersede customary law on issues of succession.

DETERMINATION

7.1 Issues to be determined

7.1.1 Whether the late paramount chief of Bakwena ba Mopeli, Motebang Mopeli, held any traditional leadership position in terms of section 8 of the Framework Act.

7.1.2 What is the nature of the position? By whom, how and when was it established?

7.1.3 Has the leadership position been passed on from one generation to the next according to the customary law and the customs of Bakwena?

7.2 Analysis of issues

7.2.1 In order for an individual to be recognised as a traditional leader he has to qualify in terms of the customary law and customs of a traditional community.

Once recognised, the position is passed on to the successor in terms of customary law and customs.

7.2.2 It was not unusual for the son of a traditional leader to break away with his followers from the mainstream traditional community, acquire his own area of jurisdiction and establish his own traditional leadership.

7.2.3 The status of such a traditional leader cannot be higher than that of the original traditional leadership.

7.2.4 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and customs of the traditional community.

7.2.5 The traditional leader may not establish or create a multiplicity of traditional leaderships equal in status to his. Customary law and customs of Bakwena do not allow a multiplicity of traditional leaders emanating from one traditional leader.

7.2.6 A *morena* may appoint a traditional leader only to a status below that of *morena*.

7.3 **Analysis of evidence**

7.3.1 Motebang Mopeli, traces his origin from Paulus Mopeli, the younger brother to Moshweshwe. Paulus Mopeli was the first traditional leader of the traditional community which later became known as Bakwena ba Mopeli. Moshweshwe posted Paulus Mopeli at Maboalela which constituted part of his kingdom, as *morena wa sebaka* (territorial chief).

7.3.2 Following the defeat after the Frontier Wars, Paulus Mopeli was forced to leave Maboalela. In 1867, Mopeli requested and was granted land in Witsieshoek by the Volksraad to settle with his people as subjects of the Orange Free State. He later successfully applied to the government for recognition as chief.

7.3.3 He died in 1897 and was succeeded by Ntsane I, Ramatshediso Charles Mopeli, Ntsane II and Motebang Mopeli respectively.

7.3.4 In 1985, Motebang Mopeli was elevated to the position of paramount chief. In its determination issued on 29 to 30 April 2008, the Commission has already found such elevation to have been irregular in that it was not in accordance with customary laws and customs of Bakwena.

7.3.5 The Commission finds that:

(a) The nature of the traditional leadership position Paulus Mopeli held was that of *morena* since he was posted to Mabilela as *morena wa sebaka* by his brother, king Moshweshwe. As such, he was always subordinate to the king.

(b) When Mabilela was conquered by the Voortrekkers, Mopeli found himself outside the jurisdiction of Moshweshwe and under the sway of the Orange Free State government.

Nevertheless, he maintained cultural ties with Basotho and retained his customary position as *morena*, so did his successors.

- (c) As aforesaid, the elevation of Motebang Mopeli, a descendant of Paulus Mopeli to the position of paramount chief was irregular.
- (d) According to the customary law and customs of Bakwena, the position Paulus Mopeli could hold is that of *morena*, below the level of king. In terms of the Framework Act, the position is that of senior traditional leader.
- (e) According to the customary law of Basotho (Bakwena), an heir to the position of traditional leadership assumes the status of his father. Paulus Mopeli held the position of *morena*. Therefore, Motebang Mopeli, as his descendant could only inherit his position as senior traditional leader.

8.

CONCLUSION

In terms of customary law and the customs of Basotho (Bakwena) and the Framework Act, the nature of the position of the late paramount chief of Bakwena ba Mopeli, Motebang Mopeli, was that of senior traditional leader.

**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF ABATHEMBU BASERHODA**

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DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF OF ABATHEMBU BASERHODA

1.

INTRODUCTION

1.1 Establishment of the Commission

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims (“the Commission”).

1.1.2 The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.2 Functions of the Commission

1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to

decide on any traditional leadership dispute and claim contemplated in section 25(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’; and

(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.”

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to section 25(2)(a)(vi).

2.

FOCUS

2.1 The focus of this investigation is the position of the late paramount chief of abaThembu baseRhoda, Kaizer Daliwonga Matanzima, as envisaged in section 28(7) of the Framework Act. It provides thus:

“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 that section.”

2.2 Having issued a determination that in terms of the customary law and customs of abaThembu and the Framework Act, the paramountcy of abaThembu baseRhoda is not a kingship, this investigation focuses on the second part of section 28(7): the position of the late paramount chief of abaThembu baseRhoda, Kaizer Daliwonga Matanzima (“the paramount chief”).

2.3 Section 8 of the Framework Act recognises three leadership positions within the institution of traditional leadership namely, kingship, senior traditional leadership and headmanship. The enquiry is whether the paramount chief held any traditional leadership position in terms of the said provision. If so, what is the nature of the position.

3.

METHODOLOGY

3.1 The investigation was conducted as follows:

3.1.1 The Commission sent a letter dated 29 May 2008, to the paramount chief informing him how the investigation in terms of section 28(7) of the Framework Act was to be conducted.

3.1.2 A letter dated 1 August 2008 was sent to the paramount chief informing him about the hearing to be held on 28 August 2008 in East London. The hearing was intended

to afford the paramount chief an opportunity to present further evidence.

3.1.3 Attached to the letter were a set of questions to which the paramount chief was to respond in writing.

3.1.4 H.S.Toni Attorneys, acting on behalf of the paramount chief, faxed a letter dated 17 June 2008 to the Commission. They stated that due to other commitments the paramount chief could not attend the hearing set for 28 August 2008. This letter was received by the Commission on 26 August 2008.

3.1.5 On the same date (26 August 2008), H.S.Toni Attorneys faxed another letter dated 22 August 2008 in which they requested clarification on the following:

(a) The objective of the set of questions attached to the letter dated 1 August 2008;

(b) Their relevance to the custom and tradition of abaThembu; and

(c) Their relevance to the issues already determined as well as those to be determined.

3.1.6 The Commission, through a letter dated 27 August 2008, advised the paramount chief that it was not practicable to postpone the hearing.

3.1.7 The Commission proceeded to hold a public hearing in Global Life Accommodation and Conference Centre at Bisho on 28 August 2008 where:

(a) The paramount chief was given an opportunity to present further evidence;

(b) The paramount chief was represented by Mr Lusapho Makiniza Bhengu. He placed on record that the paramount chief was not available and thus requested that the hearing be postponed. This request was granted;

3.1.8 The hearing was adjourned to 22 October 2008. The paramount chief was required to submit to the

Commission responses to the aforementioned set of questions by 15 September 2008.

3.1.9 The paramount chief duly responded to the set of questions through a letter dated 15 September 2008.

3.1.10 However, due to unforeseen circumstances the hearing was further postponed to 2 December 2008.

3.1.11 A public hearing was eventually held on 2 December 2008 in Global Life Accommodation and Conference Centre at Bisho where:

- (a) The paramount chief was given an opportunity to expand, explain and contextualize his responses.
- (b) The paramount chief was represented by Mr Herbert Sindile Toni.
- (c) He stated that they participated on the understanding that the proceedings were not meant to impact adversely on the status of their *ukumkani* (king).

- (d) The Commission responded that it could not preempt the outcome of the investigation. Mr Toni proceeded to make a presentation on behalf of the paramount chief.
- (e) The Commissioners were given an opportunity to ask clarity seeking questions.
- (f) After the presentation, the paramount chief was given a cut-off date of 21 December 2008 to make further inputs if he so desired.

4.

CURRENT STATUS

4.1 The late paramount chief of abaThembu baseRhoda, Kaizer Daliwonga Matanzima was appointed as such in terms of the Black Administration Act, 1927 (Act No. 38 of 1927).

4.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“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.”

4.3 The Framework Act does not make provision for the appointment of the successor-in-title following the death of a traditional leader. There is therefore, no legislation in terms of which the successor-in-title may be appointed. Hence the focus in this determination is on the late paramount chief, Kaizer Daliwonga Matanzima.

4.4 Section 28(7) enjoins the Commission to commence its investigation with the position of the existing and recognised paramountcies and paramount chiefs.

- 4.5 Determinations on the twelve existing paramountcies were issued over two days, 29 to 30 April 2008, at Kopanong Conference Centre in Benoni. In its determination on the paramountcy of abaThembu baseRhoda, the Commission made a finding that abaThembu baseRhoda paramountcy is not a kingship.
- 4.6 In issuing its determination, the Commission made it clear that the determination focused only on the position of the paramountcy, to the exclusion of the position of the paramount chief of abaThembu baseRhoda.
- 4.7 In order to comply with section 28(7) of the Framework Act, it is therefore incumbent upon the Commission to investigate the position of the paramount chief of abaThembu baseRhoda.

5.

HISTORICAL BACKGROUND

- 5.1 **The emergence of the traditional leadership of abaThembu baseRhoda**

5.1.1 Kaizer Daliwonga Matanzima, the paramount chief of abaThembu baseRhoda, is a descendant of Rhaxoti Matanzima. Rhaxoti Matanzima was the first born son of the right- hand house of Mtirara who was one of the kings of abaThembu. Ngubengcuka had earlier consolidated the kingship of abaThembu around 1800.

5.1.2 Ngubengcuka had three wives namely: Nonesi, daughter of Faku, the king of amaMpondo, in the great house; the mother of Mtirara, in the *qadi* house; and the mother of Mnqanqeni who was in the right- hand house. Nonesi had no issue and subsequently adopted Mtirara from the *qadi* house. Mtirara was therefore to ascend the throne as king of abaThembu after the death of his father.

5.1.3 Ngubengcuka died in 1830 and Joyi became regent on behalf of Mtirara who was still a minor. The political instability caused by the Mfecane Wars resulted in the abrupt departure of Nonesi, with Mtirara , from Mgwali Great Place. In about 1838, they eventually settled around Rhodana in the present district of Lady Frere.

- 5.1.4 Subsequently, Nonesi and her people settled west of Indwe River in an area referred to by the colonialists as 'Tambookie Location' (present day Gqebenya) which forms part of Emigrant Thembuland today. At that time, Nonesi was regent for the minor Mtirara.
- 5.1.5 Around 1840 Mtirara, the eldest son of Ngubengcuka, was installed as the king of abaThembu. His Great Place was at Rhodana. He fathered three sons: Ngangelizwe of the great house, Rhaxoti Matanzima of the right- hand house and Mfanta.
- 5.1.6 Mtirara died in 1855. As Ngangelizwe was still a minor, Nonesi became regent on his behalf. Around 1860 Ngangelizwe returned to Mgwali and was installed as king of abaThembu. Nonesi remained at Gqebenya with Rhaxoti, even after Ngangelizwe had returned to Mgwali.
- 5.1.7 Shortly thereafter, the land around St. Marks (present-day Cofimvaba) was vacated by amaGcaleka. In 1865, the colonial government allocated this land to the residents of 'Tambookie Location'. The relocation was

accepted by the leaders of four clans, namely Rhaxoti Matanzima of amaHala, Ndarala of amaNdungwane, Gecelo of amaGcina and Stokwe of amaQwathi. Nonesi, however, refused to move to St. Marks and was consequently banished to Libode by the colonial government. St. Marks later became part of what was to be known as Emigrant Thembuland.

5.1.8 Rhaxoti Matanzima was of the same status as the other leaders that occupied Emigrant Thembuland. However, as the son of Mtirara, the reigning king, he was considered as senior to other traditional leaders in the area. On account of his status he allocated land to communities that requested to settle in the area. Rhaxoti Matanzima therefore can be regarded as the first most senior traditional leader of the community which later became known as abaThembu baseRhoda.

5.1.9 The area they occupied became known as Emigrant Thembuland. It consisted of two districts presently known as Cofimvaba and Xhalanga. Lady Frere was later incorporated into Emigrant Thembuland.

5.1.10 Rhaxoti Matanzima was succeeded by Mhlobo and Mvuzo respectively. Mvuzo died while his heir apparent Kaizer Daliwonga Matanzima was still a minor. Dalubuhle took over the reigns as regent for Kaizer Daliwonga Matanzima. When Kaizer Daliwonga Matanzima became of age, he took over his position as *inkosi* of amaHala.

5.1.11 With the introduction of the Black Authorities Act 68 of 1951 Emigrant Thembuland became a regional authority. Kaizer Daliwonga Matanzima was appointed the chairperson of the regional authority.

5.1.12 Emigrant Thembuland was later called Western Thembuland. Kaizer Daliwonga Matanzima was officially recognised as paramount chief in 1966. His heir apparent Mthetho Matanzima had predeceased him. Kaizer Daliwonga Matanzima died in June 2003 and is to be succeeded by his grandson, Lwandile Zwelenkosi Matanzima, the son of Mthetho Matanzima.

5.1.13 The Commission has already ruled that the appointment of Kaizer Daliwonga Matanzima was

irregular because it effectively created a dual kingship within the community of abaThembu.

5.1.14 Having made a determination that the kingship of abaThembu as a whole resorts under the lineage of Dalindyebo, the only other leadership positions available within the institution of the traditional leadership of abaThembu, in terms of the Framework Act, are senior traditional leadership and headmanship.

6.

CUSTOMARY LAW AND CUSTOMS FOR IDENTIFYING A SENIOR TRADITIONAL LEADER AND HEADMAN/HEADWOMAN FOR ABATHEMBU

6.1 Succession to the traditional leadership of abaThembu

6.1.1 Customary succession among abaThembu is governed by the principle of male primogeniture. Ordinarily a female could not succeed.

6.1.2 A senior traditional leader (*inkosi*) in a polygamous marriage has several wives matching the structure of the houses in a traditional isiThembu household.

6.1.3 Upon marriage, each wife is assigned status by being allocated a house. The structure of the houses is as follows:

- (a) The great house (*indlunkulu*);
- (b) The right- hand house (*indlu yasekunene*);
- (c) *Iqadi* of the great house (*iqadi lendlunkulu*);
- (d) *Iqadi* of the right- hand house (*iqadi lendlu yasekunene*);
- (e) The seed - bearer house (*ixhiba*);
- (f) *Umsengi* of the great house (*umsengi wendlunkulu*);and
- (g) *Umtshayelo* of the great house (*umtshayelo wendlunkulu*).

6.1.4 The status of a wife within a polygamous marriage determines succession to the throne:-

- (a) The great wife is the most senior house. Her *lobola* is derived from contributions made by the community. The first born son of the great wife succeeds his father.

- (b) The next senior wife is that of the right- hand house. The first born son to the right- hand house may be awarded a headmanship. Such headmanship is subordinate to the great house. He may not establish a separate community.

- (c) The two wives belonging to *amaqadi* are regarded as support houses for the great house and right- hand house.

- (d) *Ixhiba* is a seed-bearer house, which has no allegiance to either of the main houses. The son of *ixhiba* succeeds his father if there is no male issue in the great house.

- (e) The last two houses, *umsengi* and *umtshayelo* are minor and provide “domestic services” to the great house.

DETERMINATION

7.1 Issues to be determined

7.1.1 Whether the late paramount chief of abaThembu baseRhoda, Kaizer Daliwonga Matanzima, held any traditional leadership position in terms of section 8 of the Framework Act.

7.1.2 If so, what is the nature of the position? By whom, how and when was it established?

7.1.3 Has the leadership position been passed on from one generation to the next according to the customary law and customs of abaThembu?

7.2 Analysis of issues

7.2.1 The first born son of the right-hand house of a king may establish a separate traditional leadership with a new traditional community. Such traditional leadership is semi-independent but subordinate to the great house in

respect of family, ceremonial matters as well as those matters affecting the community of abaThembu as a whole.

7.2.2 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and customs of abaThembu.

7.2.3 The customary law and customs of abaThembu do not allow for a multiplicity of traditional leaderships emanating from one traditional leader.

7.3 **Analysis of evidence**

7.3.1 Rhaxoti Matanzima was the first traditional leader of the community which later became known as abaThembu baseRhoda. He was the first born son of the right-hand house of Mtirara.

7.3.2 It was customary for a first born son of the right-hand house to establish a new traditional community, semi-independent but subordinate to the great house in

respect of family, ceremonial matters as well as those matters affecting the community of abaThembu as a whole.

7.3.3 Rhaxoti Matanzima was regarded as the most senior *inkosi* in the area of Emigrant Thembuland among the leaders of amaNdungwane, amaGcina, and amaQwathi.

7.3.4 The establishment of the regional authority of abaThembu baseRhoda as well as his election as chairperson thereof, entrenched his perceived seniority. Kaizer Daliwonga Matanzima was appointed as paramount chief of Western Thembuland on 1 April 1966.

7.3.5 Kaizer Daliwonga Matanzima died in 2003. His successor-in-title is Lwandile Zwelenkosi Matanzima.

7.3.6 The Commission finds that:

(a) As the first born son of the right-hand house of *ukumkani* Mtirara, the nature of the traditional leadership position which Rhaxoti Matanzima

could have held is that of *inkosi*. His traditional leadership was at all times subordinate to that consolidated by his father Mtirara.

- (b) With the exception of Kaizer Daliwonga Matanzima, the successors of Rhaxoti Matanzima continued to respect and regard abaThembu bakwaDalindyebo as their seniors. The interference of the colonial and apartheid regimes in the institution of traditional leadership caused some confusion in this regard.
- (c) In 1966, Kaizer Daliwonga Matanzima, a fourth generation descendant of Rhaxoti, was elevated to the position of paramount chief and accorded a status equal to that of the king of abaThembu as a whole, Jonguhlanga Sabata Dalindyebo. This created a dual kingship.
- (d) The Commission has already found that the creation of a dual kingship was not in line with the customary law and customs of abaThembu.

- (e) According to customary law and customs of abaThembu, the nature of the position Rhaxoti Matanzima could hold is that of *inkosi* below the level of *ikumkani*. In terms of the Framework Act, the equivalent of such a position is that of a senior traditional leader.
- (f) Since Rhaxoti Matanzima held the position of *inkosi*, the descendants of Rhaxoti therefore, could only inherit the position of senior traditional leader.

8.

CONCLUSION

In terms of customary law and customs of abaThembu and the Framework Act, the nature of the position of the late paramount chief of abaThembu baseRhoda, Kaizer Daliwonga Matanzima was that of senior traditional leader.

**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF AMAMPONDO ASENYANDENI**

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**DETERMINATION ON THE POSITION OF THE PARAMAOUNT
CHIEF OF AMAMPONDO ASENYANDENI**

1.

INTRODUCTION

1.1 Establishment of the Commission

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims (“the Commission”).

1.1.2 The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.2 Functions of the Commission

1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to

decide on any traditional leadership dispute and claim contemplated in section 25(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'; and

(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."

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to section 25(2)(a)(vi).

2.

FOCUS

2.1 The focus of this investigation is the position of the late paramount chief of amaMpondo aseNyandeni, Tutor Ndamase, as envisaged in section 28(7) of the Framework Act. It provides thus:

“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 the Act, before the Commission commences with any other investigation in terms of that section.”

2.2 Having issued a determination that in terms of customary law and customs of amaMpondo and the Framework Act, the paramountcy of amaMpondo aseNyandeni is not a kingship this investigation focuses on the second part of section 28(7): the position of the late paramount chief of amaMpondo aseNyandeni, Tutor Ndamase (“the paramount chief”);

2.3 Section 8 of the Framework Act recognises three leadership positions within the institution of traditional leadership namely, kingship, senior traditional leadership and headmanship. The enquiry is whether the paramount chief holds any traditional leadership position in terms of the said provision. If so, what is the nature of the position.

3.

METHODOLOGY

3.1 The investigation was conducted as follows:

3.1.1 The Commission sent a letter dated 29 May 2008 to the office of the paramount chief informing them how further investigation in terms of section 28(7) was to be conducted.

3.1.2 A letter dated 27 August 2008 was sent to the office of the paramount chief informing them about the hearing to be held on 8 to 9 October 2008 in East London. A set of questions was attached to which they were

expected to respond in writing. The hearing was intended to afford them an opportunity to present further evidence.

3.1.3 The office of the paramount chief responded per letter dated 5 September 2008. The gist of the letter was that the heir apparent was out of the country. A request for an extension to enable the office of the paramount chief to respond was made.

3.1.4 On 9 September 2008 the Commission responded to the request indicating that it could not consider it favourably and was unable to postpone the matter indefinitely. The Commission, however, granted extension for responses to the questionnaire until 1 October 2008. The public hearing would proceed as scheduled on 8 to 9 October 2008.

3.1.5 The Commission received a letter dated 22 September 2008 from the Attorneys A. F. Noxaka and Company who were acting on behalf of the office of the paramount chief. The letter raised the following issues:

- (a) The Nyandeni paramountcy intended launching review proceedings for the setting aside of the Commission's decision that the Nyandeni paramountcy is not a kingship.
- (b) It would not be possible for their client to engage meaningfully with the Commission on the question of the position to be accorded their paramount chief Ndamase. According to them this was to be the subject of the investigation at the hearing scheduled for 8 to 9 October 2008.
- (c) The Commission should postpone the scheduled hearing until such time the intended review was finalized.
- (d) They were in the process of preparing review papers.

3.1.6 The Commission could not agree to postpone the hearing and indicated that it would proceed as scheduled.

3.1.7 An urgent application for an interdict was launched in the Pretoria High Court on behalf of the acting paramount chief. The purpose was to interdict the Commission from proceeding with the hearing. The application was opposed and was unsuccessful.

3.1.8 The Commission proceeded to hold a public hearing in Global Life Accommodation and Conference Centre, Bisho, where:

(a) The acting paramount chief was given an opportunity to present her case.

(b) Prince Mlamli Ndamase, on behalf of the acting paramount chief, indicated that she would not participate in the hearing. He further provided a letter from Attorneys A. F. Noxaka and Company. The letter was read into the record. It confirmed the position taken by the acting paramount chief not to participate in the hearing.

3.1.9 The Commission informed the delegation led by Mlamli Ndamase that it would proceed with the investigation

and would issue a determination based on its own research as well as evidence gathered during the investigation into the position of the paramountcy to the extent that it was relevant.

4.

CURRENT STATUS

4.1 Bongolethu Ndamase is the Acting paramount chief of amaMpondo aseNyandeni. She was appointed as regent for her son Ndamase Ndamase in July 1991.

4.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“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.”

4.3 The Framework Act does not make provision for the appointment of the successor-in-title following the death of the traditional leader. There is therefore no legislation in terms of which the successor-in-title may be appointed. Hence the focus in this determination is on the late paramount chief, Tutor Ndamase.

4.4. Section 28(7) enjoins the Commission to commence its investigation with the position of the existing and recognised paramountcies and paramount chiefs.

4.5 Determinations on the twelve existing paramountcies were issued over two days, 29 to 30 April 2008, at Kopanong Conference Centre in Benoni. In its determination on the paramountcy of amaMpondo aseNyandeni, the Commission made a finding that amaMpondo aseNyandeni paramountcy is not a kingship.

4.6 In issuing its determination, the Commission made it clear that the determination focused only on the paramountcy, to the exclusion of the position of the paramount chief of amaMpondo aseNyandeni.

4.7 In order to comply with section 28(7), it is therefore incumbent upon the Commission to investigate the position of the paramount chief of amaMpondo aseNyandeni.

5.

HISTORICAL BACKGROUND

5.1 The emergence of the traditional leadership of amaMpondo aseNyandeni

5.1.1 Tutor Ndamase is a descendant of Ndamase. Ndamase was the first born son of the right-hand house of Faku.

5.1.2 Faku was the most significant ruler in the history of amaMpondo. During the 19th century he successfully

defended amaMpondo in the Mfecane wars, round about 1824 to 1828, against Shaka, the king of amaZulu. It was at this time that Faku crossed to the west of Mzimvubu River and established his Great Place near the Mngazi River. Faku later established his Great Place at Qaukeni. He ruled from 1824 to 1867. Faku was the last principal leader to rule over a united amaMpondo.

5.1.3 Faku fathered amongst others Mqikela from the great house and Ndamase from the right hand house. Mqikela was the rightful heir and successor-in-title to the kingship of amaMpondo.

5.1.4 Ndamase and Mqikela, the two sons of Faku, played a pivotal role in the history of the kingship of amaMpondo. It was during their time that the split occurred.

5.1.5 One day Ndamase killed a lion and he was expected to hand over the skin to Mqikela, his senior, as was customary practice. Ndamase refused. A fight ensued between supporters of Mqikela and those of Ndamase.

- 5.1.6 Following the fight, there were tensions between Mqikela, Faku and Ndamase. Ndamase left Qaukeni and settled West of Mzimvubu River, with the blessing of Faku. This was round about 1845.
- 5.1.7 Ndamase was to remain forever subordinate to the great house as he had been sent by Faku to the Western side of Mzimvubu River to look after his people.
- 5.1.8 Mqikela, who succeeded Faku, did not cooperate with the colonialists. Consequently, Nqwiliso, the son and successor to Ndamase, was elevated to the position of paramount chief in 1878. Pondoland was thus divided into two: Eastern Pondoland and Western Pondoland and the powers of Mqikela were curtailed.
- 5.1.9 The elevation of Nqwiliso was contrary to the customary law and customs of amaMpondo in terms of which the son of the great house is accorded a status senior to that of the son of the right-hand house.

5.1.10 The Commission has already ruled that the paramountcy of amaMpondo aseNyandeni is not a kingship. The elevation of Nqwiliso and his descendants to the position of paramountcy effectively created dual kingship within the community of amaMpondo. This was irregular and not in accordance with custom.

5.1.11 Having made a determination that the kingship of amaMpondo as a whole resorts under the lineage of Mqikela, the only other leadership positions available within the traditional institution of amaMpondo in terms of the Framework Act, are senior traditional leadership and headmanship.

6.

CUSTOMARY LAW AND CUSTOMS FOR IDENTIFYING A SENIOR TRADITIONAL LEADER AND HEADMAN/HEADWOMAN FOR AMAMPONDO

6.1 Succession to the traditional leadership of amaMpondo

6.1.1 Customary succession among amaMpondo is governed by the principle of male primogeniture. Ordinarily a female could not succeed.

6.1.2 A senior traditional leader (*inkosi*) may have more than one wife. Upon marriage, each wife is allocated a house. The structure of the houses is as follows:-

(a) The great house (*indlunkulu*);

(b) The right-hand house (*indlu yasekunene*);

(c) *Iqadi* of the great house (*iqadi lendlunkulu*);and

(d) *Iqadi* of the right-hand house (*iqadi lendlu yasekunene*).

6.1.3 The status of a wife within a polygamous marriage determines succession to the throne:-

(a) The great wife is the most senior house. Her *lobola* is derived from contributions made by the

community. The first born son of the great wife succeeds his father.

- (b) The next senior wife is that of the right-hand house. The first born son to the right-hand house may be awarded a headmanship (*inkosana*). Such headmanship is subordinate to the great house. He may not establish a separate community.
- (c) The other wives, each belonging to *iqadi*, are regarded as support for these two houses. The son of *iqadi* to the great house succeeds his father if there is no male issue in the great house. The same procedure is followed if there is no male issue in the right-hand house.

7.

DETERMINATION

7.1 Issues to be determined

7.1.1 Whether the late paramount chief of amaMpondo aseNyandeni, Tutor Ndamase, holds any traditional leadership position, in terms of section 8 of the Framework Act.

7.1.2 If so, what is the nature of the position? By whom, how and when was it established?

7.1.3 Has the leadership position been passed on from one generation to the next according to the customary law and customs of amaMpondo?

7.2 **Analysis of issues**

7.2.1 In order for an individual to be recognised as a traditional leader he has to qualify in terms of customary law and customs of the traditional community. Once recognised, the position is passed on to the successor in terms of customary law and customs.

- 7.2.2 It was not unusual for the son of a traditional leader to break away with his followers from the mainstream traditional community, acquire his own area of jurisdiction and establish his own traditional leadership.
- 7.2.3 The status of such a traditional leader cannot be higher than that of the original traditional leadership.
- 7.2.4 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and the customs of the traditional community.
- 7.2.5 The traditional leader may not establish or create a multiplicity of traditional leaderships equal in status to his. Customary law and customs of amaMpondo do not allow a multiplicity of traditional leaders emanating from one traditional leader.
- 7.2.6 *Inkosi* may appoint a traditional leader only to a status below that of *inkosi*.

7.3 **Analysis of evidence**

7.3.1 Ndamase was the first traditional leader of the community which later became known as amaMpondo aseNyandeni. He was the first born son of the right-hand house of Faku.

7.3.2 It was customary for the sons of the right-hand house to establish a new traditional community, subordinate to the great house. Thus, Ndamase left Qaukeni and settled West of Mzimvubu River with the blessing of Faku.

7.3.3 When Ndamase settled across Mzimvubu River, this area was already inhabited by other amaMpondo “tribes” who paid allegiance to Faku. Among the leaders of these tribes, Ndamase was the most senior, due to his status as the son of Faku, the reigning king of amaMpondo. As the first born son of the right-hand house he assumed the position of the most senior traditional leader. Ndamase therefore was the first traditional leader of the community that later became known as amaMpondo aseNyandeni.

7.3.4 The Commission finds that:

- (a) As the first born son of the right-hand house of *ukumkani* Faku, the nature of the traditional leadership position which Ndamase could have held is that of *inkosi*. His traditional leadership was at all times subordinate to that established by his father Faku.
- (b) It was only during the reign of Mqikela and through the intervention of the colonialists, that Nqwiliso, the successor to Ndamase, was recognised by the Cape Colony as paramount chief of Western Pondoland in 1878.
- (c) This created a dual kingship. The Commission has already found that such was not in line with the customary law and customs of amaMpondo.
- (d) This irregularity and the distortion of the customary law and customs of amaMpondo have continued with various successors-in-title to the

position of paramount chief of amaMpondo aseNyandeni, to date.

- (e) According to customary law and customs of amaMpondo, the position Ndamase could hold is that of *inkosi* below the level of *ikumkani*. In terms of the Framework Act, the equivalent position is that of senior traditional leader.
- (f) Ndamase held the position of *inkosi*. According to the customary law and customs of amaMpondo, the descendants of Ndamase therefore, could only inherit the position of *inkosi*.

8.

CONCLUSION

In terms of customary law and customs of amaMpondo and the Framework Act, the nature of the position of the late paramount chief of amaMpondo aseNyandeni, Tutor Ndamase, is that of senior traditional leader.

**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF NDZUNDZA MABHOKO**

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**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF NDZUNDZA-MABHOKO**

1.

INTRODUCTION

1.1 Establishment of the Commission

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims (“the Commission”).

1.1.2 The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.2 Functions of the Commission

1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to

decide on any traditional leadership dispute and claim contemplated in section 25(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' ; and

(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."

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to section 25(2)(a)(vi).

2.

FOCUS

2.1 The focus of this investigation is the position of the late paramount chief of Ndzundza-Mabhoko, Cornelius Nyumbako Mahlangu, as envisaged in section 28(7) of the Framework Act. It provides thus:

“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 that section.”

2.2 Having issued a determination that in terms of customary law and customs of amaNdebele and the Framework Act, the paramountcy of Ndzundza-Mabhoko is not a kingship, this investigation focuses on the second part of section 28(7): the

position of the late paramount chief of Ndzundza-Mabhoko, Cornelius Nyumbako Mahlangu (“the paramount chief”).

2.3 The late Cornelius Nyumbako Mahlangu (Mayitjha III) was the paramount chief of Ndzundza-Mabhoko from 1984 until his death in 2005. Currently, S. J. Mahlangu is the acting paramount chief of Ndzundza-Mabhoko (“the acting paramount chief”). To date, there is no clarity as to who will succeed Mayitjha III. This determination therefore focuses on the nature of the position of the late Mayitjha III.

2.4 In terms of section 8 of the Framework Act, provision is made for three leadership positions within the institution of traditional leadership: kingship, senior traditional leadership and headmanship. The enquiry is whether the late paramount chief held any traditional leadership position in terms of the said provision. If so, what is the nature of the position.

3.

METHODOLOGY

3.1 The investigation was conducted as follows:-

- 3.1.1 A letter dated 29 May 2008 was sent to the acting paramount chief informing him about how the investigation was to be conducted;
- 3.1.2 Subsequently, a letter dated 27 October 2008 was sent to the acting paramount chief informing him about the hearing to be held on 11 December 2008. Attached to the said letter was a set of questions to which the acting paramount chief was expected to respond in writing. The hearing was intended to afford the acting paramount chief an opportunity to present further evidence.
- 3.1.3 The acting paramount chief responded through his attorneys, Maluleke Seriti Makume Matlala Incorporated, in a letter dated 22 August 2008. He stated that he would not participate in the proceedings.
- 3.1.4 On 27 August 2008 the Commission in turn responded in writing and advised the acting paramount chief that it was obliged to fulfill its mandate and would therefore proceed to conduct its investigation without input from

the acting paramount chief. There was no response thereto.

3.1.5 On 27 October 2008 the Commission advised the acting paramount chief in writing that the public hearing was set down for 11 December 2008 at Tshwane, City Hall Pretoria.

3.1.6 On 11 December 2008 the Commission proceeded to hold a public hearing at the Tshwane City Hall in Pretoria where:-

(a) The acting paramount chief was given an opportunity to expand, explain or contextualize his responses;

(b) Mr Matlala, an attorney representing the acting paramount chief, placed on record that the acting paramount chief would not participate in the public hearing;

(c) The Commission informed Mr Matlala and the delegation that it would nevertheless proceed

with its investigation and issue a determination based on its own research.

3.1.7 The information on 'historical background' and 'customary law' contained in this determination, was accessed mainly from that contained in the determination on the investigation of the position of the Manala- Mbongo and Ndzundza-Mabhoko paramountcies as well as the Commission's own research.

4.

CURRENT STATUS

4.1 Following the death of the paramount chief of Ndzundza-Mabhoko, Cornelius Nyumbako Mahlangu who was appointed as such in terms of the Kwandebele Traditional Authorities Act 8 of 1984 on 11 July 1992, S. J. Mahlangu is the acting paramount chief of Ndzundza-Mabhoko.

4.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“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.”

4.3 The Framework Act does not make provision for the appointment of the successor-in-title following the death of the traditional leader. There is therefore no legislation in terms of which the successor-in-title may be appointed. Hence the focus in this determination is on the late paramount chief, Cornelius Nyumbako Mahlangu.

4.4 Section 28(7) enjoins the Commission to commence its investigation with the position of the existing and recognised paramountcies and paramount chiefs.

4.5 Determinations on the twelve existing paramountcies were issued over two days, 29 to 30 April 2008, at Kopanong Conference Centre in Benoni. In its determination on the

paramountcy of Ndzundza-Mabhoko, the Commission made a finding that Ndzundza-Mabhoko paramountcy is not a kingship in terms of the Framework Act.

4.6 In issuing its determination, the Commission made it clear that the determination focused only on the position of the paramountcy of Ndzundza-Mabhoko to the exclusion of the position of the paramount chief of Ndzundza-Mabhoko.

4.7 In order to comply with section 28(7) of the Framework Act, it is therefore incumbent upon the Commission to investigate the position of the paramount chief of Ndzundza-Mabhoko.

5.

HISTORICAL BACKGROUND

5.1 The emergence of the traditional leadership of Ndzundza-Mabhoko

5.1.1 The late paramount chief, Cornelius Nyumbako Mahlangu (Mayitjha III), traces his lineage from Ndzundza, one of the sons of Musi, a king of amaNdebele. Ndzundza was the first-born son of the

second house of Musi. Ndebele had established the kingship of amaNdebele centuries ago.

5.1.2 Musi had eight sons: Manala, Ndzundza, Masombuka, Dlomo, Skosana, Mhwaduba, Mphaphuli and Mthombeni. Manala and Ndzundza played a pivotal role in the history of amaNdebele:

(a) Manala was the rightful heir and successor-in-title to the kingship of amaNdebele. He was born of the great wife;

(b) Ndzundza was the first-born son of the second wife.

5.1.3 In Musi's twilight years, two battles over the succession to the kingship of amaNdebele were fought at Cullinan between Manala and his supporters on the one hand, and Ndzundza together with his supporters on the other hand.

5.1.4 Manala returned to the royal homestead at KwaMnyamana. Ndzundza and his followers settled near the Balule River at KwaSimkhulu. In 1630 Musi

died. Manala buried his father, participated in the burial and other related rituals. He accordingly ascended the throne.

5.1.5 On the other hand, Ndzundza and his followers settled across the Balule River at KwaSimkhulu. They were later known as amaNdzundza.

5.1.6 As the son of the reigning king and the leader of the faction which lost the battle for kingship against Manala, Ndzundza became the principal leader. Thus, Ndzundza was the first traditional leader of the community of amaNdzundza.

5.1.7 The other sons of Musi went their separate ways after the death of Musi and settled in various places around present-day Mpumalanga

5.1.8 AmaNdzundza were later joined by the brothers of Ndzundza and their followers: Masombuka, Skosana, Mhwaduba, Mphaphuli and Mthombeni. Mgibe, who was originally from aManala, also joined amaNdzundza after

the attack by Mzilikazi. The community of amaNdzundza therefore expanded.

5.1.9 AmaNdzundza emerged and developed independently of the original amaNdebele in that:

(i) in about 1818, amaNdzundza fought Mzilikazi as an independent entity. Thereafter, they regrouped and built a fortress at Nomtshagela;

(ii) during the indenture system, whilst under the Zuid Afrikaansche Republiek (ZAR), in 1881 they endeavoured to maintain their identity by amongst others:

(aa) regrouping homesteads and re-establishing social networks;

(bb) establishing a system of headmanship by appointing the foreman as a traditional official for the workers reporting to royalty. They officiated and settled inter-household

disputes, which were appealable to the royal court.

- (iii) the advent of the homeland system and the creation of tribal authorities resulted in a successful re-grouping of amaNdzundza. In 1967 Mabhoko, the traditional leader of amaNdzundza, was appointed as the first paramount chief of Ndzundza-Mabhoko traditional community, under the Lebowa homeland.
- (iv) the Ndzundza-Mabhoko were favoured by the apartheid government and thus became stronger. Therefore, when the legislative assembly was created in 1979, Ndzundza-Mabhoko with 21 representatives out of 28 far outnumbered the other traditional communities represented in the legislature.
- (v) in 1984 Mabhoko was succeeded by Mayitjha III who died in 2005. At the time of writing this determination, it was not clear who is to succeed him.

5.1.10 Having made a determination that the kingship of amaNdebele as a whole resorts under the lineage of Manala-Mbhongo, the only other available positions of leadership available within the traditional institution of amaNdebele in terms of the Framework Act, are senior traditional leadership and headmanship.

6.

CUSTOMARY LAW AND CUSTOMS FOR IDENTIFYING A TRADITIONAL AND HEADMAN/HEADWOMAN OF AMANDEBELE

6.1 Succession to the traditional leadership of amaNdebele

6.1.1 Customary succession among amaNdebele is governed by the principle of male primogeniture. Ordinarily a female could not succeed.

6.1.2 Typically, the successor will be the first-born son of the great wife. The *lobola* of the great wife is derived from contributions made by the community.

- 6.1.3 If the great wife is unable to bear an heir, recourse is had to other measures. A younger sister or a close relative of the great wife (*ihlanzi*) is married, to bear an heir. If neither the great wife nor *ihlanzi* wife has sons, resort is had to the senior among the other wives of the traditional leader.
- 6.1.4 Only a legitimate son fathered by the traditional leader can succeed to the throne. Where the deceased is survived only by an illegitimate son, such son may be legitimized through the custom of *ukufaka esiswini*, whereby a contribution of '*lobola*' is made to legitimize the son.
- 6.1.5 A successor is eligible to become a traditional leader only after he has been initiated. Generally, physical handicaps are not a bar to succession, except blindness.
- 6.1.6 If an heir apparent has been excluded, the next senior male will succeed. The heir apparent must be identified by the royal family (*isigodlo*).

- 6.1.7 Ascension to the throne occurs upon the death of the traditional leader. At the burial of the traditional leader, the successor-in-title is identified by wearing his jacket inside-out (*ukuhlanukela*). In some Ndzundza traditional communities the jacket is made from leopard skin (*inaka*).
- 6.1.8 The heir apparent is required to perform various rituals including taking possession of the accessories to the throne, descending into the grave of his predecessor, symbolically receiving the baton and emerge as the traditional leader.
- 6.1.9 A successor is installed immediately after the burial of the deceased traditional leader. The new traditional leader is inaugurated during a small ceremony at the Great Place attended by the men of the royal family.
- 6.1.10 The new traditional leader is then introduced to the community at large.

DETERMINATION

7.1 Issues to be determined

7.1.1 The issues are:

- (a) Whether the late paramount chief of Ndzundza-Mabhoko, Cornelius Nyumbako Mahlangu(Mayitjha III), held any traditional leadership position, in terms of section 8 of the Framework Act;
- (b) What is the nature of the position? By whom, how and when was it established?
- (c) Has the position of traditional leadership been passed on from one generation to the next according to customary law and customs of amaNdebele?

7.2 **Analysis of issues**

- 7.2.1 In order for an individual to be recognised as a traditional leader he has to qualify in terms of customary law and customs of the traditional community. Once recognised, the position is passed on to the successor in terms of customary law and customs.
- 7.2.2 It was not unusual for the son of a traditional leader to breakaway with his followers from the mainstream traditional community, acquire his own area of jurisdiction and establish his own traditional leadership.
- 7.2.3 The status of such a traditional leader cannot be higher than that of the original traditional leadership.
- 7.2.4 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and customs of the traditional community.

7.2.5 The traditional leader may not establish or create a multiplicity of traditional leaderships equal in status to his. Customary law and customs of amaNdebele do not allow a multiplicity of traditional leaders emanating from one traditional leader.

7.2.6 *Ikosi* may appoint a traditional leader only to a status below that of *ikosi*.

7.3 **Analysis of evidence**

7.3.1 Ndzundza was the first-born son of the second wife of Musi. After the split, Ndzundza left to settle at Kwasimkhulu with his followers.

7.3.2 His community was expanded when his brothers and their followers joined him.

7.3.3 He ruled independently of the original amaNdebele traditional community in that, on his own, he defended his territory during the Mfecane wars.

7.3.4 After the Mfecane wars amaNdzundza were able to regroup. They maintained their identity by forming social and judicial structures, under the ZAR and apartheid regimes. During the homeland era, amaNdzundza were consolidated. They were strengthened by the support of the apartheid government and the fact that they had more representatives in the legislative assembly than other traditional communities.

7.3.5 In 1967, Mabhoko was appointed as the first paramount chief of amaNdzundza. In 1984, Mayitjha III was appointed as *ingwenyama* of Ndzundza-Mabhoko.

7.3.6 The Commission finds that:

- (a) The position which Ndzundza held at the time, could only be that of *ikosi*.
- (b) He was elevated to the position of the leader of amaNdzundza because he was the son of the reigning king and he led the battle against Manala.

- (c) Even though amaNdzundza developed and expanded independently of the original amaNdebele, in terms of the customary law and customs of amaNdebele, the position held by their traditional leader could only be that of *ikosi*.
- (d) Ndzundza held the position of *ikosi*. According to the customary law and customs of amaNdebele, his descendants could only inherit such position.
- (e) The appointment of Mabhoko II as paramount chief was not in line with customary law and customs of amaNdebele. The appointment of both Mayitjha III and Makhosonke II, as *iingwenyama* in 1992 was also irregular in that it created a dual kingship.
- (f) The position Mayitjha could hold is that of *ikosi* below the level of *ingwenyama*. In terms of the Framework Act, the position is that of senior traditional leader.

- (g) In terms of the Framework Act, the position held by Mayitjha III, could only be that of senior traditional leader.

8.

CONCLUSION

In terms of customary law and customs of amaNdebele and the Framework Act, the nature of the position of the late paramount chief of Ndzundza-Mabhoko, Cornelius Nyumbako Mahlangu (Mayitjha III), is that of senior traditional leader.

**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF AMARHARHABE**

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**DETERMINATION ON THE POSITION OF THE PARAMAOUNT
CHIEF OF AMARHARHABE**

1.

INTRODUCTION

1.1 Establishment of the Commission

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims (“the Commission”).

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1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to

decide on any traditional leadership dispute and claim contemplated in section 25(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;*
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- (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' ; and

(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."

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to section 25(2)(a)(vi).

2.

FOCUS

2.1 The focus of this investigation is the position of the paramount chief of amaRharhabe, Bangilizwe Maxhobayakhawuleza Sandile, as envisaged in terms of section 28(7) of the Framework Act. It provides thus:

“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 that section.”

2.2 Having issued a determination that in terms of customary law and customs of amaXhosa and the Framework Act, the paramountcy of amaRharhabe is not a kingship, this investigation focuses on the second part of section 28(7): the position of the paramount chief of amaRharhabe, Bangilizwe Maxhobayakhawuleza Sandile (“the paramount chief”).

2.3 Section 8 of the Framework Act recognises three leadership positions within the institution of traditional leadership namely, kingship, senior traditional leadership and headmanship. The enquiry is whether the paramount chief holds any traditional leadership position in terms of the said provision. If so, what is the nature of the position.

3.

METHODOLOGY

3.1 The investigation was conducted as follows:-

3.1.1 The Commission sent a letter dated 29 May 2008 to the paramount chief informing him how further investigation in terms of section 28(7) was to be conducted.

3.1.2 A letter was sent to the paramount chief informing him about the hearing to be held on 6 December 2008. A set of questions was attached to which the paramount chief was expected to respond in writing. The hearing

was intended to afford the paramount chief an opportunity to present further evidence.

3.1.3 The paramount chief responded through a letter dated 25 September 2008 in which he stated that, *inter alia* he would not participate in the proceedings.

3.1.4 The Commission nevertheless proceeded to hold a public hearing in the Global Life Accommodation and Conference Centre at Bisho on 6 December 2008 where:

- (a) The paramount chief was given an opportunity to expand, explain and contextualize his responses;
- (b) The paramount chief was represented by Prince Burns Ncamashe. He placed on record that the paramount chief would not participate in the public hearing;
- (c) The Commission informed Prince Ncamashe and the delegation that it would nevertheless proceed

with the investigation and issue a determination based on its own research.

4.

CURRENT STATUS

- 4.1 Bangilizwe Maxhobayakhawuleza Sandile is the paramount chief of amaRharhabe. He was appointed in July 1991.
- 4.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“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.”

- 4.3 Section 28(7) enjoins the Commission to commence its investigation with the position of the existing and recognised paramountcies and paramount chiefs.

- 4.4 Determinations on the twelve existing paramountcies were issued over two days, 29 to 30 April 2008, at Kopanong Conference Centre in Benoni. In its determination on the paramountcy of amaRharhabe, the Commission made a finding that amaRharhabe paramountcy is not a kingship.
- 4.5 In issuing its determination, the Commission made it clear that the determination focused only on the position of the paramountcy, to the exclusion of the position of the paramount chief of amaRharhabe.
- 4.6 In order to comply with section 28(7) of the Framework Act, it is therefore incumbent upon the Commission to investigate the position of the paramount chief of amaRharhabe.

5.

HISTORICAL BACKGROUND

- 5.1 **The emergence of the traditional leadership of amaRharhabe**

5.1.1 Bangilizwe Maxhobayakhawuleza Sandile, the paramount chief of amaRharhabe, is a descendant of Rharhabe. Rharhabe was the first born son of the right-hand house of Phalo who was one of the kings of amaXhosa. Tshawe had established the kingship of amaXhosa centuries ago.

5.1.2 Phalo had two sons who played a pivotal role in the history of amaXhosa namely: Gcaleka from the great house and Rharhabe from the right-hand house. Gcaleka was the rightful heir and successor-in-title to the kingship of amaXhosa. Phalo gave Rharhabe authority to settle west of the Kei River and establish a traditional community which later became known as amaRharhabe. In 1845, Phalo accompanied Rharhabe across the Kei River and later built his Great Place at Zeleni, where he resided from time to time.

5.1.3 When Rharhabe settled west of the Kei River, this area was already inhabited by other amaTshawe “tribes” such as amaGqunukhwebe, amaNtide, amaGwali, amaHleke, imiDange and amaMbalu. Among the leaders of these tribes, Rharhabe was the most senior,

due to his status as the son of Phalo, the reigning king of amaXhosa. As the first born son of the right-hand house he assumed the position of senior traditional leader. Rharhabe therefore was the first traditional leader of the community known as amaRharhabe.

5.1.4 In expanding his community, Rharhabe fought and defeated the Khoisan. He remained obedient and recognised Phalo as the king, as did his successors Mlawu and Ndlambe. Ngqika, who succeeded Mlawu, tried unsuccessfully to assert his independence.

5.1.5 Throughout the centuries, amaRharhabe traditional leaders continued to recognise and respect amaGcaleka traditional leaders as their seniors with regard to family and ceremonial matters as well as those affecting the community of amaXhosa as a whole. From Tshawe to Zwelidumile Sigcawu, amaXhosa were one nation under one king.

5.1.6 In 1961 Archie Velile Sandile was elevated to the position of paramount chief of amaRharhabe, whilst Zwelidumile Sigcawu was appointed as paramount chief

of amaGcaleka. Consequently, amaRharhabe claimed to be equal in status to amaGcaleka.

5.1.7 The Commission has already found that the appointment of Archie Velile Sandile as paramount chief was irregular because it effectively created a dual kingship within the community of amaXhosa.

5.1.8 Having made the determination that the kingship of amaXhosa as a whole resorts under the lineage of Gcaleka, the only other leadership positions available within the institution of the traditional leadership of amaXhosa, in terms of the Framework Act, are senior traditional leadership and headmanship.

6.

CUSTOMARY LAW AND CUSTOMS FOR IDENTIFYING A SENIOR TRADITIONAL LEADER AND HEADMAN/HEADWOMAN FOR AMAXHOSA

6.1 Succession to the traditional leadership of amaXhosa

6.1.1 Customary law of succession among amaXhosa is governed by the principle of male primogeniture. Ordinarily a female could not succeed.

6.1.2 A senior traditional leader (*inkosi*) in a polygamous marriage has several wives matching the structure of the houses in a traditional isiXhosa household. Upon marriage, each wife is allocated a house. The structure of the houses is as follows:

- (a) The great house (*indlunkulu*);
- (b) The right-hand house (*indlu yasekunene*);
- (c) The support of the great house (*iqadi lendlunkulu*);
- (d) The support of the right-hand house (*iqadi lasekunene*);
- (e) The seed-bearer house (*ixhiba*);
- (f) *Umsengi* of the great house (*umsengi*); and
- (g) *Umtshayelo* of the great house (*umtshayelo*).

6.1.4 The status of a wife within a polygamous marriage determines succession to the throne:

- (a) The great wife is the most senior house. Her *lobola* is derived from contributions made by the community. The first born son of the great wife succeeds his father.
- (b) The next senior wife is that of the right-hand house. The first born son to the right-hand house may be awarded a headmanship. Such headmanship is subordinate to the great house.
- (c) The two wives belonging to *amaqadi* are regarded as support houses for the above two houses.
- (d) *Ixhiba* is a seed-bearer house, which has no allegiance to either of the main houses. The son of *ixhiba* succeeds his father if there is no male issue in the great house.
- (e) The last two houses, *umsengi* and *umtshayelo* are minor and provide “domestic services” to the great house.

DETERMINATION

7.1 Issues to be determined

7.1.1 Whether the paramount chief of amaRharhabe, Bangilizwe Maxhobayakhawuleza Sandile, holds any traditional leadership position in terms of section 8 of the Framework Act.

7.1.2 If so, what is the nature of the position? By whom, how and when was it established?

7.1.3 Has the leadership position been passed on from one generation to the next according to the customary law and customs of amaXhosa?

7.2 Analysis of issues

7.2.1 In order for an individual to be recognised as a traditional leader he has to qualify in terms of

customary law and customs of the traditional community. Once recognised, the position is passed on to the successor in terms of customary law and customs.

7.2.2 It was not unusual for the son of a traditional leader to breakaway with his followers from the mainstream traditional community, acquire his own area of jurisdiction and establish his own traditional leadership.

7.2.3 The status of such a traditional leader cannot be higher than that of the original traditional leadership.

7.2.4 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and the customs of the traditional community.

7.2.5 The traditional leader may not establish or create a multiplicity of traditional leaderships equal in status to his. Customary law and customs of amaRharhabe do not allow a multiplicity of traditional leaders emanating from one traditional leader.

7.2.6 *Inkosi* may appoint a traditional leader only to a status below that of *inkosi*.

7.3 **Analysis of evidence**

7.3.1 Rharhabe was the first traditional leader of the community which later became known as amaRharhabe. Rharhabe was the first-born son of the right-hand house of Phalo.

7.3.2 It was customary for the first-born son of the right-hand house to establish a new traditional community, subordinate to the great house. Thus, Phalo authorised Rharhabe to go and settle as an overseer of the other amaTshawe communities living west of the Kei River.

7.3.3 The communities Rharhabe found living west of the Kei River were amaGqunukhwebe, amaNtide, amaGwali, amaHleke, imiDange and amaMbalu. As the son of the reigning king, he was naturally senior to the other traditional leaders.

7.3.4 The Commission finds that:

- (a) As the first- born son of the right-hand house of *ukumkani* Phalo, the nature of the traditional leadership position which Rharhabe could hold is that below the level of *ikumkani*. His traditional leadership was at all times subordinate to that of his father Phalo.
- (b) With the exception of Nqgika, the successors of Rharhabe continued to respect and regard amaGcaleka as their seniors. The interference of the colonial and apartheid regimes in the institution of traditional leadership caused some confusion in this regard.
- (c) In 1961, Archie Velile Sandile, a sixth generation descendant of Rharhabe, was elevated to the position of paramount chief. The elevation of Archie Velile Sandile was contrary to the customary law and customs of amaXhosa in terms of which the son of the great house is accorded a

status senior to that of the son of the right-hand house.

- (d) The Commission has already found that such was not in line with the customary law and the customs of amaXhosa.
- (e) This irregularity continued with Bangilizwe Maxhobayakhawuleza Sandile. As the successor - in- title to Archie Velile Sandile, he inherited the position of paramount chief of amaRharhabe.
- (f) The position Rharhabe could hold is that of a *inkosi* below the level of *ikumkani*. In terms of the Framework Act, the equivalent position is that of senior traditional leader.
- (g) Rharhabe held the position of *inkosi*. According to the customary law and customs of amaXhosa, the descendants of Rharhabe therefore, could only inherit the position of senior traditional leader.

8.

CONCLUSION

In terms of customary law and the customs of amaXhosa and the Framework Act, the nature of the position of the paramount chief of amaRharhabe, Bangilizwe Maxhobayakhawuleza Sandile, is that of senior traditional leader.

**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF AMAGCALEKA**

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**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF AMAGCALEKA**

1.

INTRODUCTION

1.1 Establishment of the Commission

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims (“the Commission”).

1.1.2 The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.2 Functions of the Commission

1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to

decide on any traditional leadership dispute and claim contemplated in section 25(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 considerations of events that may have arisen before 1 September 1927.”

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to section 25(2)(a)(vi).

2.

FOCUS

2.1 The focus of the investigation is on the position of the late paramount chief of amaGcaleka, Xolilizwe Sigcawu, as envisaged in section 28(7) of the Framework Act, It provides thus:

“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 that section.”

2.2 Having issued a determination that in terms of customary law and customs and the Framework Act, the kingship of amaXhosa exists and resorts under the lineage of Gcaleka, this investigation focuses on the second part of section 28(7): the position of the late paramount chief of amaGcaleka, Xolilizwe Sigcawu (“the paramount chief”).

2.3 Section 8 of the Framework Act recognises three leadership positions within the institution of traditional leadership: kingship, senior traditional leadership and headmanship. The enquiry is whether the paramount chief holds any traditional leadership position in terms of the said provision. If so, what is the nature of the position.

3.

CURRENT STATUS

3.1 Xolilizwe Sigcawu was the paramount chief of amaGcaleka, appointed on 24 September 1965.

3.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“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.”

- 3.3 The Framework Act doesn't make provision for the appointment of the successor-in-title following the death of a traditional leader. There is therefore no legislation in terms of which the successor in title may be appointed, hence the focus in this determination is on the late paramount chief, Xolilizwe Sigcawu.
- 3.4 Section 28(7) enjoins the Commission to commence its investigation with the position of the existing and recognised paramountcies and paramount chiefs.
- 3.5 Determinations on the twelve existing paramountcies were issued over two days, 29 to 30 April 2008, at Kopanong Conference Centre in Benoni. In its determination on the paramountcies of amaGcaleka and amaRharhabe, the Commission made a finding that the kingship of amaXhosa exists and resorts under the lineage of Gcaleka.
- 3.6 In issuing its determination, the Commission made it clear that the determination focused only on the position of the paramountcy, to the exclusion of the position of the paramount chief of amaGcaleka.

3.7 In order to comply with section 28(7), it is therefore incumbent upon the Commission to investigate the position of the paramount chief of amaGcaleka.

4.

HISTORICAL BACKGROUND

4.1 The emergence of the traditional leadership of amaGcaleka

4.1.1 Xolilizwe Sigcawu, the paramount chief of amaGcaleka, is a descendant of Gcaleka. Gcaleka was the first-born son of the great house of Phalo who was one of the kings of amaXhosa. Tshawe had established the kingship of amaXhosa centuries ago.

4.1.2 Phalo had two sons who played a pivotal role in the history of amaXhosa namely, Gcaleka from the great house and Rharhabe from the right-hand house. Gcaleka was the rightful heir and successor- in- title to the kingship of amaXhosa.

- 4.1.3 Phalo gave Rharhabe authority to settle west of the Kei River and establish a traditional community, which later became known as amaRharhabe. This community was independent but subordinate to the kingship of amaXhosa in respect of family and ceremonial matters as well as those affecting the community of amaXhosa as a whole.
- 4.1.4 Phalo died in 1775 and was succeeded by Gcaleka, who fathered Khawuta from the great house. Gcaleka died in 1778 and was succeeded by Khawuta. Khawuta fathered amongst others Hintsa from the great house and Buru of the right hand house. Khawuta was succeeded by Hintsa. Hintsa was succeeded by Sarhili. Zwelidumile and Xolilizwe respectively.
- 4.1.5 Zwelidumile was king of amaXhosa as a whole. It was only upon the creation of the homelands of Transkei and Ciskei that the confusion arose.
- 4.1.6 In 1961, Zwelidumile Sigcau was appointed as the paramount chief of only amaGcaleka in the Transkei. On the other hand, Archie Velile Sandile who was

previously a chief of amaNgqika (a sub-section of amaRharhabe), was appointed as paramount chief of amaRharhabe in the Ciskei and thus made equal in status to Zwelidumile Sigcau.

4.1.7 The Commission has already found that the appointment of Archie Velile Sandile was irregular because it effectively created a dual kingship within the community of amaXhosa. The Commission made a further finding that, in terms of customary law and customs of amaXhosa, the kingship of amaXhosa exists and resorts under the lineage of Gcaleka.

4.1.8 Zwelidumile was succeeded by Xolilizwe Sigcau. Xolilizwe married three wives, Nondwe in the great house, whose first-born son is Siseko, Nogaweni, in the right hand house, whose son is Ahlangene, and the biological mother of Calvin Mpendulo, who is *iqadi* to the great house.

4.1.9 Siseko, the heir apparent, is deemed unfit to rule. As a result, Calvin Mpendulo Sigcau, was “adopted” into the

great house (*ukufaka esiswini*) and is therefore the successor-in-title to the late paramount chief.

5.

CUSTOMARY LAW OF SUCCESSION

5.1 Succession to the Kingship of amaXhosa

5.1.1 As it is with most African communities, customary succession among amaXhosa is governed by the principle of male primogeniture. Ordinarily female could not succeed.

5.1.2 A king usually has five to seven royal wives matching the structure of the “houses” in a traditional isixhosa household. The *lobola* of the great wife is derived from contributions made by the community.

5.1.3 Upon marriage, each wife is assigned status by being allocated a house.

5.1.4 The status of a wife within a polygamous marriage determines succession to the throne.

(a) The structure of the “houses” is as follows:-

- (i) The great house (*indlunkulu*)
- (ii) The right-hand house (*indlu yasekunene*)
- (iii) *Iqadi* of the great house (*iqadi lendlunkulu*)
- (iv) *Iqadi* of the right-hand house (*iqadi lokunene*)
- (v) The seed-bearer house (*ixhiba*)
- (vi) *Umsengi* of the great house (*umsengi wendlunkulu*)
- (vii) *Umtshayelo* of the great house (*umtshayelo*)

5.1.5 The most important of these, are the great house and the right hand house. Additional wives (each belonging to *iqadi*) are regarded as support for these two houses. *Ixhiba* is a seed-bearer house, which has no allegiance to either of the main houses.

5.1.6 The first-born son of the great house succeeds his father, whereas the first born son to the right hand

house may establish a separate traditional leadership. Such traditional leadership would be semi-independent, but not of equal status to the great house.

5.1.7 The son of a seed bearer (*ixhiba*) succeeds his father if there is no son of the great wife, and assumes a rank higher than that of the sons of the *qadi* houses. If, however, there are sons of the great wife, whether born before or after the seed-bearer was introduced into the house, the sons of the seed-bearer are regarded as brothers of lower rank,

5.1.8 A successor is only eligible to ascend the throne after he has been initiated.

6.

DETERMINATION

6.1 Issues to be determined

6.1.1 Whether the late paramount chief of amaGcaleka, Xolilizwe Sigcawu, held any traditional leadership position in terms of the Framework Act.

- 6.1.2 If so, what is the nature of the position?
- 6.1.3 By whom, how and when was it established?
- 6.1.4 Has the leadership position been passed on from one generation to the next according to the customary law and the customs of amaXhosa?

6.2 **Analysis of issues**

- 6.2.1 In order to assume the position of a king or queen the person so identified must qualify in terms of the customary law of the traditional community.
- 6.2.2 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and the customs of the traditional community.
- 6.2.3 The king should rule over the entire traditional community with linguistic and cultural affinities rather than a section thereof.

6.2.4 There cannot be a multiplicity of kingships emanating from one kingship.

6.3 **Analysis of Evidence**

6.3.1 Tshawe established the kingship of amaXhosa. One of the descendants of Tshawe was Phalo. Phalo had two sons, namely Gcaleka from the great house and Rharhabe from the right hand house. Gcaleka was the rightful heir and successor-in-title to the kingship of amaXhosa.

6.3.2 Phalo gave Rharhabe authority to settle west of the Kei River and establish a traditional community, which later became known as amaRharhabe. This community was independent but subordinate to the kingship of amaXhosa in respect of family and ceremonial matters as well as those affecting the community of amaXhosa as a whole.

6.3.3 Phalo died in 1775 and was succeeded by Gcaleka. Gcaleka was succeeded by Sarhili, Zwelidumile and Xolilizwe respectively.

6.3.4 Zwelidumile was king of amaXhosa as a whole. It was only upon the creation of the homelands of Transkei and Ciskei that in 1961, Zwelidumile Sigcawu was appointed a paramount chief of only amaGcaleka in the Transkei. On the other hand, Archie Velile Sandile who was previously chief of amaNgqika (a subsection of amaRharhabe), was appointed as paramount chief of amaRharhabe in the Ciskei and thus made equal in status to Zwelidumile Sigcawu.

6.3.5 Zwelidumile was succeeded by Xolilizwe Sigcawu. Xolilizwe inherited the kingship established by Tshawe and thereafter passed on from one generation to the next in terms of customary law and customs of amaXhosa.

6.3.6 The Commission has already found that the appointment of Archie Velile Sandile was irregular as it created dual kingship within the community of

amaXhosa. The Commission made a further finding that in terms of customary law and customs of amaXhosa, the kingship of amaXhosa exists and resorts under the lineage of Gcaleka.

6.4 **The Commission finds that:**

In terms of the customary law of amaXhosa and the Framework Act:

6.4.1 The kingship of amaXhosa exists. It was established by Tshawe through assimilating, accommodating and merging various communities.

6.4.2 Since Tshawe the kingship has been passed on from one generation to the next according to the customary law and customs of amaXhosa.

7.

CONCLUSION

In terms of customary law and customs of amaXhosa and the Framework Act, the position held by the late paramount chief of

amaGcaleka, Xololizwe Sigcawu, is that of king of amaXhosa as a whole.

**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF ABATHEMBU BAKWADALINDYEBO**

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**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF ABATHEMBU BAKWADALINDYEBO**

1.

INTRODUCTION

1.1 Establishment of the Commission

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the former State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims (“the Commission”).

1.1.2 The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”)

1.2 Functions of the Commission

1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in section 25(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' ; and ”

(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.

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and

disputes dating from 1 September 1927, subject to section 25(2)(a)(vi).

2.

FOCUS

2.1 The focus of the investigation is on the position of the paramount chief of abaThembu bakwaDalindyebo, Buyelekhaya Zwelibanzi Dalindyebo, as envisaged in section 28(7) of the Framework Act. It provides thus:

“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 that section.”

2.2 Having issued a determination that in terms of customary law and the Framework Act, the kingship of abaThembu resorts under the lineage of Dalindyebo, this investigation focuses on

the second part of section 28(7): the position of the paramount chief of abaThembu bakwaDalidyabo, Buyelekhaya Zwelibanzi Dalindyabo (“the paramount chief”).

2.3 Section 8 of the Framework Act recognises three leadership positions within the institution of traditional leadership, namely: kingship, senior traditional leadership and headmanship. The enquiry is whether the paramount chief holds any traditional leadership position in terms of the said provision. If so, what is the nature of the position.

3.

CURRENT STATUS

3.1 Buyelekhaya Zwelibanzi Dalindyabo is the paramount chief of abaThembu bakwaDalindyabo, appointed as such on 1 July 1992 in terms of the Republic of Transkei Constitution Act No. 15 of 1976 as amended.

3.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“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.”

3.3 Section 28(7) enjoins the Commission to commence its investigation with the position of the existing and recognised paramountcies and paramount chiefs.

3.4 Determinations on the twelve existing paramountcies were issued over two days, 29 to 30 April 2008, at Kopanong Conference Centre in Benoni. In its determination on the paramountcy of abaThembu, the Commission made a finding that the kingship of abaThembu resorts under the lineage of Dalindyebo.

3.5 In issuing its determination, the Commission made it clear that the determination focused only on the position of the

paramountcy, to the exclusion of the position of the paramount chief of abaThembu.

- 3.6 In order to comply with section 28(7), it is therefore incumbent upon the Commission to investigate the position of the paramount chief of abaThembu.

4.

HISTORICAL BACKGROUND

4.1 The emergence of the kingship of abaThembu bakwaDalindyebo

4.1.1 Buyelekhaya Zwelibanzi Dalindyebo, the paramount chief of abaThembu bakwaDalindyebo, is a descendant of Ngubengcuka. Ngubengcuka was the descendant of Dlomo, the son from the right hand house of Nxeko, who was one of the kings of abaThembu.

4.1.2 Ngubengcuka had three wives namely: Nonesi, daughter of Faku and king of amaMpondo, in the great house; the mother of Mtirara, in the *qadi* house; and

the mother of Mnqanqeni who was in the right-hand house. Nonesi had no issue and subsequently adopted Mtirara from the *qadi* house. Mtirara was therefore to ascend the throne as king of abaThembu after the death of his father.

4.1.3 Ngubengcuka died in 1830 and Joyi was appointed regent on behalf of Mtirara who was still a minor. The political instability caused by the Mfecane Wars resulted in the abrupt departure of Nonesi, together with Mtirara, from Mgwali Great Place. In about 1838, they eventually settled around Rhodana in the present district of Lady Frere.

4.1.4 Subsequently, Nonesi and her people settled west of Indwe River in an area referred to by the colonialists as 'Tambookie Location' (present day Gqebenya) which forms part of Emigrant Thembuland today. At that time, Nonesi was regent for the minor Mtirara.

4.1.5 Around 1840 Mtirara, the eldest son of Ngubengcuka, was installed as the king of abaThembu. His Great Place was at Rhodana. He fathered three sons:

Ngangelizwe of the great house, Rhaxoti Matanzima of the right-hand house and Mfanta of a minor house.

4.1.6 Mtirara died in 1855. As Ngangelizwe was still a minor Nonesi became regent on his behalf. Around 1860 Ngangelizwe returned to Mgwali and was installed as king of abaThembu. Nonesi remained at Gqebenya with Rhaxoti, even after Ngangelizwe had returned to Mgwali.

4.1.7 Rhaxoti Matanzima soon became recognized as the leader of the chiefs who had settled in Tambookie Location. He was succeeded by Mhlobo, Mvuso and Kaizer Daliwonga Matanzima.

4.1.8 In 1876 Ngangelizwe was the first traditional leader to be officially recognised by the colonial government as the paramount chief of abaThembu.

4.1.9 Ngangelizwe was succeeded by Dalindyebo, Jongilizwe and Jonguhlanga Sabata Dalindyebo who was appointed in terms of section 23 of the Bantu Administration Act, 38 of 1927, as a paramount chief of

the Thembu community of Africans resident in the districts comprising the area known as Thembuland, including Emigrant Thembuland and Bomvanaland with effect from 1 July 1954.

4.1.10 In 1966 Kaizer Daliwonga Matanzima was elevated to the position of paramount chief and made of equal status with his king, Jonguhlanga Sabata Dalindyebo of Thembuland. This created a dual kingship. The Commission has already found that such was not in line with the customary law and customs of abaThembu.

5.

CUSTOMARY LAW OF SUCCESSION

5.1 Succession to the kingship of abaThembu

5.1.1 Customary succession among abaThembu is governed by the principle of male primogeniture. Ordinarily a female could not succeed.

5.1.2 A king in a polygamous marriage has several wives matching the structure of the houses in a traditional isiThembu household.

5.1.3 Upon marriage, each wife is assigned status by being allocated a house. The structure of the houses is as follows:-

- (a) the great house (*indlunkulu*);
- (b) the right-hand house (*indlu yasekunene*);
- (c) *iqadi* of the great house (*iqadi lendlunkulu*);
- (d) *iqadi* of the right-hand house (*iqadi lendlu yasekunene*);
- (e) the seed - bearer house (*ixhiba*);
- (f) *umsengi* of the great house (*umsengi wendlunkulu*);and
- (g) *umtshayelo* of the great house (*umtshayelo wendlunkulu*).

5.1.4 The status of a wife within a polygamous marriage determines succession to the throne:-

- (a) The great wife is the most senior house. Her *lobola* is derived from contributions made by the community. The first born son of the great wife succeeds his father.

- (b) The next senior wife is that of the right-hand house. The first born son to the right-hand house may be awarded a senior traditional leadership. Such traditional leadership is subordinate to the great house. He may establish a separate community. Such community would be semi-independent of the great house, but not of equal status to the great house.

- (c) The two wives belonging to *amaqadi* are regarded as support houses for the great house and right hand house.

- (d) *Ixhiba* is a seed-bearer house, which has no allegiance to either of the main houses. The son of *ixhiba* succeeds his father if there is no male issue in the great house.

- (e) The last two houses, *umsengi* and *umtshayelo* are minor and provide “domestic services” to the great house.

6.

DETERMINATION

6.1 Issues to be determined

6.1.1 Wether the paramount chief of abaThembu, Buyelekhaya Zwelibanzi Dalindyebo, holds any traditional leadership position in terms of the Framework Act.

6.1.2 If so, what is the nature of the position?

6.1.3 By whom, how and when was it established?

6.1.4 Has the kingship position been passed on from one generation to the next according to the customary law and customs of abaThembu?

6.2 **Analysis of issues**

6.2.1 In order to assume the position of a king or queen the person so identified must qualify in terms of the customary law of the traditional community.

6.2.2 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to customary law and the customs of the traditional community.

6.2.3 The king should rule over the entire traditional community with linguistic and cultural affinities rather than a section thereof.

6.2.4 There cannot be a multiplicity of kingships emanating from one kingship.

6.3 **Analysis of Evidence**

6.3.1 Thembu had two sons, Ndilo and Mvelase. Mvelase broke away and established his own community at

Qhudeni, KwaZulu-Natal and Ndilo moved southwards with the rest of the community and settled on the land between Umzimkhulu River and the then Cape Colony. Ndilo was succeeded by Ntongakazi, Bhomoyi, Cedume, Mnquti, Ntoyi, Ntande, and Nxeko who was succeeded by Dlomo after the defeat of Hlanga at Msana.

6.3.2 AbaThembu kingship was established by Nxeko through accommodating, merging and assimilating fugitive clans which migrated into the abaThembu territory and accepted his sovereignty. Some of these communities such as amaNdungwana, amaXesibe and amaMpondomise assisted Dlomo against his brother Hlanga in the Battle of Msana which resulted in the defeat of Hlanga.

6.3.3 In the process of integration, the formerly independent traditional communities adopted the language and culture of abaThembu. Dlomo was succeeded by Hala, Madiba, Tato, Zondwa and Ndaba who reigned from 1756 to 1800.

6.3.4 Having thus consolidated abaThembu and expanded his sphere of influence, Nxeko can be said to have established the abaThembu kingship, hence all his successors assumed the status of kings. The kingship has been passed on from one generation to the next according to abaThembu customary law of male primogeniture.

6.3.5 It was during the reign of Ngubengcuka, the heir of Ndaba, from 1800 to 1832, that many formerly independent communities such as amaNqabe, amaGcina, amaHegebe, amaQwathi, amaNqandama, amaTshezi, amaTshomane, amaMfengu and other small communities sought refuge among abaThembu as a result of war in Natal and the Mfecane invasions.

6.3.6 It was customary for the great house to bear an heir to the throne. It was also not unusual for a right hand house to establish a new traditional community independent of, but subordinate to the great house in terms of family and ceremonial matters and those affecting abaThembu community as a whole.

6.3.7 The Matanzima royal house, the right hand house of Ngubengcuka, does not dispute that it is genealogically junior to that of Dalindyebo, which is the great house.

6.3.8 Ngangelizwe was the first to be officially recognised by the Colonial government as a paramount chief of abaThembu in 1876. On the contrary, Rhaxoti Matanzima and his successors were regarded as “petty chiefs” (a term in vogue under colonial government).

6.4 **The Commission finds that:**

In terms of the customary law of abaThembu and the Framework Act:

6.4.1 The kingship of abaThembu exists. It was established by Nxeko through assimilating, accommodating and merging various communities;

6.4.2 Since Nxeko the kingship has been passed on from one generation to the next according to customary law and customs of abaThembu;

7.

CONCLUSION

In terms of customary law and customs of abaThembu and the Framework Act, the position held by the paramount chief of abaThembu bakwaDalindyabo, Buyelekhaya Zwelibanzi Dalindyabo, is that of king of abaThembu as a whole.

DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF
OF AMAZULU

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**DETERMINATION ON THE POSITION OF THE PARAMOUNT CHIEF OF
AMAZULU**

1.

INTRODUCTION

1.1 Establishment of the Commission

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims (“the Commission”).

1.1.2 The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”)

1.2 Functions of the Commission

1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to

decide on any traditional leadership disputes and claims contemplated in section 25(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'; and

(vi) where good grounds exist, any other matters relevant to the matters listed in this paragraph, including considerations of events that may have arisen before 1 September 1927”.

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and customs of the relevant community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection 25(2) (a)(vi).

2.

FOCUS

2.1 The focus of the investigation is on the position of the paramount chief of amaZulu, Goodwill Zwelithini Zulu, as envisaged in section 28(7) of the Framework Act. It provides thus:

“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 the Act, before the Commission commences with any other investigation in terms of that section.”

2.2 Having issued a determination that the paramountcy of amaZulu is a kingship in terms of the Framework Act, this investigation focuses on the second part of section 28(7): the position of the paramount chief of amaZulu, Goodwill Zwelithini Zulu (“the paramount chief”).

2.3 Section 8 of the Framework Act recognises three leadership positions within the institution of traditional leadership, namely: kingship, senior traditional leadership and headmanship. The enquiry is whether the paramount chief holds any traditional leadership position in terms of the said provision. If so, what is the nature of the position.

3.

CURRENT STATUS

3.1 Goodwill Zwelithini Zulu is the paramount chief of amaZulu, appointed as such on 3 December 1971, in terms of the Black Administration Act No. 38 of 1927.

3.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“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.”

3.3 Section 28(7) enjoins the Commission to commence its investigation with the position of the existing and recognised paramountcies and paramount chiefs.

3.4 In issuing its determination, the Commission made it clear that the determination focused only on the position of the paramountcy, to the exclusion of the position of the paramount chief of amaZulu.

3.5 In order to comply with section 28(7), it is therefore incumbent upon the Commission to investigate the position of the paramount chief of amaZulu.

4.

HISTORICAL BACKGROUND

Information on the emergence of the traditional leadership of amaZulu is to a large extent similar to the one gathered during the investigation into the position of the paramountcy of amaZulu.

- 4.1 Shaka established amaZulu kingdom by conquering and assimilating different tribes.
- 4.2 He was assassinated by his brothers Dingane and Mhlangana. After ascending the throne Dingane disposed of Mhlangana.
- 4.3 Dingane was succeeded by Mpande in 1840.
- 4.4 Mpande fathered about 29 sons. He failed to designate a successor. This gave rise to a fierce battle between two of his sons, Cetshwayo and Mbuyazi.
 - (a) Both sons contested kingship. Cetshwayo claimed that he was the eldest son of Mpande, whereas Mbuyazi claimed that his mother, Monase, was the favourite wife of Mpande.
 - (b) The conflict simmered on until 3 December 1856 when the two rivals attacked each other on the northern bank of Thukela river. The battle is known as the Battle of Ndongakusuka.

- (c) Mpande died in October 1872. In June 1873 Cetshwayo was installed as king at the Emakheni royal village.

4.5 Cetshwayo reigned as king from 1873 to 1884.

- (a) Following the death of Mpande, Cetshwayo moved from Ndlalangubo to build his uNdi palaces, Zinhlendleni and Landandlovu on a hill in the Mahlabathini valley.
- (b) Cetshwayo fathered two sons, Dinuzulu and Manzolwandle, and six daughters.
- (c) The Battle of Isandlwana, also known as the Anglo-Zulu War (22 January 1879), was fought between the British and amaZulu. The British were defeated.
- (d) Another battle between amaZulu and the British ensued. It resulted in the capture of Cetshwayo by the British with the aid of his headman Ntshingwayo ka Mahole Khoza.

- (e) Cetshwayo was exiled to Cape Town. By right of conquest the whole of KwaZulu became vested in her Majesty Queen of Britain in 1879.

4.6 Cetshwayo was succeeded by Dinuzulu who reigned from 1884 to 1908.

- (a) On 6 June 1888, Dinuzulu left KwaZulu accompanied by a group of approximately 20 men. He crossed the border into Vryheid, passed on to the then Transvaal, north of the Phongolo river, with a view of gathering an army to attack Zibhebhu, Mnyamana and his uncle Zwedu and others in the upper parts of KwaZulu, for having pledged allegiance to the British government. The mission failed.
- (b) The conduct of Dinuzulu was deemed treasonous by the colonialists. Bishop Stone, from whom he sought refuge, betrayed him and surrendered him to the police. He was arrested and charged with high treason.
- (c) In October 1889 he was tried and found guilty of high treason. He was sentenced to exile in St Helena Island.

- (d) Dinuzulu returned from exile in 1898. He died in the Transvaal in 1913.
 - (e) After the death of Dinuzulu a succession dispute arose between his sons, Solomon and Nyawana.
- 4.7 Nkayishana Maphumzana Solomon Zulu won the battle of succession. He reigned from 1913 to 1933.
- 4.8 Solomon had not nominated a successor before his death. The matter was further complicated by the fact that he had 37 wives. The matter was eventually resolved by a court of law where the mother of Prince Cyprian, first wife of Solomon, Queen Ntombeni, produced a letter showing that Solomon had nominated Cyprian as his successor.
- 4.9 Cyprian was installed at Kwa-Dlamahlahla as *inkosi* of uSuthu clan on 27 August 1948. He was officially recognised as such by the South African Government.
- 4.10 During his reign, Cyprian made an unremitting effort to restore the pride and respect of the Zulu kingdom. He advocated

peaceful cooperation with the South African Government. He went so far as to accept the much despised Black Authorities Act, in 1955.

4.11 Cyprian died in 1968 at the age of 44.

4.12 When Cyprian died in 1968, Zwelithini, who was the successor was still a minor. Zwelithini was the eldest son of Cyprian with his second wife, Queen Thomo.

4.13 The royal family nominated Mcwayizeni, who was the son of Solomon and an uncle of Zwelithini, as regent for Zwelithini. Mcwayizeni was accordingly appointed by the government as acting paramount chief of amaZulu. He reigned as regent for four years.

4.14 Zwelithini was appointed on 4 December 1971 as the paramount chief of amaZulu.

5.

Customary Law and Customs for identifying a king for amaZulu

5.1 Succession to the traditional leadership of amaZulu.

- 5.1.1 As it is with most African communities, customary succession among amaZulu is governed by the principle of male primogeniture. A female cannot succeed.
- 5.1.2 A king usually has more than one wife. Usually, the successor will be the first-born son of the great wife. In a polygamous marriage, the great wife is at times the first wife to be married.
- 5.1.3 The great wife may be identified by the king, either amongst the existing wives or a wife married specifically for that purpose. The king would choose his great wife only when he is advanced in years in order to avoid usurpation.
- 5.1.4 The first-born son of the first wife is known as an heir of a commoner.
- 5.1.5 However, it was not unusual for the kingship to be obtained by might.

DETERMINATION

6.1 Issues to be determined

6.1.1 Whether the paramount chief of amaZulu, Goodwill Zwelithini Zulu, holds any traditional leadership position in terms of the Framework Act.

6.1.2 If so, what is the nature of the position?

6.1.3 By whom, how and when was it established?

6.1.4 Has the leadership position been passed on from one generation to the next according to the customary law and customs of amaZulu?

6.2 Analysis of Issues

6.2.1 In order to assume the position of a king or queen the person so identified must qualify in terms of the customary law of the traditional community.

6.2.2 Once the position has been established, it becomes hereditary and is passed on from one generation to the next, according to the customary law and the customs of the traditional community.

6.2.3 The king should rule over the entire traditional community with linguistic and cultural affinities rather than a section thereof.

6.2.4 There cannot be a multiplicity of kingships emanating from one kingship.

6.3 **Analysis of Evidence**

6.3.1 AmaZulu trace their origin to their ancestral and linguistic roots. The earliest oral and written records reveal that they developed a common language and culture that gave them a collective identity.

6.3.2 Until the death of Senzangakhona, amaZulu constituted a small polity, composed of several communities who may be said to have lived in a loose confederation.

- 6.3.3 When Shaka ascended the throne in 1816, he united the amaZulu communities under him as king, *ingonyama* (the lion) or *isilo* (the leopard).
- 6.3.4 He attacked, defeated and subjugated most communities whilst others simply submitted and paid tribute and allegiance to the new king.
- 6.3.5 Having thus consolidated amaZulu and expanded their sphere of influence, Shaka created the kingship of amaZulu. Shaka was the first king of amaZulu.
- 6.3.6 From the information presented and gathered it is evident that, since its expansion by Shaka the kingship has been passed on from one generation to the next through customary law of amaZulu and at times through usurpation.
- 6.3.7 Shaka was succeeded by Dingane, Mpande and Cetshwayo. Both Dingane and Cetshwayo became the target of colonial onslaught. The objective was to deprive amaZulu of their sovereignty over the land and

to destroy their independent administration and socio-political system.

6.3.8 The colonialists succeeded to the extent that their version of history has it that Cetshwayo was the last king of amaZulu to be recognised as an independent ruler.

6.3.9 The line of succession and the existence of a kingdom nevertheless perpetuated itself through custom and tradition. Shepstone was artificially elevated to “supreme chief” of amaZulu, thereby pretending to assume the role and functions of the king. The king of amaZulu was later designated “paramount chief”. It was no more than a colonial-apartheid stratagem to avoid recognition of the kingship.

6.3.10 All the kings that followed Shaka maintained the status, traditional role and functions of a monarch, albeit at times under difficult circumstances.

6.3.11 There were some succession disputes, but they were resolved by the inner family council. The disputes

never resulted in a fissure. There was always only one king.

7.

CONCLUSION

In terms of the customary law and customs of amaZulu and the Framework Act, the position held by the paramount chief of amaZulu, Goodwill Zwelithini Zulu, is that of king of amaZulu as a whole.

**DETERMINATION ON THE DISPUTE OF BAPEDI BETWEEN THULARE
VICTOR THULARE VERSUS KENNETH KGAGUDI SEKHUKHUNE**

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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 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.

- (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

- (a) 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.
- (b) 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 25 3(a):

“When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.”

(c) In terms of Section 25 3(b), the Commission must:-

(i) In respect of a kingship, 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) Section 9(1)(b) states that:-

“The President must, subject to subsection (3), recognize a person so identified in terms of paragraph (a)(i) as a king or a queen, taking into account:-

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

(ii) Whether a recognized kingship exists:-

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

(bb) in terms of which the king or queen is regarded and recognized in terms of customary law and customs as a traditional leader of higher status that 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 terms of the Framework Act in general in paragraph 1.2 above, this investigation is only limited to section 25(2)(a).

“The Commission has the authority to investigate, either on request or on its own accord:

(ii) ...a traditional leadership position where the title or right of the incumbent is contested.”

2.2 The dispute under focus is lodged by Thulare Victor Thulare (hereinafter referred to as “the Claimant”). It is a claim for the position of kingship of Bapedi. The Commission has made a determination that the paramountcy of Bapedi is a kingship and exists under the lineage of Sekhukhune.¹ Kgagudi Kenneth

¹ Determination on the position of the paramountcy of Bapedi, issued on 30 April 2008, at the Kopanong Conference Centre, Benoni.

Sekhukhune (hereinafter referred to as the “Respondent”) is the current acting kgošikgolo of Bapedi.

2.3 The Claimant contends that as the son of the late Rhyne Thulare (hereinafter referred to as “Sekhukhune III”) who was the son of Thulare II and the candle wife, Mankopodi, he is the rightful heir to the throne of Bapedi. The Respondent is opposing the claim.

3.

METHODOLOGY

3.1 In the process of its investigation, the Commission adopted the following approach:-

3.1.1 The Claimant lodged a claim by completing a claim form, essentially describing who he is and the nature of the dispute;

3.1.2 The Commission furnished the Respondent with a copy of the claim form, for him to respond to the claim;

3.1.3 After receiving the response from the Respondent, the Commission furnished the Claimant with the response, and the matter was then set down for hearing;

3.1.4 During the public hearing, the procedure adopted was as follows:-

- a) The Chairperson of the Commission made introductory remarks describing among others, the mandate of the Commission and how public hearings were to be conducted.
- b) Bishop Kgetjepe Steven Makotanyane (hereinafter referred to as “Bishop Makotanyane”) presented evidence on behalf of the Claimant. Advocate Meyers, from the Forensic Constitutional Task Force of the African Success and Entrepreneur Foundation represented the Respondent.
- c) Both parties were afforded an opportunity to make opening statements, briefly stating the nature of their claim, how they were going to

conduct their cases, how many witnesses they would be calling if any and what evidence would be tendered.

- d) Bishop Makotanyane then indicated that the Claimant would not be calling any witnesses. The Respondent indicated that then would be calling only one witness.
- e) Bishop Makotanyane, on behalf of the Claimant, testified under oath and referred the Commission to supplementary research material.
- f) This was followed by an opportunity for Advocate Meyer to pose questions to the presenter based on his testimony.
- g) The Commissioners were also given an opportunity to raise clarity seeking questions to the presenter. The parties were afforded an opportunity to ask questions arising from

the questions by the Commissioners. The Claimant closed his case.

- h) The Respondent testified under oath. A similar procedure was adopted: He was asked questions by Bishop Makotanyane arising from his testimony and the Commissioners were thereafter afforded an opportunity to ask clarity seeking questions. The parties in turn were given an opportunity to ask questions arising from the questions raised by the Commissioners.
- i) At the end, both parties were given an opportunity to make closing summaries.

4.

GENEALOGICAL HISTORY AND CUSTOMARY LAW OF SUCCESSION OF BAPEDI

4.1 The Claimant's Case

4.1.1 Bishop Makotanyane presented under oath the genealogical history and customary succession of Bapedi as follows:

- (a) Sekhukhune II was the king of Bapedi. He fathered two sons namely, Thulare II and Morwamoche III from his wife Thorometjane. The heir apparent Thulare II predeceased his father in 1941. He died without an heir.
- (b) Thulare II had a candle wife, Lekgolane, and a daughter named Nana. Soon thereafter Lekgolane died and after some time Nana also died.
- (c) In 1942 Sekhukhune II also died. His younger brother, Phatudi, was appointed as regent. He died after reigning for a year.
- (d) On the advice of the magistrate, Bapedi installed Morwamoche III, the younger brother to Thulare II, as acting *kgošikgolo*. The community married a *seantlo*, Mankopodi, from Manganeng, for

Morwamoche III to raise seed for the house of Thulare.

(e) Mankopodi had two sons: Sekhukhune Rhyne Thulare (Sekhukhune III) and Ramphelane Thulare.

(f) Sekhukhune III, as the eldest son of Morwamoche III was to succeed his father.

(g) In recognition of his status, the following rituals led by Morwamoche III were performed:-

(i) The senior *bakgoma* and Morwamoche III registered him as heir to the throne with the offices of the former Bantu Affairs Commissioner.

(ii) During initiation, he was head of the Matuba regiment. The brothers of Sekhukhune III from other houses including the Respondent were also part of the regiment of Matuba led by Sekhukhune III.

- (iii) In 1964, at a name giving ceremony arranged for Sekhukhune III, a senior member of the royal family, Sepadi Sekhukhune, cut a piece of liver from a slaughtered ox, put it in his tongue and spat it on the forehead of Sekhukhune III as a mark or token that the young man was later to be crowned Sekhukhune III.
- (h) When Morwamoche III passed away in 1965 the royal family and the royal council consisting of both senior and junior members of the royal family (hereinafter referred to as “*bakgoma* and *bakgomana*”) installed his wife Mankopodi as acting *kgošikgadi* of Bapedi. A manuscript of the minutes dated 24 January 1969 and entitled: *The Occasion of the Installation of Mankopodi as Regent* was presented. The minutes referred to Mankopodi as a surrogate. Mankopodi was regent from 1965 but was only officially recognised as such in 1968. She was to reign until Sekhukhune III was of age.

- (i) During 1974, a conflict arose amongst *bakgoma* and *bakgomana*. Some sought to install Sekhukhune III as king without consulting his mother, acting *kgošigadi* Mankopodi. Others preferred that she be consulted first. Consequently, Bapedi were divided into two factions.
- (j) One faction prevailed over the other. Mankopodi was deposed and banished from the Great Place. Her son, Sekhukhune III, was asked to ascend the throne as *kgošikgolo*.
- (k) *Bakgoma*, who are senior in rank than *bakgomana* approached the office of the magistrate at Schoonoord to issue a letter appointing Sekhukhune III as *kgošikgolo*. *Bakgomana* who were opposed to the appointment approached the magistrate, Mr Lekolwane, and instructed him not to hand over the letter to Sekhukhune III. They wanted to know whether it was possible to withdraw the letter of appointment of Sekhukhune

III as *kgošikgolo* of Bapedi. The grounds for the withdrawal arise from the discussion which is encapsulated in a minute dated 1st August 1975:

- (i) Lebidike Mogase stated that they had spent a lot of time trying to convince Sekhukhune III to take over as king of Bapedi. However, he declined to do so and even refused to process applications for old age pension and other social pensions. Consequently, Bapedi believed he would not serve the community.
- (ii) Leseilane Tenyane stated that he was suspicious of the motives of Sekhukhune III. He believed that Sekhukhune III wanted to sow division and strife among the Maroteng clan.
- (iii) Ngwanatsomane P Sekhukhune extended an invitation to the magistrate to attend a meeting at Mohlaletsi scheduled for the 8 August 1975 wherein the views of the

Maroteng community on the matter would be heard.

- (iv) The magistrate informed them that he could not make a decision until the meeting at Mophlaetsi was concluded. He would attend the said meeting and advise them accordingly.

- (l) From the contents of the abovementioned minutes, it is clear that Sekhukhune III never repudiated the kingship but was prevented by a faction of *bakgoma* from ascending the throne.

- (m) After some time the magistrate called the royal family for handing over the letter. Those opposed to the appointment of Sekhukhune III threatened that if Sekhukhune III was issued with the letter, he would rule in heaven and not at Mophlaetsi. It became clear that some members of *bakgoma* and *bakgomana* had connived to shift the kingship from the house of Thulare II to that of Morwamoche III.

- (n) In the interim, the same members who opposed the appointment of Sekhukhune III approached the Respondent who is from the sixth house of Morwamoche III. The Respondent and Sekhukhune III are biological brothers in that Morwamoche III is their biological father and sociological cousins in the sense that Morwamoche III was raising seed on behalf of Thulare II.
- (o) The conspiracy created further division amongst Bapedi. Those who supported the Respondent were violent and burnt down houses belonging to the supporters of Sekhukhune III. In the midst of this havoc, the Respondent was installed as the acting kgošikgolo of Bapedi in 1976.
- (p) The installation of the Respondent was not in line with the customary law of succession of Bapedi in that:-
- (i) the Respondent is the son from the sixth house of Morwamoche III.

(ii) enthroning the acting *kgošikgolo* involves the whole community not a section thereof. In this instance, the community was divided. Some *bakgoma* and *bakgomana* conspired to usurp the kingshipo from the house of Thulare II to that of Morwamoche III.

(q) Sekhukhune III was the rightful successor in that he was the rightful heir to the kingship of Bapedi. His mother, Mankopodi, was married by Morwamoche III as a *seantlo*² to Lekgolane, in order to raise seed for Thulare II. Sekhukhune III was the first-born son of the union.

(r) Sekhukhune III had four wives:

(i) Manyaku, the candle wife, has three children, Collins Mutodi, Oupa Phathudi and Thulare Victor Thulare, the Claimant herein;

² Surrogate wife

(ii) the second wife is Mante. She has one child, Phetodi;

(iii) the third wife is Makgalake. She has three children, Morwamoche, Tswaledi, and Kgao.

(iv) the fourth wife, Patricia, has no children.

(s) As the first-born son of Sekhukhune III and the candle wife Manyaku, the Claimant is the rightful heir to the kingship of Bapedi.

4.1.2 Under cross-examination by Advocate Meyer the following emerged:

(a) Bishop Makotanyane was referred to the judgement of Van Dijkhorst case no.2078/89 between the Respondent and A. Ramodike the former Chief Minister of Lebowa, issued in 1991, wherein:

(i) the order sought by Sekhukhune III was cited. He was asked whether the nature of the order sought related to a technical

matter. Makotanyane responded that it was not, but stated that the technicality appears in another part of the judgement and not in the portion read.

(ii) evidence of Mankopodi is discussed at page 45 of the judgement. He was asked whether it is it is correct that according to the customary law of Bapedi the regent has more powers than *bakgoma* and *bakgomana* as claimed by Mankopodi. He stated that matters related to kingship are first discussed and resolved by the family. The family will then inform *bakgoma* and *bakgomana* of their decision and *bakgoma* and *bakgomana* will in turn inform the community as a whole.

(iii) it was put to him that his version was wrong, as the court had ruled that *bakgoma* and *bakgomana* are the custodians of kingship. He responded that he did not agree with the judge.

(iv) he admitted that there were two judgements by Judge van Dijkhorst in this matter; one handed down in 1991 (“the 1991 judgement”), which related to the customary law of Bapedi and another in 1994 (the 1994 judgement), which related to technicalities.

(b) It was put to him that the Chief Minister of Lebowa supported the quest of Sekhukhune III to ascend the throne and to undermine *bakgoma* and *bakgomana*. This was done in order to get the *kgoši's* to entrench the apartheid homeland policies.

(c) He denied this assertion and stated that it was the Respondent who was supported by the apartheid government, politically and financially. Phatudi, one of the Lebowa homeland leaders, installed the Respondent as *kgošikgolo* he was also paid a monthly stipend by the apartheid government since 1976. He also denied that the state assisted

Sekhukhune III during litigation against the Respondent.

(d) He was asked to comment on the following statements in the 1991 judgement.

(i) one of the witnesses relegated the role of *bakgoma* and *bakgomana* to that of a mere advisory body. He stated that it was not true that *bakgoma* and *bakgomana* had a crucial role to play in the matter.

(ii) Mankopodi argued that it was for her to decide when Sekhukhune III should ascend the throne. On the other hand, *bakgoma* and *bakgomana* contended that they had the authority to decide when Sekhukhune III was to ascend the throne. He responded that the problem with the decision of *bakgoma* and *bakgomana* was that they wanted to exclude the regent Mankopodi from the process.

(e) It was put to him that if he claims that the regent has a right to be consulted before being replaced, why was this not done in respect of the Respondent when he was deposed in 1986. He should explain the reason they went to the politicians behind the Respondent's back instead of consulting with him. He stated that it was difficult to do so as the nation was already divided at the time and the Respondent refused to meet other *bakgoma* and *bakgomana*, he only met with those who supported him.

(f) It was put to him that the version of the Respondent is that according to the custom of Bapedi, in order for one to qualify as a *mokgoma*, ones roots should be at Maroteng that is, ones father was must have been born at Maroteng. It is therefore not true that Bishop Makotanyana is a *mokgoma* because he does not qualify to be a *mokgoma*. According to *bakgoma* and *bakgomana*, his father was not born at Mhlaletsi. He denied this, and maintained that he was a *mokgoma* and had the battle scars to prove it. His house was the

first of the *bakgoma*'s houses to be burned down during the riots.

- (g) It was put to him that *bakgoma* and *bakgomana* felt insulted by Sekhukhune III and his mother, who acted against the custom of Bapedi and thus chose the Respondent. He replied that the Respondent was the most junior of all the houses of Thulare II. Bishop Makotanyana added that it is not always the heir apparent who succeeds his father, where there is no heir apparent resort is had to junior houses.
- (h) It was put to him that *bakgoma* and *bakgomana* do not always agree. However, they show solidarity for the sake of Bapedi. Where a decision has been taken, those who did not initially support the decision were obliged to respect the decision, which prevails. He stated that it would depend on who took the decision, the authority and mandate of the decision maker, and the number of councillors who supported the decision otherwise the decision will not be binding. The reason they

are before the Commission is because none of the aforementioned were adhered to.

(i) It was put to him that *bakgoma* and *bakgomana* were unanimous in the view that Mankopodi should step down and Sekhukhune III should take over. He denied this and stated that the whole process was irregular; the most senior *mokgoma* was not consulted instead junior *bakgomana* decided to go to Seshego to discuss the matter with Sekhukhune III.

(j) It was put to him that; in terms of customary law, Mankopodi could not be a *seantlo* to Lekgolane as she was her aunt. As such, was regarded as her mother. It is taboo for a daughter to sleep in her mother's bed. Only the sisters to Lekgolane could take the place of the deceased as *seantlo*. He denied that this was a correct interpretation of the custom and added that both the families in Manganeng and Maroteng agreed that Mankopodi should be a surrogate wife to Thulare II. All the

makgosi, as well as the *bakgoma* and *bakgomana* agreed to this arrangement.

(k) It was put to him that the version of the Respondent, (which had been accepted by the Court that found Mankopodi was an unreliable witness) is that according to the customary law of Bapedi, Mankopodi could not be a *seantlo* to her paternal aunt, Lekgolane, as only the sisters of Lekgolane who could be *seantlo* to her. According to custom, Lekgolane is regarded as the mother to Mankopodi. It is taboo for a daughter to sleep with her mother's husband. He said that the statement is incorrect in that the Manganeng and Maroteng families, the *kgoši's* as well as *bakgoma and bakgomana* had all agreed to this arrangement and Mankopodi was duly handed over as a surrogate wife.

(l) It was put to him that the Respondent would say that Mankopodi was not brought in as a *seantlo* but as a nurse to Nana, the child of the Candle wife. That Mankopodi then seduced the *kgoši* and was

subsequently married. He denied this assertion as an affront to the dignity of both Mankopodi and Morwamoche III. He further stated that if Mankopodi was not the candle wife she would not have been appointed as regent for ten years, from 1965 to 1975.

(m) He was asked if he could justify presenting the Claimant as heir, whilst he is the youngest of three brothers, whereas they object to the Respondent's position because he is the youngest brother. He stated that the kingship of Bapedi is about the blood, thus the royal family decided before the death of Sekhukhune III to choose the Claimant because he is the biological son of Sekhukhune III. The Claimant's elder brothers were born out of wedlock.

(n) It was put to him that according to custom, a Candle wife should be a virgin. It was not for Manyaku, the Claimant's mother, with two children before marriage to be a Candle wife. He stated that:

- (i) generally, the Candle wife must be a virgin. However, in certain circumstances, this requirement may be waived. In this instance, the fault lay with the people of Maroteng who had already asked for Manyaku's hand in marriage, presented a bull to her family, and thereafter unduly delayed the process of marrying her. Consequently she grew impatient and had other liaisons, two sons were born.
- (ii) there was nothing amiss in taking Manyaku as a Candle wife in that a bull had been presented to her family, she was the right person to be married as she is the daughter of Sekhukhune III's paternal aunt. At the time, the families, *bakgoma* and *bakgomana* and *kgosis* had agreed thereto.
- (iii) the Respondent had also tried to marry her and was informed that she is his brother's (Sekhukhune III) wife.

- (iv) he added that Manyaku was not the first candle wife to be married with children who were born out of wedlock. Lakganabatho, the wife of Sekhukhune II, also had two sons, Thulare and Mpetje before marriage. The former (Thulare II) was destined to become king of Bapedi, but died prematurely.
- (o) He was asked when the bull was presented to Manyaku's family and when Sekhukhune III married her. He stated that he did not know the date the bull was delivered, as it was long ago, even the elders: Sehlophe Sekhukhune, Maboje Sekhukhune and Kopjane Sekhukhune who took the bull are now deceased. The community was not involved at this stage. The marriage between Manyaku and Sekhukhune III took place on 23 October 1991.
- (p) It was put to him that the Respondent disputes the paternity of the Claimant and that scientific proof thereof would be required. He stated that *bakgoma*

and *bakgomana* are convinced that he is the biological son and the rightful heir of the late Sekhukhune III.

- (q) It was suggested to him that on his own version, the majority of *bakgoma and bakgomana* as custodians of kingship had elected to depose Mankopodi. He responded that in kingship matters, it is not the majority decision that prevails, but the decisions are taken according to rank and seniority. In this case, the junior *bakgomana* wanted to depose Mankopodi.
- (r) He was asked whether he agreed that Sekhukhune III failed to perform his duty of signing the social pension applications. He replied that Sekhukhune III was hindered from performing his duties by *bakgomana* who had chased away his mother.
- (s) It was put to him that the disagreement was between *bakgoma and bakgomana and* Sekhukhune III only; the Respondent was not involved in the dispute. He agreed with this

statement, but contended that the Respondent should have discussed the matter with Sekhukhune III, before accepting the proposal of *bakgomana*.

- (t) He was referred to a portion of the judgement in which the court had found that the Respondent had not sought the position of kingship, but he was appointed by *bakgoma* and *bakgomana* and had held the position since 1976. This was because Sekhukhune III had refused for two years to be appointed as *kgoši*. He responded that publicly the Respondent did not display such ambition, however his actions indicated the contrary. He further denied that Sekhukhune III had repudiated the kingship for two years.

- (u) It was put to him that the Respondent had been appointed the acting *kgošikgolo* of Bapedi and would stand down only in favour of the son born of the union between himself and the candle wife. He stated that only a clique of *bakgomana* supported the Respondent, Bapedi do not recognise the said union and progeny thereof as their future king.

- (v) It was put to him that if a *kgošikgadi* defies the authority of *bakgoma and bakgomana* those who support her would be acting contrary to custom. He responded that Mankopodi never defied *bakgoma and bakgomana*. A section of *bakgomana* had decided to disregard traditional procedure and installed the Respondent as acting *kgošikgolo*.
- (w) It was further put to him that according to Bapedi customary law, no significance could be attached to a few *bakgomana* running away from Mochlaletsi as such conduct was due to their own folly. He stated that when a king is enthroned there are set procedures to be followed; there should be consultation with the senior *mokgoma and bakgoma and bakgomana*. In this case, the procedure adopted by *bakgomana* was in violation of the set procedure.
- (x) It was put to him that it was not true that Sekhukhune III was named in a ceremony, but that the Native Commissioner had given him the name. He responded that the English name "Rhyne" came

from the native Commissioner, however, Sekhukhune III was named “Sekhukhune” according to custom.

- (y) It was put to him that he had alluded to the Respondent being involved in conspiracies and secret meetings, however the only reference to such conduct in both court cases relates to the meetings between the Lebowa Government and Sekhukhune III. He stated that the secrecy arose from the Respondent’s failure to get Sekhukhune III’s version of events before ascending the throne.
- (z) It was put to him that the court found that Sekhukhune III was a weakling who was not interested in the customs and culture of Bapedi, but had other priorities before his duty and was controlled by the aspirations and ambitions of his mother. He stated that this was not true. When *bakgoma* and *bakgomana* asked him to take over he asked whether the senior *mokgoma* and his mother had been informed. Furthermore, a *kgoshi* cannot be deposed merely because he is unwise

he has the wisdom of *bakgoma* and *bakgomana* at his disposal.

(aa) It was put to him that the decision to make Thulare III the Claimant was taken spontaneously, because it was only when the Commission asked for a claimant that Thulare III was presented. He responded that the issue of the heir to Sekhukhune III had been finalised long ago. There had been a long-standing dispute between the Respondent and Sekhukhune III, and they were still pursuing it.

(bb) He was asked how he could be certain that the Claimant is the son of Sekhukhune III. He stated that he cannot, as it is only the mother who knows the paternity of the child. He has no option but to listen to the mother. Furthermore, his father took him to circumcision and named him Thulare III.

(cc) To the question that *bakgoma and bakgomana* would never have ratified the marrying of Manyaku without the Candle wife rituals being performed, he stated that when the bull was presented to her family *bakgoma and bakgomana* were united. Presently there are two sets of *bakgoma and bakgomana* at Maroteng; those who support the Claimant and those who support the Respondent and it was the former, that supported the marriage of Manyaku.

(dd) It was put to him that throughout the history of Bapedi an illegitimate child (*Iehlaba*) has never ruled as king. He responded that according to the custom of Bapedi the heir to the throne must be born of the king or one of the senior *bakgoma*. The people could not accept Mampuru for this reason. He further stated that it was not the first time that a candle wife is introduced in the same way as Manyaku. Morwamoche I married a woman

who had two children at Mphahlele, Thulare and Mpetje.

4.1.3 To questions of clarity from Commissioners, he responded as follows:

- (a) With regard to the status of Mankopodi, Bishop Makotanyane was referred to the letter dated 1969 and entitled "*The Memorable Occasion of the Installation of the Surrogate Chieftainess, Mankopodi Thulare Sekhukhune*". He confirmed that the letter correctly refers to Mankopodi as a surrogate wife and that indeed she was regarded as such.

- (b) When asked what led to the deposition of Mankopodi, he stated that some junior *bakgoma* surreptitiously approached Sekhukhune III and asked him to take over as king. He had been instructed not to inform his mother. Sekhukhune III however went against the *bakgomana's* instructions and informed his mother. The *bakgomana* changed their minds and stated

that they do not want Sekhukhune III to be king anymore. The *bakgomana* then approached the magistrate to withdraw the letter of appointment of Sekhukhune III as king of Bapedi and banished *Mankopodi* from the royal house.

(c) He described the procedure for the nomination of king of Bapedi as follows:

(i) the main role-players in their hierarchical order are the royal family, which is comprised of the mother of the heir apparent, his paternal aunts and uncles coupled with a senior *mokgoma*, who is the younger brother of the reigning king.

(ii) the royal family meets and nominates the successor. The successor will normally be the heir apparent who is the first-born son of the candle- wife.

(iii) *bakgoma* and *bakgomana* converge in the *kgoro* (royal kraal) and the senior

mokgoma informs them of the royal family's decision. The role of *bakgoma* and *bakgomana* is to confirm the decision of the royal family. If *bakgoma* and *bakgomana* agree with the royal family, a meeting of all heads of families is convened wherein the name of the nominee will be announced. The heads of families will in turn inform the public at large. Thereafter, the new king is presented to the nation.

(iv) it is very rare that *bakgoma* and *bakgomana* disagree with the decision of the royal family because ordinarily, the successor-in-title is known from birth.

(v) if *bakgoma* and *bakgomana* themselves do not agree on the successor, then it is referred back to the royal family for reconsideration. The decision of the senior *bakgoma* prevails. Seniority is determined by the social rank within the family. The

ranking of the mother of the members of *bakgoma* and *bakgomana* determines seniority.

(vi) if it is the heads of families who disagree, the matter will be referred back to *bakgoma* and *bakgomana*.

(d) He was asked to explain whether Sekhukhune III was officially appointed as king of Bapedi at any stage prior to the conflict that erupted in 1975. He responded that:-

(i) from birth, the status of Sekhukhune III as the heir apparent was common cause, to this end all the rituals attendant to his position had been performed at various stages of his life.

(ii) Sekhukhune III had agreed with *bakgomana* that he would take his rightful place as king. A letter was written to the magistrate to confirm his acceptance. The

magistrate then called Sekhukhune III to collect the letter of appointment. One of the *bakgomana* threatened that if he collected the letter of appointment, he would rule in heaven.

(iii) therefore, there was no letter of appointment for Sekhukhune III until one was issued by the Chief Minister of Lebowa, Ramodike, in 1989.

(e) On the question whether the Claimant's mother was a candle wife, he stated that she was a candle wife because she was married as such: the *lobola* proceedings, the arrival and the rituals that make her part of the family were performed. However, the lights or flames were not extinguished because of the prevailing turmoil at that time.

(f) He described the seniority of the houses of Bapedi ba Maroteng as follows: Lekganabatho had two sons, Thulare II and Morwamoche.

(i) Thulare II had five wives:

(aa) Lekgolane, the candle wife had a daughter Nana. She died without an heir and therefore her niece, Mankopodi was married as a surrogate to Lekgolane. Mankopodi had two sons Sekhukhune III and Ramphelane.

(bb) Madinoge, of the second house had one son Malekutu;

(cc) Mbwilu, of the third house who bore Phethedi and Morore;

(dd) Motlakaro, of the fourth house who bore Matsebe, Phatudi and Morore;

(ee) Tlakale, of the fifth house who bore Mafete.

- (ii) Morwamoche had two wives, Makopi, of the first house and the mother of the Respondent and Tlakale.

- (iii) the *bakgoma* and *bakgomana* did not follow custom when they chose the Respondent as regent in that the order of seniority was not followed. If Sekhukhune III could not succeed his brother, Ramphelane was next in line followed by Malekutu, Phethedi, Sekwati, Matsebe, Phatudi, Morore and Mafete; the sons of the houses of Thulare in their order of seniority.

- (iv) the Respondent therefore, was junior as he came from Morwamoche's first house and not any of the houses of Thulare. He believes that *bakgomana* chose the Respondent because they believed that due to his disability, he could be pliable.

4.1.4 The Respondent's counsel, Advocate Meyer was given an opportunity to ask questions arising from the

Commission's examination and Bishop Makotanyane responded as follows:

- (a) To the question whether *bakgoma* may challenge the decision of the royal family he stated that any decision of the royal family may be challenged and discussed by the *bakgoma* and *bakgomana* in the *kgoro*. However, the final decision rests with the senior *mokgoma*.

- (b) It was put to him that the version of the Respondent will be that the Respondent was approached by seventeen senior *bakgoma*. The most senior of these was Mosehla, the eldest son of Sekhukhune II. He responded that, at the time the Respondent was requested to act as *kgošikgolo*, the senior *bakgoma* were: Ramphelane, the brother of Sekhukhune III who was the most senior *mokgoma*; followed by Matsebe and Phatudi in the fourth house and Malekutu in the house of the Respondent.

(c) It was put to him that all the sons of Thulare II cannot be senior *bakgoma* as Thulare II was not the biological son of Sekhukhune II. He responded that the children born within the marriage are presumed to be children of the marriage. Therefore, according to the culture of Bapedi it is irrelevant who fathered the children.

4.2 **Respondent's Case**

4.2.1 The Respondent's counsel called one witness, the acting *kgošikgolo* of Bapedi Kgagudi Kenneth Sekhukhune. He testified as follows:-

(a) Sekhukhune II married many wives, two of whom played a pivotal role in this matter. The first wife was Lekganabatho who was married as *timamollo*. She had two sons, Thulare II and Morwamoche III. His second wife was Makopi, the daughter of Kgobalale the son of Sekhukhune I. She had a number of children including the Respondent. Thulare II married Lekgolane, the daughter of *kgoši* Phaswane as an ordinary wife. They had

one child named Manyaku, generally known as Nana.

(b) Thulare II and Lekgolane died. After the death of Nana's parents, Mankopodi, the daughter of Ramphelane and Lekgolane's brother, was taken into the royal household to look after Nana. Mankopodi was Lekgolane's niece. She was brought to the royal household merely as a babysitter. Later Nana died.

(c) Morwamoche III was made regent and acting *kgošikgolo* of Bapedi. He was to raise seed for the house of Thulare II. It was during this time that Mankopodi was impregnated by Morwamoche III. This caused embarrassment to the royal family, consequently, Morwamoche III was forced to marry Mankopodi. To this end, a contribution of *lobola* was made to Ramphelane. The traditional community did not make any contribution towards the *lobola*. Mankopodi later bore a son, Sekhukhune Rhyne Thulare.

(d) He refuted the Claimant's version that Mankopodi was married as *seantlo* to Lekgolane in that:

(i) according to the culture of Bapedi, as a niece, Mankopodi is regarded as a daughter to Lekgolane.

(ii) if a *seantlo* were to be married, it would be a sister or half sister to the deceased wife.

(iii) furthermore, had Mankopodi been a *seantlo* her children would be named after Lekgolane's family not her own family. Mankopodi is from the house of kgoši Nkadimeng that is of lesser royalty status to that of Mphahlele.

(e) Morwamoche III died in 1965. His brother, Phatudi, was installed acting *kgošikgolo*. He died after a short while. *Bakgoma* and *bakgomana* installed Mankopodi as the acting kgošigadi of Bapedi.

(f) During her reign, Mankopodi acted in breach of the customs and customary law of Bapedi: she disrespected and disobeyed the rules and structures of Bapedi including *bakgoma* and *bakgomana*. She was autocratic and assaulted members of the royal family including *kgošigadi* Thorometjane. A dispute arose between Mankopodi and *bakgoma* and *bakgomana*. Consequently, in 1974 *bakgoma* and *bakgomana* deposed and banished Mankopodi from Mohlaletse.

(g) Prior to the removal of Mankopodi from her regency, *bakgoma* and *bakgomana* approached her son, Sekhukhune III, to ascend the throne. Sekhukhune III refused, he elected to neglect his duty and abandon the affairs of the kingship by sympathising and supporting his mother Mankopodi. There was a continuous dispute between Sekhukhune III, *bakgoma* and *bakgomana*. It was resolved that since Sekhukhune III refused to ascend the throne the government should withdraw his letter of

recognition and appointment as *kgošikgolo* of Bapedi.

- (h) During 1975, the Respondent was employed as a clerk at Maandagshoek Hospital. He was approached by senior *bakgoma* of Mochlaetsi to accept the position of acting *kgošikgolo* of Bapedi.

They explained that initially, they had approached Sekhukhune III. When they did so, they instructed Sekhukhune III not to inform his mother, Mankopodi as they would inform her using their own protocol. Accordingly, a date was set for Mankopodi to be informed. On the appointed day, *bakgoma* were surprised to learn that Mankopodi knew everything and she vowed that she would not comply with *bakgomana's* instructions.

- (i) Bakgoma realised that they could not handle the situation on their own and solicited the intervention of the aunt (the *kgadi*) and *kgosi* Phetedi. The *kgadi* requested that Mankopodi

should at least hand over kingship to Sekhukhune III. She refused.

(j) *Bakgoma* implored the Respondent to assist because Sekhukhune III had refused, despite several requests to take over the leadership, saying that he listens to nobody except his mother. As a result, *bakgoma* decided that they wanted nothing to do with Mankopodi and her children, as she disrespected the customs and customary practices of Bapedi. She was banished from the royal palace together with her children.

(k) In any event, Mankopodi was not married by the nation, but was brought into the royal family as a babysitter. She was not married as a surrogate wife. A surrogate wife is married in the same way as a candle wife. He described the process for marrying a candle wife as follows:

(i) after a woman has been identified, different *kgoros* (households) make a contribution towards *lobola*. Some

representatives are sent to deliver the *lobola*.

(ii) she is married before the rainy season starts. She arrives in the evening and the whole community switches off or puts out their lights or flames. Other women carrying traditional mats and brooms accompany the *timamollo*. In order to conduct a virginity test, an elderly woman carries the *timamollo*, who is naked on her back from the gate to the house and brings her into the house. Along the way, a young man places a spear in front of the *timamollo*, and an elderly man picks up the spear in the name of the heir to the throne. The spear symbolises that she must give birth to a warrior. The spear and the shield are placed on the roof.

(iii) very early, the next morning *bakgoma* and *bakgomana* enquire from the elderly woman who carried the girl, whether the

girl passed the virginity test. The *timamollo* goes to a secluded place with her contemporaries, both boys and girls fast for the whole day. The boys carve a wooden doll, which resembles the future king to be borne by the *timamollo*. Upon their return, they approach the royal household with shouts of joy, confirming that she is indeed a virgin.

(iv) upon arrival at the royal household, they are met by a praise singer who recites praises in anticipation of the birth of the future king.

(l) He asked *bakgoma* and *bakgomana* whether they had consulted with the royal family including his aunt Dinkwanyane (who was in charge at the time), his uncle Mutodi, and his half-brother Phetedi at Marulaneng. He also asked if his own brothers had been approached since he could not see. The *bakgoma* assured him that they had consulted and followed customary practices to the

letter and they were satisfied that there was no one better qualified in the royal family except the Respondent. Due to his parentage, he was the rightful person in the royal family to take over the position and raise seed for the house of Thulare II. His father, Morwamoche was the son of Sekhukhune II and his mother, Makopi was the daughter of Kgobalale, the son of Sekhukhune I.

(m) The Respondent consulted widely on this issue, enquiring from several members of the royal family as well as *bakgoma* and *bakgomana*. Having satisfied himself that the royal family agreed to his appointment, he agreed to take the position of acting *kgošikgolo*. He married his first wife Makopi. He was officially enthroned as regent.

(n) In 1980 *bakgoma* and *bakgomana* as well as the whole tribe decided to marry '*timamollo*' from Mphahlele royal family for the Respondent. After marriage, she is taught how to behave as a queen and wife for a year. She came to the royal palace

in 1981 and participated in all the rituals for *timamollo* as set out above.

(i) three children were born including the heir in the name of Sekwati. He was born in 1988.

(o) The first 12 years of the Respondent's regency were peaceful until:

(i) 1986 when a group of young men from Mangana regiment including Sekhukhune III demanded that, the Respondent should remove all the elders from the royal council and replace them with younger councillors and members of the Mangana regiment. *Bakgoma* and *bakgomana* rejected this proposal in that they believed the wisdom and experience of the elder councillors was required to strengthen the royal council.

(ii) various demands were made on the Respondent by some members of the

Mangana regiment. As a result the relationship deteriorated further.

(iii) finally, they demanded that the Respondent should hand over the position of acting *kgošikgolo* to Sekhukhune III because he (Sekhukhune III) led the Mangana regiment during their initiation in 1964.

(p) During the 1986 youth riots, one Makotanyane Isaac Morwamoche, a community member and supporter of Rhyne Thulare, misled the youth in Sekhukhune area into believing that the building belonging to Agricultural Corporation belonged to apartheid government. The building and other structures were burnt down. During the conflict, he never discussed the matter with Sekhukhune III. He did not know where to find him and Sekhukhune III did not come to him.

(q) In 1989 the Respondent was deposed by the then Lebowa Government without reasons. He together with *bakgoma* and *bakgomana* tried to challenge

the deposition but failed. Sekhukhune III was installed as *kgošikgolo* of Mhlaletse. The followers of the Respondent harassed and assaulted, some were even killed by the security guards of Sekhukhune III and Lebowa police.

- (r) The Respondent appeared before the Magistrate in order to be registered as acting *kgošikgolo* of Bapedi. The Magistrate was satisfied that he had not dispossessed anyone of their rightful position but had taken what was bestowed upon him by *bakgoma* and *bakgomana*. He had also not participated in the meetings which led to the deposition of Mankopodi. In 1989 the Respondent was deposed by the then Lebowa Government without reasons. He together with *bakgoma* and *bakgomana* tried to challenge the deposition but failed. Sekhukhune III was installed as *kgošikgolo* of Mhlaletse. The followers of the Respondent were harassed and assaulted, some were even killed by the security guards of Sekhukhune III and Lebowa police.

(s) The dispute continued and it was inflamed by the intervention of the politicians.

(i) he received a letter for his dethronement from the Magistrate. He was surprised by this turn of events and tried to secure a meeting with the then Chief Minister of Lebowa, Ramodike. He however had a chance meeting with Ramodike who informed him that the decision had been taken and he could not reverse it.

(ii) he then approached the Supreme Court in Pretoria, the court ruled in his favour. The Chief Minister unsuccessfully appealed the decision in the Appellate Division.

(iii) a public meeting was arranged with *bakgoma* and *bakgomana* for the 7 May 1994. At the meeting *bakgoma* and *bakgomana* said the people at Maroteng would not accept the proposal by Nelson Ramodike, therefore the status quo should remain.

(iv) the government was dissatisfied with the 1994 judgement. It set aside all judgements made by the courts. The government set up *bosberaad* after *bosberaad*. These were followed by Commissions of Enquiry. First, was the Mahlo Commission followed by the Ralushai Commission.

(t) The 'Mahlo Commission' was instituted to investigate whether Rhyne Thulare had repudiated *Bogoši-ba-Bapedi* or not. The said Commission found that indeed Rhyne Thulare had repudiated the kingship. The government nevertheless rejected the Commission's recommendations.

(u) *Bakgoma* and *bakgomana* challenged the deposition of acting *kgošikgolo* K.K Sekhukhune in the Pretoria High Court. In 1991, the High Court in Case 2078/89 found among others that Mankopodi was not married as "*seantlo*", that indeed Sekhukhune III had repudiated the Bapedi throne, and that the Respondent should retain his

position as the rightful acting *kgošikgolo* of Bapedi. The then Lebowa Government unsuccessfully appealed this decision.

(v) In 1992, the Lebowa Government created a *Bapedi-ba-Thulare* kingship. Sekhukhune III was installed as *kgošikgolo* and the kingship was misrepresented to third parties as the Bapedi kingship. Again *bakgoma* and *bakgomana* of Mhlaletsi took this matter to the Pretoria High Court (case no 2607/94). The High Court in its judgement dismissed the position of Bapedi-ba-Thulare kingship including the status of Sekhukhune III as their *kgošikgolo*.

(w) Despite all the court decisions and the Commission of Enquiry's recommendations, the splinter group continued to disregard the Marota-a-Mhlaletsi Traditional Authority under the leadership of the Respondent. The *bakgoma* and *bakgomana* insisted that the Respondent should remain acting *kgošikgolo* of Bapedi.

(x) The democratic government established a Ralushai Commission to investigate the dispute over Bapedi kingship. It was discovered that there were certain individuals influencing the operations of the Commission. The Bapedi royal council challenged this aspect; as a result the Commission's recommendations were never released. On 03 March 1994, he met with one Kgwana John Nkadimeng, who said he had been sent by Nelson Mandela to inform the Respondent that the decision of the Supreme Court should be reversed and the Respondent returns the throne to his brother Sekhukhune III. The Respondent explained that it was the decision of the *bakgoma* and *bakgomana*, as they are the custodians of the kingship.

(y) In 2000, the Pretoria High Court pressurised the Limpopo Government to issue a certificate to confirm that the Respondent is a paramount chief of Bapedi. This decision was taken after the then Premier of the Northern Province was taken to court in case 2378/98.

(z) Manyaku, the Claimant's mother, was married by Sekhukhune III, not as candle wife. Her marriage took place in daylight and cattle were taken to Magakale. Her three children Mutodi, Phatudi and Victor Thulare were born out of wedlock. A certain coloured man known as Alfred Ward fathered claimant's two elder brothers.

4.2.2 In relation to the Claimant the Respondent stated the following:

(a) He was surprised to hear that there was a new Claimant to the kingship of Sekhukhune. As far as he was concerned, in order to ascend the throne the successor must be the son of a candle wife. The Claimant's mother, Manyaku, was not married as a Candle wife neither did she participate in the rituals attendant to being a candle wife. Sekhukhune III was not prohibited from marrying her because she is his aunt's daughter.

(b) He conceded that the marriage between Sekhukhune III and Manyaku took place during the dispute. However, he contends that the marriage took place in broad daylight, it was no secret and therefore there is no excuse why the rituals were not performed if indeed she was married as a candle wife. Furthermore, Sekhukhune III could not have married a candle wife whilst still pursuing his claim to kingship. Sekhukhune III died without kingship and therefore his son, the Claimant cannot lay claim to kingship.

(c) The Claimant cannot take away the kingship from the lineage of Morwamoche in that:

(i) he is not of royal descent. His biological descent is questionable. It was only after the death of Sekhukhune III in 2008 that he was taken to Schoonoord Premier's Office to be registered as the future king of Bapedi. It is also not known which names he used to register for his first South African I.D in 2005.

He is unknown to Bapedi.

- (ii) he is the third son of Sekhukhune III. His two elder brothers, Mutodi and Phatudi are still alive. The Respondent investigated the paternity of Phatudi and Mutodi and found that one Mr Alfred Ward, a coloured he knew from Maandagshoek, fathered them.
- (iii) his father failed while he was still alive to claim the kingship of Bapedi. He cannot claim what his family never had his father, Sekhukhune III, was never a king, to the contrary, he repudiated the kingship. Furthermore, his grandfather Thulare II never reigned.
- (iv) the Claimant cannot take the kingship from the son of Morwamoche III who is of royal blood. His father, Morwamoche III was of royal blood as was his grandfather Sekhukhune II.

(d) It is not always the most senior son who becomes king. In certain circumstances, the junior one may take over the reigns of kingship for example: Thulare took over whilst his brother Dikotope was still alive; Sekwati took over from his brother Phetedi; Sekhukhune I took over from Mojalodi.

4.3 Under cross-examination by Bishop Makotanyane, the Respondent stated the following:-

4.3.1 It was put to him that as at 9 July 1974, the most senior *mokgoma* was Malekutu Sekhukhune the brother of Sekhukhune III. Therefore, the delegation of *bakgoma* and *bakgomana* led by Mosehla Sekhukhune to ask Sekhukhune III to become king was not properly mandated to do so as the most senior *mokgoma* should have been involved in the decision. That infact, there were other *bakgoma* who were senior to Mosehla that were excluded, including: Malekutu, Sepadi, Phethedi, Kgopotso, and Matsebe Thulare. The Respondent stated that the most senior *mokgoma* was Mosehla Sekhukhune, who was senior not only in age but also by lineage. He added that Malekutu Sekhukhune is not the

most senior by blood, because he is not fathered by Sekhukhune II.

4.3.2 It was put to him that according to the custom of Bapedi a child born within a marriage is presumed to be the child of the marriage. Therefore, although Malekutu was not fathered by Sekhukhune II he was regarded as his son.

4.3.3 He was questioned as to whether the clandestine manner in which *bakgoma* and *bakgomana* approached Sekhukhune III at Seshego to ascend the throne was according to custom. He responded in the affirmative. He added that

(a) it was not unusual for *bakgoma* and *bakgomana* to request Sekhukhune III not to inform his mother as women are not privy to all the matters of traditional leadership. The fact that she was regent would not make a difference as she was neither senior nor above *bakgoma* and *bakgomana* who are the custodians of kingship. In fact, *bakgoma* and *bakgomana* had informed Sekhukhune III that they

would inform Mankopodi of the decision in due course.

(b) There was nothing wrong with *bakgoma* and *bakgomana* discussing traditional leadership matters at Seshego, such matters may be discussed anywhere.

4.3.4 It was put to him that Mankopodi was justified to be angered as she was approached by a group of *bakgomana* instead of one person. He stated that, initially, Mosehla had been sent to Mankopodi by the *bakgoma* and *bakgomana*. She was very rude to him and he left unceremoniously. Mosehla then called the rest of the *bakgoma* and *bakgomana* to come and hear her response for themselves.

4.3.5 When asked how it was that as a member of the royal family, he was not aware of a dispute that took place over one and a half years. He responded that due to his disability, he could not afford to travel home as often as he would have liked as he was only earning R100.00 per month.

4.3.6 It was put to him that Manyaku, his cousin, who was a teacher at a school near the Respondent's workplace would confirm that she had informed him about the problems at home, furthermore, Mariri who was also his cousin and owned a shop at Maandagshoek stated that often he gave the Respondent a lift home and it was the Respondent who initiated the discussion about problems at home. He stated that:

(a) As far as he was concerned, Manyaku's utterances were rumour and he could not rely on rumour.

(b) He denied that he discussed his family problems with Mariri.

4.3.7 On the question what caused him to believe *bakgomana* since he had not discussed the matter with Sekhukhune III directly. He stated that:

(a) He consulted with his aunt and uncle who are members of the royal family. They confirmed what *bakgomana* said and he was satisfied that indeed, Sekhukhune III had repudiated the kingship.

(b) He did not know where to find Sekhukhune III and in any event, Sekhukhune III did not have the kingship it rests in *bakgoma* and *bakgomana*.

4.3.8 It was put to him that on 22 March 1975 *bakgoma* and *bakgomana*, Sekhukhune III and Mankopodi agreed that Mankopodi step down as regent and hand over the kingship to Sekhukhune III. It was reduced to writing and signed at Schoonoord before a magistrate. He conceded that this did occur but this was long after Sekhukhune III repudiated the throne.

4.3.9 It was put to him that inspite of the fact that Sekhukhune III had repudiated the throne, they buried the hatchet and the agreement was signed. However, the very same *bakgoma* went to the magistrate and withdrew the letter. He responded that:

(a) *Bakgoma* and *bakgomana* withdrew the name of Sekhukhune III and requested the magistrate not to issue him with a certificate from the Magistrate's office because after the signing Sekhukhune III did

not return with *bakgoma* and *bakgomana* to the royal house as expected and could not be found.

(b) The *bakgoma* and *bakgomana* councillors were desperate to find him as he had to process applications for pension. They solicited the assistance of the Magistrate, Lekolwane.

(c) The Magistrate found Sekhukhune III and requested him to come and fulfil his duties. Sekhukhune III refused saying he did not have the authority to do so as he had not received the certificate of appointment. The Magistrate assured him that he could sign without the papers as the *bakgoma* and *bakgomana* had presented him as their king. Notwithstanding the assurance by the Magistrate, Sekhukhune III still refused.

4.3.10 It was put to him that, according to the minutes of the meeting for the withdrawal, the reasons advanced for the withdrawal were that they did believe that Sekhukhune III was going to be troublesome. The Respondent did not answer this question directly, he only emphasized that

the magistrate gave him authority to sign without the certificate.

4.3.11 He was referred to a statement at page 43 (manuscript) of exhibit F which reads;

“on 4 March 1976, the magistrate, instructed by the cabinet convened a meeting with some bakgoma at Schoornhoord in order to witness the handover of the letter of appointment, One mokgoma raised an objection to the handover being done at Schoornhoord and maintained that if such a ceremony was to be conducted it should be done at Mhlaletsi.”

4.3.12 He maintained that he was not present at this time. All these events occurred after Sekhukhune III had repudiated the kingship a number of times. In any event, he went along with what he was told, as he was not asked for an opinion.

4.3.13 It was suggested to him that *bakgoma* misled him as the next paragraph shows that Sekhukhune III instructed his attorneys to write a letter to the magistrate demanding

that he handover the letter of appointment. However, on 22 March 1976 *bakgoma* and *bakgomana* wrote a letter to the magistrate repeating their request of 19 September 1975 stating that they wanted the Respondent to be appointed as acting Paramount Chief. At this stage, they had already agreed surreptitiously with the Respondent. He reiterated that he was listening to the custodians of the kingship in that they said it was not necessary for Sekhukhune III to state categorically when making an objection, his conduct was sufficient.

4.3.14 He was referred to annexure “E” or “F” at page 43 (manuscript) in which it is stated that on 19th September, 1975 *bakgoma* and *bakgomana* wrote a letter to the magistrate informing him that they wanted the Respondent to be appointed as paramount chief, whereas, in his evidence in chief, he stated that he heard about the matter for the first time in December 1975 when *bakgoma* and *bakgomana* approached him. He stated that the correct date is the 19 September 1975.

4.3.15 It was suggested that, that could not be as *bakgoma* and *bakgomana* should have consulted him before the 19 September 1975. The Respondent conceded that he was consulted before that date, but he is certain that the year was 1975.

4.3.16 He further stated that he accepted the proposal of *bakgoma* and *bakgomana* because:

- (a) He did not want to repudiate the kingship as his brother, Sekhukhune III had done;
- (b) It was imperative that he took over the kingship, so that the kingship could not be lost and for Bapedi to have a leader;
- (c) His role was to ensure continuity in the line of succession;
- (d) He had asked *bakgoma* and *bakgomana* whether his rank as the son of Morwamoche, the younger brother to Thulare, would not cause disputes in future. *Bakgoma* and *bakgomana* informed him that

he was chosen, to raise the seed for Thulare because of his blood.

4.3.17 He was referred to annexure “F” where the royal *bakgoma* and *bakgomana* told the Respondent that Mankopodi is not a *seantlo*. The question is who was a surrogate to Lekgolane from 1944 to 1975. He responded that no one was appointed as a problem had been created by Morwamoche having impregnated Mankopodi.

4.3.18 He was asked why the royal councillors did not raise the family of Lekgolane. He stated that it emerged that Thulare was illegitimate, and whilst attempts were being made to rectify this, Mankopodi became pregnant.

4.3.19 He was referred to annexure “A”, K34/120 entitled “Submission to the Commission by the Sekhukhune III Royal Family” in which the royal councillors referred to Mankopodi as a surrogate. He stated that this was done for public consumption; the true status of Mankopodi was a private family matter.

4.3.20 He was referred to page 40(manuscript) of annexure “E” wherein it is stated that the *bakgoma* and *bakgomana*

decided to divorce Mankopodi and all her children including Sekhukhune. He was asked whether it was correct that Mosehla as the most senior *mokgoma* was the one who divorced Mankopodi. He stated that the decision to divorce was taken by *bakgoma* and *bakgomana* as a collective, not Mosehla alone.

4.3.21 He was asked whether it was proper for the *bakgoma* and *bakgomana* to divorce Mankopodi. He stated that she was only a regent, she could be deposed. Furthermore, Mankopodi as a woman, if the brothers of the king could marry her on behalf of the king, they can divorce her too.

4.3.22 He was asked whether it was customary for a twenty-eight year old, married man with children to be divorced and deposed with his mother. He responded that he is also of the same sentiment that a man with two wives is mature. However, it was Mankopodi who said Sekhukhune III was too young at the time. Nevertheless, it is customary for a traditional leader to be deposed; previously, Thobela was deposed and Thobejane ruled in his stead.

4.3.23 He was asked whether the *bakgoma* and *bakgomana* involved in asking for Mankopodi's hand in marriage were informed about the divorce. He stated that *bakgoma* and *bakgomana*, as the custodians of kingship married Mankopodi and therefore, it was their decision to inform whomever they pleased.

4.3.24 He was asked to explain why it was that *bakgomana* appointed Mankopodi as regent if she was not a surrogate. He stated that:

(a) Mankopodi was a pseudo-surrogate (*seka seantlo*) and this is evidenced by the fact that her children were not given appropriate family names. She never participated in the rituals of a Candle wife.

(b) Mankopodi was made regent as this was done in order to buy her silence about the illicit relations she had with Morwamoche.

4.3.25 It was put to him that according to the custom of Bapedi, the traditional leaders of Maroteng normally marry the

daughter of a *kgoši*. Could the Respondent explain whether, as acting *kgošikgolo* he had done the same. He responded that Khudu, his candle wife, was of royal blood and a daughter of *mokgoma*. At the time, the chief had no daughter to give in marriage and requested the daughter from one of his brothers. Therefore, she is not the daughter of a *kgoši*, but the niece of a *kgosi*.

4.3.26 He was asked whether Khudu, participated in all the rituals of a candle wife because the elderly women claim that she did not. He stated that she did and time permitting he would call witnesses to support his version.

4.3.27 It was put to him that the houses of Thulare II were as follows:

- (a) Lekgolane, the candle wife had a daughter Nana. She died without an heir and therefore her niece, Mankopodi, was married as a surrogate to Lekgolane. Mankopodi had two sons Sekhukhune III and Ramphelane.

- (b) Madinoge, of the second house had one son Malekutu;
- (c) Mbwilu, of the third house who bore Phethedi and Morore;
- (d) Motlakaro, of the fourth house who bore Matsebe, Phatudi and Morore;
- (e) Tlakale, of the fifth house who bore Mafete.
- (f) Makopi, of the sixth house and the mother of the Respondent.

4.3.28 Could he explain how it is that coming from the sixth house he could supersede all the other sons from the other houses and be accepted by the Maroteng clan. He stated that:

- (a) He is not from the sixth house of Thulare II but from the first house of Morwamoche, the brother to Thulare II. Thulare II was illegitimate and after

his death, Morwamoche was the rightful person to succeed him by blood.

- (b) He had already testified about Lekgolane. In the second house, the house of Madinoge, Malekutu had passed away. Mbilu and her children had gone for greener pastures outside the area. Motlakaro who is referred to as the third house is not the wife of Thulare II but the wife of Sekhukhune II. The fifth wife Tlakale bore no sons. Consequently, *bakgoma* decided to look to the house of Morwamoche III to raise seed of Thulare II.

4.3.30 He was asked whether he accepts that the order of seniority in the Maroteng houses in descending order is as follows: Sekhukhune III, Ramphelane, Malekutu, Phetedi, Sekwati, Matsebe, Phathudi and Morore. and that according to rank he is tenth in line. When the family gathers the ranking applies, the manner in which the salutations and seating are conducted are according to rank. He responded that such ranking is only used at initiation school and nowhere else.

4.3.31 It was put to him that it is accepted by all Bapedi that Motlakaro is the wife of Thulare II. The children are given great names within the royal family. For example, Matsebe is Sekhukhune I. The sons of Thorometsane are: Sekhukhune II, Phatudi, and Kgakgudi. He stated that he only agreed with the names and ranking but as far as Motlakare is concerned, Thulare II violated his father's (Sekhukhune II) bed and had relations with Motlakare.

4.3.32 The witness was referred to page 2 paragraph 4 of exhibit "F", a document entitled "*Framework And Summary Of Evidence Acting Kgošikgolo K.K. Sekhukhune*". He was asked to comment on the statement therein that "*The councillors told the Respondent that he was the most senior amongst all the sons Thulare*" He stated that the statement is correct in that:

- (a) His father, Morwamoche III married his mother, Makopi, the daughter of Kgobalale, who is the son of Sekhukhune I;

- (b) Therefore, when the blood of the sons of Sekhukhune I and Sekhukhune II is mixed, his is thicker and stronger than all.
- (c) It follows that if Thulare II is illegitimate, his sons will be illegitimate.
- (d) He conceded that the sons of Thulare II are senior to him only in terms of rank, not by blood.

4.3.33 He was asked to comment on the statement that Thulare II is the son of Kgoloko, who is the son of Mahlagaume, the son of Sekhukhune I. He stated that:

- (a) The candle wife of Sekhukhune I, Leganabatho, came into the marriage with two children, Thulare II and his sister Mpetje from gaMphahlele. Therefore, they were not fathered by Sekhukhune I.
- (b) He added that the children who come with the candle wife are renamed according to royal rank

and they become part of the royal family due to the marriage but in terms of royal blood they do not participate in certain rituals of the family.

4.3.34 It was put to him that in 1918, Thulare II was accepted by Bapedi as the future king, he led the regiment of Mangana. Thereafter he married a candle wife Lekgolane from Manganeng, in order to give birth to the heir to the throne, He replied that the people who accepted Thulare II were *bakgoma* and *bakgomana* who had not followed custom. Those who were aware of this transgression did not accept him. That is why he was only named Thulare II during the initiation graduation ceremony. According to custom, this should have been done at the beginning of initiation.

4.3.35 The Respondent was asked why he had named his biological son with Khudu, Sekwati and not Morwamoche. He stated that he was not the father of Sekwati as he was raising seed on behalf of Thulare II. In his own family, he had named his first-born son Morwamoche.

4.3.36 It was put to him that Sekwati was not the grandfather of Thulare II, why then was he not named after the father of Thulare, Sekhukhune. He replied that it was the decision of the royal council as the custodians of the kingship, he followed their decision without question.

4.4 During questions of clarity by Commissioners the following emerged:

4.4.1 He was asked to explain why Sekhukhune III was treated as the heir apparent if his mother was neither a *seantlo* nor a candle wife. He stated that it was because of the indiscretion between Mankopodi and Morwamoche.

4.4.2 He was asked why *bakgoma* and *bakgomana* appointed Mankopodi as regent. He stated that *bakgoma* and *bakgomana* had agreed her term would be five years only and thereafter Sekhukhune III would have attained majority and would be ready to take over.

4.4.3. To the question whether it is customary for a nurse-maid to become regent. He stated that where

circumstances required this could happen, it is negotiable.

4.4.4 He was asked as to whether matters of importance are first discussed by the inner circle consisting of the king, the queen and senior *mokgoma* as well as *kgadi*³. He stated that matters do not start in the royal household. The proper channels of communication are that the message is taken to the senior *bakgoma* who then convene a meeting of all *bakgoma* and *bakgomana*.

4.4.5 He was asked how Mankopodi related with *bakgoma* and *bakgomana* during her reign. He stated that there were no relations between Mankopodi and *bakgoma* and *bakgomana* in that Mankopodi was a dictator, she did not take advice from anyone. Women were not allowed in the *kgoro*⁴ but Mankopodi forcefully attended meetings at the *kgoro*.

³ the paternal aunt

⁴ the seat of the royal council

4.4.6 He was asked how it was that Mankopodi was appointed regent if women are not permitted to participate during discussions in the *kgoro*. He stated that ordinarily, a woman appointed to this position must have a male representative for communication between herself and *bakgoma* and *bakgomana*. Mankopodi was not the first female regent Thorometsane, who was regent before her, cooperated fully with *bakgoma* and *bakgomana* during her reign. Mankopodi was stubborn and refused to listen to *bakgoma* and *bakgomana*.

4.4.7 To the question why he had married a candle wife, he confirmed that he married a candle wife to revive the house of Thulare II, who was illegitimate. He responded that the illegitimacy could only be cleansed by substitution with the correct blood. If Sekhukhune III had not repudiated the kingship, *bakgoma* and *bakgomana* would have married a candle wife for Sekhukhune III as they did for him.

4.4.8 He was questioned about the status of Lekgolane the wife of Thulare II. He stated she was supposed to be his candle wife but because she was married as the

first wife this did not happen, she was only a senior wife. Thulare II therefore died without a candle wife.

4.4.9 He was asked the criteria used when choosing the one who is to raise seed for a deceased king. He was evasive.

4.4.10 It was asked whether he is contesting the legitimacy of Sekhukhune III. He stated that by blood, Sekhukhune III is not illegitimate as he was fathered by Morwamoche III, the son of Sekhukhune II, however, because sociologically he falls under the lineage of Thulare II who is illegitimate, he too is illegitimate.

5.

DETERMINATION

5.1 **The Issues to be determined**

Issues to be determined are:

- (a) Whether Mankopodi was married as a “*seantlo*” to Lekgolane?

- (b) Was Sekhukhune III the rightful heir?
- (c) Whether Sekhukhune III repudiated the kingship?
- (d) Was the appointment of the Respondent as acting *kgošikgolo* in 1976 according to customs and customary law of Bapedi?
- (e) Whether Manyaku was married as a candle wife to Sekhukhune III.
- (f) Is the Claimant the rightful heir to the throne of Bapedi?

5.2 **Analysis of Issues**

5.2.1 In pursuit of uniformity in the Republic in terms of the Framework Act, the Commission takes cognisance of the following:

- (a) The traditional leader should not have lost his position through indigenous political processes.

(b) In considering the dispute the Commission must consider and apply customary law and customs as they were when the dispute arose.

(c) The Commission has authority to investigate disputes dating from September 1927 unless the claimant provides good grounds for the Commission to go beyond this date.

5.3 **Analysis of evidence**

Whether Mankopodi was married for Thulare II as “seantlo” to Lekgolane.

5.3.1 The following facts are common cause:

(a) Sekhukhune II married a candle wife, Lekganabatho. At the time of the marriage, Lekganabatho already had two children: Thulare II and Mpetje, who were adopted into the royal family and given appropriate royal names. Thereafter, Morwamoche III was born. Although Thulare II was not the biological son of

Sekhukhune II, he was considered as his successor-in-title.

(b) Thulare II had five wives:

(i) the first house belonged to Lekgolane, the candle wife; she had a daughter Nana. She died without an heir and therefore her niece, Mankopodi, was married as a surrogate to Lekgolane. Mankopodi had two sons Sekhukhune III and Ramphelane.

(ii) in the second house, was Madinoge, the mother of Malekutu;

(iii) in the third house, was Mbwilu, the mother of Phethedi and Morore;

(iv) in the fourth house was Motlakaro, the mother of Matsebe, Phatudi and Morore;

(v) Tlakale, of the fifth house the mother of Mafete.

- (c) Thulare II married a candle wife, Lekgolane. Thulare II and Lekgolane predeceased Sekhukhune II, they were survived by their daughter Nana.
- (d) In 1942, Sekhukhune II also died. Phatudi was installed as acting *kgošikgolo*, he died after a year. Morwamoche III was installed as acting *kgosikgolo*.
- (e) Morwamoche had two wives, Makopi, the mother of the Respondent and Tlakale.
- (f) Mankopodi, the daughter of Ramphelane from Nkadimeng, was brought to Maroteng royal palace.
- (g) She gave birth to Sekhukhune III, whose biological father was Morwamoche III, but was the sociological son of Thulare II. Sekhukhune III married three wives. The third wife, Manyaku and the mother of the Claimant was married in 1992. At the time of the marriage,

Manyaku already had three sons: Mutodi was born in 1972, Phatudi was born in 1976 and the Claimant born in 1988.

- (h) After the death of Morwamoche III, Mankopodi was installed as acting *kgošikgadi* from 1965. In 1974, a dispute arose between Mankopodi and the royal council, she was subsequently deposed and banished from the royal palace in 1975.
- (i) The Respondent was installed as acting *kgošikgolo* in 1976. He married three wives, including a Candle wife, Khudu, who was married in 1978 and her first son is Sekwati.
- (j) Sekhukhune III and the Respondent have continuously made applications and counter applications in the courts of law contesting the position of *kgošikgolo* of Bapedi. They also sought political intervention. In 1999, he was shortly installed as *kgošikgolo* of Bapedi. The Respondent however, successfully re-claimed

his position as acting *kgošikgolo*, in the High Court. Sekhukhune III died in 2007. Thulare Victor Thulare his son is the Claimant.

5.3.2 There is a dispute as to the status of Mankopodi.

(a) The Claimant states that:

(i) both Legkolane and Thulare II had died without an heir. Therefore, it was necessary to revive the house of Thulare II. The royal family, *bakgoma* and *bakgomana* agreed that a *seantlo* or surrogate wife should be found to replace Lekgolane. Mankopodi was married as a *seantlo* to her deceased aunt Lekgolane.

(ii) Morwamoche III, the acting *kgošikgolo* and brother to Thulare II was to raise seed for the house of Thulare II with Mankopodi. To this end, all the rituals attendant to a candle wife were conducted and Mankopodi was duly

married. Consequently, Sekhukhune III was born.

(b) On the other hand, the Respondent contends that:-

(i) after the death of Lekgolane, Mankopodi was brought in as a nursemaid to Nana. During her time as a nursemaid, she seduced Morwamoche III, who was the acting *kgošikgolo*. As a result, Mankopodi became pregnant. This caused embarrassment to the royal family. In order to rectify the situation, the royal family decided that Morwamoche III should marry Mankopodi and a contribution towards *lobola* was to be made to the family of Mankopodi. Mankopodi later gave birth to Sekhukhune III.

(ii) in any event, Mankopodi would not qualify to be a *seantlo* because:

- (aa) according to custom, it is taboo for a niece to substitute her aunt, who is like a mother to her. It is only a sister who can do so.
 - (bb) Mankopodi's family is junior in rank to the other royal families;
 - (cc) if Mankopodi were a *seantlo*; her children should have been named after Lekgolane's family and not her own family.
- (iii) he conceded that Mankopodi was publicly held out to be a *seantlo*, but according to the royal family she was only a pseudo-surrogate wife. This was done in order to protect the royal family from the scandal with Morwamoche III.
- (iv) he gives two reasons for *bakgoma* and *bakgomana* failing to appoint a surrogate wife to raise the family of

Lekgolane. First, he states that it was because it emerged that Thulare II was illegitimate and secondly he claims that it is because of the confusion created by Morwamoche III having impregnated Mankopodi.

5.3.3 It is common cause that, after the death of a king without an heir, his house must be revived, by the most senior *mokgoma*, usually the younger brother of the deceased king. In this instance, Morwamoche III the acting *kgošikgolo*, was the one to raise seed for Thulare II. In order to do so, a candle-wife had to be married for him.

5.3.4 From the evidence tendered by both parties there is no other woman who is mentioned, be it a pseudo or candle wife except Mankopodi. She subsequently gave birth to Sekhukhune III, the heir to the throne of Bapedi. Upon the death of Morwamoche III she was unanimously appointed acting *kgošikgadi*. In the documents presented before the Commission, on the

day of her inauguration, 24 January 1969 she is referred to as a *seantlo*.

5.3.5 The Commission finds that the Claimant's version is more probable in that:-

(a) After the death of Lekgolane, Nana would not have wanted a caregiver in that the family would have assigned the responsibility to the female members of the royal family who reside within the royal palace. There would have been many servants to look after the child even during the lifetime of the mother.

(b) Ordinarily, the sister to the deceased would be a surrogate wife; however, as stated by the Claimant, the families, *bakgoma* and *bakgomana* had agreed that Mankopodi should be the one to take over from her aunt.

(c) In terms of custom, the candle wife bears the successor-in-title. It is not disputed by the Respondent that from birth Sekhukhune III,

was regarded as such and he performed all the rituals of a successor-in-title.

(d) The union between Mankopodi and Morwamoche III was meant to revive the house of Thulare II. It is not in dispute that Sekhukhune III was the sociological son of Thulare II. The claim by the Respondent that Mankopodi was a *pseudo-seantlo* in that for all intents and purposes she was publicly held out to be a *seantlo* when *bakgoma* and *bakgomana* knew her true status is not supported by the facts.

(e) In the circumstances, the Commission finds that Mankopodi was a *seantlo* to Lekgolane.

Was Sekhukhune III the rightful heir?:

5.3.6 The parties do not agree as to whether Sekhukhune III was the rightful heir.

(a) The Claimant contends that Sekhukhune III was the rightful heir to Thulare II in that:

(i) he was the first-born son of the candle wife, Mankopodi and the sociological son of Thulare II;

(ii) at birth he was registered at the Magistrate's office as the future king of Bapedi;

(iii) during initiation, as the heir apparent he led the Mangana regiment and carried the *sefoka* (the ostrich sceptre).

(iv) at the initiation ceremony a special ritual was performed in which he was identified as the future king of Bapedi and given the title of Sekhukhune III.

(v) throughout all the stages of his upbringing he was regarded and treated as the heir apparent.

5.3.7 The Respondent does not challenge the right of Sekhukhune III directly, but instead focuses on the status of Mankopodi, the mother of Sekhukhune III:

(a) He denies that Mankopodi was married as a *seantlo*;

(b) He does not deny the above version of the Claimant. Whilst he concedes that Sekhukhune III led the regiment during initiation, he contends that no significance may be attached thereto, as it related only to initiation matters and has no bearing on the kingship.

(c) He also claims that, *bakgoma and bakgomana* told him that he was most senior amongst the sons of Thulare II. He said the statement was true in that:

(i) his father Morwamoche III, the son of Sekhukhune II, married his mother Makopi, the daughter of Kgobalale, who

is the son of Sekhukhune I. Thus when the blood of the sons of Sekhukhune I and Sekhukhune II are mixed, his blood is thicker and stronger than all.

- (ii) the sons of Thulare II are senior to him in rank only and not in terms of blood. This is because Thulare II was illegitimate and therefore his progeny would be illegitimate.

5.3.8 The Commission finds that Sekhukhune III was the rightful heir of Bapedi for the following reasons:

- (a) The Commission has already found that the mother of Sekhukhune III, Mankopodi, was *seantlo* to Lekgolane, therefore he is the first born son of the Candle wife. Morwamoche III was his biological father, and Thulare II was his sociological father.
- (b) It is not in dispute that from birth all the rituals and processes, such as registration

before the Magistrate, were carried out for Sekhukhune III and he was held out as the heir apparent.

(c) The events which followed the fallout between Mankopodi and the royal council support the conclusion that Sekhukhune III indeed was the heir to the throne of Bapedi. It is common cause that *bakgoma and bakgomana* pursued Sekhukhune III to take over from his mother who was regent. Sekhukhune III was unhappy with the manner in which he was approached as *bakgoma and bakgomana* asked that he should not tell his mother and therefore refused to ascend the throne as requested. It is unlikely that *bakgoma and bakgomana* would have gone to these lengths for someone who, according to the Respondent was not the rightful heir.

(d) The Respondent's claim that he had 'thicker' blood than Sekhukhune III because of his parentage is novel in customary law and

customs. It is trite that in terms of custom it is rank which determines seniority and not affinity by blood. The Respondent concedes that he is junior in rank to the sons of Thulare II, but maintains that he has a better right because of his blood.

- (e) The Respondent's contention that Thulare II was illegitimate and therefore his sons would be illegitimate, does not hold water in that but for his demise, Thulare II was destined to become the future king of Bapedi.

5.3.9 In the same breath, he claims that Sekhukhune III repudiated the kingship and in support of this contention, states that various commissions and courts of law had made findings in this regard. This is a contradiction in terms in that one can only repudiate a right, which belongs to him. If Sekhukhune III was not the rightful heir, there can be no repudiation.

5.3.10 According to custom, the kingship does not deviate to another house. Upon the death of a *kgošikgolo* without a successor, a senior *mokgoma* is appointed to raise seed on behalf of the deceased with the candle wife if she is alive. If not, one will be married for that purpose. The children born of that union will be regarded as those of the deceased heir apparent.

5.3.11 In this case, at the time of the death of Sekhukhune II, Lekgolane, the candle wife, had predeceased him. The commission has already found that Mankopodi was *seantlo* to Lekgolane and accordingly, Morwamoche III fathered Sekhukhune III on behalf Thulare II.

5.3.12 According to the Respondent's own version, Bapedi married a candle wife, Khudu, and he is raising seed on behalf of Thulare II. This notwithstanding the fact that; Thulare II was illegitimate and due to affinity of blood he claims a better right to Thulare II.

5.3.13 It is the Commission's finding that Sekhukhune III was the rightful heir and successor to Thulare II and

Morwamoche III was acting on behalf of Sekhukhune III.

Whether Sekhukhune III repudiated the kingship?

5.3.14 The Claimant argues that Sekhukhune III did not repudiate the kingship of Bapedi but was prevented from ascending the throne by a faction of junior *bakgomana* who had connived to remove the kingship from the lineage of Thulare II to that of Morwamoche III. The faction usurped the powers of *bakgoma* and *bakgomana* and imposed the Respondent on Bapedi.

5.3.15 On the other hand, the Respondent contends that, *bakgoma* and *bakgomana* in their capacity as custodians of kingship had sought to remove the regent Mankopodi, who had become rude, dictatorial and disregarded the customs of Bapedi in order to replace her with her son, Sekhukhune III. They had tried unsuccessfully to persuade Sekhukhune III to ascend the throne, but he refused saying he will listen only to his mother. *Bakgoma* and *bakgomana*

had no choice but to save the kingship and find a leader for Bapedi.

5.3.16 It is common cause that:

(a) In 1974, a conflict arose between Mankopodi and some members of *bakgoma* and *bakgomana* as they wanted to depose Mankopodi and install Sekhukhune III. They approached Sekhukhune III to take over the kingship without informing his mother. Sekhukhune III refused to do so.

(b) At some stage there was some form of reconciliation when Mankopodi agreed to step down in favour of Sekhukhune III. To this end, *bakgoma* and *bakgomana* wrote a letter to the Schoonoord Magistrate requesting a letter of appointment for Sekhukhune III as the *kgošikgolo* of Bapedi.

(c) When the letter of appointment was to be delivered to Sekhukhune III, some

bakgomana asked the magistrate to withdraw the letter of appointment as they no longer trusted Sekhukhune III.

- (d) There is a dispute as to the reasons the letter of appointment was never handed over to Sekhukhune III. The Claimant states that it was because a faction of *bakgomana* wanted to shift the kingship from one lineage to the other. The Respondent claims that *bakgoma and bakgomana* were frustrated with Sekhukhune III who refused to perform his duties and caused the community to suffer, as social grants amongst others, could not be processed.

5.3.17 It cannot be denied that the friction between Mankopodi and *bakgoma and bakgomana* caused Sekhukhune III undue distress, as he could not betray his mother. Ultimately, when he was ready to take over, *bakgoma and bakgomana*, who were opposed to Mankopodi, saw an opportunity to get someone else who would be more pliable. It was

clear to them that they would lose their grip on power with Sekhukhune III on the throne, as he would no doubt continue to consult his mother (whom they despised) on matters of kingship.

5.3.18 Furthermore, Sekhukhune III never gave up his quest for kingship. He made various attempts to ascend the throne. This is evidenced by the litany of litigation between himself and the Respondent. None of these attempts were successful. Sekhukhune III died without a title.

5.3.19 In order for the Commission to make a finding on this issue, it is important for the matter to be considered in its proper context. The atmosphere that prevailed at the time was that *bakgoma* and *bakgomana* despised the mother of Sekhukhune III. Consequently, there was strife in the community due to this dispute. Mankopodi was banished from the area. Therefore, it is the Commission's finding that when Sekhukhune III failed to ascend the throne it did not amount to a repudiation as it was impossible to do so in the circumstances.

Was the appointment of the Respondent as Acting kgošikgolo of Bapedi in accordance with the customary law and customs

5.3.20 Assuming, that Sekhukhune III could not ascend the throne for any reason, according to the customs and customary law of Bapedi, the next eligible son would be the second born son of the candle wife, in this case, Ramphelane. Failing which the sons of Thulare II from the other houses in order of rank: Malekutu, Phethedi, Sekwati, Matsebe, Phatudi, Morore and Mafete respectively.

5.3.21 In the event that any of the sons within the house of the deceased king, cannot take over the most senior *mokgoma* (being the brother of the deceased king), should raise seed on behalf of the deceased king. After the death of Thulare II, Morwamoche III the brother of Thulare II raised seed on behalf of his brother. It is in dispute as to who among the *bakgoma* was the most senior at the time. However

it is not important to make a finding on this aspect as the principle remains.

5.3.22 In this case, the Respondent claims that *bakgoma* and *bakgomana* acted in terms of customary law in that even though the sons of Thulare II were still alive and were available to ascend the throne, he had a better right because of his blood and the illegitimacy of Thulare II and his progeny. In the same breath, he claims that he has already married a candle wife and is raising seed on behalf of Thulare II.

5.3.23 The Commission finds that the appointment of the Respondent as the acting *kgošikgolo* of Bapedi was not in accordance with the customs and customary laws of Bapedi in that:

(a) *Bakgoma* and *bakgomana* without justification, overlooked Ramphelane the brother of Sekhukhune III who was next in line as well as the other sons of Thulare II in order of their rank who were still alive;

- (b) Furthermore, it is common cause that by the time the Respondent was installed as acting *kgošikgolo* there were two sets of *bakgoma* and *bakgomana*, a situation which still exists. Consequently, the decision to appoint the Respondent was taken by a section thereof. The Bapedi nation continues to be divided to date.

Whether Manyaku was married as a candle wife for Sekhukhune III?

5.3.24 The Claimant maintains that Manyaku is a candle wife in that:

- (a) On or before 1972, the royal family delivered a beast to her home in anticipation of her marriage as a candle wife;
- (b) The community contributed to her *lobola*, she was married as a candle wife in 1992 and during the marriage ceremony, all other rituals of a candle wife were performed

except the extinguishing of the fires due to the strife that persisted within the community at the time.

5.3.25 The Respondent contends that Manyaku is not the candle wife, she was married in broad daylight. All her sons were born out of wedlock. He disputes that Sekhukhune III is the father of the Claimant.

5.3.26 It is common cause that Manyaku was pledged to be married to Sekhukhune III. It is customary for a king to marry a candle wife after he has ascended the throne and having married at least one wife. Sekhukhune III could not ascend the throne due to the strife that prevailed. He was finally installed in 1992, as *kgošikgolo* of Bapedi and around this time, he married Manyaku.

5.3.27 With regard to the Respondent's contention that Manyaku could not be a candle wife because she was not a virgin and had illegitimate children. It is common cause that Lekganabatho, the wife of Sekhukhune II was married as a candle wife in spite

of the fact that at the time of the marriage she had two children. In the circumstances, the fact that Manyaku has two children cannot be a bar to her being a candle wife.

5.3.28 In the circumstances, the Commission finds that Manyaku was married as a candle wife for Sekhukhune III.

Is the Claimant the rightful heir to the throne of Bapedi ?

5.3.29 According to the Claimant's version, he is the only son born of the candle wife, Manyaku and Sekhukhune III. Sekhukhune III did not father his siblings Motodi and Phatudi. Prior to the death of Sekhukhune III, *bakgoma* and *bakgomana* agreed that as the only biological son of Sekhukhune III he would succeed him. The Respondent contends that the Claimant cannot claim the kingship of Bapedi in that he is not born of a candle wife, his paternity is doubtful and his father and grandfather before him never reigned as kings; therefore he cannot claim what his ancestors did not possess.

5.3.30 The fact that Thulare II and Sekhukhune III never reigned as kings cannot prevent the Claimant from claiming his birthright. It is common cause that Thulare II was not barred from ascending the throne, but for his death. Furthermore, on the Respondent's own version he is reviving the house of Thulare II. With regard to Sekhukhune III, he was destined to be the king of Bapedi. The circumstances for not ascending the throne have been discussed at length hereinabove, it is not necessary to repeat. At the time of the death of Sekhukhune III, his claim to the kingship of Bapedi had already been lodged with the Commission.

5.3.31 The Commission has already found that the father of the Claimant, Sekhukhune III, was the rightful heir to Thulare II and the Claimant's mother, Manyaku, is a candle wife. Therefore, the Claimant as the first born son of his parents, is the rightful heir to the kingship of Bapedi.

6.

CONCLUSION

In the circumstances, the Commission finds that:-

- 6.1 The appointment of the Respondent, Kenneth Kgakgudi Sekhukhune, as the acting *kgošikgolo* of Bapedi ba Maroteng, was irregular and not in line with the customs and customary laws of Bapedi.

- 6.2 Sekhukhune III was the successor-in-title to Thulare II his father. According to the customs and customary law of Bapedi, the Claimant, Thulare Victor Thulare, is the rightful heir to the kingship of Bapedi.

**DETERMINATION ON THE KINGSHIP DISPUTE OF AMAMPONDO
BETWEEN TYELOVUYO ZANOZUKO SIGCAU VERSUS
MPONDOMBINI JUSTICE SIGCAU**

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INTRODUCTION

1.1 ESTABLISHMENT OF THE COMMISSION

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims (“the Commission”).

1.1.2 The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.2 FUNCTIONS OF THE COMMISSION

1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in section 25(2) and arising in 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’ ; and*

(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.”

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to section 25(2)(a)(vi).

2.

FOCUS

2.1 Having defined the functions of the Commission in terms of the Framework Act in general in paragraph 1.2 above, this investigation is only limited to Section 25(2)(a).

“The Commission has authority to investigate either on request or of its own accord the following:

(ii) ...a traditional leadership position where the title or right of the incumbent is contested;

2.2 The dispute under focus is lodged by Zanozuko Tyelovuyo Sigcau (“hereinafter referred to as the Claimant”). It is a claim for the position of the kingship of amaMpondo. The Commission has made a determination that the paramountcy of amaMpondo is a kingship and exists under the lineage of Mqikela⁵. Mpondombini Justice Sigcau (“hereinafter referred to as the Respondent”) is the current incumbent of the disputed position.

⁵ Determination on the paramountcies of amaMpondo aseNyandeni and amaMpondo aseQaukeni issued on 29 April 2008, at the Kopanong Conference Centre, Benoni.

2.3 The Claimant contends that he is the son of Zwelidumile, who was the product of ukungena between Nelson and Magingqi. The Respondent is opposing the claim.

3.

METHODOLOGY

3.1 In the process of its investigation the Commission adopted the following approach:-

3.1.1 The Claimant lodged a claim by completing a claim form, describing who he is and the nature of the dispute;

3.1.2 The Commission furnished the Respondent with a copy of the claim form, for him to respond to the claim;

3.1.3 After receiving the response from the Respondent, the Commission furnished the Claimant with the response and the matter was set down for hearing.

3.1.4 During the public hearing, the procedure adopted was as follows:-

- (a) The Chairperson of the Commission made the introductory remarks describing among other things the mandate of the Commission and how the public hearing was to be conducted.
- (b) The Claimant conducted his own case and Advocate Thabiso Machaba, instructed by Langa Attorneys, represented the Respondent.
- (c) Adv. Machaba indicated that he would be raising *res judicata*/estoppel/jurisdiction as points *in limine*. The crux of the points *in limine* were that the Commission did not have the jurisdiction to hear this matter as it had been finally adjudicated upon by the Appellate Division in 1944.
- (d) Having heard the argument by the Respondent, the Commission dismissed the points *in limine*. The Commission indicated that the reasons for its decision would be furnished together with the determination on the dispute. The public hearing proceeded on the merits.

- (e) Both parties were afforded an opportunity to make opening statements, briefly stating the nature of their claim, how they were going to conduct their cases, how many witnesses they intended to call, if any, and what evidence would be tendered.
- (f) The Claimant indicated that he did not intend to call any witnesses. The Respondent indicated that he intended to call nine witnesses.
- (g) The Claimant, Zanozuko Tyelovuyo Sigcau, testified under oath and referred the Commission to supplementary research material;
- (h) This was followed by an opportunity for Adv. Machaba, to pose questions to the Claimant arising from his testimony;
- (i) The Commissioners also raised clarity seeking questions with the Claimant;
- (j) The Claimant closed his case.

- (k) A similar procedure was adopted for the Respondent. Advocate Machaba led witnesses who testified under oath. The Claimant asked the witnesses questions arising from their testimony. Thereafter, the Commissioners were afforded an opportunity to ask clarity seeking questions. The parties in turn were given an opportunity to ask questions arising from the questions asked by the Commissioners.

- (l) At the close of the Respondent's case, the Claimant successfully applied to re-open his case and call two witnesses. A similar procedure was followed in testing the evidence of the witnesses.

- (m) In the end, both parties were afforded an opportunity to furnish the Commission with written closing submissions.

4.

REASONS FOR THE RULING ON POINTS – IN LIMINE

1. At the commencement of the dispute hearing counsel for the Respondent raised preliminary objections to the claim: Estoppel by judgment or authority, the Commission's lack of jurisdiction and a defense of *res judicata*.
2. In the opinion of the Commission these points in-limine are inter-related, if not one and the same and will be best discussed together.
3. The question the Commission has to decide is whether the dispute, between the Claimant, and the Respondent, over the kingship position of amaMpondo is the same as the one decided by the Appellate Division in 1944, such that the Respondent may benefit from the preliminary objection of *res judicata*.
4. The case law lays down clear principles and requirements on this defense, namely the proceedings on which reliance is placed must be between the same parties, based on the same cause of action, and the must have been finalised.

5. In Rail Commuters Action Group and Other vs Transnet Ltd and Others⁶: The court held that for the plea of *res judicata* to succeed, the parties concerned in both sets of proceedings must either be the same individuals or persons who are in law identified with those who were parties to the proceedings. Such persons must be privy to one another and they must derive their interest in the later proceedings from the parties to their earlier proceedings, such as example a deceased and his heir, a principal and his agent etc.

6. The 1944 appeal was from a decision of the Cape Provincial Division arising out of a dispute as to who was the rightful heir to the property of the great house of the paramount chief of Eastern Pondoland.

7. It is common cause that: After the death of Mandlonke, Nelson and Botha claimed both the chieftainship and the property. In the meetings the majority favoured Nelson. Botha sought the assistance of the Governor General, who then appointed a commission of enquiry in 1938. After instituting an enquiry into the rival claims to the chieftainship only, the Governor General

⁶ 2006 (6) SA 65(C) at p.83

appointed Botha as Paramount Chief of Eastern Pondoland in terms of Section 23 of Act 38 of 1927.

8. Subsequent to such appointment, Botha took possession of that portion of the property which had previously belonged to the great house of Marhelane. Prior to that, amaMpondo had given the control and possession of the said estate to Nelson as he had been duly recognized as heir in February 1938 in terms of the custom of amaMpondo. Nelson instituted an action against Botha in the Cape Provincial Division in which he claimed delivery of all property belonging to the Qaukeni Estate and an account of all property of the estate alienated by Botha and payment to Nelson of an amount equivalent to the value of such property so alienated. Davis J gave judgement in favour of Botha.

9. Nelson appealed. In its rationale for dismissing the appeal, the appeal court said that “... a *Chief appointed under the Act is a creature of the Statute of 1927. “The Government in making an appointment is not bound to appoint the man who would be chief according to Native Custom ...”*

10. On that reasoning alone, it is clear that indeed, the Respondent's father was a creature of the Statute, and that in appointing him the customary law and customs of amaMpondo had not been followed. This Commission was established precisely for matters such as this one of amaMpondo.

11. The dispute before the Commission relates to the question of the position of kingship within the lineage of Mqikela. The Claimant contends that after the death of Mandlonke, the next eligible house to succeed was that of the surviving *qadi*, as the right hand house ordinarily never rules.

12. The Claimant contends that when amaMpondo were frustrated by the laws of the land because Nelson as *iqadi* could not take over, they resorted to the custom of *ukungena*. The Claimant's biological grandfather Nelson, entered into a union of *ukungena* with Magingqi, Mandlonke's great wife, and fathered Zwelidumile his father. Zwelidumile was meant to revive the house of Mandlonke. Therefore, Zwelidumile is the son of Mandlonke according to the custom of amaMpondo, even though his biological father is Nelson.

13. The Commission has to make a finding amongst other things on whether the custom of *ukungena* was entered into between Nelson and Maginqi, whether such custom is applicable at the level of kingship, as alleged by the Claimant. These issues are going to be dealt with fully in the main dispute determination.
14. That alone, according to the Commission's opinion gives the Claimant the authority to lodge the claim with the Commission, as these were not before the Appellate Division nor any lower court for that matter.
15. It is common knowledge that the institution of traditional leadership has been undermined, distorted and eroded. Even our courts of law were using the oppressive laws of the land which were meant to undermine and distort the institution, hence the Commission.
16. The Claimant contends that Botha was appointed in terms of laws of colonialists, without considering the customs of amaMpondo. The Respondent obviously disputes this. This again is going to be discussed in detail in the main determination.

17. It is the mandate of this Commission in terms of Section 25(1) to decide on any traditional leadership dispute and claim within South Africa, including the one brought by the Claimant.
18. Furthermore there is evidence that after the death of Botha, there was a case between Zwelidumile Sigcau, and the Respondent which was brought after the 1944 decision. Unfortunately, Zwelidumile died whilst the case was still pending before the court.
19. That again gives the son of Zwelidumile the right and the opportunity to take up the matter when a forum such as this Commission is made available to the indigenous peoples of South Africa, to correct the wrongs of the past.
20. The preliminary objections as raised by the Respondent are dismissed and the Commission finds that the matter was not finally dealt with by the Appellate Division.

5.

**GENEALOGICAL HISTORY AND CUSTOMARY LAW OF
SUCCESSION OF AMAMPONDO**

A. The Claimant's Case

5.1 The Claimant testified as follows:-

5.1.1 He traces his lineage to Faku, who was one of the early kings of amaMpondo. Mqikela, the son of the great wife, succeeded Faku.

5.1.2 Mqikela married three wives;

(a) In the great house was Masarhili who had no male issue,

(b) In the right hand house was the mother of Cetshwayo and

(c) Manxele, the mother of Mhlanga was *iqadi* to the great house.

5.1.3 According to custom, *iqadi* is the support of the house to which she is allocated. If there is no son in the great house, then the son of *iqadi* attached to the great house is 'adopted' into the great house and assumes the position of the successor.

5.1.4 As *iqadi* to the great house, Manxele was supposed to assist the great house which did not produce an heir by handing over her son, Mhlanga, to become part of the great house. She refused. Subsequently, Sigcau, a son of Mqikela born out of wedlock, was legitimized (*ukuhlahla*) and 'adopted' into the great house.

5.1.5 Sigcau succeeded Mqikela. He had two sons, Toli who was born of the right hand house and Marhelane who was the first-born son of Majali, the great wife. Marhelane succeeded Sigcau.

5.1.6 Marhelane married many wives. However, of significance in this matter are the following:-

- (a) Maphakathi, the first wife, was allocated to the right hand house. She was the mother of Mpiyenkulu, Botha (the father of the Respondent), Mdudulo and Vukayibambe;

- (b) Mankosinani, the second wife, was allocated to the great house. She had only one child, a daughter Nomathemba;
- (c) Mandwane, the third wife, was allocated as *iqadi* to the great house. She had no issue;
- (d) Mamtshibeni was the fourth wife:
 - (i) her status is not clear in that some sources state that she was *iqadi* to the right hand house whilst others state that she was *iqadi* to the great house of Marhelane.
 - (ii) she bore Maneli and Nelson, the biological grandfather of the Claimant;
- (e) Maqhinebe, the fifth wife, was allocated as the second *qadi* to the great house. She was the biological mother of Mandlonke.
- (f) Mamdingazwe, the sixth wife, was allocated as the second *qadi* to the right hand house;

(g) Maxesi, was the seventh wife, her royal palace was at Sikhilikindini.

5.1.7 Marhelane died in 1921. Since Mankosinani had no male issue, she adopted Mandlonke, the son of the second *qadi* to the great house.

5.1.8 At the time of the death of Marhelane, Mandlonke was still a minor. His uncle, Mswakeli, was regent from 1921 to 1935;

5.1.9 Mandlonke ascended the throne in 1935. He married two wives, Mampofana, of the right hand house who resided at Khubeni and Magingqi of the great house who resided at Mzindlovu. Magingqi was the daughter of the royal house of Gingqi in Port St. Johns. Mandlonke died without issue on 25 November 1937. After the death of Mandlonke, Singetheni acted as regent.

5.1.10 After the burial of Mandlonke, Victor Poto, who was a descendant of the right hand house of

Faku and later became the paramount chief of amaMpondo aseNyandeni, had warned that neither Nelson nor Botha should *ngena* Magingqi since the child born of that union would be regarded as the son of Mandlonke and thus entitled to become *ikumkani*.

5.1.11 A succession dispute ensued between Botha, the son of the right hand house, and Nelson, the son of *iqadi* house of Marhelane;

(a) Botha Sigcau claimed that he was entitled to succeed because:

(i) Mandlonke died without a great wife and without issue. Mankosinani, the great wife of Marhelane had predeceased Mandlonke. Thus, there was no one to nominate a successor;

(ii) as the first-born son of the right hand house, he was more senior to Nelson who was the son of *iqadi* of the right hand house.

(b) Nelson Sigcau, on the other hand contended that:

(i) according to the custom of amaMpondo, the right hand house never succeeds.

(ii) as Maneli, his elder brother, had drowned mysteriously, he was the only surviving son of *iqadi* in the house of Marhelane, and was therefore entitled to succeed.

5.1.12 A meeting of the royal family was convened to resolve the dispute. It was agreed that the two parties should suspend their claims until Mampofana, the wife of the right hand house of Mandlonke, who was pregnant at the time, gave birth. She subsequently gave birth to a girl, Nomampondo.

5.1.13 A second meeting was convened wherein it was agreed that search parties should be dispatched to find any male child which could have been

fathered by Mandlonke out of wedlock. The search was unsuccessful.

5.1.14 In a bid to find a solution to the problem, the royal family held several meetings. It was clear that the majority of the family favoured the claim of Nelson over that of Botha.

5.1.15 Botha was dissatisfied with the decision of the royal family and requested the magistrate to seek the intervention of the Governor-General.

5.1.16 As a result, the government appointed a Commission of enquiry in 1938(hereinafter referred to as “the 1938 Commission”). The 1938 Commission recommended that Botha Sigcau be appointed paramount ‘chief’ in terms of section 23 of the Black Administration Act 28 of 1927 (hereinafter referred to as “the Black Administration Act”).

5.1.17 The appointment of Botha was clearly not in line with the customary law and customs of amaMpondo, but in line with section 23 of the

Black Administration Act. In terms of the Black Administration Act, in appointing a successor, the government was not obliged to follow amaMpondo custom. However, in terms of the custom of amaMpondo there was no justification for the appointment of Botha over Nelson.

5.1.18 The same procedure adopted after the death of Marhelane should have been followed. Neither the great house nor the first *qadi* to the great house produced male issue, therefore, the great wife 'adopted; the son of the second *qadi* into the great house. He became *ikumkani*. This was in line with custom.

5.1.19 According to the custom of amaMpondo when *ikumkani* dies without issue in the great house, the heir is identified from the sons of *iqadi* to the great house. If there is no male issue in the *qadi* to the great house, any *qadi* takes preference over the right hand house. Throughout this process, the great wife is consulted if she is still alive.

5.1.20 Therefore, after the death of Mandlonke, Nelson, as the only surviving son of *iqadi* was entitled to succeed. As a result, he enjoyed popular support from the royals of amaMpondo.

5.1.21 Having been frustrated by the laws of the land, the royal houses of Faku opted for the custom of *ukungena* as it was practiced during the reign of Cabe.

5.1.22 The custom of *ukungena* as practiced even during the reign of Cabe is as follows:-

(a) *Ukungena* is the union between a widow and a relative of her deceased husband;

(b) The objective of *ukungena* is to raise seed for the deceased and thus revive the house of the deceased. Children born of this union are sociologically regarded as those of the deceased.

(c) The procedure for the custom of *ukungena* is:

(i) the elders of the house meet and decide on who should *ngena* the widow;

(ii) the person who is so chosen then introduces himself to the family through the ritual of *isifingo* which is in the form of cattle.

(iii) a beast is slaughtered and a celebration is held.

(d) The consequences of *ukungena* are the following:

(i) the union does not result in a marriage. The parties thereto do not regard each other as husband and wife. The woman remains the wife of the deceased.

(ii) the children born of the union sociologically belong to the deceased.

(iii) in the event of the death of one of the partners to the union, *ukuzila*, the ritual performed for the surviving spouse does not apply to the *ukungena* union, for example, the cleansing rituals or wearing of mourning attire.

5.1.23 It was resolved by those members of the royal family who supported Nelson's claim that Nelson should *ngena* Magingqi, the great wife of Mandlonke to raise seed for the house of Mandlonke. To this end, Nelson was taken out of school at Adam's College, Amanzimtoti, Durban, in order to participate in the union.

5.1.24 In 1944, Nelson and Magingqi were united according to the custom of *ukungena*. Nelson delivered six herd of cattle and a white horse to Magingqi's maiden home as "*isifingo*".

5.1.25 Three children were born of this union:-

(a) In 1944, a girl named Ntombiyokwenzani (literally meaning “what use is a girl”) was born. AmaMpondo were disappointed when she was born as they were expecting and required a king.

(b) In 1947, Zwelidumile, the father of the Claimant, was born at Xopozo, Flagstaff;

(c) Daliwonga, a boy, was the last- born.

5.1.26 At the time of the death of Mandlonke, Magingqi was living at Mzindlovu, the royal palace. Botha laid claim to all the property which belonged to Mandlonke. Nelson approached the Cape Provincial Division. His claim was unsuccessful. His appeal to the Appellate Division was also unsuccessful. Botha having succeeded in the Appellate Division, tried to evict Magingqi from Mzindlovu. She refused to leave.

5.1.27 One night, would-be assassins arrived at Magingqi’s home and warned her to flee as they had been sent

by Botha to assassinate her. She fled and set up house at Matshona.

5.1.28 Mampofana left the royal house after the birth of Nomampondo.

5.1.29 Nelson married three wives, Mantlane, Masukude and Maqgwaru respectively. Nelson was appointed as 'chief' of Khimbili, administrative area. Nelson died and was succeeded by his biological son Gwebinkumbi.

5.1.30 Zwelidumile married two wives. His first wife was Victoria Zuziwe Nobandla, the mother of the Claimant, Nontsasa and Ziyanda. Zwelidumile was 'chief' of Ndimakude. The second wife was Nompucuko, from the abaThembu royal family of Matanzima. She is had one son, Zwelodumo Sivento.

5.1.31 In 1968 he was appointed *inkosana* (headman) and in 1978 he was elevated to the status of 'chief' by his uncle, Botha.

- 5.1.32 Botha ruled as paramount chief of amaMpondo aseQaukeni until his death in 1978. Nelson's biological son Zwelidumile Sigcau again raised the issue of succession to the throne.
- 5.1.33 In 1978 Zwelidumile instituted an action against the Respondent over *ubukumkani* of amaMpondo aseQaukeni in the Supreme Court of the former Transkei. The basis of Zwelidumile's claim was that he was the sociological first- born son of Mandlonke and therefore the heir to the throne according to custom. Unfortunately, Zwelidumile passed away in 1984, before the matter could be finalized.
- 5.1.34 In 1983 Magingqi lodged an application in the former Supreme Court of Transkei against the Respondent wherein she unsuccessfully sought to return to Mzindlovu.
- 5.1.35 Prior to the public hearings before this Commission, the Claimant had approached the office of the Registrar of the High Court, Mthatha, for more information in the matter. However, the court file

concerning this application could not be located. The Respondent was able to produce the Replying Affidavit in this matter, during the proceedings.

5.1.36 The claim by the Respondent that the sons of the union of *ukungena* do not succeed to *ubukumkani* is not true. In the course of the history of amaMpondo, there are several examples of sons born of the union of *ukungena* succeeding:-

- (a) During the reign of Cabe, Qiya his eldest son, with the assistance of Gqwerha, had sought to contest the throne whilst his father was still alive. Qiya and Gqwerha were banished. Qiya's wife who had been left behind, was *ngenad* by Gangatha his younger brother. Bhala, was born of the union. Upon the death of Cabe, Bhala duly ascended the throne as the sociological son of Qiya.

(b) In another royal house of amaMpondo, one 'chief' Nonkonyana died, his wife was *ngenad* by Zondwayo.

(c) The Respondent recently initiated a child born of ukungena who succeeded as 'chief' in another royal family of Siyoyo at Ntabankulu.

5.1.37 In the circumstances:-

(a) Following this tradition from time immemorial, the Claimant as the first-born son of Zwelidumile, who was the first-born son of Magingqi, the great wife of Mandlonke, is the rightful *kumkani* of amaMpondo.

(b) The principle of the allocation of houses applies only to *ikumkani*. For ordinary chiefs, the first-born son of the first wife who succeeds, irrespective of the number of wives married. If the Claimant's father had been king, as the first wife,

his mother would have been allocated the right hand house.

5.2 The Claimant called Pawuli Ncoyeni who testified as follows:

5.2.1 Magingqi is the daughter of Zintonga, elder brother to Pawuli Ncoyeni.

5.2.2 After emissaries had been sent, to ask for Magingqi's hand in marriage, on behalf of Mandlonke, she was *lobolad* with 35 cattle. However, because of the distance from Qaukeni to Magingqi's home, not all the cattle reached Magingqi's home. Some were left at Nobatsiki's place and others at Julweni's place. He is not certain whether all the cattle ultimately reached Magingqi's home.

5.2.3 His home is next to that of Magingqi. It is not true that Magingqi returned home for any significant period after the death of Mandlonke

5.2.4 As far as he is concerned, Mandlonke is the only man to have asked to marry Magingqi, no one else.

5.2.5 Nelson came with a white horse to Magingqi's home in order to:-

- (a) Inform the family of Magingqi that since *ikumkani* passed away he had ngenad Magingqi;
- (b) Present the white horse (also known as *isifingo*) which depicted the beginning of a new relationship between Nelson and Magingqi; and
- (c) Perform *isifingo* as the man who was to *ngena* Magingqi and a celebration is held with African beer and beast.

5.2.6 He is not aware of any rituals that may have been conducted at Magingqi's marital home.

5.2.7 Under cross-examination the following emerged:

- (a) When he talks about Qaukeni, he refers to the area under the jurisdiction of *ikumkani* of

amaMpondo aseQaukeni as a whole, as it then was.

- (b) For as long as the widow has not left the marital home she belongs to the deceased.
- (c) *Isifingo* is the process through which the man who is to *ngena* the woman introduces himself to the family of the woman. He has no knowledge of other practices.
- (d) Botha was *ikumkani* at the time the *isifingo* was performed. Nelson had two children with Magingqi, Ntombiyokwenzani and the younger brother, Zwelidumile. Both were born at Qaukeni.
- (e) After *isifingo*, Magingqi returned to her marital home and lived there until she died.

5.3 The Claimant called the second witness, Magqwarhu Sigcau who testified as follows:

- 5.3.1 She is the third wife of Nelson. He had three wives: Manzimankulu, from Emantlaneni clan, she was the mother of Gwebinkumbi, as well as Masukude and Magqwarhu.
- 5.3.2 Magingqi is the wife of Mandlonke, *ngenad* by Nelson. In isiMpondo she is called *iqabane*. Nelson did not marry Magingqi.
- 5.3.3 In a previous High Court application, Gwebinkumbi, the son of the first wife of Nelson, had stated that Nelson introduced Magingqi as his mother. She denied the veracity of this statement in that, after she was married to Nelson, she was sent to Mantlaneni in the company of Gwebinkumbi, and was introduced as the person who was to see to the upbringing of Gwebinkumbi who was twelve years old at the time.
- 5.3.4 Her maiden home is near the great place kwaGingqi, the home of Magingqi. She was aware of all that took place there, as her father was a councillor and very close to the 'chief'. Nelson's great place was at Khimbili. Magingqi never lived at Khimbili.

- 5.3.5 Magingqi lived eKhubeni in Buhlanyamba. Nelson would visit Magingqi at Khubeni. From Khubeni she went to live at Matshona in a house owned by one Gwadiso.
- 5.3.6 Magingqi had left eKhubeni because she had been warned that her life was in danger. Botha had sent people to assassinate her. Magingqi then fled and sought refuge at a place owned by Makhomofana. Nelson was called and informed of Magingqi's whereabouts. Some women, including the mother of the witness, went to collect Magingqi's belongings from eKhubeni.
- 5.3.7 In the culture of amaMpondo the groom does not deliver *ikhazi (lobola)*, it is delivered by the elders assisted by the herdboys. It is not true that Nelson took out *ikhazi* for Magingqi.
- 5.3.8 Only Masukude and Magqwarhu, Nelson's wives, participated in the mourning rituals after their husband's death, since Mantlane (Manzimankulu) had predeceased him. Magingqi did not participate in the

mourning rituals with the widows of Nelson as she was not his wife, but *iqabane*.

5.3.9 Under cross-examination, the following emerged:

- (a) The witness denied that Magingqi was the third wife of Nelson;
- (b) She is aware of the circumstances under which Magingqi fled from Khubeni, as Magingqi informed her personally.
- (c) Magingqi did not leave Khubeni for her maiden home, Nyandeni, but she went to Matshona.
- (d) The witness was present when *isifingo* was performed, as that is near her maiden home.
- (e) She does not know of the dispute between Botha and Nelson after the passing of Mandlonke.
- (f) *Isifingo* is the ritual of delivering a beast to the widow's maiden home by the *ngena* consort. The

objective of *isifingo* is for the man to introduce himself to the woman's family.

- (g) After *isifingo*, a ritual called *ukuhlamba izitya* is performed at the widow's marital home. This ritual was not performed at Matshona, it could have been done elsewhere.
- (h) She was married to Nelson in 1949. Magingqi was already at Matshona. Gwebinkumbi was at Khimbili. Magingqi never lived at Khimbili with Gwebinkumbi nor did she move to Matshona with him either.
- (i) Gwebinkumbi and his wife, Mamofokeng, never lived at Matshona with Magingqi. When Mamofokeng was married Masukude was at Matshona. Magingqi had left for Ndimakude.
- (j) He denied that Magingqi did not participate in the mourning rituals with the wives of Nelson because according to the custom of amaMpondo, a woman does not wear mourning clothes twice.

Truth is, she did not participate because she was not a wife to Nelson but *iqabane*.

5.3.10 To the questions from Commissioners, she responded as follows:

- (a) Magingqi was the first wife of Mandlonke.
- (b) *Ukubhoxa intsika* is the same as *ukuhlamba izitya*. It is performed at the marital home of the widow. *Isifingo* is performed at the maiden home of the widow. She does not know if *ukuhlamba izitya* was performed for Magingqi and Nelson at the marital home. When she married Nelson he had already *ngenad* Magingqi.
- (c) She did not know the purpose for which Nelson *ngenad* Magingqi but the children belonged to the deceased husband of Magingqi.

B. THE RESPONDENT'S CASE

5.4 Counsel for the Respondent called the first witness, Sylvia Noyolo Madikizela, who testified as follows:-

5.4.1 She is a retired nurse and midwife. Her father was 'chief' Lumaye Langa and the uncle of Nelson and Botha. She assisted Magingqi during the birth of Zwelidumile at Holy Cross Hospital in Lusikisiki. She met Magingqi for the first time at the hospital. Magingqi was accompanied by Nelson who introduced her as his wife.

5.4.2 Prior to the meeting at the hospital, she had only heard of her (Magingqi) as the wife of Mandlonke. She had also heard rumours that she could not conceive and was practicing witchcraft.

5.4.3 The parents of Zwelidumile are Nelson and Magingqi. Her father informed her that the family of Magingqi had received *lobola* on two occasions for Magingqi: Mandlonke and Nelson. The people were astonished as it was considered a rare occurrence for two sets of *lobola* to be paid for one woman.

According to her father, Magingqi and Nelson were married.

5.4.4 The custom of *ukungena* is performed whilst the widow is at her marital home, not at her maiden home. There was no *ukungena* as far as Nelson and Magingqi were concerned, it was a straight forward marriage.

5.4.5 She did not have anything to do with the royal family. She happened to hear about Nelson and Magingqi when Nelson, who was expected to *ngena* Magingqi, decided to marry her. He had been expected to *ngena* her in order to give birth to the king of amaMpondo.

5.4.6 Under cross-examination, the following emerged:

(a) She only knew of Zwelidumile as Magingqi's child. She did not know whether he was the first- born child of Magingqi.

- (b) She did not know when the marriage between Nelson and Magingqi took place. Nevertheless, she insists that Nelson married Magingqi, even though it was not a civil marriage.
- (c) She does not know the number of beasts paid as lobola, but a white horse was mentioned.
- (d) She came to testify in order to avoid a dispute between the two parties.

5.5 Counsel called the second witness, Mercy Nonceba Jamjam who testified as follows:-

5.5.1 She was born in 1923. Although there was no affinity between herself and Mandlonke, she lived at Mzindlovu with Mandlonke per arrangement with her father and *ikumkani*.

5.5.2 Mandlonke had two wives. She was not certain whether the two wives were married before or after he became king.

- (a) The first wife was Magingqi from Zintonga, Nyandeni. She was allocated a house at Khubeni great place, in Buhlanyanga;
- (b) The second wife was Mampofana of the Lukhwiliva family in Maqi; she lived with Mandlonke at Mzindlovu. Mampofana lived at Mzindlovu until she returned to her marital home due to ill- health.

5.5.3 She categorically denied that Magingqi was the great wife of Mandlonke. At the time of his death, Mandlonke had not yet married a great wife. Arrangements were still being made for a great wife. Mandlonke died shortly after the elders had taken Magingqi to Khubeni. After the Mandlonke's death Magingqi left the marital home and was married at Khimbili.

5.5.4 It was rumoured that Nelson had *ngenad* Magingqi at Khubeni but it was not clear what had happened.

All she knew was that Magingqi had returned to her marital home and was remarried by Nelson.

5.5.5 Magingqi was taken to Khubeni after Mandlonke died. She had no knowledge of Magingqi having been allocated a house at Khimbili.

5.5.6 She did not know much about the dispute between Nelson and Botha except that there was a time when the birth of Mampofana's child was awaited. Singetheni was regent until the dispute, which lasted for many years was resolved.

5.5.7 According to the custom of amaMpondo, *lobola* may be paid more than once for one woman. *Lobola* will be paid for a widow if she leaves her marital home.

5.5.8 Under cross-examination, the following emerged:

(a) She was requested to clarify her earlier statement that "It had been rumoured" that

Nelson had *ngenad* Magingqi at Khubeni. She gave the following responses:-

- (i) indeed she had heard the rumour but there was not much to it as Magingqi had left the marital home and returned to her maiden home;
 - (ii) according to her Magingqi should never have left the marital home subsequent to the alleged "*ukungena*" as this effectively nullified the union;
 - (iii) after the *ukungena* custom had been performed, the union should have been publicized. This never occurred.
- (b) *Isifingo* is one beast used in the ritual of *ukungena*. It is slaughtered at the deceased husband's home and men gather to counsel the man who is to *ngena* the woman. *Isifingo* could never consist of beasts and horses; such would be lobola.

5.5.9 During re-examination, she stated that she had never heard of *ikumkani* born of *ukungena* custom reigning.

5.6 Counsel called the third witness, Mlungu Gideon Sigcau who testified as follows:

5.6.1 He is the son of Marhelane whose great wife was Mankosinani. After the death of Marhelane, Mswakeli acted as regent for Mandlonke.

5.6.2 Mandlonke ascended the throne and married two wives. The first one was Magingqi and the second was Mampofana. Mandlonke did not have a great wife. At the time of Mandlonke's death, Mampofana was pregnant. She subsequently gave birth to a girl. As a result, a search was conducted for other sons who could have been fathered by Mandlonke out of wedlock.

5.6.3 The dispute was between Botha and Nelson. Botha was the first-born son of the right hand house. He was the son of Maphakathi, and resided at Hewu.

Nelson was the first-born of Mamtshibeni and resided at Khimbili.

5.6.4 The royal family nominated Botha to be *ikumkani*. He did not know of Botha having lived at Ntabankulu.

5.6.5 Although the elders had appointed Botha, Nelson appealed to the High Court in Cape Town and finally went to the Appellate Division in Bloemfontein without success. Having thus lost, Nelson had to make peace with Botha by apologising. At this stage, Botha had already been installed by government.

5.6.6 *Ukungena* is often initiated from the heir of that house and a ritual called *ukubetha intsika* is performed. If not, the relationship is merely a love affair. The objective of *ukubetha intsika* is for the man to make the people aware that he is the ukungena consort of the widow. Beer is brewed and a beast is slaughtered.

5.6.7 Nelson never *ngenad* Magingqi because:-

- (a) The two left Mzindlovu for Khubeni. After the dispute had been settled, Nelson took Magingqi to her maiden home Kwagingqi. From there Nelson took Magingqi to his home in Khimbili and married her. Magingqi never returned to Khubeni.
- (b) He never heard of *ukungena* between Nelson and Magingqi. However, there was an instruction from Victor Poto that she should not be *ngenad* as that would cause a never-ending dispute.
- (c) Consequently, Nelson fell in love with Magingqi, married her and took her to his place in Matshona. There was no *ukungena* because Nelson took Magingqi away from her marital home. Nelson is said to have paid out *lobola* for Magingqi, which constituted five herd of cattle and a white horse.

5.6.8 Under cross-examination, he stated the following:

- (a) He is illiterate and at the time of the dispute he was very young. He did not know his age. He could not say how old he was when *ikumkani* Marhelane died.
- (b) At the time of the death of Mandlonke and the subsequent appointment of Botha as *ikumkani*, he resided at Khubeni with his elder brother. None of his wives lived at Khubeni before the death of Mandlonke.
- (c) Botha took Magingqi to Khubeni after she fell in love with Nelson. Magingqi claimed that Mandlonke had allocated her the house at Khubeni. He knew this because Botha came to inform them about the impending arrival of Magingqi. Magingqi herself upon her arrival at Khubeni confirmed this.

5.7 Counsel called the fourth witness, Alfred Malangana Ndunge who testified as follows:-

- 5.7.1 He is the son of a 'chief'. He had been asked to testify as to whether it is permissible for a prince of amaMpondo, who was born of *ukungena* custom to ascend the throne. He believed that according to the custom of amaMpondo, such son does not ascend the throne.
- 5.7.2 *Ukungena* custom is defined as a union between the widow and a man(usually the brother of the deceased or a close relative) for the purposes of raising seed on behalf of the deceased.
- 5.7.3 The man who is to *ngena* performs the ritual of *ukubhoxa intsika*. The essence of this ritual is that the suitor slaughters a beast to introduce himself to the deceased's family. The woman does not leave her matrimonial home. All children born of the *ukungena* union sociologically belong to the deceased.
- 5.7.4 Where the widow does not leave her matrimonial home but a man comes to cohabit with her, without

having performed *ukubhoxa intsika* but is to all intents and purposes ploughing the deceased's fields, supporting the children and tending the cattle, he will be regarded as her husband, for as long as the widow has not left the marital home. The children born of the marriage will be regarded as those of the deceased.

5.7.5 In 1979, Nyangilizwe Ndamase, a former paramount 'chief' of Western Pondoland, confirmed this when he was a witness in the dispute between Respondent and Zwelidumile Sigcau.

5.7.6 The restriction to ascension to *ubukumkani* through *ukungena* is so placed because:

- (a) A king is the symbol of the nation, the pure blood of the nation.
- (b) He reflects the nature of the nation.
- (c) The pure blood of the nation might be contaminated because there is no bar as to who may *ngena* the widow of the king.

5.7.7 Where a widow leaves the matrimonial home, she is regarded as having reverted to her single status (*idikazi*). The issue of any future union will not be regarded as those of the deceased.

5.7.8 Under cross-examination he stated the following:

(a) He had never heard of the instance where Qiya's wife had entered into *ukungena* union with Gangatha and that Bhala, the issue thereof, had ascended the throne as *ikumkani*.

(b) As far as he is concerned, there was an altercation between the eldest son and heir apparent, Qiya and his father Cabe. Qiya was expelled from the royal family.

(c) When Gqiya left, his wife was ngenad by his brother, Gangatha. Bhala was subsequently born, of that union and ascended the throne.

5.8 Counsel called the fifth witness Nkosi Gwebizilwana Sigcau who testified as follows:

5.8.1 He is the son of Vukayibambe, the younger brother to Botha. He was appointed as 'chief' in October 1968.

5.8.2 With regard to the appointment of Zwelidulimile he stated that:

(a) In 1978, Nelson sent him to request Botha to appoint his son, Zwelidumile, as headman of the Ndimakude Administrative Area. Botha agreed on condition that the inhabitants of the area did not object thereto.

(b) Zwelidumile was later elevated to the status of 'chief' by Matanzima, the former Chief Minister of Transkei. Such appointment was irregular in that Botha Sigcau as *ikumkani* was supposed to appoint 'chiefs'.

(c) Matanzima's daughter was engaged to Zwelidumile therefore Matanzima wanted to give him a higher status. Matanzima was also instrumental in Zwelidumile's quest for the kingship of amaMpondo aseQaukeni.

5.8.3 Politically, there was a rift between Botha Sigcau and Matanzima because:-

(a) In his capacity as the President of the former Transkei homeland, Botha Sigcau had refused to remove the outspoken Sabata Dalindyebo from his position of paramount 'chief' of abaThembu Proper.

(b) Botha Sigcau's daughter, Stella Sigcau, left the Tanskei National Independence Party, led by Matanzima to form a new political party.

5.8.4 After the death of Botha an *imbizo* was called at Qaukeni, the seat of the royal house. All the members of the regional authority (most of whom are 'chief's) were present. *Inkosi* Nelson, the

grandfather of the Claimant, tabled a motion that the son of his deceased brother, the Respondent, be appointed king of amaMpondo. Stanford Sigcau seconded the motion. Thus, the Respondent was unanimously enthroned as king of amaMpondo.

5.8.5 In relation to *isifingo* he stated that:

- (a) *Isifingo* is defined as the introduction of the suitor into the marital family of the widow. The family of the deceased gathers, traditional beer is brewed and a beast is slaughtered.
- (b) If *isifingo* is not performed, the children of the union are members of the family but they cannot inherit. They are regarded as illegitimate children.
- (c) The terms *isifingo* and *ukubhoxa intsika* may be used interchangeably.

5.8.6 He denied that the union between Gangatha and Qiya's wife amounted to *ukungena* as Qiya was still alive at the time. The union came about because Qiya had deserted his wife. Cabe, and the nation agreed that there should be a union between Gangatha and Qiya's wife. The children of this union were regarded as the children of Qiya.

5.8.7 Under cross- examination the following emerged:

(a) There was never *ukungena* between Nelson and Magingqi in that:

(i) it is common knowledge that they fell in love and married;

(ii) she was the wife of Mandlonke, but upon his death she left the marital home and returned to her maiden home. It was then that she married Nelson;

(iii) they had three children Ntombokwenzani, Zwelidumile and Daliwonga;

(iv) *lobola* was paid by Nelson.

- (b) He denied that the relationship between Magingqi and Nelson began whilst Magingqi was at the marital home. Thereby refuting the version that Nelson was seen visiting Magingqi at Mzindlovu.
- (c) Claimant put the following version to the witness. He denied each statement.
- (i) Magingqi is known as the wife of Mandlonke not Nelson.
 - (ii) their daughter was named Ntombokwenzani .because they expected a boy to lead amaMpondo.
 - (iii) it is not possible that two members of one family can *lobola* the same woman.
- (d) With regard to the succession dispute between Nelson and Botha he stated the following:
- (i) Before Nelson and Botha laid their personal claims to kingship, a search was conducted for any son of Mandlonke which yielded no results.

- (ii) He conceded that the royal family and amaMpondo were divided into two groups, some supported Nelson whilst others supported Botha.
- (iii) Gwebizilwane's father supported his brother, Botha.

5.9 Counsel called the last witness, Justice Mpondombini Sigcau, the Respondent in this matter, who testified as follows:

5.9.1 He is *ikumkani* of amaMpondo aseQaukeni. There are a number of senior traditional leaders under his jurisdiction, from the Faku royal family as well as other clans.

5.9.2 The houses of *ikumkani* are composed as follows:

- (a) The first is the great house. AmaMpondo as a whole contribute towards the *lobola* for the great wife. The first-born son from the great house succeeds his father;

(b) The second house is the right-hand house, which is allocated to the first wife to be married. *Lobola* for the wife in the right-hand house will come from the great house only;

(c) The third house is *iqadi* to the great house, and the fourth house is *iqadi* to the right-hand house.

5.9.3 The above structure was adopted by Nyawuza from amaXhosa. Ngqungqushe, the son of Nyawuza, was the first *ikumkani* born of a great wife.

5.9.4 Previously, the custom was that the first-born son of the first wife to be married ascends the throne. The reason for this change was to avoid rivalry between the reigning king and the sons of the first wife.

5.9.5 However, the trend was broken intermittently, when the sons born of the right-hand house succeeded their fathers, for example:

- (a) Phakane of the great house, was superceded by Faku of the right-hand house.
- (b) Faku himself offered the kingship to Ndamase, who was the first-born son of the right-hand house. However, Ndamase declined the offer.

5.9.6 With regard to Marhelane's wives, he stated the following

- (a) The first wife was Maphakathi. She was allocated the right-hand house and lived at Ntlenzi in Flagstaff. She was the mother of Botha, Mpiyenkulu and Vukayibambe.
- (b) The second wife was Mankosinani. She was allocated the great house, she lived at Rhini and later moved to a new palace at Mzindlovu. She was the mother of Nomathemba.
- (c) The third wife was Mandwane. She was allocated the first *qadi* to the great house and lived at Qaukeni. She had no issue.

(d) The fourth wife was Mamtshibeni. She was allocated the *qadi* to the right hand house and lived at Khimbili. She was the mother of Maneli and Nelson.

(e) The fifth wife was Maqhinebe. She was allocated the second *qadi* to the great house and lived at Khubeni, She was the mother of Mandlonke and Mtshotsho,

(f) The sixth wife was Mamdingazwe. She was allocated the second *qadi* to the right-hand house and lived at Sizindeni.

(g) The seventh wife was Maxesi, she lived at Sikhilikindini.

5.9.7 Marhelane died in July 1921. When Marhelane died there was no male issue in the great house. According to custom, where the great house has failed to produce an heir, it was the prerogative of the great wife to nominate a son to be adopted

from one of the *qadi* houses of the great house. Thus Mankosinani, nominated Mandlonke, the son from the second *qadi* to the great house. Mandlonke was duly 'adopted' into the great house. He became the heir apparent to Marhelane.

5.9.8 At the time of Marhelane's death, Mandlonke was still a minor, therefore Mswakeli became regent for Mandlonke. Mswakeli died in 1934 and Mandlonke ascended the throne in 1935.

5.9.9 On 25 November 1937 Mandlonke died. At the time of his death:

- (a) He had married two wives: Magingqi from Nyandeni and Mampofana from Izingolweni. He had not yet married a great wife.
- (b) Magingqi and Mampofana temporarily resided at Mzindlovu although they had been allocated houses at Khubeni and Sikhilikindini respectively.
- (c) Mampofana was pregnant, but Mandlonke had no other issue.

(d) Marhelane's great wife, Mankosinani had already died.

5.9.10 After the death of Mandlonke, Mampofana stayed on at Mzindlovu. She had three children, Nomampondo (the daughter of Mandlonke), Ndoda, born in 1940 and Jikintetho, born in 1943. Mampofana later left the marital home and returned to her home in Mpofana at Izingolweni.

5.9.11 Following the death of Mandlonke, a succession dispute arose between Botha and Nelson. Botha claimed that as the son of the first house he was entitled to succeed. Nelson, on the other hand, claimed that the right-hand house never succeeds and as the son of the minor house, he was entitled to succeed.

5.9.12 In an attempt to resolve the dispute, a series of meetings were held by the royal family. Victor Poto, the paramount chief of Eastern Pondoland (Nyandeni), attended one of the meetings. He stated that according to the custom of amaMpondo

if there is no great wife to make the nomination, the kingship should revert to the house of the first wife to be married. Everyone accepted Victor Poto's suggestion. If this was to be followed, the first wife was the house of Maphakathi, the right hand house.

5.9.13 In 1938, the Government appointed the 1938 Commission which recommended that Botha be installed as paramount chief. Consequently, on 12 December 1938 at Mzindlovu, Governor-General Sir Patrick Duncan installed Botha as *ikumkani*.

5.9.14 The appointment of Botha was based on custom in that:-

(a) First, there was the decision of amaMpondo at Qaukeni which was supported by all the 'chiefs' from the districts of Bizana, Flagstaff, amaNci, amaMpisi, amaCwerha, amaNtshangase, as well as the Hlamandana family in Bizana and other senior traditional leaders including amaNgutyana.

(b) Secondly, the recommendations of the 1938 Commission.

5.9.15 In a bid to overturn the support for Botha, Nelson approached the Cape Provincial Division, claiming both the estate and the kingship of amaMpondo. The court decided in favour of Botha on both issues. Nelson then unsuccessfully appealed the decision of the Cape Provincial Division to the Appellate Division.

5.9.16 Having lost both court applications, Nelson went to Qaukeni with six men to apologise to Botha. He acknowledged that Botha is his elder brother, but claimed to have been misled by people. In accepting the apology, Botha slaughtered a beast for Nelson and it was agreed that Nelson would make a public apology.

5.9.17 Consequently, in 1944, a big meeting was convened by Botha which was attended by amaMpondo including those of Nyandeni, wherein Nelson duly made the public apology to Botha.

5.9.18 In 1978 when Zwelidumile, the son of Nelson, laid claim to the kingship of amaMpondo, Nelson informed the Respondent that as far as he was concerned after the apology to Botha, the matter was laid to rest.

5.9.19 With regard to Magingqi's departure from the marital home he stated that: after Botha was officially appointed *ikumkani*, Magingqi resided at Khubeni. On or about July 1945, she went back to live at her maiden home, KwaGingqi. She took all her belongings including cattle, and left by night. Such departure meant that Magingqi had abandoned her marital home.

5.9.20 It was later reported that Nelson, accompanied by several men, drove six herd of cattle to the maiden home of Magingqi as *lobola*.

5.9.21 After Nelson paid *lobola*, he and Magingqi went to live at Khimbili. Nelson and Magingqi did not enter into a union of ukungena. They were married in

that he paid six herd of cattle and a white horse as *lobola*.

5.9.22 During the custom of *ukungena*, *isifingo* is performed. The procedure is as follows:

- (a) Traditional beer is brewed, a beast is slaughtered and the members of the family assemble to celebrate the union.
- (b) The suitor is counselled on his new responsibilities. For example, he is warned to look after the widow. He is also informed of his right to fine any man who interferes with the widow.
- (c) The woman remains at the marital home of the deceased husband. If she were to leave the homestead of the deceased husband, with the suitor and settle elsewhere, the union is nullified. Their children will be regarded as illegitimate.

5.9.23 *Isifingo* does not include a horse. If there is no *isifingo*, then the union is of no consequence because the man has not been counselled.

5.9.24 The children of *ukungena* are regarded as those of the deceased husband. However, they may inherit the property of the deceased, but they do not have a legitimate claim thereto.

5.9.25 As far as Nelson and Magingqi are concerned he stated that:

(a) Magingqi and Nelson were married in July 1946 or 47. At this time, Botha was *ikumkani*.

(b) He never heard anything about *ukungena* between Nelson and Magingqi. Nobody even suggested that Nelson should *ngena* Magingqi.

(c) None of the rituals of *ukungena* were performed for Nelson and Magingqi.

5.9.27 He stated that the sons of *ukungena* do not ascend the throne. He refuted the examples made by the Claimant.

(a) With regard to Gangatha and Qiya, Qiya was still alive when Gangatha married Qiya's wife. Furthermore, the children born of the marriage were regarded as those of Gangatha.

(b) In respect of Cetshwayo and Tyali, the latter merely impregnated Cetshwayo's widow as a result a son Mdabuka was born. Mdabuka never assumed the status of his father Cetshwayo. He was just a member of the royal family.

(c) Siyoyo is the senior traditional leader of amaCwerha. He is not *ikumkani*, but an *inkosi*. In any event, the Respondent did not initiate *ukungena*, it was proposed by the subjects of Siyoyo.

5.9.28 Counsel referred the Respondent to page 21 of the Respondent's bundle which is an affidavit deposed to by one Mary Sigcau. The Respondent explained that:

(a) The affidavit was deposed to during a dispute wherein Zwelidumile claimed he was the sociological son of Mandlonke through *ukungena*.

(b) The purpose of this affidavit was to refute the claim by Zwelidumile and confirm that Zwelidumile was the product of a marriage between Nelson and Magingqi.

5.9.29 Counsel also referred the Respondent to a copy of a page from a baptismal register dated 1952, which reflected the names of the children as "Zwelidumile the son of Nelson and Sosolina born in 1948" and "Daliwonga Kaiser son of Nelson and Sosolina born in 1950."

5.9.30 The Respondent contended that the said document is proof that Zewlidumile and Daliwonga are the

children of Nelson and Sosolina (Magingqi). If indeed they were issues of *ukungena*, Mandlonke would be named as the father of the two children.

5.9.31 The circumstances which led to Zwelidumile being given the status of traditional leader were as follows:

- (a) As Gwebizilwana had said, he and Nelson requested the position from Botha and he was taken to Ndimakude as 'Inkosana' of the local authority and later chief of the administrative area called Ndimakude.
- (b) At the time of his death, he was 'chief' of the Ndimakude Traditional Authority. Nelson appointed him as such, but the Regional Authority rejected this.
- (c) The reason this move was rejected is that according to the custom of amaMpondo a 'chief' cannot give birth to two 'chiefs'. The

government of the day however insisted that Zwelidumile be appointed as 'chief'.

- (d) It is true that Botha gave Zwelidumile land. However, in one meeting 'chief' Babini said Nelson should not refer to Zwelidumile as the son of Mandlonke but his son. Zwelidumile did not object to that statement.

5.9.32 With regard to the circumstances under which the Respondent was appointed *ikumkani* the Respondent testified as follows: On 10 December 1978, after the burial of Botha and at a public meeting attended by amaMpondo, including the magistrate of Lusikisiki, Mr Qaba, Nelson proposed that the Respondent be elevated to the position of *ikumkani* of amaMpondo. The motion was seconded by 'chief' Ludziya Sigcau, of Gunyeni Traditional Authority. Both Zwelidumile and the Respondent were present at the time. No one objected thereto.

5.9.33 The above facts are confirmed by the minute at page 39 of Respondent's bundle, which reads as follows:

"This (sic) 'chief' Nelson Sigcau seconded by 'chief' Stanford L. Sigcau recommends that the successor to the late Paramount 'chief' MB Sigcau be his eldest son 'chief' MJ Sigcau, i.e., Mpondombini Justice Sigcau. Motion is unanimously confirmed and carried."

5.9.34 A short while after the Respondent had been installed, there were rumours of meetings taking place at Ndimakude Traditional Authority.

5.9.35 Finally, the Respondent was informed that Zwelidumile was claiming succession to the kingship of amaMpondo as the son of Mandlonke and had lodged his claim with the magistrate's court.

5.9.36 This discontent resulted in the intervention by the Transkei Government under Kaiser Daliwonga Matanzima:

(a) In 1979 Matanzima issued an instruction that amaMpondo should vote on the issue. Accordingly, dates were set for the votes.

(b) In an endeavour to prevent the voting from taking place, the Respondent brought an urgent interdict in the Transkei High Court on the basis that succession to the kingship of amaMpondo could not be determined by vote. The High Court dismissed the application.

(c) Voting took place in five districts: Bizana, Flagstaff, Lusikisiki, Ntabankulu and Mount Ayliff. The Respondent received the most votes.

5.9.37 In relation to the current dispute, he stated that he is supported by 25 senior traditional leaders and only three are supporting the Claimant.

5.9.38 Under cross examination by the Claimant, the following emerged:

(a) In respect of the paternity of Mlungu, one of the Respondent's witnesses he stated that:

(i) he is the third child born to Marhelane's concubine. He was born after the death of Marhelane.

(ii) when pressed on the veracity of Mlungu's statement that he was the son of Marhelane, the Respondent stated that only Mlungu knows the truth and he withdrew his initial statement.

(b) The Claimant referred the Respondent to page 73 of the 1944 Appellate Division case wherein the court found that Mamtshibeni was the *qadi* to the great house. Respondent stated that this was incorrect as she was the *qadi* to the right-hand house.

- (c) When asked to reconcile his claim that *iqadi* never succeeds, with the fact that Mandlonke, being the biological son of Maqhinebe, the *qadi* to the great house became *ikumkani*. He stated that it is the great wife who can nominate anyone she likes. If she is deceased then the old custom will be resorted to and the son of the right-hand house is nominated.
- (d) When questioned about the statement by Gwebizilwane that the children born of the union between Gangatha and Qiya's wife were regarded as Qiya's, the Respondent contended that they were regarded as Gangatha's children. This is borne out in the book by Victor Poto.
- (e) The Respondent was asked to reconcile the version put by counsel, that Magingqi never lived at Mzindlovu with his own version that Magingqi only left Mzindlovu after the death of her husband. He responded that this was

because at the time of marriage she had been informed that she would be allocated a house at Khubeni.

(f) When asked why it was that Magingqi could not continue to live at Mzindlovu, he stated that Magingqi left Mzindlovu after the death of her husband because she had two homes: Khubeni and Mzindlovu. Mandlonke had lived at Mzindlovu. After his death Magingqi had no reason to go back to Mzindlovu.

(g) It was put to him by the Claimant that Magingqi had left Mzindlovu because she had been chased away by Botha. He denied this.

(h) The Claimant asked the Respondent to comment on this statement: the reason why Victor Poto, from the lineage of Ndamase, was chosen over the right-hand houses of Cetshwayo and Sigcau, to resolve the dispute between the sons of Marhelane, Botha and

Nelson was that at the time Poto wanted to entrench his position by placing a right-hand house at Qaukeni so that no one could object to another right hand house at Nyandeni; thus Poto's motives were not altruistic. The Respondent did not comment.

- (i) He conceded that immediately after the death of Mandlonke, a meeting was held by amaMpondo, wherein Nelson was recommended as the successor to Mandlonke. However, in his view, such meeting was insignificant in that it was only attended by a few men from the neighbouring villages: ama-Khwetshube, amaBala and amaNyawuza.
- (j) The majority that supported Nelson were the junior 'chiefs' and they were using custom, but the more senior and important 'chiefs' like amaCwerha and amaNci supported Botha.

- (k) The Respondent confirmed that when Nelson requested Botha to award Zwelidumile traditional leadership status, he referred to Zwelidumile as the son of Mandlonke and that one Babini objected thereto. Babini insisted that Nelson should refer to Zwelidumile as his own son.
- (l) The Respondent disputed the statement made by his witnesses, Mercy Jamjam and Mr Mlungu Sigcau, that Victor Poto had warned Botha and Nelson not to form a union of *ukungena* with Magingqi. According to him Poto merely came to give advice on the dispute.
- (m) Claimant put to the Respondent that Botha was appointed because he was favoured by the apartheid regime, as he supported the Bantu Authorities Act and other oppressive laws of the government of the day. He denied this and contended that Botha was appointed

by government having considered the customs and traditions of amaMpondo.

5.9.39 To questions of clarification from Commissioners he responded as follows:

(a) He was referred to Exhibit A at page 9 para 7 which is an affidavit deposed to by the Respondent himself. The paragraph reads:

“If a deceased paramount chief is succeeded by two brothers and leaves no issue of his own, then an ingwena (sic ngena) union can only be entered into between the widow and the elder of the two such brothers.”

He responded that this statement is only theoretical. In practice *ukungena* has never happened at the level of kumkani.

(b) He conceded that Ntombokwenzani was born at Khubeni in 1944, but maintained that at

this stage it was merely a love relationship nothing more. It was never known that Nelson had *ngenad* Magingqi.

- (c) Marhelane, who was a paramount chief of all the Pondos, had three sons, Botha was the eldest followed by Mandlonke and then Nelson. According to custom, although Botha was the eldest he could not succeed because of a certain old tribal custom and Mandlonke was appointed. When Mandlonke died, the tribesmen expected Nelson to be appointed. Instead, through the unexpected interference by Nyandeni's 'chief' Poto, Botha was appointed.

What right does the Respondent have to succeed Botha?

- (d) Custom is what is practiced by diverse tribes from time immemorial. Everybody should embrace the custom. By virtue of being *ikumkani* of amaMpondo, Respondent is the

custodian of the culture of amaMpondo and acts with the assistance of councilors. No one is exempt from custom, even *ikumkani*. *Ukungena* is not an exception but through disuse it does not apply to *ikumkani*.

5.9.40 With regard to the affidavit deposed to by Gwebinkumbi Sigcau at pages 24 to 26 of the Respondent's bundle. The 1944 AD case at page 73 refers to Mamtshibeni as the qadi to the great house. That is incorrect she is the qadi to the right-hand house.

(a) Did not respond directly to his claim that *iqadi* never succeeds, in view of the fact that Mandlonke was the biological son of Magqhinebe the qadi to the great house said appointment;

6.

DETERMINATION

6.1 Issues to be Determined

6.1.1 The issues are:-

- (a) When Mandlonke died without a successor, who was to succeed him in terms of the customary law and customs of amaMpondo.
- (b) Was Magingqi the great wife of Mandlonke?
- (c) Was the appointment of Botha according to the customary law and customs of amaMpondo?
- (d) Did Nelson and Magingqi enter into a union of *ukungena*?
- (e) Is the Claimant the rightful heir to the throne of amaMpondo?

6.2 **Analysis of Issues**

6.2.1 In pursuit of uniformity in the Republic in terms of the Framework Act, the Commission takes cognisance of the following:-

- (a) The traditional leader:
 - (i) should not have lost his position through indigenous political processes,

(ii) in considering the dispute the Commission must consider and apply customary law and customs as they were when the dispute arose,

(iii) the Commission has authority to investigate disputes dating from September 1927 unless the claimant provides good grounds for the Commission to go beyond this date.

6.3 **Analysis of Evidence**

6.3.1 The following facts are common cause:

(a) Marhelane had seven wives, Mankosinani, Maphakathi, Mandwane, Mamtshibeni, Maqhinebe, Mamdingazwe and Maxesi.

(b) The most important of these wives for the purposes of this dispute are: Mankosinani, of the great house, the mother to Nomathemba; Maphakathi, of the right hand house; the mother to Mpiyenkulu, Botha, Mdudulo and Vukayibambe;

Mamtshibeni who was *iqadi* to the right hand house, mother to Maneli and Nelson.

- (c) Marhelane died in July 1921. Mankosinani, the great wife, had no male issue and therefore had to 'adopt' into the great house, Mandlonke, the son of Maqhinebe, the second *iqadi* to the great house. However, as he was still a minor, Mswakeli acted as regent on his behalf.
- (d) In 1935, Mandlonke ascended the throne. He married two wives, Magingqi and Mampofana. In 1937, he died without issue.
- (e) Following the death of Mandlonke, a succession dispute arose between Nelson and Botha. Botha claimed that as the son of the first house of Marhelane, he was entitled to succeed. Nelson, on the other hand, claimed that the right-hand house never succeeds and as the only surviving son of *amaqadi* houses, he was entitled to succeed.

- (f) A series of meetings were held to resolve the dispute. Victor Poto, of amaMpondo aseNyandeni, was invited and in one of the meetings, he recommended that Botha should succeed Mandlonke. However, the majority favoured Nelson. Both parties were requested to suspend their claims until Mampofana, the second wife of Mandlonke, who was pregnant at the time, gave birth. She later bore a girl, Nomampondo. Consequently, a search for any illegitimate son of Mandlonke was conducted but did not yield the desired result.
- (g) Botha solicited the intervention of the government of the day; as a result, the 1938 Commission was established. The objective of the Commission was to investigate and make recommendations as to who was to succeed Mandlonke.
- (h) The 1938 Commission recommended Botha to be appointed as the paramount chief of amaMpondo of Eastern Pondoland. Botha was installed by the

Governor-General in terms of section 23 of Act 38 of 1927.

- (i) After Botha was appointed paramount Chief, he took possession of the property which belonged to Mandlonke. Nelson instituted action against Botha in the Cape Provincial Division, wherein he claimed delivery of the said property as well as the position of *ubukumkani*. The action and subsequent appeal to the appellate division were unsuccessful.

- (j) Nelson and Magingqi had a relationship as a result of which three children were born: Ntombokwenzani, Zwelidumile (the father of the Claimant) and Daliwonga.

6.3.2 **When Mandlonke died without a successor, who was to succeed him in terms of the customary law and customs of amaMpondo?**

- (a) Mandlonke died without a successor. The Claimant and the Respondent do not agree as

to who was to succeed Mandlonke in terms of customary law and customs of amaMpondo:-

- (i) The Claimant argues that, according to the custom of amaMpondo when *ikumkani* dies without issue in the great house, the heir is identified from the sons of *amaqadi* to the great house. If there are no male issues in the houses of *amaqadi* to the great house, the sons of any *qadi* take preference over the right hand house. Throughout this process, the great wife is consulted if she is still alive.

- (ii) The Respondent, on the other hand, contends that if there are no male issues in the great house, then one has to revert to the old custom: the first born son of the first wife to be married is eligible to succeed. In support of this contention, he provided the Commission with several examples of the right-hand house having ascended the throne:-

- (aa) during the reign of Ngqungqushe, his successor-in-title, Phakane, was mentally ill and Faku, the son of the right-hand house, succeeded his father;
- (bb) Faku himself, preferred Ndamase, the first-born son of the right-hand house to succeed him, however Ndamase declined the offer and found a great wife for Faku;
- (cc) Masarhili, the great wife of Mqikela, had no issue. She proposed that the son of a minor house was to be 'adopted' into the great house. Cetshwayo objected to a minor house being given preference over the right-hand house. The councillors, including Nqwiliso, the paramount chief of Western Pondoland, upheld this objection.

(iii) At page 50 of his book, *AmaMpondo. Ibali neNtlalo*. Victor Poto⁷ states that:

“Ngamanye amaxesha inkosi ifa ingabekanga, ize kuketwe ngamadoda kubafazana bayo abanonyana oyena uzakubekwa ubukosikazi, ize unyana wake abe nguye oyakuba yinkosi; xa kuketwa akuze kuketwe intsoka ngqanji. Ngamanye amaxesha ifa inkosi ingazalanga inkosikazi ebibekiwe, ku-tike xa kunjalo amadoda akete omnye wonyana bamaqadi oyakutatyatwa asiwe e-Ndlu’ nkulu yobeko abe nguye inkosi nonyana walondlu.

Intsoka ngqanji ngumfazi ekuqalwe ngaye ukuzekwa aze-ke yena atabate ubunene kwakubekwa inkosikazi. Nokuba kubekwe ngalupina uhlobo lomfazi oyintsoka ngqanji uya kusoloko etabata ubunene yena.

⁷ Date of publication.

Injongo yolubeko seyizekile inkosikukuba unyana angakuli inkosi ingekabuxamli ubukosi, kuba unyana ubeti akukula alingane noyise atande ukwenza ibango kuyise.”

(iv) This extract sets out two scenarios in the event that a king dies without an heir:

(aa) When a king dies without marrying a great wife, one of the wives of the minor houses, who has sons, is chosen by councillors and she is elevated to the position of great wife. The first-born son of the wife so chosen becomes the heir. When the choice is made the first wife to be married, (*intsokangqanji*) is never chosen.

(bb) When a king dies without issue in the great house, the councillors will choose one of the sons of *amaqadi*

who will be 'adopted' into the great house. He becomes the son of that house and the successor-in-title.

(cc) whatever happens or in whatever scenario the first wife to be married will always remain the right-hand house. The objective of this practice is to prevent usurpation by the sons of the right-hand house before the king dies.

(b) The Commission finds that:

(i) It is common cause that amaMpondo adopted the system of the structure of houses similar to that of amaXhosa. According to this system, the sons of the right-hand house never succeed. The first-born son may however, establish a separate community, semi-independent but subordinate to the great house.

(ii) Upon the death of Mandlonke without a great wife and without issue, resort should have been had to the houses of his father Marhelane. In the house of Marhelane there was no issue in the great house. His great wife Mankosinani had predeceased Mandlonke. There were no sons from the *qadi* houses of the great wife. The only surviving *qadi* was Mamtshibeni, the mother to Nelson. In the right hand house of Maphakathi, the eldest son was Botha.

(iii) If the abovementioned scenario of Victor Poto were to be followed it would mean that Nelson as the only surviving son of *iqadi* was entitled to succeed. Botha of the right-hand house (*intsokangqanji*), should have never succeeded.

(c) The Commission is mindful of the fact that, before the 1938 commission, Victor Poto qualified the above statement, by stating that:

“Where the Chief Wife is still alive so that the child to be selected could be, as it were borne by her. On this occasion, there is no Great House and the Chief is dead. That house is therefore finished. An appeal has to be made to the Pondo custom in regard to inheritance. If there had been a Chief Wife she would have been able to select the intsokanqanji (the eldest son of the first woman married) of the previous generation. I say that this would not be in conflict with the statement in my book because the Chief Wife is given the right to bear a son for herself from among the sons of her late husband by his other wives.”

- (d) Although the 1938 commission accepted this explanation, the Commission finds that the two statements are mutually exclusive and misleading in that:

(i) Initially, in his book⁸, which was written before this controversy, Victor Poto stated categorically that the right-hand house never succeeds. The rationale behind this was to avoid usurpation. However, before the 1938 commission, he stated that the great wife would have been able to select *intsokanqganji*. Victor Poto does not furnish reasons why the great wife could not have chosen a son of *iqadi*.

(ii) In the book, he states that where there is no great wife, it is the councillors who choose among the wives in the minor houses, the one to be elevated to the status of a great wife. In the event that the king dies without issue in the great house, it is still the councillors who choose among the sons of the minor houses a son to be adopted into the great house. Before the 1938 commission, he stated that it was the prerogative of the great wife to choose

⁸ supra

the son to be adopted from the minor houses.

(e) The Respondent has made examples where the sons right-hand house have ascended the throne. The Commission does not accept these examples as proof of Respondent's contention in that:

(i) There is no evidence that in choosing Faku, to succeed Ngqungqushe, the sons of *amaqadi* were overlooked.

(ii) The fact that Faku wanted Ndamase to succeed him as *ikumkani* was contrary to custom as it is not the prerogative of the reigning king to choose a successor. The custom is clear: it is the first-born son of the great wife who succeeds. Ndamase's intervention prevented a situation which could have caused strife and divisions within the family.

- (iii) In proposing the son of the *qadi*, Masarhili was acting in accordance with the customary law and customs of amaMpondo. The objection by Cetshwayo that was upheld, was wrong and contrary to the custom of amaMpondo. It was fortunate that Cetshwayo did not succeed as this had the potential to cause division.
- (f) In the circumstances, the version of the Claimant is more probable and in line with the customary law and custom of amaMpondo which prevailed at the time.

6.3.3 **Was Magingqi the great wife of Mandlonke?**

- (a) The Claimant says that Magingqi was the great wife of Mandlonke, due to the fact that she was married by the nation and that she was more senior as she was born of royal blood.
- (b) The Respondent contends that Magingqi was the first wife of Mandlonke but not the great wife.

According to Mercy Jamjam, one of the Respondent's witnesses, at the time of Mandlonke's death, the royal family was yet to arrange for the marriage of a great wife.

(c) The Commission finds that the probability is that Magingqi was regarded as the great wife since:-

(i) The warning by Victor Poto against *ukungena* was in relation to Magingqi only and not Mampofana;

(ii) The Respondent stated on affidavit that he had been approached to *ngena* Magingqi, but refused to do so. The royal council chose Magingqi over Mampofana.

(iii) Prior to the death of Mandlonke, Magingqi resided at Mzindlovu, the seat of the royal house and left involuntarily at the instance of Botha.

6.3.4 **Was the appointment of Botha according to custom?**

- (a) According to the Claimant, the appointment of Botha was irregular and not in line with the customary law and customs of amaMpondo in that:
- (i) At the time, the government was not obliged to follow the customs of amaMpondo in appointing a paramount chief;
 - (ii) When Marhelane died, Mandlonke, the son of *iqadi*, succeeded him. Upon the death of Mandlonke the same custom should have been followed.
 - (iii) According to custom, where *ikumkani* dies without issue in the great house, the heir is identified from the sons of *amaqadi* to the great house or if this fails, any *qadi* is given preference over the right hand house;

- (iv) Therefore, after the death of Mandlonke, Nelson, as the only surviving son of *iqadi*, should have succeeded.

- (b) The Respondent, however, argues that in appointing Botha the government was guided by the custom of amaMpondo and the recommendations of the 1938 commission:
 - (i) The custom applicable was that if there is no son in the great house and no great wife to nominate a successor, then the first-born son of the right-hand house must succeed over the son of *iqadi* to the right hand house.

 - (ii) The recommendations of the 1938 commission were that:
 - (i) *“The custom to be followed is that of the commoners, which is that the first woman married is the great wife and the second woman to be married is the right-hand house. On failure of the male*

issue, in the great house the son of the right-hand house succeeds to the great house.

(ii) As regards the relative merits of the two Claimants there is a consensus of opinion that Botha bears a better character than Nelson he is more mature in years and has a good reputation for straight dealings among both Europeans and natives and is progressive. Under his charge, the Pondos will have a better chance of developing. Nelson on the hand, is a weakling under the sway of hangers on at the great place. It seems to us very probable that the backing he has received from those in contact with the great place is inspired by the wish of the men in question to retain the power in their own hands, which they have undoubtedly wielded since the death of Mswakeli.”

- (c) The Commission has already found that according to the custom of amaMpondo when *ikumkani* dies without issue in the great house, the heir is identified from the sons of *amaqadi* to the great house. If there is no male issue in the *qadi* to the great house, any *qadi* takes preference over the right-hand house.
- (d) It appears that in its recommendations, the 1938 commission placed more emphasis on the perceived character flaws of Nelson as opposed to custom. This was not in line with customary law and customs of amaMpondo.
- (e) The dispute between Nelson and Botha should be viewed in its proper context *viz a viz* the prevailing political climate at the time:
- (i) There was great resistance to the policies of the colonial government. It therefore suited the colonialists to place in positions of authority people who were pliable and easy

to manipulate such as Botha. Armed with the Native Administration Act No. 38 of 1927, the Government was able to impose its will and frustrate amaMpondo. Against determined amaMpondo opposition, the government installed Botha as paramount chief of amaMpondo.⁹

(ii) The disaffection of amaMpondo with the installation of Botha over Nelson is said to be part of the reasons for what was known as the “The Pondo Revolt” in 1960.

(iii) During this time, it is alleged that Botha was forced to flee and sought refuge from the colonialists. They secured his return, and he advocated the introduction of the Bantu Authorities Act.¹⁰

(f) In view of the above, the Commission finds that the appointment of Botha was irregular and not in

⁹ The Discussion Document On the History of AmaMpondo: chapter 3

¹⁰ See the Determination on the position of the paramountcy of abaThembu refer to the relevant section in Black Authorities Act.

line with the customary law and customs of amaMpondo.

6.3.5 **Did Nelson and Magingqi enter into a union of ukungena?**

(a) The Claimant's version is that:

(i) In an attempt to wrestle the kingship from Botha, amaMpondo resorted to the custom of *ukungena*. Nelson was approached to *ngena* Magingi, the great wife of Mandlonke. To this end, Nelson was taken out of school and he subsequently performed all the rituals attendant to the custom of *ukungena*, that is, *isifingo* and *ukuhlamba izitya*.

(ii) The objective of this exercise was for Nelson to raise seed and thus revive the house of Mandlonke.

(iii) The Claimant stated that the decision that Nelson should *ngena* Magingqi was not

unusual in that historically, the sons of *ukungena* ascended the throne of amaMpondo. He cited the following examples:

(aa) during the reign of Cabe, Ngangatha *ngenad* Qiya's wife;

(bb) one chief Nonkonyana, *ngenad* the wife of Zondwayo; and

(cc) recently, the Respondent installed one Siyoyo, a son born of *ukungena*.

(b) The Claimant's witnesses Magqwaru Sigcau and Pawuli Ncoyeni corroborated the Claimant's version:

(i) Magqwaru, the third wife of Nelson married in 1949, confirmed that Nelson *ngenad* Magingqi in that:

- (aa) she witnessed the performance of *isifingo* by Nelson at the home of Magingqi.
- (bb) Magingqi was not regarded as the wife of Nelson but *iqabane*¹¹
- (cc) Magingqi resided at her marital home and only left as a result of the death threats from Botha;
- (dd) Nelson's great place was at Khimbili. Magingqi never lived at Khimbili with Nelson. To the contrary, Nelson visited Magingqi at her marital home;
- (ee) when Nelson died, Magingqi did not participate in the mourning rituals with the wives of Nelson.

¹¹ the term is used for the woman in the union of *ukungena*;

(ii) Pawuli Ncoyeni, the uncle and neighbour of Magingqi, stated that:

(aa) Nelson *ngenad* Magingqi;

(bb) he was present during the ritual of *isifingo*, where Nelson presented a white horse to the family of Magingqi;

(cc) after the marriage to Mandlonke, Magingqi did not live at her home.

(c) The Respondent avers as follows:

(i) He categorically denied that Magingqi and Nelson entered into the union of *ukungena*. As far as he is concerned, the possibility of such union was never mooted. After the death of Mandlonke, Magingqi and Nelson fell in love; Magingqi returned to her maiden home and married Nelson who delivered six herd of cattle and a white horse as *lobola* to the home of Magingqi. She lived with Nelson at Khimbili.

- (ii) The supporters of Nelson could not have proposed *ukungena* because according to the custom of amaMpondo, children born of *ukungena* union do not succeed at the level of *ubukumkani*. This clearly would have been an exercise in futility.

- (iii) In any event, the union between Nelson and Magingqi could not have been *ukungena* because; none of the rituals of *ukungena* were performed in that:
 - (aa) Magingqi left the marital home;
 - (bb) Nelson paid *lobola* and married Magingqi;
 - (cc) The *isifingo* ritual was not performed at the marital home of the deceased husband.
 - (dd) The children born of the union between Nelson and Magingqi were regarded as those of Nelson and not Mandlonke.

(d) The Respondent's witnesses: Sylvia Noyolo Madikizela, Mlungu Gideon Sigcau and Mercy Nonceba Jamjam also denied that there was *ukungena* between Nelson and Magingqi:

(i) Sylvia Noyolo Madikizela, who was a midwife at Holy Cross hospital at the time of the birth of Zwelidumile stated that.

(aa) she believed that Nelson and Magingqi were husband and wife because at their first meeting, Nelson had introduced himself as such;

(bb) she had heard rumours that Nelson was supposed to *ngena* Magingqi, in order to give birth to the king of amaMpondo but to everyone's surprise, he paid *lobola* and married her. It was unusual for *lobola* to be paid twice for the same woman;

(cc) there was no *ukungena* between Nelson and Magingqi.

(ii) Mercy Nonceba Jamjam, who lived at Mzindlovu during the reign of Mandlonke stated that:-

(aa) Magingqi was the first wife of Mandlonke. After the death of Mandlonke it was rumoured that Nelson had *ngenad* Magingqi;

(bb) Magingqi left the marital home, and she later heard that Magingqi and Nelson had gotten married. Therefore, there could not be *ukungena* between Magingqi and Nelson;

(cc) She understood *isifingo* to constitute one beast. Six cattle and a horse, paid by Nelson would be tantamount to *lobola*.

(iii) Mlungu Gideon Sigcau, the son of Marhelane stated that:

(aa) Magingqi was the first wife of Mandlonke;

(bb) Nelson never *ngenad* Magingqi because he took Magingqi from her marital home and took her to her maiden home where he married her and settled at Khimbili with her;

(cc) he never heard of *ukungena* between Nelson and Magingqi but he knows that Victor Poto had warned that neither Botha nor Nelson should *ngena* Magingqi as this will result in a never-ending dispute;

(iv) Malangana Ndunge testified generally about the custom of *ukungena*.

(aa) he stated that the purpose of *ukungena* is to revive the bloodline of the deceased. Therefore, it was important

that a man who *ngenas* the widow does not dilute the said bloodline;

(bb) the restriction of *ukungena* at the level of kingship is in order to prevent the dilution of the bloodline. The widow is not restricted as to who may *ngena* her. There is therefore a danger of the bloodline being diluted;

(cc) he denied that Ngangatha *ngenad* Qiya's wife because the former was still alive.

(v) Gwebizilwana Sigcau also denied that the union between Magingqi and Nelson constituted *ukungena* because:

(aa) they fell in love and left the marital home. They had children;

(bb) he denied that children born of *ukungena* are permitted to ascend the

throne and like Ndunge, he stated that Gangatha did not *ngena* Qiya's wife.

(e) In determining whether Nelson and Magingqi were engaged in a union of *ukungena*, it would appear that the Commission would have to deal with the following issues:

(i) Where Magingqi resided before and after the death of Mandlonke:-

(aa) the Claimant contends that Magingqi always resided at Mzindlovu during the lifetime of Mandlonke. She never left the marital home. Magingqi left Mzindlovu for Khubeni at the instance of Botha. As a result of death threats from Botha, she had to leave Khubeni for Matshona. His evidence was corroborated by Magqwarhu Sigcau;

(bb) initially, the version put by the Respondent's counsel during the

Claimant's case was that Magingqi never lived at Mzindlovu but was allocated a house at Khubeni;

(cc) However, during the Respondent's case, the version changed:

- Mercy Jamjam testified that both Magingqi and Mampofana lived at Mzindlovu during the lifetime of Mandlonke. However, after Mandlonke's death the elders had taken Magingqi to Khubeni. Magingqi later left the marital home and got married at Khimbili.
- Mlungu Gideon Sigcau stated that after Botha had been installed, Botha took Magingqi to Khubeni
- The Respondent testified that upon marriage, Magingqi was informed that she would be allocated a house

at Khubeni. She later moved to Khubeni and visited Mandlonke at Mzindlovu. After the death of Mandlonke, Magingqi left Khubeni, at night, taking with her all her belongings, including the livestock.

- According to the Respondent, *ukungena* is only valid if the widow does not leave the marital home. Magingqi's departure from the marital home supports their contention that *ukungena* union did not exist between Nelson and Magingqi. Magingqi is said to have left the marital home for her maiden home where Nelson married her and they subsequently settled at Khimbili.

(f) The Commission finds that on the evidence of the Claimant and witnesses for the Respondent, the probabilities are that:

- (i) Magingqi lived at Mzindlovu during the lifetime of Mandlonke and after his death moved to Khubeni. Her departure from the marital home points to one who is fleeing.
 - (ii) According to the Respondent's own version, Magingqi left at night with all her belongings including the livestock. Magqwarhu also stated that Magingqi fled from Khubeni at night. This shows that her departure from the marital home was involuntary. It is common cause that Ntombokwenzani, the daughter of Magingqi, was born at Mzindlovu.
- (g) What the ritual of *isifingo* entails and whether in the case of Nelson and Magingqi the ritual was performed:
- (i) The Claimant states that *isifingo* is a ritual through which the man chosen by the family to *ngena* the widow is introduced to her maiden family. He further stated that all the rituals of

ukungena custom were performed including *isifingo*. In 1944, Nelson and Magingqi were united according to the custom of *ukungena*. Nelson delivered six herd of cattle and a white horse to Magingqi's maiden home. The following witnesses also supported his version:-

(aa) Magqwaru Sigcau stated that:

- *isifingo* is the ritual of delivering a beast to the widow's maiden home by the *ngena* consort;
- the objective of *isifingo* is for the man to introduce himself to the woman's family. She was present when this ritual was performed at Magingqi's home, kwaGingqi;
- after *isifingo* a ritual called *ukuhlamba izitya* or *ukubhoxa intsika* is performed at the widow's marital

home. She has no knowledge whether this was done at the marital home of Magingqi.

(bb) Pawuli Ncoyeni stated that:

- *isifingo* is the presentation of a white horse to the maiden home of the widow's family and the introduction of the *ukungena* consort to the family of the widow.
- he was present when this ritual was performed at the home of Magingqi.

(cc) The Respondent contends that the ritual of *isifingo* is performed when a beast is slaughtered when the man introduces himself to the marital home of the widow. The man is counseled to take care of the widow. With regard to this aspect, the Respondent's witnesses stated following:

- Alfred Malangana Ndunge, the Respondent's fourth witness stated that according to custom, there is no need for *isifingo*, that is, the introduction of the suitor to the maiden home of the widow, because the widow belongs to her marital home. *Ukubhoxa intsika* is a ritual performed at the marital home of the widow.
- Mercy Jamjam stated that one beast and one horse would amount to *isifingo*, anything more would amount to *lobola*.
- Gwebizilwana Sigcau, stated that it is defined as the introduction of the suitor into the marital home of the widow. Traditional beer is brewed and a beast is slaughtered. The

terms *isifingo* and *ukubhonxa intsika* are used interchangeably.

(h) The Commission finds that:

(i) From the evidence, it is not clear what *isifingo* entails. However, it is evident that *isifingo* constitutes some form of introduction between the consort and the marital home as well as the maiden home of the widow. It is probable that the consort has to introduce himself to the maiden home of the widow.

It would also be logical for members of the marital family to publicly announce the union and counsel the consort.

(ii) In the case of Nelson and Magingqi, it is common cause that Nelson delivered six beasts and a white horse to the maiden home of Magingqi. It is highly improbable that Nelson would have paid *lobola* for his brother's wife in that according to custom, *lobola* is not paid twice for the same woman from the same

family. The purpose of *lobola* is to establish and maintain the relationship between the two families. *Lobola* is redeemable in the event that the woman misbehaves and she is returned to her maiden home.

(iii) Nelson was merely introducing himself to the maiden home of Magingqi. Therefore, the six beasts and horse delivered to the maiden home of Magingqi constituted *isifingo* and not *lobola*.

(i) Having made a finding on these issues, it is important to examine closely the broader issue of *ukungena*;

(i) It is common cause that amaMpondo were not satisfied with the installation of Botha by government. According to the Claimant, this led to the decision that Nelson should *ngena* Magingqi. It is in dispute whether in fact this did occur.

(ii) From the evidence, it is clear that *ukungena* was mooted. Magqwarhu Sigcau and Pawuli Ncoyeni supported the Claimant's version. Even though the Respondent denies that *ukungena* occurred, his witnesses do not. Sylvia Madikizela heard rumours that Nelson was supposed to *ngena* Magingqi. Mlungu Gideon Sigcau was aware of the warning against *ukungena* by Victor Poto. Furthermore, in the affidavit deposed to by the Respondent himself and handed in as exhibit A, the following is recorded on page 9 paragraph 7;

"It is a matter of common knowledge that the late paramount chief Botha declined to ingwenya (to ngena) the Applicant (Magingqi)..."

(iii) It is also common cause that Ntombokwenzani was born whilst Magingqi was at her marital home. Nelson always maintained that Zwelidumile was the son of

Mandlonke, the evidence of Gwebizilwane supports this, when Nelson busad land for Zwelidumile, he referred to him as the son of Mandlonke. Magingqi did not mourn the death of Nelson;

(iv) It is highly probable that indeed Ntombokwenzani, which literally means 'what do we do with this girl' or 'of what use is this girl' was so named due to the fact that amaMpondo were disappointed when a boy was not born.

(v) In view of the fact that amaMpondo were frustrated that custom was not followed and this was supported by the colonialists, in order to preserve the kingship within the correct lineage, the custom of *ukungena* seemed to be the necessary and the reasonable solution.

(vi) In the circumstances, there was *ukungena* between Nelson and Magingqi. The objective

was to raise seed and to revive the house of Mandlonke.

(j) The next issue to be determined is whether, according to the custom of amaMpondo, a son born of *ukungena* union may ascend the throne:

(i) The Claimant's version is that *ukungena* is widely practiced at the level of *ubukumkani*. He cited the example of Qiya and Gangatha. Qiya was the son of Cabe, a former king of amaMpondo. After a succession dispute, Qiya was banished and his wife was *ngenad* by his younger brother, Gangatha;

(ii) The Respondent concedes that *ukungena* is practiced amongst amaMpondo, but not at the level of *ubukumkani*. He went further to state that a son born of *ukungena* never succeeds to the throne of amaMpondo. He denied that the union between Qiya's wife and Gangatha was *ukungena* because at

the time of the union, Qiya was still alive. Bala, who was born of the union between Qiya's wife and Gangatha was regarded as the son of Gangatha and accordingly succeeded him as king.

(k) The Commission finds that:

(i) Indeed *ukungena* is practiced at the level of *ubukumkani*. The warning by Victor Poto that neither Nelson nor Botha should *ngena* Magingqi, was not on the basis that *ukungena* union between Magingqi and the sons of Marhelane (Nelson and Botha) would be contrary to custom, but rather, that the children born of the union would have a legitimate claim to the kingship of amaMpondo.

(ii) Since the Commission accepts that the above warning by Victor Poto supports the Claimant's contention that *ukungena* does take place at the level of *ubukumkani*, the

Commission does not deem it necessary to make a finding on the veracity or otherwise of the example of Qiya and Gangatha cited by the Claimant.

- (iii) According to the customary law and customs of amaMpondo, a son born of *ukungena* union may ascend the throne.

6.3.6 **Is the Claimant the rightful heir to the throne of amaMpondo?**

- (a) The Claimant, Tyelovuyo Zanozuko Sigcau states that he is the rightful heir to the kingship of amaMpondo in that:-

- (i) He is the first-born son of the first wife, Victoria Zuziwe Nobandla Sigcau and Zwelidumile, the sociological son of Mandlonke.

- (ii) During his lifetime, his father Zwelidumile was an ordinary chief, however he never

abandoned his claim to the kingship of amaMpondo and made several endeavours to what he believed was his rightful position. He died in 1984, whilst the case in this matter was still pending before the then Transkei Division in 1988.

(iii) He contends that because he was not a king at the time of his death, he did not marry a great wife. In terms of the custom of amaMpondo, the successor-in-title at the level of *inkosi* is the first-born son of the first wife. In this case, it is the Claimant. Furthermore, he has inherited the father's position of chief of Ndimakude in the district of Flagstaff.

(b) On the other hand, the Respondent contends that the Claimant cannot lay claim to the position of the heir to the kingship of amaMpondo in that:-

(i) He is the first-born son of the first-wife. The Claimant's mother, Zuziwe is the daughter of

a commoner unlike the second wife, Nompucuko who is born of the Matanzima royal family.

- (ii) At the funeral of Zwelidumile, the elders of the family instructed Nompucuko to sit at the head of the casket signifying that she was a chief mourner and the chief wife.
 - (iii) After the burial of Zwelidumile, the Claimant's mother, reported to the Respondent that she had been chased out of the house and the second wife Nompucuko inherited the estate of Zwelidumile.
- (c) In reply, the Claimant denies that Nompucuko is the senior wife and contends that because the marriage was conducted at the first wife's house, this makes her junior to the first-wife. In the event that the marriage ceremony is conducted at the first wife's home, the latter should surrender her status to the new wife by handing over a spear, thereby

symbolically relinquishing her senior status. In this case this did not occur, instead her uncle, George Matanzima the then Prime Minister of Transkei, gave her the spear. This was contrary to the customs of amaMpondo.

- (d) The Claimant further states that the Respondent's claim that Nompucuko inherited the estate of Mandlonke is misleading in that she only inherited his pension and it was only through the manipulation of the system by her father and uncle, Kaiser Matanzima and George Mantanzima who were in power at the time.
- (e) The Commission has already made a finding on the following aspects:
 - (i) Magingqi was the great wife of Mandlonke, after the death of Mandlonke, she entered into a union of *ukungena* with Nelson. Three children, including Zwelidumile were born of the union.

- (ii) The appointment of Botha as *ikumkani* of amaMpondo was irregular in that it was not in accordance with customary law and customs of amaMpondo. Nelson, as the only surviving son of *amaqadi* should have succeeded Mandlonke. Therefore, the position that was subsequently inherited by his successor, was also irregular.
- (f) It is common cause that:
- (i) Both Nelson and Zwelidumile held a status of *inkosi* at the time of their death. However, during their lifetime both were dissatisfied with the *status quo* and challenged same through the channels of customary law and customs and before the courts of law.
 - (ii) Zwelidumile was *inkosi* of Ndimakude Administrative Area. In terms of custom, at this level, the first-born son of the first wife succeeds his father.

(iii) After the death of Zwelidumile, the Claimant as the first-born son of the first wife accordingly succeeded his father as the senior traditional leader of Ndimakude.

(g) The Commission finds that:

(i) But for the interference by the colonial masters during the lifetime of Nelson, Zwelidumile ought to have been the king of amaMpondo.

(ii) Even though Zwelidumile held the status of an ordinary chief at the time of his death and had no great wife, the Claimant, as his successor-in-title, is entitled to the rightful traditional leadership position and status that was supposed to be held by his father.

(iii) The Claimant therefore, is the rightful heir to the throne of amaMpondo.

- (iv) The appointment of Botha to the position of paramount chief that was subsequently inherited by the Respondent was irregular in that it was not in accordance with the customary law and customs of amaMpondo.

7.

CONCLUSION

7.1 In terms of customary law and customs of amaMpondo and the Framework Act:

7.1.1 The Claimant, Zanozuko Tyelovuyo Sigcau, is the rightful successor to the throne of amaMpondo.

7.1.2 The appointment of Botha to the position of paramount chief which was subsequently inherited by the Respondent, Mpondombini Justice Sigcau, was irregular and not in accordance with the customary law and customs of amaMpondo and the Framework Act.

**DETERMINATION ON THE KINGSHIP DISPUTE OF AMANDEBELE
BETWEEN JOHANNES DLIZE MABENA AND MBULAWA ENOCK
MABENA (MAKHOSONKE II)**

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1.

INTRODUCTION

1.1 Establishment of the Commission

1.1.1 It is common cause that over the years the institution of traditional leadership has been undermined, distorted and eroded. In order to restore the dignity of this institution, in 2004 the State President of the Republic of South Africa appointed a Commission on Traditional Leadership Disputes and Claims (“the Commission”).

1.1.2 The Commission is established in terms of section 22(1) of the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.2 Functions of the Commission

1.2.1 In terms of section 25(1) of the Framework Act, the Commission operates nationally and has authority to decide on any traditional leadership dispute and claim

contemplated in section 25(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' ; and

(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.”

1.2.2 When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community, as they were when the events occurred that gave rise to the dispute or claim (section 25(3)(a)).

1.2.3 In terms of section 25(4) the Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to section 25(2)(a)(vi).

2.

FOCUS

2.1 Having defined the functions of the Commission in terms of the Framework Act in general under paragraph 1.3 herein above, this investigation is on the dispute of aManala and only limited to section 25 (2)(a)(ii) viz:

“The Commission has authority to investigate, either on request or of its own accord- a traditional leadership position where the title or right of the incumbent is contested;”

2.2 The dispute under focus is lodged by one Johannes Dlize Mabena (“the Claimant”). It is against the current paramount chief of Manala-Mbhongo: Mbulawa Enock Mabhena (Makhosonke II) (the Respondent). The dispute is over the position of the kingship of amaNdebele which was pronounced by this Commission to be under the lineage of Manala.

2.3 The Claimant contends that *Ingwenyama* Makhosonke II is not the rightful principal leader of aManala as he is not the direct

descendant of *Ingwenyama* Silamba. In fact Makhosonke II comes from the house of regents. He further alleges that he, on the other hand, is the direct descendant of *Ingwenyama* Silamba. His father, Libangeni, was the son of Silamba and was a regent from 1896 to 1903.

2.4 The Respondent is opposing the claim.

3.

METHODOLOGY

3.1 In the process of its investigation the Commission adopted the following approach:-

3.1.1 The Claimant lodged a claim by completing a claim form, essentially describing who he is and the nature of the dispute;

3.1.2 The Commission furnished the Respondent with the claim form, to submit a response to the claim;

3.1.3 After receiving the response from the Respondent, the Commission furnished the Claimant with the response, and the matter was then set down for hearing.

3.1.4 During the public hearing the procedure adopted was as follows:-

j) Both parties were given an opportunity to make opening statements, briefly stating how they were going to conduct their cases, how many witnesses they would be calling if any, and what evidence would be tendered. The Claimant indicated that he would not be calling any witnesses. The Respondent indicated that he would be calling only one witness.

b) The Claimant was represented by Titus Tukani Mabena, and the Respondent was represented by Prince Peter Lelike Mabena.

- c) Titus Tukani Mabena, testified under oath and referred the Commission to supplementary research material;
- d) This was followed by an opportunity for Prince Peter Lelike Mabena, the Respondent, to pose questions to Titus Tukani Mabena based on the testimony;
- e) The Commissioners were also given an opportunity to raise clarity seeking questions from Titus Tukani Mabena;
- f) The Claimant closed his case;
- g) Prince Peter Lelike Mabena also testified under oath. He was asked questions by Titus Mabena, arising from his testimony and thereafter Commissioners posed questions of clarity.
- h) At the end, both parties were given an opportunity to make closing summaries (arguments).

4.

GENEALOGICAL HISTORY AND CUSTOMARY LAW OF SUCCESSION

The genealogical history and customary law presented by Titus Tukani Mabena on behalf of the Claimant and Prince Peter Lelike Mabena on behalf of the Respondent was mostly common cause.

4.1 The Claimant's case

4.1.1 Titus Tukani Mabena described the dispute as follows:-

- (a) The Claimant is the direct descendant of Silamba. Silamba was the king of aManala of Wallmansthal, north of Pretoria.

- (b) Silamba had twelve wives and seventeen sons. Among his sons were Buti, Libangeni Somratha, Mkhutshwa, Cengiwe Marhokolodi, Sosighidi, Libandla Mphephana, Zondiwe, Khosiwe, Phambili, Meciwa, Msongelwa, Mfundi and Mngoni.

- (c) Silamba's eldest son and successor-in-title was Buti. Silamba died in 1892. Buti ascended the throne in 1892. Buti fathered amongst other children Nyumba, who was his rightful successor. Buti died in 1895.
- (d) When Buti died, his successor-in-title, Nyumba, was still a minor. The royal family therefore appointed Libangeni, Buti's brother, as regent on behalf of Nyumba. Libangeni reigned from 1896 until his death in 1903.
- (e) After the death of Libangeni, kingship was returned to Nyumba who ascended the throne in 1903. He fathered only one son, Mbulawa. The reign of Nyumba was short-lived as he died in 1905.
- (f) At the time of the death of Nyumba his successor, Mbulawa, was still a minor. The royal family appointed Mbhongo, a "half" brother to Nyumba.

- (g) Mbhongo was the son of Trompie, the second wife of Buti. According to the Claimant, Mbhongo was fathered by Marhokolodi, one of the sons of Silamba, and not Buti. He was chosen as regent as he was from the royal family, *albeit* in one of the small houses, that have no right to reign. Mbhongo reigned from 1905. He fathered Makhosonke I. Mbhongo died in 1932.
- (h) After Mbhongo's regency, the kingship reverted back to Mbulawa, the rightful successor of Nyumba. Mbulawa ascended the throne in 1932. During his reign, he was "haunted" by Makhosonke I, who had the ambitions of succeeding Mbulawa. Before his death, Mbhongo had warned Makhosonke I through Khulakhe (Thukani) Mabhena that Makhosonke "should not fight Mbulawa over kingship because they are not from the ruling house".
- (i) Mbulawa died in 1941, without an issue and successor.

- (j) After the death of Mbulawa, the royal council appointed Thukani, the son of Libangeni, to take over the reign. This was because after the death of Mbulawa, the next eligible house from the house of Buti, was that of Libangeni, the brother to Buti.

- (k) Libangeni had two sons, Ndai and Thukani. Ndai was from the senior house, but he disqualified himself when he and his mother stole the treasure from the king's home (*ukhobongile*), and fled to Witbank. Thukani reigned from 1948. He fathered Johannes Dlize Mabhena, the claimant in the matter. Thukani died in 1960.

- (l) After the death of Thukani, the descendants of Mbhongo contested kingship. They claimed that the Claimant was not the rightful successor to the throne. The royal council appointed the Claimant as the successor to Thukani. When the Claimant was taken to Groblersdaal to take an oath, before the Magistrate, it was discovered that William Mbhongo had already been there and had reported that Thukani, the regent had died, and he (William

Mbongo) had been installed as king. The Magistrate did not resolve the matter but said that he would call them. He never did.

- (m) The matter ended up in the courts of law, but it was not resolved. They were even attempts to kill the Claimant. The Claimant consequently went into hiding in Cullinan.
- (n) The Claimant's family took the matter up with the then KwaNdebele government, but to no avail.
- (o) It was only in 1975 that William Mbhongo came in the company of the Commissioner to the Claimant in Winterveld to borrow the royal baton for conducting initiation (*ingoma*) as he did not have one. They were given the wrong one because it was known that Mbhongo was not going to return it. To date Makhosonke II, the Respondent, has the wrong baton because he is not the rightful leader of aManala.

4.1.2 Titus Tukani Mabena presented the customary law of succession as follows:

- (a) The status of a wife within a polygamous marriage determines succession to kingship.
- (b) The first-born son from the first wife in order of marriage will succeed.
- (c) If there's no son from the first house the first-born son of the second house will succeed.
- (d) If there are four wives, the first and third wives will be the ruling houses.
- (e) If the king dies without a son, the king's brother succeeds.
- (f) If there is no brother, the uncle of the deceased king will succeed.

4.2 **The Respondent's Case**

4.2.1 On the other hand Prince Peter Lelike Mabena presented the Respondent's genealogy and customary law:-

- (a) Silamba was the king of aManala at Walmansdaal (KoMjekejeke). He had twelve wives. The status of the wives was determined by the ranks in order of marriage. The 1st wife to be married was the most senior and bears the successor, (*Ikosana*).

- (b) In the case of Silamba, the senior house (*ubunene*) was that of NaMahlangu (NaNtobela), the mother of Buti (also known as Mbhedlengane). The second house was that of Munyadiwa, the mother of Libangeni, (also known as Daan), followed by that of NoMkhutshwa, the mother of Mkhutshwa – Saul Songazimbi. The fourth house was that of Nomalobola, the mother of Cingiwe Jas. The fifth was that of Thethepe/naMkwebane, the mother of Magokolodi and Phambili. The sixth, was that of NaMayisa, the mother of Sothabane. The seventh was that of

Malela, the mother of Ngoma Wiskey. The list goes on.

- (c) Buti had two wives who played a pivotal role in the history of aManala, Nakgoma and Namsiza (Trompie). Nakgoma was the senior wife from the right hand house (*ubunene*) and her eldest son and successor was Nyumba (also known as Mabhena). NaMsiza was from the left hand house (*ikhohlo*), and her son was Mbhongo I. Buti died in 1895.
- (d) At the time of Buti's death, his successor Nyumba was still a minor. The royal family appointed Libangeni, the brother of Buti, as regent on behalf of Nyumba.
- (e) Libangeni therefore reigned as regent from 1896 until his death in 1903. After his death kingship reverted to its rightful owner, Nyumba. He ascended the throne in 1903. He fathered only one son Mbulawa. He died in 1905, whilst his only son and successor was still a minor.

- (f) The royal family appointed Mkhutshwa, Saul, from the third house of Silamba, as regent on behalf of Mbulawa. He only ruled for a few months and Mbhongo I took over regency.
- (g) Mbhongo I was the son of Buti (Mbhedlengane) from *ikhohlo*. One day when he was still young (heading cattle with other boys at eGongo), east of Walmansdaal, birds appeared (*izinyoni zezulu*).
- (h) The boys were fascinated by these birds as sparks of fire came underneath the wings as they flew. They chased the birds until other boys left Mbhongo I still chasing. He caught two and cooked them on an open fire. The birds could not be cooked they remained raw again after putting them in the fire. He went back home and told the story to his uncle (*uSongwani*) Mkhutshwa, the regent. The royal men knew what that meant. After he had slept in the kraal in the presence of those men they covered him with a royal blanket. Mbhongo I was thereafter initiated, and was a

leader of the regiment called *Ikungu Emnyama* in 1906. After the initiation, Mkhutshwa peacefully handed over the kingship to him. Mkhutshwa is quoted to have said:

“Mntakamfowethu thatha zakwenu”...

Meaning *my brother’s son take what belongs to your family*. That is how Mbhongo I took over kingship as regent for his brother Mbulawa.

- (i) Accordingly, Mbulawa ascended the throne. He died without issue. The kingship in terms of customary law, shifted to the second house of Buti, that of Mbongo I. Makhosonke I ascended the throne in 1941. Makhosonke I fathered William Mbhongo II. He died in 1947, and his successor William Mbhongo II was still a minor.

- (j) The royal family appointed Thukani, as regent on behalf of William Mbhongo II. Thukani is from the second house of Libangeni who had two wives. The first wife ran away with money belonging to

the king (*imali yengoma*), fees for initiation school. She got married to Funwakho Mabhena from Makerana family in Kangala. She left koMjekejeke with her son Ndai. After the death of Libangeni, the mother of Thukani was married by custom of *ukungena* by Phambili (Jan) one of the son's of Silamba.

- (k) Thukani was approached to be the regent with certain conditions. The conditions were that firstly, he should relocate to Loding, before he was installed as regent. He refused to relocate. The royal family accepted his refusal on condition that even if he was not relocating to Loding, he had to build a royal court there (*ikhundla*) and use it as his Head Quarters.

- (l) Secondly as it was the common practice for regents, he had to shave one side of his face at a time, in order to differentiate and to identify himself from the real king. Thukani adhered to these conditions at the beginning but later became disobedient. Thukani died in 1960.

- (m) After the death of Thukani, there was conflict between the Mbhongo and the Thukani families. The Thukani family did not report the death of Thukani to the royal council that had appointed him as regent. The royal council heard about it later. When they got there, they found that Thukani had already been buried by the non-royal members, and they had installed the claimant as a successor to Thukani, the regent.
- (n) This led to the court of law battles. The main disputes were over succession and the estate of the late Mbhongo I includes property the farms, Klipspruit and Van Dykspruit. The court eventually ruled that Mbhongo I was the rightful successor-in-title and heir to inherit the estate of Mbhongo I. He was accordingly installed as the king. He ascended the throne in 1960. He died late in 1974, and was buried early in the New Year 1975.

- (o) The Respondent also contended that it was impossible that William Mbhongo II could have gone to the claimant's home in 1975 to ask for royal baton as he was no more. Even if the date is wrong Mbhongo II had his own baton to conduct initiation. He conducted his first initiation in 1963 (amaDuba), followed by amaDlawu (1967), amaDlari (1971) and lastly amaLinga (1974).
- (p) The Respondent also refuted that there was any bad blood between Mbulawa and Makhosonke I. During the reign of Mbulawa, Makhosonke I was at school, Kilnerton College; thereafter he proceeded to further his studies in Cape Town, where he qualified as a teacher.
- (q) He had no time to fight for kingship and besides Makhosonke I was also staying at Loding where king Mbulawa was, and therefore there was no need to "haunt" or "hunt" him.

4.2.2 The Respondent called another witness MASANA JONAS MABENA:

- (a) He said that he was born and bred at Loding. Even after schooling he came back to work for the government in the area until he retired.
- (b) During the reign of Makhosonke I he was part of the royal council.
- (c) After the death of Makhosonke I, Thukani was installed as regent for William Mbhongo II. He was not the first one to be approached. Ngoma, the first in line for the position of regent, had already declined the regency.
- (d) He further corroborated Peter Lelike Mabhena on the conditions put for Thukani whilst he was regent and how Thukani acceded to them, except towards the end of his regency. During the court battle William Mbhongo I was successful.

(e) After the death of Mbhongo I, his brother, Mbhedlengane, was installed as regent for Makhosonke II, the Respondent, as he had not been initiated. He reigned from 1975 to 1986. After his death Makhosonke II ascended the throne. He has been reigning since 1986 to date.

5.

DETERMINATION

5.1 Issues to be Determined

5.1.1 The issues are:-

- (a) Whether Mbhongo I was indeed the son of Buti (Mbhedlengane), or was the son of Marhokolodi;
- (b) Whether the succession lineage deviated upon the death of Mbulawa, the son of *ubunene* without any children;

- (c) Who was supposed to be the next eligible successor after the death of Mbulawa, according to the laws of customary succession of amaNdebele;
- (d) Whether in 1960 Thukani was installed as king or regent.
- (e) If the Claimant Johannes Zidle (Dlize) Mabena went into hiding in Cullinan after the Mbhongo family threatened his life with death, can he at this stage seek for the restoration of his kingship position.

5.3 **Analysis of Issues**

5.3.1 In pursuit of uniformity in the Republic in terms of the Framework Act, the Commission takes cognisance of the following:-

- a) The traditional leader:

- (i) should not have lost his position through indigenous political processes,
- (ii) in considering the dispute the Commission must consider and apply customary law and customs as they were when the dispute arose,
- (iii) the Commission has authority to investigate disputes dating from 1 September 1927, unless the Claimant provides good ground for the Commission to go beyond this date.

5.4 **Analysis of Evidence**

5.3.1 According to the genealogy submitted by the Claimant and also used by the Respondent during the public hearing as well as the genealogy submitted by the Respondent, Silamba's heir and successor was Buti (Mbhedlengane). Buti's brother was Libangeni. Buti fathered Nyumba from the house of *ubunene* and Mbhongo I from the house of *ikhohlo*. Nyumba's mother

was Nakgoma and Mbhongo's mother was Trompie (NaMsiza) - Genealogies are annexed hereto marked "AMD1" and "AMD2" respectively.

5.4.1 However, according to the oral narrative of the Claimant, Mbhongo's father is Marhokolodi and not Buti.

(a) When the Claimant was asked: What is Buti to Silamba?

Response: Buti is Silamba's son.

Question: What is Libangeni to Buti?

Response: Libangeni is a brother to Buti.

Question: What is Mbhongo to Nyumba?

Response: I would say they are half brothers.

5.3.3 The Claimant could not explain what evidence he had to claim that Mbhongo and Nyumba were half brothers when he had not said so with the previous ones standing in the same column or line of the genealogy structure.

5.3.4 During questioning time, the case of the Claimant evolved. Having started by saying Silamba's eldest son was Buti who fathered Nyumba who in turn fathered Mbulawa, the Claimant changed. His questions were such that in fact Buti was an illegitimate child who came with his mother. Libangeni's mother, Munyadiwa, was married because Buti's mother could not bear children in her marriage with Silamba.

5.4 The Commission finds that:-

5.4.1 Mbhongo I was indeed the son of Buti (Mbhedlengane). This is because even if Mbhongo I was fathered by Marhokolodi, at the time of birth his mother was married to Buti. The presumption that a child born in wedlock is presumed to be the child of the union was also applicable during those days. Secondly he was installed as regent for Mbulawa as he was regarded as *usongwana* (his uncle), notwithstanding that he was illegitimate. Thirdly both genealogies are probably as reliable as oral history

can be, as there was no motive for deliberate falsification.

5.4.2 The succession lineage did indeed deviate from the house of Nyumba, as Mbulawa was the only son, and he died without issue.

5.4.3 In terms of the customs and customary law of amaNdebele, the next qualifying house was that of Mbhongo I. This was because of the custom of the children of *ikhohlo* (left hand house) becoming the children of *ubunene* house. So in that case since Mbulawa died without children, Makhosonke I, who was the son of Mbhongo I was rightfully installed as king.

5.4.4 Furthermore even the claimant also stated that one of the principles of customary law of succession is that if the right hand house (*indlunkulu*) has no son, the first born son in the second house takes over. According to the claimant's own version, resort is had to the paternal uncles only if the late king had no sons. In

this case there was a son from the left hand-house, Mbhongo I.

5.4.5 The Commission was also informed about the custom of marrying *ihlazi* (the young sister of the *ukunene* who is married for the purposes of assisting her sister who is unable to bear an heir). In this case it was not applicable because the man had passed away.

5.4.6 During the questioning time, the Claimant did ask if Libangeni's mother was not married as *ihlazi*. Again this did not change the lineage as Buti succeeded his father and so did his children.

5.4.7 The custom of *ukungena*, (when the brother of the deceased marries the wife of the deceased with the intention of reviving his brothers house), was not part of the parties case.

5.4.8 It is highly improbable that Thukani was installed as a king and not as a regent in 1948. According to the claimant Mbulawa was succeeded by Thukani. Even though Makhosonke had the ambitions of succeeding

Mbulawa, the royal council/family chose Thukani. However, if regard is had to both genealogies submitted by both parties, Makhosonke I did rule. In fact according to the claimant's genealogy he ruled from 1941 to 1947.

- 5.4.9 If the Claimants submission is accepted, there seems to be a gap between Mbulawa and Thukani; since Thukani according to the genealogy only reigned from 1948 to 1960. There appears to be nobody between 1941 to 1947. The only probability one can draw is that Makhosonke did reign after Mbulawa from 1941 until his death in 1947. His son could not take over because he was still a minor. Thukani was therefore appointed as regent on behalf of Mbhongo II from 1948 to 1960. Secondly, the Respondent contended that infact there was another house which was more qualifying than that of Thukani, the line of Ngoma but he declined because he said that he did not want to die early and to go to Lodini. This evidence was not disputed by the claimant.

5.4.10 The Claimant according to his own version went into hiding in Cullinan fearing for his life. After that he did not do much to fight for his position. Claimant told the Commission that it was the government people who approached them, wanting to know about the seniority within the Manala lineage and also the people who approached the presenter at his employment, the SABC. One would have expected the Claimant to initiate the process. For example, he could have written to the government of that time, complaining that the Commissioner promised to call them but never did. There is evidence of discussion with KwaNdebele government but the Commission finds that it was not sufficient. The Claimant rather seemed to have accepted the defeat until the present government introduced the Commission. Nevertheless, even if he did make endeavours to claim his alleged position, fact is, the claimant fled when he forfeited his rights to kingship, if there was any. As the African saying goes “the victorious bull is the one that remains in the kraal.”

- 5.4.11 The Commission also noted that the Claimant is ninety five years old. Even though he was present in the public hearings, he did not seem to fully understand and appreciate the proceedings.
- 5.4.12 When asked if the children of the Claimant were present at the hearing, the presenter said that they were not.
- 5.4.13 The Commission also took note of the fact that none of the traditional leaders within aManala supported the Claimant. The speaker said that the Claimant is supported by some of amaNdzundza traditional leaders.
- 5.4.14 The speaker of the claimant also told the Commission that they did not consult the traditional community before they lodged the claim, so they do not know whether they have their support or not.

6.

CONCLUSION

6.1 The Framework Act enjoins the Commission to consider and apply customary law and customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.

6.1.1 The status of an heir apparent is determined by the well established customary laws common to most indigenous people of South Africa, including amaNdebele, being the status of the mother, male primogeniture and performance of specific rituals.

6.2 In Conclusion, the Commission finds that:-

6.2.1 In terms of the customary law and customs of amaNdebele, Johannes Dlize Mabena, the Claimant, is not entitled to the position of king of aManala. His claim is dismissed.

6.2.2 According to the customary law of succession of amaNdebele, the house of Mbhongo I, which is the house of the current incumbent, Makhosonke II, is the

rightful lineage to hold the position of king of aManala
and amaNdebele as a whole.

DETERMINATION ON THE AMAHLUBI KINGSHIP CLAIM

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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 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 are imperialism and colonization; repressive laws, in particular, the Black Administration Act 38, of 1927 and apartheid laws which provided for the creation of territorial authorities, self-governing states and pseudo-independent enclaves.

1.2 ESTABLISHMENT OF THE COMMISSION

- (a) The dignity of the institution of traditional leadership has been negatively affected. 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.
- (b) The Commission is established in terms of section 23 of the Traditional Leadership and Governance Framework Act 2003, Act 41 of 2003.

1.3 **FUNCTIONS OF THE COMMISSION**

- (a) In terms of section 25, the Commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising from any province. Accordingly, in terms of section 25(2)(a) 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 recognized 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'; and

(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 25(3),

“(a) When considering a dispute or claim the Commission must consider and apply customary law and customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.

(b) The Commission must-

(i) In respect of kingship, 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;

2.

FOCUS

2.1 The investigation under focus is in relation to the claim for:

2.1.1 the restoration of the kingship claim by the traditional community of amaHlubi in terms of sections 25(4) and 25(2)(a)(vi);

(a) Section 25(4) provides that;

“The Commission has the authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection (2)(a)(vi)”.

(b) Section 25(2)(a)(vi) provides that :

The Commission has authority to investigate, either on request or of its own accord-

“(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”.

2.2 The claim under focus is lodged by Muziwenkosi Johannes Radebe Langalibalele II. It is a claim for the restoration of the kingship of amaHlubi that was lost through colonial intervention.

3.

METHODOLOGY

3.1 In the process of its investigation, the Commission conducted public hearings in two stages.

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

3.1.2 The second stage was held after the Commission had conducted its own research. The purpose of this second stage was to canvass information obtained from the research of the Commission and not raised during the first stage.

3.1.3 The Claimant had been furnished with a set of questions arising from the research of the Commission. He was expected to respond thereto before the second public hearing was conducted. The hearing was

intended to afford the Claimant an opportunity to expand, explain and contextualize his responses.

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

3.2.1 Public hearings in which selected members of amaHlubi royal house and others appointed by them testified under oath and referred the Commission to supplementary research material;

3.2.2 This was followed by an opportunity for commissioners to raise questions and seek clarity from the presenters;

3.2.3 Interested parties were afforded an opportunity to challenge the version of the royal house and state their case; (This was only applicable to the first stage).

3.2.4 Members of the public were permitted to pose questions to the presenters and make comments. (This was only applicable to the first stage).

3.2.5 The Claimant was represented by Bhekithemba Langalibalele and Fungile Dothwana.

3.2.6 The Claimant was given an opportunity to make closing arguments. On 27 July 2009 the Claimant was given a cut-off date of 3 August 2009 to make further written inputs if he so desired.

4.

HISTORICAL BACKGROUND

4.1 According to the evidence tendered, the historical background of amaHlubi is as follows:

4.1.1 AmaHlubi are of eMbo or amaLala origin. They formed part of the eMbo downward migration from Central Africa, known as the kingdom of Congo or Congo kingdoms. They were the largest formation of the eMbo nation. At this stage, they were known as amaNgelengele or amaMpembe or imiHuhu. They are a much older tribe than either amaZulu or amaXhosa.

4.1.2 On their downward migration, amaLala at first settled briefly along the Lubombo Mountains, a range

extending from the north of the present-day Kwa-Zulu Natal, northwards along the Swaziland – Mozambique border.

4.1.3 During the 13th century amaNgelengele moved south and settled in the present-day KwaZulu-Natal, leaving behind a section of the eMbo nation, which later became known as amaSwazi.

4.1.4 AmaNgelengele (amaHlubi) occupied the territory, which was marked by the Pongola river on the north-east border. On the east, the territory extended beyond Blood river (*Income*), extending south to where Umzinyathi and Tugela Rivers meet. Further south were the Bushmen River and the Drakensberg Mountain, which also made up the western border.

4.1.5 It is estimated that amaHlubi moved to uMzinyathi region around 1650. However, some historians state that amaHlubi arrived in Natal in 1500. It was around 1650 that their name changed from amaMpembe or amaNgelengele or imiHuhu to amaHlubi.

4.1.6 The name changed to amaHlubi after Ncobo ka Mthimkhulu I had married a daughter of a Bhele traditional leader, Hlubi, but passed away without male issue. Prince Hadebe, of the right-hand-house, raised seed on behalf of the deceased. A dispute followed between the house of Hadebe and the great house. The descendants adopted a neutral name, LamaHlubi (that is, *isizwe sika LamaHlubi*) the nation of the daughter of Hlubi. Later the prefix was dropped and they were known as amaHlubi. The Hadebe house followed suite.

4.1.7 Hlubi-land would include the present-day: Charlestown, Volkrust, Newcastle, Madadeni, Utrecht, Wakkeestroom. Alckospruit, Paulpieterburg, Vryheid, Dundee, Nquthu, Glencoe, Harrismith, Van Reenen, Ladysmith, Colenso, Winterton, Weenen up to Escourt. It also extended to Hammarsdale and included Pietermaritzburg.

4.1.8 AmaHlubi are therefore the earliest rulers and occupants of what the colonialists later called the Natal Colony.

- 4.1.9 During the reign of Bungane, amaHlubi ruled a larger territory than even abaThembu and amaNdwandwe, who were larger than the Zulu chiefdom.
- 4.1.10 The kingship of amaHlubi was established and became stronger when different tribes and clans joined amaHlubi. For example: Mdakana, Mlambo and Gumbi broke away from amaNgwane; Kheswa and Mnguni broke away from amaChunu; Nkwali Mkhwanazi from Ndwandwe; Maduna (Matona) was of Sotho origin; Nkomo and amaZangele of Thiyani origin; Tshabalala and Msimang of Swazi origin; and Xaba of Mthethwa origin came through marriage; and amaBongwe, Dontsa, Ndaba, Hlatshwayo, Khumalo, Mabaró, Mayaba, Nkala and Ntini.
- 4.1.11 The different tribes and clans joined amaHlubi because amaHlubi were blessed with a gift of rainmaking and knowledge of traditional medicines.

4.1.12 During the reign of Shaka, amaHlubi lived peacefully with amaZulu as their neighbours. The spirit of coexistence is borne out by the following:

- (a) Dingiswayo, Shaka's mentor, sought shelter from Bungane (of amaHlubi) when he was on the run from the spear of his father, Jobe;
- (b) During his shelter by amaHlubi, Dingiswayo was appointed as *induna* (headman) by Bungane, the king of amaHlubi;
- (c) During the reign of Mthimkhulu II, amaNgwane attacked amaHlubi and killed their king, Mthimkhulu II. Consequently, Shaka attacked and conquered amaNgwane.
- (d) IziYendane, a regiment of amaHlubi, volunteered its services to Shaka and was considered by him as one of the most trusted regiments.

(e) Although Shaka attacked and conquered many tribes during the reign of Bungane and Mthimkhulu, amaHlubi were spared.

(f) It was not unusual for amaHlubi and amaZulu to support each other in the hour of need.

4.1.13 As already stated, Bungane was succeeded by Mthimkhulu II. Mthimkhulu II had several sons among others, Dlomo II (the heir), Langalibalele (Mtetwa), Duba, Magadla, Ludidi, Luzipho and Mhlambiso. Mthimkhulu II died in 1818 during the war with Matiwane of amaNgwane. Mpangazitha, one of the three sons of Bungane, assumed the leadership position. AmaHlubi fled.

4.1.14 Shaka started the Mfecane wars round about 1818. Mpangazitha was embroiled in several Mfecane skirmishes and wars. He died in a battle with amaNgwane on his return from Lesotho. Some of amaHlubi clans found in the Eastern Cape and Lesotho are his descendents. The name Phakaditha

commonly found in Lesotho today is the Sesotho version of Mpangazitha.

4.1.15 After the Mfecane wars, amaHlubi returned to their land led by Mthimkhulu's brother, Mahwanqa. Disputes over the kingship of amaHlubi started. The disputes were fuelled by the interference of the successors to Shaka. Unlike Shaka, his successors endeavoured to impose their supremacy over amaHlubi.

(a) Dingane, who reigned after Shaka (1828), attacked and raided amaHlubi for cattle. When Mthimkhulu's successor-in-title, Dlomo II, was due to take over kingship, Mahwanqa was reluctant to hand it over. Dlomo II sought advice from their neighbour Dingane, the king of amaZulu. Dlomo II subsequently killed Mahwanqa. On his visit to Dingane to report the news Dingane killed Dlomo II and his bodyguards. This again caused further depletion of amaHlubi.

(b) Again after the death of Dlomo II, a succession dispute occurred between the younger brother of Dlomo, Langalibalele I, and one of the sons of Mahwanqa, Mini. Dingane again intervened, he sent his army to assist Langalibalele I. After the defeat of Mini, Dingane endeavored to kill Langalibalele I, but was unsuccessful.

(c) Mpande, who succeeded Dingane in 1840, also attacked amaHlubi in 1848.

4.1.16 In 1843 the new British Colony northern border had cut through amaHlubi land and in particular uMzinyathi district, which had always been home for amaHlubi. This further divided amaHlubi who had returned to uMzinyathi, their home. Some were living in the Colony and others were living under the kingdom of KwaZulu.

4.1.17 The attack by Mpande caused further strife and depletion of amaHlubi. AmaHlubi fled their homeland, uMzinyathi, under the leadership of Langalibalele I, not because they were defeated, but to avoid a larger

force of amaZulu that would be sent to compel Langalibalele's submission. They settled in the present-day Ladysmith area along the Klip River, and later sojourned to the foothills of the Drakensberg Mountain, the present-day Escourt.

4.1.18 AmaHlubi in Natal grew, not only in numbers but also in prosperity. Langalibalele's position of influence in African societies was enhanced by his reputation as a rainmaker. AmaHlubi in the Eastern Cape, under various traditional leaders of amaHlubi, continue to recognize Natal as home of their supreme royal house, and recognize Langalibalele I as their king.

4.1.19 The general defiance of the colonial authority and illegal possession of firearms by Langalibalele I became a security threat to the colonialists:-

(a) Rumour had it that Langalibalele I was collecting guns for purposes of planning rebellion.

(b) In 1870 Langalibalele I, was arrested and prosecuted for treason and rebellion.

(c) Langalibalele I endeavored to escape but was unsuccessful. This was regarded by the colonialists as an act of treason. Consequently, a proclamation dated 11 November 1873 was issued in terms of which Langalibalele I was deposed.

4.1.20 Langalibalele I was later detained in Robben Island and exiled in Cape Town until 1887 when he was allowed to return to Zwartkop in Natal, under some form of house arrest. He never regained his power as king of amaHlubi. In 1889, Langalibalele I died and was buried on the foothills of the Drakensberg Mountain.

4.1.21 In 1897 Langalibalele's son, Siyephu, took over the leadership of amaHlubi. He ruled until his death in 1910.

4.1.22 Tatazela kaSiyephu only ascended the throne in 1926. He died in 1956. He was succeeded by the Claimant, Muziwenkosi Johannes Radebe, Langalibalele II, in 1974.

5.

CUSTOMARY LAW OF SUCCESSION

5.1 Succession to the kingship amaHlubi

- 5.1.1 Customary succession among amaHlubi is governed by the principle of male primogeniture. Ordinarily a female could not succeed.
- 5.1.2 Traditionally, a king marries several wives. The status of a wife within a polygamous marriage determines kingship. The most senior of these wives is *iNdllovukazi ye sizwe*, her residence is called *indlunkulu*. She should be a princess from another royal family and her *lobola* is derived from the contributions of the traditional community of amaHlubi. The other wives are ranked in terms of the order of their marriage.

5.1.3 The first-born son of *iNdllovukazi ye sizwe* succeeds his father. Before he ascends the throne the successor must -

(a) undergo certain rituals including initiation. After he has completed the initiation, a ceremony wherein a beasts are slaughtered is held and the heir apparent is strengthened with traditional kingship medicine;

(b) marry his first wife who should be from the Xaba or the Msimang clans, who are part of the traditional community of amaHlubi.

5.2 If the above general principles of customary law of succession fail to produce an heir. The following is resorted to-

(a) Where *iNdllovukazi ye sizwe* fails to bear an heir, the younger sister or a close relative of *iNdllovukazi ye sizwe* is taken to bear an heir. Alternatively, one of the king's younger wives who has no sons is chosen to bear an heir.

(b) If the leader dies without an heir, his brother may through the custom of *ukungena*, raise seed for his deceased brother. For example, Ncobo died without an heir. His brother Hadebe was made regent and entered into a union of *ukungena* with Ncobo's widow, LamaHlubi (the great wife). Dlomo was born of the union he succeeds.

6.

CURRENT STATUS

6.1 Muziwenkosi Johannes Radebe, Langalibalele II, is officially recognised as a senior traditional leader within the uKhahlamba district. He was appointed as such in terms of the Black Administration Act 38 of 1927, on 17 September 1974.

6.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognized as a traditional leader immediately before the commencement of this Act, is deemed to have been recognized as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26”

6.3 The area of jurisdiction that is claimed is uMzinyathi, Newcastle, Ladysmith, Escourt and Ixopo.

7.

DETERMINATION

7.1 Issues to be determined

7.1.1 The issues are:

- (a) whether in the course of the history of amaHlubi, a kingship was established;
- (b) How and when was the kingship was lost;

(d) Can such kingship be restored?

7.2 **Analysis of Issues**

7.2.1 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.

7.3 **Analysis of Evidence**

7.3.1 AmaHlubi trace their origins from abaMbo or amaLala. Like most Africans, they formed part of downwards migration from central Africa. They arrived earlier and were larger in number than amaZulu and amaXhosa. At that stage, they were known as amaMpembe/ amaNgelengele / ImiHuhu.

7.3.2 They first settled along Limbombo Mountains, north of the present day Zululand, along the Swaziland, Mozambique borders.

7.3.3 When they moved South during the 13th century they left a section of their community which was later absorbed by amaSwazi.

7.3.4 They moved to uMzinyathi around 1650, and it was around this time that they changed their name to amaHlubi.

7.3.5 Even though amaHlubi claim to have had kingship from the 11th century as amaMpembe or amaNgelengele etc, their kingship if any might have been established when different tribes and clans joined them. This was because of their blessing with a gift of rainmaking and knowledge of traditional medicines, during the reign of Bungane.

7.3.6 The Commission finds that:

(a) AmaMpembe/amaNgelengele/imiHuhu, were just like all other indigenous peoples of South Africa, semi-independent entities, but not a kingdom. They lived in loose confederations. Their neighbours included amaNdwandwe, amaZulu, abaThethwa, amaNgwane, amaQwabe etc.

- (b) The order of the day was to fight and conquer in order to extend areas of influence and incorporating of smaller communities.
- (c) It is common cause that Shaka ultimately conquered and consolidated many traditional communities including amaNdwandwe and abaThethwa and other small communities simply surrendered.
- (d) Even if it is accepted that Shaka had a good relationship with amaHlubi, amaHlubi had already been attacked and disintergrated by Matiwane, the chief of amaNgwane in 1818.
- (e) When Mpangazitha fled to Lesotho with some followers after the death of Mthimkhulu II, amaHlubi were further depleted. Even when Mpangazitha attempted to return in 1825 he was killed by amaNgwane, this led to further depletion of the nation of amaHlubi.

(f) The succession dispute within amaHlubi created an opportunity for their rivals, amaZulu to destroy amaHlubi further. After Dlomo II had killed his uncle Mahwanqa, Dingane also killed Dlomo II and his bodyguards.

(g) The attack by of amaHlubi by Dingane caused amaHlubi who were disintergrated to further deplete as they fled Mzinyathi under the leadership of Langalibalele. It is the Commission's finding further that when they fled they were defeated. As African saying goes:

“the bull who remains in the kraal is the victorious bull.”

(h) There is no evidence that they revived or strengthened their kingship when they were at Escourt.

(i) Instead, amaHlubi claim that they returned to the land which had been occupied by their forefathers. It is common knowledge that, that part of Natal had

already been subjugated by Shaka. When Shaka ascended the throne there were about 50 independent traditional communities in KwaZulu between 1816 to 1828 he attacked, conquered and subjugated most communities whilst others simply submitted and paid tribute and allegiance to the new king.

- (j) Even if it is accepted that amaHlubi were independent of the kingdom of KwaZulu established by Shaka. The place that they fled to when running away from Dingane, namely Ladysmith, Escourt had already been conquered by Shaka.

7.3.7 It is the Commission's considered view that:

- (a) The kingship of amaHlubi which might have been created when they were joined by other smaller tribes and clans as they were gifted in rain-making and knowledge of traditional medicines, disintegrated by the Mfecane Wars and succession disputes.

- (b) The arrest of the leader of amaHlubi Langalibalele I in 1873, occurred when amaHlubi had already been disintegrated. This is the reason why they were unable to sustain the kingship during his arrest and thereafter.
- (c) AmaHlubi, in their own version are scattered all over South Africa, and their great place is KwaZulu-Natal, Escourt. The majority of their traditional leaders are in the Eastern Cape, some in Mpumalanga, Limpopo, and North West. There are others who are alleged to be outside the Republic, like Zimbabwe, Lesotho and Swaziland.
- (d) Part of the mandate of the Commission in terms of the Framework Act, is to establish uniformity in the Republic, in respect of the status afforded to a king or queen.
- (e) The case of amaHlubi is unique; a substantial numbers of senior traditional leaders are in the Eastern Cape, within the areas of jurisdiction and

under the authority of other kings. These senior traditional leaders are members of the traditional structures of the areas within which they reside.

- (f) The Framework Act does not provide for a senior traditional leader to be under the authority of one king whilst residing in the area of jurisdiction of another. In the case of amaHlubi this would be impossible.
- (g) One of the factors the Commission has to consider is that, the principal leader should rule over the entire traditional community with similar linguistic and cultural affinities rather than a section thereof.
- (h) AmaHlubi do not share similar linguistic and cultural affinities. To the contrary they have been subsumed into traditional communities within which they reside. Consequently, the language and culture of amaHlubi who reside in KwaZulu-Natal, North-West, Eastern-Cape, Limpopo and Mpumalanga are very diverse. The disintegration and dispersal caused by the Mfecane wars and

finalized by the colonialists in 1873 created great difficulties for amaHlubi.

- (i) As it has been stated before the traditional community should not have lost its independence through indigenous political processes which resolved themselves before colonial intrusion. By the time the colonialists interfered, amaHlubi as a community had already been depleted by the Mfecane Wars and succession disputes and only remnants remained.

8.

CONCLUSION

8.1 In Conclusion:

8.1.1 In terms of the Framework Act, amaHlubi do not have kingship.

8.1.2 Thus, there is no kingship to be restored.

8.1.3 Therefore, the claim by Muziwenkosi Johannes Radebe is unsuccessful.

DETERMINATION ON THE AMAHLUBI KINGSHIP CLAIM

I N D E X

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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 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 are imperialism and colonization; repressive laws, in particular, the Black Administration Act 38, of 1927 and apartheid laws which provided for the creation of territorial authorities, self-governing states and pseudo-independent enclaves.

1.2 ESTABLISHMENT OF THE COMMISSION

- (a) The dignity of the institution of traditional leadership has been negatively affected. 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.
- (b) The Commission is established in terms of section 23 of the Traditional Leadership and Governance Framework Act 2003, Act 41 of 2003.

1.3 **FUNCTIONS OF THE COMMISSION**

- (a) In terms of section 25, the Commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising from any province. Accordingly, in terms of section 25(2)(a) 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 recognized 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'; and
- (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 25(3),

(a) *“When considering a dispute or claim the Commission must consider and apply customary law and customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.*

(b) *The Commission must-*

(i) *In respect of kingship, 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;*

2.

FOCUS

2.1 The investigation under focus is in relation to the claim for:

2.1.1 the restoration of the kingship claim by the traditional community of amaHlubi in terms of sections 25(4) and 25(2)(a)(vi);

(a) Section 25(4) provides that;

“The Commission has the authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection (2)(a)(vi)”.

(b) Section 25(2)(a)(vi) provides that :

The Commission has authority to investigate, either on request or of its own accord-

“(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”.

2.2 The claim under focus is lodged by Muziwenkosi Johannes Radebe Langalibalele II. It is a claim for the restoration of the kingship of amaHlubi that was lost through colonial intervention.

3.

METHODOLOGY

3.1 In the process of its investigation, the Commission conducted public hearings in two stages.

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

3.1.2 The second stage was held after the Commission had conducted its own research. The purpose of this second stage was to canvass information obtained from the research of the Commission and not raised during the first stage.

3.1.3 The Claimant had been furnished with a set of questions arising from the research of the Commission. He was expected to respond thereto before the second public hearing was conducted. The hearing was intended to afford the Claimant an opportunity to expand, explain and contextualize his responses.

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

3.2.1 Public hearings in which selected members of amaHlubi royal house and others appointed by them testified under oath and referred the Commission to supplementary research material;

3.2.2 This was followed by an opportunity for commissioners to raise questions and seek clarity from the presenters;

3.2.3 Interested parties were afforded an opportunity to challenge the version of the royal house and state their case; (This was only applicable to the first stage).

3.2.4 Members of the public were permitted to pose questions to the presenters and make comments. (This was only applicable to the first stage).

3.2.5 The Claimant was represented by Bhekithemba Langalibalele and Fungile Dothwana.

3.2.6 The Claimant was given an opportunity to make closing arguments. On 27 July 2009 the Claimant was given a cut-off date of 3 August 2009 to make further written inputs if he so desired.

4.

HISTORICAL BACKGROUND

4.1 According to the evidence tendered, the historical background of amaHlubi is as follows:

4.1.1 AmaHlubi are of eMbo or amaLala origin. They formed part of the eMbo downward migration from Central Africa, known as the kingdom of Congo or Congo kingdoms. They were the largest formation of the eMbo nation. At this stage, they were known as amaNgelengele or amaMpembe or imiHuhu. They are a much older tribe than either amaZulu or amaXhosa.

4.1.2 On their downward migration, amaLala at first settled briefly along the Lubombo Mountains, a range extending from the north of the present-day Kwa-Zulu

Natal, northwards along the Swaziland – Mozambique border.

4.1.3 During the 13th century amaNgelengele moved south and settled in the present-day KwaZulu-Natal, leaving behind a section of the eMbo nation, which later became known as amaSwazi.

4.1.4 AmaNgelengele (amaHlubi) occupied the territory, which was marked by the Pongola river on the north-east border. On the east, the territory extended beyond Blood river (*Income*), extending south to where Umzinyathi and Tugela Rivers meet. Further south were the Bushmen River and the Drakensberg Mountain, which also made up the western border.

4.1.5 It is estimated that amaHlubi moved to uMzinyathi region around 1650. However, some historians state that amaHlubi arrived in Natal in 1500. It was around 1650 that their name changed from amaMpembe or amaNgelengele or imiHuhu to amaHlubi.

4.1.6 The name changed to amaHlubi after Ncobo ka Mthimkhulu I had married a daughter of a Bhele traditional leader, Hlubi, but passed away without male issue. Prince Hadebe, of the right-hand-house, raised seed on behalf of the deceased. A dispute followed between the house of Hadebe and the great house. The descendants adopted a neutral name, LamaHlubi (that is, *isizwe sika LamaHlubi*) the nation of the daughter of Hlubi. Later the prefix was dropped and they were known as amaHlubi. The Hadebe house followed suite.

4.1.7 Hlubi-land would include the present-day: Charlestown, Volkrust, Newcastle, Madadeni, Utrecht, Wakkeestroom. Alckospruit, Paulpieterburg, Vryheid, Dundee, Nquthu, Glencoe, Harrismith, Van Reenen, Ladysmith, Colenso, Winterton, Weenen up to Escourt. It also extended to Hammarsdale and included Pietermaritzburg.(check transcript)

4.1.8 AmaHlubi are therefore the earliest rulers and occupants of what the colonialists later called the Natal Colony.

- 4.1.9 During the reign of Bungane, amaHlubi ruled a larger territory than even abaThembu and amaNdwandwe, who were larger than the Zulu chiefdom.
- 4.1.10 The kingship of amaHlubi was established and became stronger when different tribes and clans joined amaHlubi. For example: Mdakana, Mlambo and Gumbi broke away from amaNgwane; Kheswa and Mnguni broke away from amaChunu; Nkwali Mkhwanazi from Ndwandwe; Maduna (Matona) was of Sotho origin; Nkomo and amaZangele of Thiyani origin; Tshabalala and Msimang of Swazi origin; and Xaba of Mthethwa origin came through marriage; and amaBongwe, Dontsa, Ndaba, Hlatshwayo, Khumalo, Mabaró, Mayaba, Nkala and Ntini.
- 4.1.11 The different tribes and clans joined amaHlubi because amaHlubi were blessed with a gift of rainmaking and knowledge of traditional medicines.

4.1.12 During the reign of Shaka, amaHlubi lived peacefully with amaZulu as their neighbours. The spirit of coexistence is borne out by the following:

- (a) Dingiswayo, Shaka's mentor, sought shelter from Bungane (of amaHlubi) when he was on the run from the spear of his father, Jobe;
- (b) During his shelter by amaHlubi, Dingiswayo was appointed as *induna* (headman) by Bungane, the king of amaHlubi;
- (c) During the reign of Mthimkhulu II, amaNgwane attacked amaHlubi and killed their king, Mthimkhulu II. Consequently, Shaka attacked and conquered amaNgwane.
- (d) IziYendane, a regiment of amaHlubi, volunteered its services to Shaka and was considered by him as one of the most trusted regiments.

(e) Although Shaka attacked and conquered many tribes during the reign of Bungane and Mthimkhulu, amaHlubi were spared.

(f) It was not unusual for amaHlubi and amaZulu to support each other in the hour of need.

4.1.13 As already stated, Bungane was succeeded by Mthimkhulu II. Mthimkhulu II had several sons among others, Dlomo II (the heir), Langalibalele (Mtetwa), Duba, Magadla, Ludidi, Luzipho and Mhlambiso. Mthimkhulu II died in 1818 during the war with Matiwane of amaNgwane. Mpangazitha, one of the three sons of Bungane, assumed the leadership position. AmaHlubi fled.

4.1.14 Shaka started the Mfecane wars round about 1818. Mpangazitha was embroiled in several Mfecane skirmishes and wars. He died in a battle with amaNgwane on his return from Lesotho. Some of amaHlubi clans found in the Eastern Cape and Lesotho are his descendents. The name Phakaditha

commonly found in Lesotho today is the Sesotho version of Mpangazitha.

4.1.15 After the Mfecane wars, amaHlubi returned to their land led by Mthimkhulu's brother, Mahwanqa. Disputes over the kingship of amaHlubi started. The disputes were fuelled by the interference of the successors to Shaka. Unlike Shaka, his successors endeavoured to impose their supremacy over amaHlubi.

(a) Dingane, who reigned after Shaka (1828), attacked and raided amaHlubi for cattle. When Mthimkhulu's successor-in-title, Dlomo II, was due to take over kingship, Mahwanqa was reluctant to hand it over. Dlomo II sought advice from their neighbour Dingane, the king of amaZulu. Dlomo II subsequently killed Mahwanqa. On his visit to Dingane to report the news Dingane killed Dlomo II and his bodyguards. This again caused further depletion of amaHlubi.

(b) Again after the death of Dlomo II, a succession dispute occurred between the younger brother of Dlomo, Langalibalele I, and one of the sons of Mahwanqa, Mini. Dingane again intervened, he sent his army to assist Langalibalele I. After the defeat of Mini, Dingane endeavored to kill Langalibalele I, but was unsuccessful.

(c) Mpande, who succeeded Dingane in 1840, also attacked amaHlubi in 1848.

4.1.16 In 1843 the new British Colony northern border had cut through amaHlubi land and in particular uMzinyathi district, which had always been home for amaHlubi. This further divided amaHlubi who had returned to uMzinyathi, their home. Some were living in the Colony and others were living under the kingdom of KwaZulu.

4.1.17 The attack by Mpande caused further strife and depletion of amaHlubi. AmaHlubi fled their homeland, uMzinyathi, under the leadership of Langalibalele I, not because they were defeated, but to avoid a larger

force of amaZulu that would be sent to compel Langalibalele's submission. They settled in the present-day Ladysmith area along the Klip River, and later sojourned to the foothills of the Drakensberg Mountain, the present-day Escourt.

4.1.18 AmaHlubi in Natal grew, not only in numbers but also in prosperity. Langalibalele's position of influence in African societies was enhanced by his reputation as a rainmaker. AmaHlubi in the Eastern Cape, under various traditional leaders of amaHlubi, continue to recognize Natal as home of their supreme royal house, and recognize Langalibalele I as their king.

4.1.19 The general defiance of the colonial authority and illegal possession of firearms by Langalibalele I became a security threat to the colonialists:-

(a) Rumour had it that Langalibalele I was collecting guns for purposes of planning rebellion.

(b) In 1870 Langalibalele I, was arrested and prosecuted for treason and rebellion.

(c) Langalibalele I endeavored to escape but was unsuccessful. This was regarded by the colonialists as an act of treason. Consequently, a proclamation dated 11 November 1873 was issued in terms of which Langalibalele I was deposed.

4.1.20 Langalibalele I was later detained in Robben Island and exiled in Cape Town until 1887 when he was allowed to return to Zwartkop in Natal, under some form of house arrest. He never regained his power as king of amaHlubi. In 1889, Langalibalele I died and was buried on the foothills of the Drakensberg Mountain.

4.1.21 In 1897 Langalibalele's son, Siyephu, took over the leadership of amaHlubi. He ruled until his death in 1910.

4.1.22 Tatazela kaSiyephu only ascended the throne in 1926. He died in 1956. He was succeeded by the Claimant, Muziwenkosi Johannes Radebe, Langalibalele II, in 1974.

5.

CUSTOMARY LAW OF SUCCESSION

5.1 Succession to the kingship amaHlubi

5.1.1 Customary succession among amaHlubi is governed by the principle of male primogeniture. Ordinarily a female could not succeed.

5.1.2 Traditionally, a king marries several wives. The status of a wife within a polygamous marriage determines kingship. The most senior of these wives is *iNdllovukazi ye sizwe*, her residence is called *indlunkulu*. She should be a princess from another royal family and her *lobola* is derived from the contributions of the traditional community of amaHlubi. The other wives are ranked in terms of the order of their marriage.

5.1.3 The first-born son of *iNdllovukazi ye sizwe* succeeds his father. Before he ascends the throne the successor must -

(a) undergo certain rituals including initiation. After he has completed the initiation, a ceremony wherein a beasts are slaughtered is held and the heir apparent is strengthened with traditional kingship medicine;

(b) marry his first wife who should be from the Xaba or the Msimang clans, who are part of the traditional community of amaHlubi.

5.2 If the above general principles of customary law of succession fail to produce an heir. The following is resorted to-

(a) Where *iNdllovukazi ye sizwe* fails to bear an heir, the younger sister or a close relative of *iNdllovukazi ye sizwe* is taken to bear an heir. Alternatively, one of the king's younger wives who has no sons is chosen to bear an heir.

- (b) If the leader dies without an heir, his brother may through the custom of *ukungena*, raise seed for his deceased brother. For example, Ncobo died without an heir. His brother Hadebe was made regent and entered into a union of *ukungena* with Ncobo's widow, LamaHlubi (the great wife). Dlomo was born of the union he succeeds.

6.

CURRENT STATUS

6.1 Muziwenkosi Johannes Radebe, Langalibalele II, is officially recognised as a senior traditional leader within the uKhahlamba district. He was appointed as such in terms of the Black Administration Act 38 of 1927, on 17 September 1974.

6.2 As a transitional arrangement, section 28(1) of the Framework Act provides as follows:

“Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still

recognized as a traditional leader immediately before the commencement of this Act, is deemed to have been recognized as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26”

6.3 The area of jurisdiction that is claimed is uMzinyathi, Newcastle, Ladysmith, Escourt and Ixopo.

7.

DETERMINATION

7.1 Issues to be determined

7.1.1 The issues are:

- (a) whether in the course of the history of amaHlubi, a kingship was established;
- (b) How and when was the kingship was lost;
- (d) Can such kingship be restored?

7.2 Analysis of Issues

7.2.1 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.

7.3 **Analysis of Evidence**

7.3.1 AmaHlubi trace their origins from abaMbo or amaLala. Like most Africans, they formed part of downwards migration from central Africa. They arrived earlier and were larger in number than amaZulu and amaXhosa. At that stage, they were known as amaMpembe/ amaNgelengele / ImiHuhu.

7.3.2 They first settled along Limbombo Mountains, north of the present day Zululand, along the Swaziland, Mozambique borders.

7.3.3 When they moved South during the 13th century they left a section of their community which was later absorbed by amaSwazi.

7.3.4 They moved to uMzinyathi around 1650, and it was around this time that they changed their name to amaHlubi.

7.3.5 Even though amaHlubi claim to have had kingship from the 11th century as amaMpembe or amaNgelengele etc, their kingship if any might have been established when different tribes and clans joined them. This was because of their blessing with a gift of rainmaking and knowledge of traditional medicines, during the reign of Bungane.

7.3.6 The Commission finds that:

(a) AmaMpembe/amaNgelengele/imiHuhu, were just like all other indigenous peoples of South Africa, semi-independent entities, but not a kingdom. They lived in loose confederations. Their neighbours included amaNdwandwe, amaZulu, abaThethwa, amaNgwane, amaQwabe etc.

(b) The order of the day was to fight and conquer in order to extend areas of influence and incorporating of smaller communities.

(c) It is common cause that Shaka ultimately conquered and consolidated many traditional

communities including amaNdwandwe and abaThethwa and other small communities simply surrendered.

- (d) Even if it is accepted that Shaka had a good relationship with amaHlubi, amaHlubi had already been attacked and disintegrated by Matiwane, the chief of amaNgwane in 1818.
- (e) When Mpangazitha fled to Lesotho with some followers after the death of Mthimkhulu II, amaHlubi were further depleted. Even when Mpangazitha attempted to return in 1825 he was killed by amaNgwane, this led to further depletion of the nation of amaHlubi.
- (f) The succession dispute within amaHlubi created an opportunity for their rivals, amaZulu to destroy amaHlubi further. After Dlomo II had killed his uncle Mahwanqa, Dingane also killed Dlomo II and his bodyguards.

(g) The attack by of amaHlubi by Dingane caused amaHlubi who were disintergrated to further deplete as they fled Mzinyathi under the leadership of Langalibalele. It is the Commission's finding further that when they fled they were defeated. As African saying goes:

“the bull who remains in the kraal is the victorious bull.”

(h) There is no evidence that they revived or strengthened their kingship when they were at Escourt.

(i) Instead, amaHlubi claim that they returned to the land which had been occupied by their forefathers. It is common knowledge that, that part of Natal had already been subjugated by Shaka. When Shaka ascended the throne there were about 50 independent traditional communities in KwaZulu between 1816 to 1828 he attacked, conquered and subjugated most communities whilst others simply

submitted and paid tribute and allegiance to the new king.

- (j) Even if it is accepted that amaHlubi were independent of the kingdom of KwaZulu established by Shaka. The place that they fled to when running away from Dingane, namely Ladysmith, Escourt had already been conquered by Shaka.

7.3.7 It is the Commission's considered view that:

- (a) The kingship of amaHlubi which might have been created when they were joined by other smaller tribes and clans as they were gifted in rain-making and knowledge of traditional medicines, disintegrated by the Mfecane Wars and succession disputes.
- (b) The arrest of the leader of amaHlubi Langalibalele I in 1873, occurred when amaHlubi had already been disintegrated. This is the reason why they

were unable to sustain the kingship during his arrest and thereafter.

- (c) AmaHlubi, in their own version are scattered all over South Africa, and their great place is KwaZulu-Natal, Escourt. The majority of their traditional leaders are in the Eastern Cape, some in Mpumalanga, Limpopo, and North West. There are others who are alleged to be outside the Republic, like Zimbabwe, Lesotho and Swaziland.
- (d) Part of the mandate of the Commission in terms of the Framework Act, is to establish uniformity in the Republic, in respect of the status afforded to a king or queen.
- (e) The case of amaHlubi is unique; a substantial numbers of senior traditional leaders are in the Eastern Cape, within the areas of jurisdiction and under the authority of other kings. These senior traditional leaders are members of the traditional structures of the areas within which they reside.

- (f) The Framework Act does not provide for a senior traditional leader to be under the authority of one king whilst residing in the area of jurisdiction of another. In the case of amaHlubi this would be impossible.

- (g) One of the factors the Commission has to consider is that, the principal leader should rule over the entire traditional community with similar linguistic and cultural affinities rather than a section thereof.

- (h) AmaHlubi do not share similar linguistic and cultural affinities. To the contrary they have been subsumed into traditional communities within which they reside. Consequently, the language and culture of amaHlubi who reside in KwaZulu-Natal, North-West, Eastern-Cape, Limpopo and Mpumalanga are very diverse. The disintegration and dispersal caused by the Mfecane wars and finalized by the colonialists in 1873 created great difficulties for amaHlubi.

- (i) As it has been stated before the traditional community should not have lost its independence through indigenous political processes which resolved themselves before colonial intrusion. By the time the colonialists interfered, amaHlubi as a community had already been depleted by the Mfecane Wars and succession disputes and only remnants remained.

8.

CONCLUSION

8.1 In Conclusion:

8.1.1 In terms of the Framework Act, amaHlubi do not have kingship.

8.1.2 Thus, there is no kingship to be restored.

8.1.3 Therefore, the claim by Muziwenkosi Johannes Radebe is unsuccessful.

DETERMINATION ON THE AMASHANGANA KINGSHIP CLAIM

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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 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.

(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

- (a) 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.
- (b) The Commission is established in terms of section 22(1) the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.3 **FUNCTIONS OF THE COMMISSION**

The Commission operates nationally and has authority to decide on any traditional leadership disputes and claims, arising from any province. Accordingly in terms of section 25 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;
- (ii) claims by communities to be recognized as traditional communities;
- (iii) the legitimacy of the establishment or disestablishment of "tribes";
- (iv) disputes resulting from the determination of traditional authority boundaries and the merging or division of "tribes".

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

Furthermore, 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.

In order to satisfy itself whether a kingship exists, the Commission has taken the following into consideration:

- (i) the need to establish uniformity in the Republic in respect of the status afforded to a king or queen;
- (ii) whether a recognized 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 recognized 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 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 The investigation under focus is in relation to:-

2.1.1 a new kingship claim by the traditional community of AmaShangana in terms of sections 25(4) and 25(2)(a)(vi);

(a) Section 25(4) provides that:

“The Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection (2)(a)(vi)”.

- (b) Section 25(2)(a)(vi) provides that the Commission has authority to investigate, either on request or of its own accord-

“...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”.

2.2 The claim under focus is lodged by Mpisane Eric Nxumalo. It is the claim for the restoration of the kingship of amaShangana.

3.

METHODOLOGY

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

3.1.1 The first public hearing was held on 10 and 27 March 2006 in the old Legislature Hall, in Giyane, Limpopo.

3.1.2 The second public hearing was held on 08 December 2008 at Oasis Lodge in Polokwane, Limpopo. The second stage was held after the Commission had conducted its own research. The purpose of this hearing was to canvass information gathered during the research of the Commission.

3.1.3 The Claimant had been furnished with a set of questions arising from the research of the Commission. He was expected to file the response before the public hearing. The hearing was intended to afford the Claimant an opportunity to expand, explain and contextualize his responses.

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

- 3.2.1 Public hearings in which selected members of amaShangana royal house and others appointed by them testified under oath and referred the Commission to supplementary research material;
- 3.2.2 This was followed by an opportunity for commissioners to raise questions and seek clarity from the presenters;
- 3.2.3 Interested parties were afforded an opportunity to challenge the version of the royal house and state their case; (This was only applicable to the first stage).
- 3.2.4 Members of the public were permitted to pose questions to the presenters and make comments. (This was only applicable to the first stage).
- 3.2.5 The claimant was given an opportunity to make closing arguments.

4.

4.1 **HISTORICAL BACKGROUND**

4.1.1 AmaShangana are Nguni people. Mnguni is the forefather of the Nguni people.

4.1.2 The Nguni people are divided into southern and northern Nguni. The southern Nguni include among others amaXhosa, abaThembu, amaFengu, while the northern Nguni include amaZulu, amaSwazi, amaNdebele and amaNdwandwe.

4.1.3 Nxumalo was the first leader of amaNdwandwe during the seventeenth century. They occupied the northern part of the then Zululand, from Pongola River in the north to Umfolozi in the south, Ngome River in the north-west and St. Lucia Bay in the east.

4.1.4 Nxumalo was succeeded by Ndwandwe, Mkhathswa, Gaza I, Langa I, Mavuso, Ludonga, Xaba, Langa II and Zwide II.

- 4.1.5 During 1819, amaNdwandwe were under the leadership of Zwide II. Soshangana (also known as Manukusi) was his cousin, military commander and leader of the Gaza regiment.
- 4.1.6 After the defeat of Zwide by Shaka in 1819, Soshangana refused to be incorporated into the Zulu kingdom. He fled with his followers along the eastern foothills of the Lubombo mountains to the upper Tembe River.
- 4.1.7 Soshangana and his followers later crossed the Tembe River to Delagoa Bay. He fought, defeated and subjugated the vaThonga communities he found in the area. In 1828, he was attacked by Shaka. He moved further north to an area known as Bileni.
- 4.1.8 Along his way to Bileni, Soshangana subjugated and incorporated indigenous communities that included amongst others vaNdzawu, vaNgomane, vaShongonono, vaRhonga, vaChopi, vaShona and vaTshwa. Thus, Soshangana established his kingdom.

He established his Great Place at Bileni. He named his newly formed traditional community amaShangana. The kingdom was named “Gaza,” after one of his ancestors.

4.1.9 Soshangana married two wives. He fathered Mzila from the first wife, Sokujamile Madlope. His great wife, who was of the Nkosi clan, had two sons, Nomboya and Mawewe. Nomboya, the heir apparent, predeceased his father.

4.1.10 Soshangana fought his way further north, and eventually settled in the area known as Musapa between Limpopo and Zambezi Rivers. Soshangana died at Chayimite in 1858. He had ruled for 37 years.

4.1.11 Mawewe ascended the throne against the wish and advice of his father who preferred Mzila as his successor. In 1862 Mzila successfully wrestled the kingship from Mawewe and ascended the throne. Mawewe fled to Swaziland where he died in 1872.

- 4.1.12 Mzila fathered three sons. Mdungazi, his eldest son, was from the first wife. His other sons were Mafemani and Komokomo. The latter two predeceased their father.
- 4.1.13 It was during the reign of Mzila that missionaries arrived in the Gaza kingdom. The Portuguese had already settled in the area. His reign experienced the beginning of the subjugation of the Gaza kingdom and intensification of colonialism. Numerous battles with the Portuguese ensued over the land and the introduction of the monetary economy. Mzila died in 1884 after ruling for 21 years.
- 4.1.14 Mzila was succeeded by Mdungazi. Upon ascending the throne he changed his name to Nghunghunyani. He further moved along the Zoutpansberg Mountains. He subjugated local traditional communities, such as vaN'wanati and vaTshwa under chief Bingwani. In 1889, he established his Great Place and named it Mandlakazi.

- 4.1.15 Nghunghunyani had seven wives. He fathered the following sons: Godide and Buyisonto from the first wife; Thulamahashe, Nyameyindjhe and Mpikaniso from the second wife; Mawewe from the fourth wife; Mzila and others from minor houses.
- 4.1.16 In 1884 Nghunghunyani realized that his kingdom was being invaded by the Boers and the British. He signed a treaty with the Portuguese government, and by so doing compromised his sovereignty and independence. The Portuguese went on to demarcate boundaries of the Gaza kingdom and further dispossessed amaShangana of their land.
- 4.1.17 In 1895 Nghunghunyani placed his kingdom under the British to gain protection from the Portuguese. Nevertheless, the Portuguese attacked and defeated the Gaza regiments. This resulted in the dispersal of amaShangana all over the country and some became victims of the migrant labour system.
- 4.1.18 On 28 December 1895, the Portuguese captured Nghunghunyani, his sons Godide and Buyisonto, his

brothers, uncles as well as his generals. He pleaded for the release of his brothers, uncles and the generals. On 13 March 1896, Nghunghunyani, his sons and one of his generals were banished to Portugal as prisoners of war.

4.1.19 After the defeat by the Portuguese, amaShangana regrouped under Mpisane Nxumalo, the uncle of Nghunghunyani. Mpisane was forced to leave Mandlakazi together with the wives of Nghunghunyani and the remaining members of the royal family. He took along his followers, travelled west, and eventually settled at Bushbuckridge, in the present day Mpumalanga. Mpisane ruled as regent for Thulamahashe who was the qualifying successor in the absence of Godide and Buyisonto.

4.1.20 Nghunghunyani was the last king to rule over the united Gaza kingdom. He died on 23 December 1906 at the age of 56. He was buried in Portugal.

4.1.21 After the First World War in 1922, the two sons of Nghunghunyani and his general were released from

prison. Godide and the general passed away before they could rejoin their families. It was only Buyisonto who joined the royal family at Bushbuckridge, where he assumed the position of king of amaShangana. The South African government, however, did not recognize him as king, but as chief of amaShangana. He died on 12 October 1932.

4.1.22 Buyisonto fathered one son, Mafemani Heavyman Nxumalo. Khetho Nxumalo, his uncle, acted as regent during his minority until 1944. Mafemani Heavyman Nxumalo was installed and recognized as chief of amaShangana from 1944. In 1968, he was appointed chairman of amaShangana Tribal Authority. He died in 1973.

4.1.23 Mafemani Heavyman Nxumalo fathered one son, Mpisane Eric Nxumalo. Ngobo Nxumalo, his uncle, acted as regent for him during his minority. In 1981, Mpisane Eric Nxumalo was installed as senior traditional leader of amaShangana Traditional Authority. He is the incumbent and claimant in this matter.

5.

CUSTOMARY LAW OF SUCCESSION

5.1 Some amaShangana are of Nguni origin whilst others are amaShangana due to alliance or by conquest, such as vaChopi, vaNdzawu and vaHlengwe.

5.2 The customary law of succession of amaShangana reflects traces of the customary law of amaShangana of Nguni origin as well as that of amaShangana through conquest.

5.2.1 As it is with most African communities, customary law of succession among amaShangana is governed by the principle of male primogeniture. A female cannot succeed.

5.2.2 Mawewe adopted the customary law of succession from the Nguni. The first son of the wife whose *lobola* was paid for by the community succeeded his father.

5.2.3 Having successfully wrestled the kingship from Mawewe, Mzila changed the customary law of succession. He adopted that of the conquered amaShangana. The first born son of the first wife succeeded his father.

5.2.4 Any sexual activity on the part of the heir with one of the father's junior wives disqualifies him from ascending the throne.

6.

CURRENT STATUS

6.1 The Claimant, Mpisane Eric Nxumalo, is a senior traditional leader, appointed as such on 28 July 1981, in terms of paragraph 27 of schedule 1 of Act No. 21 of 1971.

6.2 The area of jurisdiction of Mpisane Eric Nxumalo comprises of Trust Farms and portions of Trust Farms in the Boksbokrand area and Pilgrim's Rest District as listed in Government Notice

No. 447, dated 23 March 1962 as amended with effect from 29 January 1981.

7.

DETERMINATION

7.1 Issues to be Determined

7.1.1 Issues to be determined are:

- (a) Whether in the course of the history of amaShangana a kingship was ever established;
- (b) If it was established, by whom, how and when;
- (c) Whether the kingship has since passed on from one generation to another according to the customary law and customs of amaShangana;

(d) If it is found that a kingship was established, when was it lost; and

(e) Can the kingship be restored?

7.2 **Analysis of Issues**

7.2.1 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.

7.3 **Analysis of Evidence**

- 7.3.1 AmaShangana are Nguni people. Mnguni is the forefather of the Nguni people.
- 7.3.2 The Nguni people are divided into southern and northern Nguni. The northern Nguni include amaZulu, amaSwati, amaNdebele and amaNdwandwe.
- 7.3.3 Nxumalo was the first leader of amaNdwandwe during the seventeenth century. He was succeeded by Ndwandwe, Mkhathshwa, Gaza I, Langa I, Mavuso, Ludonga, Xaba, Langa II and Zwide II.

- 7.3.4 During 1819, amaNdwandwe were under the leadership of Zwide II. Soshangana (also known as Manukusi) was his cousin, military commander and leader of the Gaza regiment.
- 7.3.5 After the defeat of Zwide by Shaka in 1819, Soshangana refused to be incorporated into the Zulu kingdom. He fled with his followers along the eastern foothills of the Lubombo mountains to the upper Tembe River.
- 7.3.6 Soshangana and his followers later crossed the Tembe River to Delagoa Bay. He fought, defeated and subjugated the vaThonga communities he found in the area. In 1828, he was attacked by Shaka. He moved further north to an area known as Bileni.
- 7.3.7 He further subjugated and incorporated indigenous communities that included amongst others vaNdzawu, vaNgomane, vaShongonono, vaRhonga, vaChopi, vaShona and vaTshwa. Thus, Soshangana established his kingdom. He established his Great Place at Bileni. He named his newly formed traditional

community amaShangana and the kingdom was named “Gaza,” after one of his ancestors.

7.3.8 Soshangana fathered Mzila, from the first wife, Nomboya and Mawewe from his great wife. Nomboya, the heir apparent, predeceased his father.

7.3.9 Soshangana fought his way further north and eventually settled in Musapa, the area between Limpopo and Zambezi Rivers. He died at Chayimite in 1858.

7.3.10 Mawewe ascended the throne. In 1862 Mzila successfully wrestled the kingship from Mawewe. Mawewe fled to Swaziland where he died in 1872.

7.3.11 Mzila fathered three sons: Mdungazi, from the first wife, Mafemani and Komokomo. The latter two predeceased their father.

7.3.12 The reign of Mzila experienced the beginning of the subjugation of the Gaza kingdom, intensification of colonialism and the introduction of the monetary

economy. Numerous battles with the Portuguese ensued over the land. Mzila died in 1884.

7.3.13 Mzila was succeeded by Mdungazi who changed his name to Nghunghunyani. Nghunghunyani further moved along the Zoutpansberg Mountains. He subjugated local traditional communities, such as vaN'wanati and vaTshwa under chief Bingwani. In 1889, he established his Great Place and named it Mandlakazi.

7.3.14 Nghunghunyani fathered several sons, among others, Godide and Buyisonto from the first wife and Thulamahashe from the second wife.

7.3.15 In 1884 Nghunghunyani signed a treaty with the Portuguese government and by so doing compromised his sovereignty and independence. The Portuguese went on to demarcate boundaries of the Gaza kingdom and further dispossessed amaShangana of their land.

- 7.3.16 In 1895 Nghunghunyani placed his kingdom under the British to gain protection from the Portuguese. Nevertheless, the Portuguese attacked and defeated the Gaza regiments. This resulted in the dispersal of amaShangana.
- 7.3.17 On 28 December 1895, Nghunghunyani, his sons Godide and Buyisonto, his brothers, uncles as well as his generals were captured by the Portuguese. On 13 March 1896, Nghunghunyani, his sons and one of his generals were banished to Portugal, as prisoners of war, where he later died on 23 December 1906. He was buried in Portugal.
- 7.3.18 After the defeat by the Portuguese, amaShangana regrouped under Mpisane Nxumalo, the uncle of Nghunghunyani. Mpisane and his followers travelled west and eventually settled at Bushbuckridge. Mpisane ruled as regent for Thulamahashe, the successor-in-title in the absence of Godide and Buyisonto.

- 7.3.19 After the First World War in 1922, the two sons of Nghunghunyani and his general were released from prison. Buyisonto joined the royal family at Bushbuckridge where he assumed the position of king of amaShangana. The South African government, however, did not recognize him as king, but as *hosi* of amaShangana.
- 7.3.20 Buyisonto fathered one son, Mafemani Heavyman Nxumalo. Buyisonto died on 12 October 1932. Mafemane's uncle, Khetho Nxumalo, acted as regent during his minority. Mafemani Heavyman Nxumalo was installed and recognized as *hosi* of amaShangana in 1944. In 1968, he was appointed chairman of amaShangana Tribal Authority. He died in 1973.
- 7.3.21 Mafemani Heavyman Nxumalo fathered one son, Mpisane Eric Nxumalo. His uncle, Ngcobo Nxumalo, acted as regent for him during his minority. In 1981 Mpisane Eric Nxumalo was installed as *hosi* of amaShangana Traditional Authority. He is the incumbent and Claimant in this matter.

7.4 The Commission finds that:

7.4.1 AmaShangana originate from amaNdwandwe, one of the northern Nguni groups.

7.4.2 Soshangana broke away from amaNdwandwe with his followers and established himself along the eastern foothills of the Lubombo Mountains towards upper Tembe River.

7.4.3 Soshangana fought, defeated and subjugated various indigenous communities he came across on his way towards Delagoa Bay. He welded these communities together into a new community which he later named amaShangana. Thus the kingship of amaShangana was established round about 1828.

7.4.4 In 1828, after he was attacked by Shaka, Soshangana moved further north to an area known as Bileni, where he further consolidated his kingship through conquering, subjugating and incorporating indigenous communities.

7.4.5 Soshangana was succeeded by Mawewe. In 1862 Mzila wrestled the kingship from Mawewe who subsequently fled to Swaziland where he died in 1872. It was not unusual for kingship to be usurped by might or through bloodshed. Thus Mzila became the rightful successor to the kingship of amaShangana. Mzila was succeeded by Nghunghunyani, the rightful heir and successor-in-title to the kingship of amaShangana.

7.4.6 In 1884, Nghunghunyani signed a treaty with the Portuguese government, and by so doing compromised his sovereignty and independence. Even after Nghunghunyani had placed his kingdom under the British in 1895, the Portuguese attacked and defeated amaShangana. Consequently, amaShangana neither regained their sovereignty nor their independence. This resulted in their dispersal. On 28 December 1895 Nghunghunyani was banished to Portugal as a prisoner of war, where he died on 23 December 1906. Nghunghunyani was the last to reign over a unified amaShangana.

7.4.7 After the defeat by the Portuguese round about 1896, Mpisane Nxumalo, the uncle of Nghunghunyani, left the Great Place, Mandlakazi. He travelled west together with his followers and the nucleus family of Nghunghunyani. He eventually settled at Bushbuckridge. As they settled at Bushbuckridge the kingship of amaShangana had already disintegrated. Neither Mpisane Nxumalo nor his successors re-established the amaShangana kingship that was destroyed by the Portuguese.

7.4.8 The claim for the restoration of the kingship of amaShangana predates 1 September 1927. No good grounds have been furnished for the restoration of the kingship that was lost long before 1 September 1927.

7.4.9 Mpisane Eric Nxumalo, the Claimant, could not have inherited the position of kingship from his predecessors, Buyisonto and Mafemani Heavyman Nxumalo, as the kingship was long lost.

8.

CONCLUSION

8.1 In Conclusion:

8.1.1 In terms of the Framework Act, amaShangana do not have kingship.

8.1.2 Thus, there is no kingship to be restored.

8.1.3 Therefore the claim lodged by Mpisane Eric Nxumalo is unsuccessful.

DETERMINATION ON THE KINGSHIP OF BAKAMAHLALELA

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1.

INTRODUCTION

1.1 CONSTITUTIONAL PROVISIONS

- (c) 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.

- (ii) 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**

- (a) 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.
- (b) The Commission is established in terms of section 22(1) the Traditional Leadership and Governance Framework Act 41 of 2003 (“the Framework Act”).

1.3 **FUNCTIONS OF THE COMMISSION**

The Commission operates nationally and has authority to decide on any traditional leadership disputes and claims, arising from any province. Accordingly in terms of section 25 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;
- (ii) claims by communities to be recognized as traditional communities;
- (iii) the legitimacy of the establishment or disestablishment of "tribes";
- (iv) disputes resulting from the determination of traditional authority boundaries and the merging or division of "tribes".

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

Furthermore, 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.

In order to satisfy itself whether a kingship exists, the Commission has taken the following into consideration:

- (i) the need to establish uniformity in the Republic in respect of the status afforded to a king or queen;
- (ii) whether a recognized 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 recognized 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 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 The investigation under focus is in relation to:

2.1.1 a new kingship claim by the traditional community of AmaSwati in terms of sections 25(4) and 25(2)(a) (vi);

(a) Section 25(4) provides that:

“The Commission has authority to investigate all traditional leadership claims

and disputes dating from 1 September 1927, subject to subsection (2)(a)(vi)”.

- (b) Section 25(2)(a)(vi) provides that the Commission has authority to investigate, either on request or of its own accord:

“...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”.

- 2.2 The claim under focus is lodged by Mandlenkhosi Mahlalela. It is a claim for the restoration of a kingship of bakaMahlalela.

3.

METHODOLOGY

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

3.1.1 The first stage was used to gather evidence and information. The Commission conducted a hearing for the Claimant, on 15 March 2006, at Mbangweni Multipurpose centre, Mbuzini, Mpumalanga.

3.1.2 The second hearing was held after the Commission had conducted its own research, on 30 July 2009. The purpose of this hearing was to canvass information gathered during the research of the Commission.

3.1.3 The Claimant had been furnished with a set of questions arising from the research of the Commission. He was expected to respond specifically to the said questions at the hearing.

3.2 During both stages the following procedure was followed:

3.2.1 Public hearings were conducted wherein selected members of the royal house and others appointed by them testified under oath and referred the Commission to supplementary research material.

- 3.2.2 This was followed by clarity seeking questions on the presentation from Commissioners.
- 3.2.3 Members of the public were given an opportunity to pose questions to the presenters and make comments. (This was applicable to the first stage only.)
- 3.2.4 Finally, the Claimant made a closing summary.

4.

HISTORICAL BACKGROUND

4.1 Nyezane Reuben Mahlalela, on behalf of the royal house, presented the historical background of bakaMahlalela as follows:

4.1.1 BakaMahlalela originate from Central Africa, sometimes referred to as eMbo (the place of the sun

or the reed). BakaMahlalela are also known as abaMbo or eMalangeni.

4.1.2 Whilst in Central Africa, eMalangeni were part of the abaMbo-Nguni led by Mnguni. They migrated southwards from the Great Lakes, round about 1570. Emalangeni settled around Delagoa Bay/Maputoland, in the present day Mozambique.

4.1.3 The leader of eMalangeni possessed ritual paraphernalia that fortified his leadership. The leadership was passed on from one generation to the next through the principle of male primogeniture.

4.1.4 According to oral narrative, Ngwane I was one of the successors to the leadership of eMalangeni. He fathered three sons who were later known as Mahlalela, Maziya and Dlamini. Mahlalela and Dlamini played a pivotal role in the history of the leadership of eMalangeni.

4.1.5 The three eMalangeni brothers broke away from the main stream abaMbo. They left Delagoa Bay, together

with their supporters, and travelled along the Lubombo Mountains.

4.1.6 At a certain point of their journey from Delagoa Bay, the three brothers split. This is how the split came about:

(a) The three brothers came across an elephant. The eldest brother, Mahlalela, killed the elephant with his magic stick. As the elephant fell one of its tusks stuck in the ground. Mahlalela believed that the tusk pointed at something that would appear from the ground. He decided to wait to witness the emergence of that mysterious thing. His followers remained with him. Because he waited for something he was named Mahlalela and his followers were subsequently known as bakaMahlalela.

(b) One of the brothers was undecided on whether to remain or to leave. Because he dilly-dallied, he became known as Maziya. His followers were subsequently named bakaMaziya.

(c) The youngest brother migrated towards the present day Swaziland. On his way he conquered communities that he came across. Since he literally 'devoured' these communities during day light, he was named Dlamini.

4.1.7 Dlamini returned to report his conquest to his elder brother, Mahlalela. He invited Mahlalela to join him. Mahlalela declined. He advised Dlamini to go back to his newly found territory.

4.1.8 As the eldest son, Mahlalela possessed ritual paraphernalia of eMalangeni. The paraphernalia included a magic stick. Upon request by Dlamini, Mahlalela willingly gave a portion of the paraphernalia to him. He, however, retained among others, the magic stick. Dlamini, thereafter, returned to his newly established traditional community and became the founder of the present day kingdom of Swaziland.

4.1.9 BakaMahlalela later moved to a place called Shiselweni, situated along the banks of Phongola

River, in the then northern Zululand. Around 1670 they settled on a hill called eMkhuwaneni, in the present day Mbuzini area. In about 1680 they moved to eBukhunkhwini, in the present day Mozambique. They later moved to Pigg's Peak and Stegi, in the present day Swaziland. In 1892 they settled in the Mbuzini area in the present day Mpumalanga Province.

4.1.10 It is not clear as to who succeeded Mahlalela. However, in the line of succession to the leadership of bakaMahlalela, Sibangamswane is recalled. He was succeeded by Nzalela and Zembe. The three ruled while bakaMahlalela were at Shiselweni.

4.1.11 Zembe was succeeded by Mlambo I who ruled at Mkhuwaneni, in Mbuzini. He was such a prominent leader that the Mlambo Traditional Authority was named after him. Mlambo I died and was buried on the slope of Mkhuwaneni.

- 4.1.12 Sidloko I succeeded Mlambo I. During his reign bakaMahlalela moved to Bukhunkhwini and later to Pigg's Peak and Sitegi.
- 4.1.13 Sidloko I fathered Makhuneni, the heir apparent. In 1825 Makhuneni fathered Lomasha. Lomasha grew up at eMalibeni, near Piggs' Peak.
- 4.1.14 Sidloko I ruled for a long time. Makhuneni became impatient. He started to mobilize support from the community to assist him ascend the throne. At times he addressed community meetings as though he was already their leader. Consequently, he was charged with high treason by *lusendvo* (the king's council). He was found guilty and executed.
- 4.1.15 Sidloko I died and was buried at Bukhunkhwini forest. During the mourning period, his *lisokanchanti*¹², Ntsele, was appointed regent for the heir apparent, Lomasha.

¹² First and eldest son of *inkhosi* born of the first wife.

4.1.16 Lomahasha succeeded his grandfather and is remembered for his bravery. He was a member of *Inyatsi*, a highly regarded regiment during the reign of Mswati I in Swaziland. He played a leading role in the capture of the renegade prince Mabhedla who was sought by Mswati I for desertion. He was part of the regiment of emaSwati that assisted Mawewe in the battle against his brother, Mzila, at Bileni in Mozambique. Mawewe was one of the leaders of amaShangana.

4.1.17 Lomahasha married forty wives. Amongst his sons, was Mbudula (Mbudula Mashakane). Lomahasha died around 1892 and was buried at Mbondweni, in the present day Swaziland.

4.1.18 Mbudula succeeded his father around 1892. His Great Place at Mbuzini was called eMbangweni. It was during his reign that there was a wide spread of the myth and belief that *emakhosi* of bakaDlamini are not to meet *emakhosi* of bakaMahlalela.

4.1.19 Mbudula fathered amongst others, the following sons who played a significant role in the history of the leadership of bakaMahlalela:

- (a) Magudu (*lisokanchanti*), born around 1897,
- (b) Sidloko II, born around 1909. His mother was a daughter from the Mawewe royalty,
- (c) Gija was born around 1913. His mother was fathered by a grandson to Zwide kaLanga, and
- (d) Mbiko.

4.1.20 Mbudula died on 27 October 1933. Sidloko II was still a minor. Magudu, *lisokanchanti* of Mbudula, was appointed regent for the heir apparent, Sidloko II.

4.1.21 Sidloko II ascended the throne in 1935. His headquarters was known as eNkanini. He fathered Mahlokomane (*lisokanchanti*) and Majalimane, the heir apparent. Sidloko II died on 21 April 1936. Majalimane was still a minor.

- 4.1.22 *Lusendvo* approached Gija, the brother to Sidloko II, to inherit his deceased brother's wives and children through the custom of *kungena*. Gija went on to father Sigwili and Mkheva, his biological sons but sociological sons to Sidloko II.
- 4.1.23 Once more Magudu was appointed regent. It was not clear to some members of the community on whose behalf he acted, but other community members believed that he was regent for Majalimane, the minor.
- 4.1.24 Magudu died around 1938. In 1940, Mbiko took over as regent. He was requested by *lusendvo* to step down after being blamed for misuse of royal cattle. Mbiko died shortly thereafter.
- 4.1.25 Gija was appointed regent. However, there was uncertainty regarding the person for whom Gija was regent. According to the custom of bakaMahlalela, Mahlokomane could not succeed to the throne as he was *lisokanchanti*. On the contrary, the heir apparent,

Majalimane, had left for Swaziland where he worked on the sugar plantations.

4.1.26 The confusion around the rightful heir apparent was somehow cleared by Gija himself. On 27 April 1973 he stated in public that he was regent for Majalimane whom he regarded as the rightful successor.

4.1.27 In the meantime, whilst working on the sugar plantations in Swaziland, Majalimane got married to Lomgezo Nkonyane. However, their marriage did not comply in full with the customs of bakaMahlalela. A son, Mandlenkhosi, was born out of this marriage.

4.1.28 During the regency of Gija, there occurred two significant events that impacted on the succession to the traditional leadership of bakaMahlalela:

- (a) On two occasions attempts at installing Majalimane as *inkhosi* of bakaMahlalela had to be postponed as Gija refused to step down.

(b) Majalimane took ill. He was admitted at Shongwe Mission hospital at Matsamo, in the present day Mpumalanga. In 1966, while on his way to recovery, Majalimane was assassinated.

4.2.29 Gija continued as regent. Mahlokomane challenged him to reveal the name of the person for whom he was acting. He demanded that Gija should step down. Gija refused.

4.1.30 Mahlokomane was under the impression that Mandlenkhosi, the heir apparent and son to Majalimane, was dead. It was thus opportune for him to claim *bukhosi* for his own lineage. He was supported by Lovunya, one of the elders. Lovunya died under mysterious circumstances when his hut was burnt down.

4.1.31 In the midst of confusion, Gija named Sigwili, his biological son through *kungena*, as heir. He instructed that Sigwili be fetched from his place of work to be employed in the offices of the Mlambo Tribal

Authority. This was to position him for succession. Some members of the royal family were not in accord with this decision but were rendered powerless.

- 4.1.32 In October 1981, Sigwili was installed as *inkhosi*. By then Gija had already lost his speech. He died in December 1981.
- 4.1.33 Sigwili died the following year. LaMasilela, the woman who was earmarked for Sigwili, was married according to custom and placed in the royal house.
- 4.1.34 Mkheva, another *kungena* son of Gija, became regent. He was to raise seed with LaMasilela on behalf of Sigwili. A son was born through this union.
- 4.1.35 Meanwhile, unknown to bakaMahlalela, Mandlenkhosi, son to the late Majalimane, was still alive and in hiding in Swaziland. On his first visit to Mbuzini, the Mahlalela community became divided: some members insisted that Mandlenkhosi be installed immediately as *inkhosi*, whereas others maintained that Mkheva

continue as regent. The latter prevailed. Mandlenkhosi returned to Swaziland.

4.1.36 In 1985 Mandlenkhosi returned to Mbuzini again. This revived the intention to install him as *inkhosi*. Whilst awaiting installation, he survived several assassination attempts. Consequently, he was forced to return to Swaziland again.

4.1.37 In 1991 Mandlenkhosi eventually succeeded in returning to Mbuzini permanently. He was then installed on 2 May 1992 as *inkhosi* of bakaMahlalela, also known as bakaMlambo.

5.

CUSTOMARY LAW OF SUCCESSION OF BAKAMAHLALELA

5.1 The succession to kingship of bakaMahlalela

5.1.1 The rules of succession discussed in this section are based on the information presented during the hearings and the Commission's own research.

- (a) As it is with most African communities, customary law of succession among bakaMahlalela is governed by the principle of male primogeniture. A female may not succeed.
- (b) The status of a wife within a polygamous marriage determines succession to *bukhosi*:
- (i) the first wife married by *inkhosi* is *sesulamsiti*. The first born son of *sesulamsiti* is called *lisokanchanti/ likhulanchanti*. *Lisokanchanti* takes charge of the family after the death of his father. However, he does not succeed to *bukhosi*. He may only act as regent after the death of his father.
- (ii) amongst the wives of *inkhosi* there is the great wife. The *lobola* of the great wife is derived from contributions made by the community. The heir to the throne is the first born son of the great wife.

- (iii) the wife who bears the successor to *bukhosi* is chosen by *lusendvo*. In making the choice *lusendvo* may take into consideration the family of origin of the woman earmarked to bear a successor. A daughter from a royal house normally has precedence over the other women married to *inkhosi*.
- (c) If the customary laws of succession discussed above fail to provide an heir, the following customary practices are resorted to:
- (i) if the great wife does not have male issue, one of the sons of *inkhosi* is adopted by the great wife as her own son (*kumfaka esiswini*). The adoption process is conducted by *lusendvo* after the death of *inkhosi*.
 - (ii) if *inkhosi* dies without male issue his younger brother is assigned to look after the widows of his brother and to raise seed for him through *kungena*.

6.

CURRENT STATUS

- 6.1 The Claimant Mandlenkhosi Sibusiso Mahlalela, is a Senior Traditional Leader appointed as such in terms of section 2(8) or the Black Administration Act 38 of 1927, read with section 21 item 27 of Annexure 1 of the Constitution of the National State (Act 21 of 1971).
- 6.2 The area of jurisdiction of Mandlenkhosi Sibusiso Mahlalela comprises of Trust Farms and Released Area in the Barberton District as listed in Government Notice No. 1399, dated 3 August 1956.
- 6.3 The area of jurisdiction claimed is between South Africa, Mozambique and Swaziland. Their territory stretches beyond the borders into Swaziland as well as into Mozambique.

7.

DETERMINATION

- 7.1 **Issues to be determined**

7.1.1 The issues are:

- (a) whether in the course of the history of bakaMahlalela a kingship was established;
- (b) if it was established, by whom, how, and when;
- (c) whether the kingship has since been passed on from one generation to another according to the customary law and customs of bakaMahlalela;
- (d) if it is found that the kingship was established, when and how was it lost; and
- (e) can the kingship be restored.

7.2 **Analysis of Issues**

7.2.1 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 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.

7.3 **Analysis of evidence**

7.3.1 BakaMahlalela originate from Central Africa. They are also known as abaMbo or Emalangi.

- 7.3.2 Whilst in Central Africa, eMalangeni were part of abaMbo - Nguni led by Mnguni. Round about 1670 they migrated southwards and settled around Delagoa Bay in Maputoland in the present day Mozambique.
- 7.3.3 Each leader of eMalangeni possessed ritual paraphernalia that fortified his leadership. The leadership was passed on from one generation to the next through the principle of male primogeniture.
- 7.3.4 Ngwane I was one of the successors to the leadership of eMalangeni. He fathered three sons: Mahlalela, Maziya and Dlamini.
- 7.3.5 The three eMalangeni brothers broke away from the mainstream abaMbo, together with their supporters, and travelled along the Lubombo mountains.
- 7.3.6 At a certain point the three brothers split: Dlamini went on to establish the kingship of emaSwati, in the present day Swaziland. Mahlalela established a

community later know as bakaMahlalela, and Maziya established bakaMaziya community.

7.3.7 After settling at places such as Shiselweni, eMkhuwaneni (1670), Ebukhunkwini (1680), Pigg's Peak and Sitegi, bakaMahlalela eventually settled in the Mbuzini area, in the present day Mpumalanga province, in 1892.

7.3.8 The line of succession after Mahlalela is blurred until the emergence of Sibangamswane. The latter was succeeded by Nzalela, Zembe and Mlambo I. After the death of Sidloko I, Ntsele acted during the minority of Lomahasha.

7.3.9 Lomahasha succeeded his grandfather. He was a member of *Inyatsi*, a highly regarded regiment during the reign of Mswati I in Swaziland. He was part of the regiment of emaSwati that assisted Mawewe in the battle against his brother, Mzila at Bileni in Mozambique. Lomahasha fathered Mbudula Mashakane. In 1892 Lomahasha died and was buried at Mbondvweni, in the present day Swaziland.

- 7.3.10 Mbudula succeeded his father. His Great Place at Mbuzini was called eMbangweni. Mbudula died. As Sidloko II was still a minor, Magudu was appointed regent.
- 7.3.11 In 1935 Sidloko II ascended the throne. He fathered Mahlokomane (*lisokanchanti*) and Majalimane, the heir apparent.
- 7.3.12 Sidloko II died. Magudu became regent for Majalimane, who was still a minor. Gija, through the custom of *kungena*, fathered Sigwili and Mkheva, his biological sons but sociological sons to Sidloko II.
- 7.3.13 Shortly after the death of Magudu Gija was appointed regent for Majalimane. By this time Majalimane had left for Swaziland where he worked in the sugar plantations whilst in Swaziland, Majalimane got married to Lomgezo Nkonyane. A son, Mandlenkosi, was born out of this marriage.

- 7.3.14 Attempts were made to install Majalimane as *inkhosi* of bakaMahlalela. Nevertheless, Gija refused to step down. Majalimane took ill and was admitted at Shongwe Mission Hospital at Matsamo. As he was recovering in hospital he was assassinated.
- 7.3.15 Mahlokomane demanded *bukhosi* for his own lineage. Lovunya died when his house was burnt down.
- 7.3.16 On October 1981, Sigwili, the biological son of Gija through *kungena*, but the sociological son of Sidloko II, was installed as *inkhosi*. He died in 1982. Mkheva became regent.
- 7.3.17 After two failed attempts to return to Mbuzini for installation, Mandlenkhosi, the son to Majalimane and Claimant, eventually returned to Mbuzini permanently in 1991. He was installed on 2 May 1992 as *inkhosi* of bakaMahlalela, also known as bakaMlambo.

7.4 The Commission finds that:

- 7.4.1 There is no evidence that Mnguni, the leader of abaMbo/Nguni, had established a kingship by the time he migrated southwards with his followers from the Great Lakes round about 1670.
- 7.4.2 As abaMbo settled around Delagoa Bay / Maputoland, they constituted a loose confederation of several communities, including the eMalangeni community. Each community had its own traditional leader. Thus Ngwane I, one of the earliest known leaders of eMalangeni, could not have held the position of king.
- 7.4.3 Possession of ritual paraphernalia alone does not bestow kingship. Even though the leader of eMalangeni possessed ritual paraphernalia that fortified his leadership, that did not make him king.
- 7.4.4 During the split from the mainstream abaMbo, neither of the three sons of Ngwane: Mahlalela, Maziya and Dlamini could have inherited the position of kingship as there was none to inherit from their father.

7.4.5 Mahlalela was the eldest of the three brothers. In terms of customary law and customs, he could break away and establish his own community independent of that of his father, Ngwane I. However, the establishment of such traditional leadership does not necessarily elevate him to the position of kingship.

7.4.6 Dlamini, the youngest of the three brothers, broke away from his two elder brothers and established his own kingship through conquering and subjugating diverse communities. He welded together these communities into a new community with common linguistic and cultural affinities. The Community was later known as emaSwati. Mahlalela refused the invitation by his brother, Dlamini, to join him in his newly established kingdom.

7.4.7 There is no evidence to suggest that Mahlalela ever established a kingship.

7.4.8 Mahlalela, the eldest son of Ngwane I, was a traditional leader of the community of bakaMahlalela / bakaMlambo. The position of traditional leadership held by Mahlalela was passed on from one generation to the next up to Sibangamswane. Sibangamswane was succeeded by Nzalela, Zembe, Mlambo I, Sidloko I, Lomahasha, Mbudula and Sidloko II. None of the successors to Mahlalela ever established a kingship.

7.4.9 The traditional leadership of bakaMahlalela has always been inextricably bound to the kingship of emaSwati, in that:

(a) At one stage bakaMahlalela were settled around Pigg's Peak and Sitegi in the present day Swaziland.

(b) Lomahasha not only grew up at Malibeni in the present day Swaziland, but was also a member of Inyatsi, a highly regarded

regiment, in Swaziland, during the reign of Mswati I.

(c) Lomasha was also part of the regiment of emaSwati that assisted Mawewe in the battle against his brother Mzila, at Bileni in Mozambique.

(d) According to the evidence tendered by bakaMahlalela one of the senior traditional leaders who pays allegiance to them is located in Swaziland.

(e) Majalimane, the heir apparent to Sidloko II, resided and got married in Swaziland. His heir apparent Mandlenkhosi Sibusiso Mahlalela, was born in Swaziland and also sought refuge in Swaziland when there was conflict at Mbuzini.

7.4.10 Mandlenkhosi Sibusiso Mahlalela could only inherit the traditional leadership position established by Mahlalela and passed on from one generation to

the next, in terms of customary law and customs of bakaMahlalela.

8.

CONCLUSION

8.1 In Conclusion:

8.1.1 In terms of the Framework Act, bakaMahlalela do not have kingship.

8.1.2 Thus there is no kingship to be restored.

8.1.3 Therefore the claim lodged by Mandlenkosi Sibusiso Mahlalela is unsuccessful.

DETERMINATION ON THE VHAVENDA KINGSHIP

CLAIM: VHANGONA, RAMABULANA, RAVHURA, TSHIVASE AND

MPHAPHULI

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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 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 are imperialism and colonization; repressive laws, in particular, the Black Administration Act 38, of 1927 and apartheid laws which provided for the creation of territorial authorities, self-governing states and pseudo-independent enclaves.

1.2 ESTABLISHMENT OF THE COMMISSION

- (a) The dignity of the institution of traditional leadership has been negatively affected. 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.
- (b) The Commission is established in terms of section 23 of the Traditional Leadership and Governance Framework Act 2003, Act 41 of 2003.

1.3 **FUNCTIONS OF THE COMMISSION**

- (a) In terms of section 25, the Commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in subsection (2) and arising from any province. Accordingly, in terms of section 25(2)(a) 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 recognized 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'; and

(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 25(3),

“(a) When considering a dispute or claim the Commission must consider and apply customary law and customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.

(c) The Commission must-

(i) In respect of kingship, 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;

2.

FOCUS

2.1 The investigation under focus is for-

2.1.1 The restoration of the following kingships:-

(a) the Vhavenda kingship as a whole under the leadership of Vhangona. The Claimant is Tshidziwelele Azwidowi Nephawe;

(b) the Vhavenda kingship as a whole under the leadership of the house of Mphephu Ramabulana.

The Claimant is Toni Peter Mphephu Ramabulana.

(c) the Vhavenda kingship as a whole under the leadership of the house of Ravhura. The Claimant

is Azwianewi David Mutshinyalo Ravhura.

2.1.2 The following claims to new kingship:-

(a) Midiavhathu Prince Kennedy Tshivhase claims the Tshivhase kingship, which is a section of the Vhavenda traditional community.

(b) Phaswana Musiiwa Michael Mphaphuli claims the Mphaphuli kingship, a section of the Vhavenda traditional community.

2.2 The investigation is in terms of sections 25(4) and 25(2)(a)(vi) of the Framework Act;

2.2.1 Section 25(4) provides that:

“The Commission has authority to investigate all traditional leadership claims and disputes dating

from 1 September 1927, subject to subsection (2)(a)(vi)”.

2.2.2 Section 25(2)(a) provides that :

“The Commission has authority to investigate, either on request or of its own accord-

(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.”

3.

METHODOLOGY

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

3.1.1 The first stage was used to gather evidence and information. The Commission conducted joint hearings for all the Claimants.

3.1.2 The second stage was held after the Commission had conducted its own research. The purpose was to canvass information obtained from the research of the Commission and not raised during the first stage.

3.1.3 Each Claimant 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.

3.2 During both stages, the following procedure was adopted:-

3.2.1 Public hearings were conducted wherein selected members of the Claimants and others appointed by them testified under oath and referred the Commission to supplementary research material.

3.2.2 This was followed by clarity seeking questions on the presentation from Commissioners.

3.2.3 Each party examined the evidence of the other parties.

- 3.2.4 Members of the public were given an opportunity to pose questions to the presenters and make comments. (This was applicable to the first stage only.)
- 3.2.5 In conclusion, each party made closing summaries.
- 3.3 Although the Claimants lodged separate claims, the hearings were held jointly as their history is inextricably intertwined. Collectively they are known as Vhavenda. However, for the purposes of the determination the Claimants have been divided into their historical groupings of Masingo and Vhangona.
- 3.4 During the second stage, Tshidziwelele Azwidowi Nephawe, the Claimant on behalf of Vhangona, did not attend the hearings. In his stead, one Mr Rakhadana placed on record that Nephawe was indisposed. Subsequently, the Claimant submitted written responses to the set of questions sent to him by the Commission.

4.

HISTORICAL BACKGROUND OF Vhangona

4.1. The history of Vhangona as presented by Mr Azidwohi Tshidziwelele Nephawe is as follows:-

4.1.1 Vhangona originate from Matongoni in Central Africa. Matongoni was the sacred place of Vhangona traditional leader, Mwali.

4.1.2 Vhangona sojourned further south and became the original inhabitants of the present-day Venda; as such they named the mountains and the trees. Vhangona are the real Vhavenda.

4.1.3 Tshidziwelele was the first king of Vhangona with his royal settlement at the Soutpansberg Mountains.

4.1.4 The traditional leaders of Vhangona were Netshisevhe, Nemusina, Nevhembe, Neluonde, Netshiendeutu, Mulima, Mulovhedzi, Netshikuma,

Nemadzivhanombe, Manenzhe, Nembilwi, Nethengwe, Nedzanani of Tzaneen.

4.1.5 Currently, there are four Vhangona traditional leaders: Vharuvhu of Mulima, Vhafamadi of Mashao, Ndou of Thengwe Manenzhe, and Mutele of Nzhelele.

4.1.6 Vhangona occupied various areas in Southern Africa but were defeated by the Masingo, Bakgatla, Mashangaan.

4.1.7 He is entitled to the kingship of Vhavenda nation, as he is the son of Mafanedza Nephawe who was his predecessor.

5.

HISTORICAL BACKGROUND OF MASINGO¹³

¹³ The Masingo constitute all Vhavenda except the Vhangona. In the determination Masingo refers to the Claimants; Rhavhura, Mphephu Ramabulana, Tshisevhe and Tshivhase, which excludes Nephawe.

5.1 The history of Masingo, as presented by the Claimants, from Dimbanyika to Vele-la-Mbeu also known as Dyambeu is mostly common cause:

5.1.1 As with most indigenous peoples of Southern Africa, Masingo trace their origins to Central Africa. They were led by Mambiri. Mambiri was succeeded by Tovera, Thohoyandou, Nehanda, Rusvingo, Chaminuka, Tshilume, Chikurawedlembeu, Belelamambo, Tshikalange, Hwami and Ntidime respectively. They migrated southwards from Central Africa and settled in Mapungubwe (which was in the present-day Botswana and Zimbabwe), under the leadership of Shiriyadenga.

5.1.2 Around 1600 they migrated further south and crossed the Limpopo river under the leadership of Dimbanyika. He reigned from 1688 to 1722. He settled around the Soutspansberg Mountains, where he established the first Dzata. At this stage, the traditional community was known as Masingo or Makwinda.

- 5.1.3 Across the Limpopo river, Masingo found other traditional communities such as Vhangona and Vhatavhatsinde. Dimbanyika conquered, subjugated, assimilated and merged these communities into a new traditional community called Vhavenda.
- 5.1.4 Thus the kingship of Vhavenda was created. Dimbanyika was the first king of Vhavenda. He died in 1722.
- 5.1.5 Dimbanyika was succeeded by Vele- la- Mbeu. It is common cause that Vele-la-Mbeu fathered one daughter Tshavhungwe, who was born of the *dzekiso* wife¹⁴, and two sons, Tshisevhe and Tshivhase (Raluswielo) from other wives.
- 5.2 The history of Masingo, after the death of Vele-la-Mbeu is in dispute. Each Claimant recounted the events as follows:-
- 5.2.1 Munyadziwa Alpheus Vusani Netshimbupfe on behalf of the Mphephu Ramabulana house stated the following:

¹⁴ A wife who is married to bear an heir to the throne.

- (a) Vele-la-Mbeu fathered Tshavhungwa from the first house (*dzekiso*), Thohoyandou from the second house, Tshisevhe, from the third house and Tshivhase (Raluswielo) from the fourth house. There is no information of other sons of Vele-la-Mbeu.
- (b) The *dzekiso* house failed to produce an heir and therefore, as the son of the next senior house, Thohoyandou succeeded Vele-la-Mbeu. He accordingly reigned as *thovele* (*king*) after the death of his father.
- (c) During his reign, Thohoyandou deployed his son Munzhedzi Mpofu, to Songozwi, and his brother Raluswielo to Dopeni.
- (d) Thohoyandou disappeared in 1870. After his disappearance, the elders installed Tshisevhe as *thovhele*. It later transpired that Thohoyandou had died.

(e) After the death of Thohoyandou:-

- (i) Some family elders confirmed Tshisevhe as *thovhele*. He was not installed by the royal family as is customary. He therefore usurped the throne;
- (ii) As a result, a conflict arose between Munzhedzi Mpofu, the first born son and rightful heir of Thohoyandou and Tshisevhe. Tshisevhe was assassinated. Rhavhura, the first born son of Tshisevhe, fearing for his life fled to Makonde;
- (iii) Munzhedzi Mpofu was finally installed as *thovhele* at Dzata;
- (iv) Tshivhase, who had been strategically deployed by his brother, Thohoyandou at Dopeni, attempted to return to Dzata

and usurp the throne. He was defeated by Munzhedzi Mpofu.

- (f) Munzhedzi Mpofu later relocated the great place from Dzata to Songozwi. This was because the latter was strategically situated, as one could see the whole kingdom from the summit: from Vhukalanga, Luvhombo, Vhuzwana up to Lydenburg.
- (g) Tshivhase once again mobilized an army and invaded Munzhedzi Mpofu at Dzanani (Songozwi). The battle was fought along the banks of a river that became red with blood. It was consequently known as Khwivhila, which means red. Tshivhase lost the battle. Having been defeated twice, first at Dzata and then at Khwivhila, Tshivhase fled. Munzhedzi Mpofu remained king of Vhavenda.
- (h) Munzhedzi Mpofu expanded and consolidated the Vhavenda kingship in the following manner:

- (i) he offered refuge to persons displaced by the Mfecane wars; these included the traditional community of Batlokwa under their chiefs Machaka and Ramokgopa.
 - (ii) he successfully repelled two attacks from Tshivhase.
-
- (i) Munzhedzi Mpofu was succeeded by his son Ramabulana who fathered four sons: Davhana, Ramanala, Rasikhuthuma and Makhado. He died in 1864.
 - (j) Makhado Ramabulana was born of the *dzekiso* house and was therefore the rightful heir. However, when Ramabulana died, Makhado Ramabulana was away on a hunting trip and the elders installed Davhana who was the eldest son.
 - (k) Upon his return, Makhado Ramabulana successfully wrestled the kingship from Davhana through a battle. Dhavana fled and sought

asylum from Joao Albasini who was a Portuguese settler.

(l) The Voortrekkers arrived in Venda during the reign of Makhado Ramabulana between 1867 and 1895. They gradually interfered with the institution of traditional leadership and reduced the status of Makhado Ramabulana from *thovhele* to an ordinary traditional leader.

(m) As a result, on 15 July 1867 Makhado Ramabulana drove the Voortrekkers out of Venda. Consequently, the Voortrekkers retreated to the south and established Pietersburg in 1886. Makhado Ramabulana quashed further attempts by the Voortrekkers to return to Venda in 1869. He then became known as “the Lion of the North”. He died in 1895.

(n) Makhado Ramabulana was succeeded by Mphephu Ramabulana in 1895. He continued to keep the Voortrekkers out of Venda. A battle ensued in 1898 and the Voortrekkers ultimately

drove Mphephu Ramabulana to exile in Zimbabwe. He fathered amongst others, George Mbulaheni.

(o) He returned to Venda in 1902 and settled in Dzanani, near the old Dzata. Many traditional leaders paid homage to him. He died in January 1925.

(p) Mbulaheni Mphephu Ramabulana succeeded Mphephu Ramabulana in February 1925. He fathered amongst others Patrick Ramaano Mbulaheni Mphephu Ramabulana died in 1948. He was succeeded by his son Patrick Ramaano who reigned from 1950 to 1988 as paramount chief of Vhavenda and became the first president of the erstwhile Republic of Venda.

(q) Makhadzi Phopi Mphephu was regent for Dimbanyika Tshimangatsho Ramabulana from 1988 to 1993. Dimbanyika Tshimangatsho Ramabulana, he reigned from 1993 to 1996. He fathered amongst others, Peter Toni.

(r) Makhadzi Phophi was again regent for Peter Toni Ramabulana from 1996 to 1998. Peter Toni Ramabulana ascended the throne in 1998.

5.2.2 Tshifhiwa Maumela Mphaphuli made the following presentation on behalf of the Mphaphuli house:

(a) Thohoyandou was not the son of Vele-la-Mbeu, he was the brother to Vele-la-Mbeu.

(b) Thohoyandou never reigned as king but was regent for Tshisevhe.

(c) Vele-la-Mbeu gave his favourite son, Nelugunda, the traditional instruments that guarded the whole kingdom.

(d) After the death of Vele-la-Mbeu, the main houses in order of seniority were: the *dzekiso* house to which Tshavhungwe was born; followed by the houses of Tshisevhe, Mpofu and Raluswielo (Tshivhase)

respectively. The most junior house was that of Nelugunda (Kutama) also known as Tshibogo.

- (e) Although she was born of the *dzekiso* house, Tshavhungwe being a female could not succeed. Therefore, the royal council nominated Tshisevhe who was next in line. Since Tshisevhe was still a minor, Thohoyandou was appointed regent on behalf of Tshisevhe.
- (f) The royal council instructed Nelugunda to go with Ragavheli, the son of Tshisevhe, to a Ndebele traditional healer in order to prepare him for succession to the throne. En route Ragavheli was assassinated.
- (g) During the skirmish, Nelugunda chopped off the arm of one of the attackers. He thus assumed the name Mphaphuli, which is derived from the Venda word 'to chop'. He

fled to Tshitomboni and never returned to Dzata.

(h) Following their departure from Dzata, the house of Mphaphuli was not involved in the events that took place at Dzata

(i) The Mphaphuli house created a new kingship independent of the Vhavenda kingship in that:

(i) Mphaphuli gathered his followers from Dzata and settled at Tshitomboni and later sojourned to Mbilwi;

(ii) they found Vhangona and other traditional communities who submitted themselves to the authority of Mphaphuli in order to avoid invasion by other traditional communities.

(j) Mphaphuli was succeeded by Tshilala, Ratsimbi Ranwedzi, Makwarela, Phaswana, Magwedzha and Mpandeli respectively.

(k) The arrival of the Voortrekkers heralded the end of Vhavenda kingships in that they:

(i) established their own version of royal leadership, in a manner that is both ignorant and defiant of African culture and customs;

(ii) deposed legitimate royal leaders and based on tokenism, wrongly elevated commoners against the applicable customs and customary laws of succession;

(iii) realigned traditional borders and created their own for their own convenience .

(l) Consequently, all the Vhavenda kingships including that of Mphaphuli kingship were destroyed.

(m) The present incumbent, Phaswana Musiwa Mphaphuli succeeded Mpandeli. He reigns as *thovhele* of the Mphaphuli traditional community.

5.2.3 Thambaleni Allan Budeli made the following submissions on behalf of the Tshivhase house:-

(a) Thohoyandou was not the son of Vele-la-Mbeu, he was the son of Masindi, a younger brother to Vele-la-Mbeu. Thus, Thohoyandou and Tshivhase were cousins.

(b) Thohoyandou was installed as regent for Tshivhase.

(c) During his reign, Thohoyandou settled at the second Dzata in 1760.

- (d) It is common cause that Thohoyandou disappeared around 1870.
- (e) After the disappearance of Thohoyandou, there was feuding between the three half brothers namely, Tshisevhe, Mpofu and Tshivhase who were potential successors. The elders concluded that Tshivhase should be installed as *thovhele* at Dzata.
- (f) There are several reasons for the elders' decision to install Tshivhase:
- (i) His mother, Vho-Nyavele, was a close relative to Thovhele Vele-la-Mbeu as a result Tshivhase is named after her father;
 - (ii) He was favoured by *khadzi* Tshavhumbwe to succeed his father. It is customary for the royal family to consult the first born daughter of the *dzekiso* house when choosing a successor in title.

- (g) All the three brothers left Dzata because “the centre could not hold”. Tshivhase went to Dopeni to establish a new kingship; due to threats of attack from the other communities, Tshivhase moved the royal settlement from Dzata to settle in a more secure area at Dopeni.
- (h) The Tshivhase kingdom was established around 1780 by Thovhele Ramashelo Vele Tshivhase because of royal feuding and the succession battle.
- (i) Tshivhase expanded his kingdom. The people of Tshivhase assimilated some of the Vhangona traditional communities they found in the Dopeni area. The royal court moved from Vuvha to Vhulaudzi, Phiphidi, Denga and finally settled at Luaname (Mukumbane) where it presently resides.
- (j) Tshivhase ruled from 1780 to 1834. He was succeeded by his son Mukhesi Luvhengo Ramarumo.

- (k) Mukhesi Luvhengo Ramarumo reigned from 1834 to 1867. It was during his reign that the first white settlers arrived in the Tshivhase kingdom in order to establish the Transvaal Boer Republik. Acting in concert with the British colonialists, they set about disarming the Tshivhase community. Many of their traditional leaders and their subjects were arrested and tortured; others were even murdered as they resisted payment of the violently imposed taxes.
- (l) Mukhesi Luvhengo Ramarumo was succeeded by Tshivhase Raluswielo. Morwale Legegise Mankili-Mankili, in turn succeeded Tshivhase Raluswielo, his father and reigned from 1867 to 1902. Vele Ramaremisa the son of Morwale Ligege Mankili-Mankili, reigned from 1902 to 1930. Various pieces of land legislation were enacted between 1913 and 1936. Massive tracts of land were expropriated as a result, the kingdom virtually collapsed and there was a shift from sovereignty to subjugation.

- (m) Vele Ramaremisa was succeeded by Rasimphi Phiriphiri Frans Mphaya in 1930. He was subjected to persecution in that:
- (i) the Black Administration Act which had been introduced during his reign, served as a legal instrument to depose him;
 - (ii) he was arrested for defying the Smuts-Hertzog Government between 1930 and 1947. He was banished to Hammanskraal, north of the present day Tshwane;
 - (iii) it is believed that he was assassinated as he died from poisoning in 1952.
- (n) Ratshalingwa Thikhathali Prince Thohoyandou (Dr Ndou please revisit) reigned from 1963 to 1966. He is the father of the current incumbent Kennedy Tshivhase.

(o) Kennedy Tshivhase presently reigns as *thovhele* of the Tshivhase traditional community.

5.2.4 Aaron Fulufhelo Nedzingahe who presented on behalf of the house of Ravhura stated that:

(a) Thohoyandou was the son of Dimbanyika; the brother to Vele-la-Mbeu and therefore the uncle to Tshisevhe.

(b) Tshisevhe was the son of Vele-la-Mbeu. Since the *dzekiso* house failed to produce an heir, the next senior house was that of Tshisevhe. However, as Tshisevhe was still a minor Thohoyandou was appointed as regent. After the disappearance of Thohoyandou, Tshisevhe was enthroned as *thovhele*.

(c) Tshisevhe fathered Ravhura. Tshisevhe was later assassinated.

- (d) After the death of his father, Rhavhura fled to Makonde on the advice of N'wali, the ancestral god of Vhavenda.
- (e) As he fled from Dzata to Makonde, he maintained his status as successor-in-title to the kingship of Vhavenda. At Makonde, Ravhura ruled as *thovele* of Vhavenda as a whole.
- (f) Various traditional leaders came to Makonde to pay homage to him and ask for rain and blessings because N'wali, communicated with Vhavenda through Ravhura as *thovhele*.
- (g) Ravhura successfully defended himself against an attack from Tshivhase.
- (h) In 1879 the colonialists called a meeting of all traditional leaders at Muananzhelele. The meeting was attended by the "chiefs" including the Tshivhases, Mphaphulis and Mphephu Ramabulanas. Ravhura did not attend the

meeting because as *thovhele*, he could not be summoned to a meeting, by right, the people came to him.

- (i) The failure by Ravhura to attend the meeting was viewed as insubordination by the colonialists. Ravhura was sidelined and demoted to the status of headman. In order to reward Tshivhase, who had faithfully attended all meetings convened by the colonialists, Ravhura was placed under the jurisdiction of Tshivhase.
- (j) Ravhura mysteriously disappeared and was succeeded by Malise, his younger brother. Malise died and was succeeded by Jim Masindi Badaga (1911 to 1955) and Solomon Mavhungu (1956 to 1965) respectively. Solomon Mavhungu fathered the Claimant, Azwianewi David Mutshinyalo Ravhura.
- (k) From 1967 to 1990, a succession of regents ruled on behalf of the minor child Azwianewi

David Mutshinyalo Ravhura who ascended the throne in 1990.

6.

CUSTOMARY LAW OF SUCCESSION

6.1 The general rules of customary law of succession are mostly common cause and are based on the presentations made during the hearings.

6.1.1 Customary law of succession is based on a system of male primogeniture. The status of a wife within a polygamous marriage determines succession to kingship.

6.1.2 The *dzekiso* wife or candle wife is:-

(a) The wife chosen by the royal family to bear the heir to the throne.

(b) The wife whose *lobola* has been paid for by the royal family or with the cattle which married the *thovhele's* sister(*makhadzi*).

(c) The most senior of the wives of *thovhele*.

6.1.3 The members of the community have no say in the process of choosing the king. It is only the royal family composed of *makhotsimunene* (*thovhele's* brothers) and the *vho-makhadzi* (*thovhele's* sisters).

6.1.4 In a meeting of the royal family, convened by a senior *khotsimunene*, the *khadzi*¹⁵ nominates a successor within the royal family.

6.1.5 When sufficient consensus is reached, the royal family communicates its decision to the king's council composed of *mahosi*(senior traditional leader).

6.1.6 The king's council informs the public and government of the identity of the new king.

¹⁵ The *khadzi* or *makhadzi* , is the sister who plays the role of an advisor to the reigning king.

- 6.1.7 Generally, the new king is the first born son of the *dzekiso* wife. He only assumes traditional leadership upon the death of his father.
- 6.2 However, the Claimants are at variance as to which customary practices are resorted to, in the event that the above customary rules of succession fail to provide an heir.
- 6.2.1 According to the house of Tshivhase:
- (a) The *dzekiso* wife is married to produce an heir to the position of traditional leadership. In the event that the *dzekiso* wife fails to produce an heir, there is no rigid formula, but one of the following options may be resorted to:
 - (i) the royal family may choose the first born son of the other wives who has the closest affinity to the deceased;

(ii) the first born daughter of the *dzekiso* wife will be consulted to assist in choosing the successor; or

(iii) makhadzi may also choose a successor.

(b) The *dzekiso* house may be passed over in the event that:

(i) it fails to produce an heir who qualifies to be king, for example, any disability, physical or mental disqualifies a would be heir;

(ii) serious misconduct on the part of the *dzekiso* wife;

(iii) serious misconduct on the part of the children of the *dzekiso* house;

(iv) the death of the children of the *dzekiso* wife.

6.2.2 The Mphaphuli house asserts that:-

- (a) If a *dzekiso* cannot bear an heir, the royal house (*khoro*) meets and decides who should be an heir;
- (b) The role of *makhadzi* and *ndumi* is crucial in the selection of an heir.

6.2.3 The Mphephu Ramabulana house asserts as follows:

- (a) The wives of *thovhele* mainly consist of three categories classified in order of seniority:-
 - (i) The *dzekiso* wife, her *lumalo* (*lobola*) comes from the cattle of *thovhele's* father;
 - (ii) the *tshiwozwi* wife, her *lobola* comes from the cattle of the mother of *thovhele*; and
 - (iii) the *tshienda* wife; her *lobola* comes from the reigning *thovhele*.

(b) The *dzekiso* house may be passed over in the following circumstances:-

- (i) if the *dzekiso* wife misbehaves;
- (ii) if the sons of the *dzekiso* wife have committed gross misconduct for example, having intimate relations with one of the *thovhele's* wives;
- (iii) In the event of disqualification of the *dzekiso* house, the sons from the other houses become eligible.

6.2.4 The Ravhura house states as follows:-

- (a) The most senior wife of a traditional leader is the *dzekiso* wife. The seniority of the other wives is determined by the order of marriage. In the event that the *dzekiso* wife is married after a number of wives have been married, she assumes seniority and the rest of the wives maintain their seniority depending on the order in which they were married.

(b) In the event that the *dzekiso* house fails to produce an heir or is disqualified, one of the following scenarios occurs:-

(i) the eldest son of the deceased king can be 'transferred' to the *dzekiso* house;

(ii) If the sons are too young or there are no sons from the other wives of the deceased, the *dzekiso* wife is transferred into the house of the *ndumi*¹⁶ or *khotsimunene*¹⁷. The wives in this household will then be ranked below the *dzekiso* wife.

(c) The heir to the throne may be disqualified if he misbehaves or if his paternity is questionable. The *makhotsimunene* and *makhadzi* will meet and select another *dzekiso* from one of thovhele's wives (preferably the second senior wife).

¹⁶ This is the brother to the king assigned as an advisor to the king.

¹⁷ The paternal uncle to the reigning king.

6.2.5 According to Vhangona the customary law of succession, the status of the royal wives is as follows:

(a) There are two categories of *dzekiso* wives:

(i) The first one is called *muvhuyanga dza makhadzi*, meaning one married with the cattle of the reigning king's sister. This is the most senior wife in the royal family irrespective of the time of marriage. The decision to marry her is taken secretly by the inner circle;

(ii) The second category is *netshiozwi*. The queen mother is commonly known as *netshiozwi* because she is the one who bore the king. Her royal palace is called *tshiozwi*. The marriage is also arranged secretly.

(b) All the other royal wives, *vhatanuni*, are ranked in order of marriage.

- (c) As the first born son, the Claimant contends that he was chosen by the elders of the royal family as the successor to King Mafanedza in accordance with custom.

7.

CURRENT STATUS

7.1 Vhavenda have 28 officially recognized senior traditional leaders.

7.1.1 Azwidowi Tshidziwelele Nephawe is officially recognized as headman of the Domboni Ward Village, under the jurisdiction of the Tshivhase Traditional Authority.

7.1.2 Midiavhathu Prince Kennedy Tshivhase is officially recognized as senior traditional leader. He is the head of the Ha-Tshivhase Traditional Authority with 80 headmen under his area of jurisdiction.

- 7.1.3 Azwianewi David Ravhura is officially recognized as headman of Makonde Ward Village, under the jurisdiction of the Tshivhase Traditional Authority.
- 7.1.4 The Claimant, Toni Peter Mphephu Ramabulana is officially recognized as senior traditional leader. He is the head of the Ha-Mphephu Traditional Authority in the Makhado District Municipality. There are 50 officially recognised headmen under his jurisdiction.
- 7.1.5 Phaswana Musiiwa Michael Mphaphuli is officially recognized as a senior traditional leader. He is the head of the Ha-Mphaphuli Traditional Authority in the Vhembe District Municipality. There are 57 officially recognized headmen under his jurisdiction.

8.

DETERMINATION

8.1 Issues to be Determined

8.1.1 The issues are:-

(a) Whether in the course of the history of Vhangona:-

(i) a kingship was established;

(ii) by whom, how and when;

(iii) how and when was the kingship lost.

(b) Whether in the course of the history of
Vhavenda:-

(i) a kingship was established;

(ii) by whom, how, and when;

(iii) how and when was the kingship lost.

(c) Whether at the split:-

(i) Tshivhase left to establish his own kingship;

(ii) Mphaphuli left to establish his own kingship;

- (iii) Ramabulana or Ravhura, the son of Tshisevhe, retained the Vhavenda kingship as a whole.
- (d) If the kingships are to be restored as claimed, whether they can exist as such.
- (e) Can the kingship of Vhavenda be restored.
- (f) if the kingship of Vhavenda is to be restored, under whose lineage should it resort.

8.2 **Analysis of issues**

8.2.1 In pursuit of uniformity in the Republic as envisaged by 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 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 **Whether in the course of the history of Vhangona a kingship was established?**

(a) It is common cause that Vhangona were the earliest known inhabitants of the present-day Venda and beyond. As such, they named the rivers and mountains.

- (b) Vhangona claim to be the real Vhavenda. The claim to kingship is merely based on Vhangona being the first inhabitants of the area.
- (c) The Commission finds that Vhangona cannot claim seniority over the other traditional communities of Vhavenda because:-
- (i) there is no evidence that Vhangona subjugated or conquered Masingo or any other traditional community. To the contrary, they concede that they were subjugated by Masingo.
 - (ii) there is no evidence that Vhangona conquered, subjugated, assimilated or exercised authority over Vhavenda at any stage in their history.
- (d) Even though Vhangona were an independent traditional community, with their own cultural and linguistic elements, they lost their independence and identity when they were conquered, absorbed and assimilated by Masingo and Bapedi.

(e) In the circumstances, there is no evidence that Vhangona established a kingship.

8.3.2 **Whether in the course of the history of the Masingo a kingship was established?**

(a) Vhavenda, like all other indigenous peoples of South Africa, originate from Central Africa.

(b) Dimbanyika led Masingo across the Limpopo River. He conquered, subjugated and assimilated Vhangona and other small traditional communities who had already settled in the area. Subsequently, a new community known as Vhavenda was formed.

(c) The Commission finds that Dimbanyika established the kingship of Vhavenda around 1600.

(d) Vele-la-Mbeu succeeded Dimbanyika. After the death of Vele-la-Mbeu, Thohoyandou reigned. It is in dispute whether he reigned as king or regent.

(e) In 1870, Thohoyandou disappeared mysteriously. After his disappearance, a succession dispute arose amongst the descendants of Vele-la-Mbeu: Tshisevhe, Tshivhase and Munzhendzi Mpofu. This resulted in a split.

8.3.3 At the split the descendants of Vele-la-Mbeu went their separate ways;

(a) Ravhura, the son of Tshisevhe went to Makonde.

(b) Tshivhase settled at Dopeni.

(c) Munzhendzi Mpofu, the son of Thohoyandou, relocated to Songozwi.

(d) Mphaphuli settled at Tshitomboni.

8.3.4 **After the split did Tshivhase establish a new kingship?**

(a) The house of Tshivhase claims kingship on the basis that, after the split, they established a new kingship independent of the old Dzata kingdom.

(b) in support of its claim, the house of Tshivhase alleges that:-

(i) Tshivhase had been installed king of Vhavenda as a whole before he left Dzata;

(ii) Tshivhase subsequently left Dzata for Dopeni due to the succession dispute;

(iii) at Dopeni, he subjugated the Vhangona community which resided in the area;

(iv) from Thovhele Raluswielo Vele to the incumbent Kennedy Tshivhase, the house of Tshivhase has always ruled independently, and has never been under the authority of any other traditional leader.

(c) The Commission finds that:-

(i) the claim by the house of Tshivhase that Tshivhase had been enthroned as king of Vhavenda is not supported by the facts presented before the Commission or any other material researched. It is

highly unlikely that having been so honoured he would have left Dzata to create an independent kingship.

- (ii) Furthermore, it is common cause that after having left Dzata he had attempted to attack Munzhendzi Mpofu at Dzata and at Songozwi. This is an indication that he had not relinquished the fight for the kingship of Vhavenda as a whole.
- (iii) It is common cause that Tshivhase settled within the jurisdiction of the Dzata kingdom and that his forefathers had already defeated Vhangona. Therefore, he cannot claim to have subjugated Vhangona again;
- (iv) the house of Tshivhase did not establish a traditional community with a new identity, through conquering and subjugation, either similar to or distinct from that of Vhavenda as created by Dimbanyika;

- (v) the house of Tshivhase contends that the house of Ramabulana was wrongly elevated to paramountcy, by the apartheid regime because the house of Ramabulana was in agreement with the creation of homelands. The Commission finds that such elevation was in line with custom in that the house of Ramabulana was the most senior of the descendants of Vele-la-Mbeu. The Commission will deal with this aspect in more detail below.

- (vi) in the circumstances, there is no evidence that the Tshivhase house established a kingship.

8.3.5 **After the split did Mphaphuli establish a kingship?**

(a) The house of Mphaphuli house claims kingship on the basis that, after the split, they established a new kingship independent of the old Dzata kingdom in that:

- (i) Mphaphuli was the son of Vele-la-Mbeu. He was from the junior house;

- (ii) he was the favourite son of Vele-la-Mbeu. During his lifetime, Vele-la-Mbeu gave Mphaphuli the traditional instruments which guarded the whole kingdom;
- (iii) Tshisevhe was the rightful successor to Vele-la-Mbeu, but after the former's assassination, Mphaphuli fled to Tshitomboni where he established a new kingship independent of the Vhavenda kingship;
- (iv) he never returned to Dzata but established a kingship at Tshitomboni by:-
 - (aa) gathering members of his household and his followers to settle under his authority in Tshitomboni and
 - (bb) assimilating the Vhangona living in the area.
- (v) in respect of the other Claimants, the house of Mphaphuli stated that they are not aware

of the events that occurred at Dzata, but as far as they know each of the Claimants established their own separate kingships.

(vi) the house of Mphaphuli seeks that the *status quo* be maintained, as each house is independent.

(b)The Commission notes that:

(i) The house of Mphaphuli concedes that they come from a junior house of Vele-la-Mbeu. Their claim for kingship therefore, does not emanate from genealogical seniority, but from establishing a new traditional community at Tshitomboni independent of the Dzata kingdom.

(ii) It is clear from the evidence that after the split the descendants of Vele- la- Mbeu ruled independently. There is however evidence that the house of Ramabulana exercised some

authority over the other houses. This was through the elevation of Mphephu.

(c) The Commission therefore finds that there is no evidence of the house of Mphaphuli having established a new kingship in that:-

(i) although Mphaphuli was independent of the Dzata kingdom, he did not establish a traditional community with a new identity through conquering and subjugation similar to that of Vhavenda created by Dimbanyika.

(ii) Vhangona had already been subjugated by his forefathers, therefore Mphaphuli cannot claim that they submitted to his authority.

8.3.6 **Did Ravhura retain kingship at the split?**

(a) The house of Ravhura base their claim on the following:

- (i) Since there was no heir in the *dzekiso* house, the house of Tshisevhe was next in line as the most senior house within the house of Vele-la-Mbeu;
- (ii) Thohoyandou was appointed as regent on behalf of Tshisevhe who was a minor at the time;
- (iii) Tshisevhe was accordingly enthroned as king of Vhavenda after Thohoyandou had disappeared. Soon thereafter, Tshisevhe was assassinated. On the instruction of N'wali, the ancestral god, his son, Ravhura, fled and settled at Makonde;
- (iv) At Makonde, he ruled as king of Vhavenda as a whole. As such, N'wali communicated with the people through him. N'wali also gave him the ability to make rain. Various sought his assistance in rain-making;

(v) Vhavenda including the descendants of Mpofu paid homage to him as king of Vhavenda.

(b) The Commission observes that:

(i) Ravhura was enthroned as king and reigned for a short period. The Commission does not deem it fit to determine whether such enthronement was in line with custom or by usurpation, however upon the death of Tshisevhe, his successor-in-title, Ravhura should have ascended the throne. Ravhura concedes that he fled to Makonde. In so doing, Ravhura effectively abandoned his right as the successor to Tshisevhe;

(ii) In any event, Ravhura could not have fled to Makonde with the kingship as this was before he was enthroned.

(c) The Commission finds that, at the split Ravhura did not retain kingship.

8.3.7 **Did Munzhendzi Mpofu remain with the kingship at the split?**

(a) The house of Ramabulana bases its claim to kingship on genealogical seniority in that:-

(i) Thohoyandou was the son of Vele-la-Mbeu from the first house, since the *dzekiso* house failed to produce an heir. Thohoyandou as the son of the next senior house succeeded Vele-la-Mbeu;

(ii) Thohoyandou fathered Munzhendzi Mpofu. In 1870, Thohoyandou disappeared;

(iii) After his disappearance, a succession dispute ensued between Munzhendzi Mpofu and his uncles: Tshisevhe and Tshivhase. Some elders installed Tshisevhe. However, he died shortly after his enthronement. Ravhura, the son of Tshisevhe, fled to Makonde;

- (iv) Munzhendzi Mpofu was installed at Dzataasking of Vhavenda as a whole. He later relocated the great place to Songozwi for strategic reasons;
 - (v) he expanded and consolidated the kingdom of Vhavenda by offering refuge to persons displaced by the Wars of Turmoil and successfully repelling several attacks from Tshivhase;
 - (vi) he was succeeded by Makhado, Mphephu, Mbulaheni, Patrick Ramaano, and Peter Toni respectively.
- (b) The Commission does not deem it fit to make a finding as to whether Thoyohoyandou was the brother or son of Vele-la-Mbeu in that:
- (i) it is common cause that Ravhura fled to Makonde thereby abandoning his right to succeed Tshisevhe;
 - (ii) Munzhedzi Mpofu was enthroned as king of Vhavenda. Whether this was in line with customary

succession or by usurpation is not clear from the evidence. However, he was able to entrench his position by *inter alia* successfully repelling the attacks of Tshivhase. He was therefore the only remaining *thovhele* of Vhavenda. Tshivhase was defeated by Munzhedzi Mpofu on two occasions, first at Dzata and then at Khwivhila River;

(iii) Thus, having been installed as king at Dzata, Munzhedzi Mpofu was able to defend his position as such.

(c) The Commission finds that at the split it was Munzhedzi Mpofu who remained with the kingship at Dzata.

8.3.8 **Can the kingships be restored as claimed?**

(a) In determining whether a kingship exists, the Framework Act enjoins the Commission to consider the need to establish uniformity in the Republic, in respect of the status afforded to a king:-

- (i) with regard to Vhangona it is clear from their own version that when the Masingo group came to Venda, they conquered, assimilated and absorbed the Vhangona into the traditional community of Vhavenda;
- (ii) the Commission therefore finds that Vhangona lost their independence through indigenous political processes;
- (iii) the claim by Vhangona to kingship of Vhavenda therefore cannot succeed;
- (iv) having regard to both oral and written history records, the Commission finds that after the split the descendants of Vele-la-Mbeu ruled independently of each other;
- (v) from the time of the split, the houses of Ravhura, Tshivhase, Ramabulana and Mphaphuli emerged and developed separately. The Commission finds that good grounds exist for the restoration of the kingship of Vhavenda.

- (b) The Commission finds that:-
- (i) Some of the houses, such as Mphaphuli and Tshivhase and Ramabulana continued to exist independently;
 - (ii) Such independence did not constitute separate kingdoms;
 - (iii) Although the groups developed separately neither of them established a traditional community with a new identity, through conquering, assimilation and subjugation similar to that of Vhavenda as created by Dimbanyika.
- (c) The claim by Tshivhase and Mphaphuli is effectively for independent kingships. As Vhavenda, they share similar cultural and linguistic elements with the rest of the traditional community of Vhavenda.
- (d) In pursuit of uniformity in the Republic, the Commission takes into cognizance that a traditional

leader should rule over the entire community and not a section thereof.

- (e) In the circumstances, the claims by Tshivhase and Mphaphuli should fail.

8.3.9 **Can the kingship of Vhavenda be restored to its original state?**

- (a) The Commission has found that:
 - (i) in the history of Vhavenda a kingship was created by Dimbanyika around 1600. This kingship was later destroyed by the Voortrekkers during the reign of Mphephu Ramabulana in December 1898;
 - (ii) after the split at Dzata, the descendants of Velela-Mbeu existed independently. Such independence did not constitute the creation of new kingships;
 - (iii) the Vhavenda traditional communities, as they exist today, share similar linguistic and cultural

affinities. The similarities were established by their former kings, among others, Dimbanyika, Vele-la-Mbeu and Makhado;

- (b) The Commission finds that good grounds exist for the restoration of the kingship of Vhavenda.
- (c) In pursuance of the need to restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and customs, it is imperative that the kingship of Vhavenda be restored.
- (d) Uniformity in the Republic, with regard to the status afforded to a traditional leader, in terms of customary law and customs should be achieved and Vhavenda are no exception.
- (e) It is the view of the Commission that if the kingship of Vhavenda is to be restored, this can only be done under one king, following the customary law and customs of Vhavenda. Previously, traditional leaders of Vhavenda ruled independently in that each of them were responsible for their daily administrative duties;

they paid allegiance to the *Khosikhulu* who reigns over all Vhavenda. His role is that of a unifying figure, the father of the nation (*muzwale*). The traditional leaders of Vhavenda will seek advice and wisdom from time to time on a variety of issues that affect their territorial authority, culture and tradition.

8.3.10 **Under whose lineage should the kingship resort?**

- (a) There is no dispute as to the succession of kings from Dimbanyika to Vele-la-Mbeu. The succession dispute arose from the death of Vele-la-Mbeu.
 - (i) It is common cause that the *dzekiso* house had failed to produce an heir;
 - (ii) The parties are at variance, as to whether Thohoyandou succeeded Vele-la-Mbeu as regent or as his substantive heir;
 - (iii) Tshisevhe was installed as king, but he died shortly thereafter. His heir apparent fled to

Makonde thereby abandoning his right to ascend the throne;

(iv) Munzhedzi Mpofo was installed as king of Vhavenda as a whole at Dzata;

(v) Munzhedzi Mpofo was able to entrench his position by repelling the attacks of Tshivhase, expanding and consolidating the kingship as aforestated;

(vi) there is no evidence that Mphaphuli and Tshivhase each established a new traditional community separate and distinct from that of Dzata;

(vii) the kingship has therefore been passed on in the house of Mphephu Ramabulana from one generation to the next in terms of the customary law and custom of Vhavenda;

(b) In the circumstances, the Commission finds that the kingship has to be restored under the lineage of Ramabulana.

9.

CONCLUSION

9.1 In terms of customary law and customs of Vhavenda and the Framework Act:-

9.1.1 The claim for the restoration of Vhangona kingship by Azwidowi Tshidziwelele Nephawe on behalf of Vhangona is unsuccessful.

9.1.2 The claim for the restoration of kingship of Vhavenda as a whole by Azwianewi David Mutshinyalo Ravhura on behalf of the house of Ravhura is unsuccessful.

9.1.3 The claim for the recognition of the Tshivhase kingship by Midiavhathu Prince Kennedy Tshivhase is unsuccessful.

- 9.1.4 The claim for the recognition of the Mphaphuli kingship by Gordon Mphaphuli is unsuccessful.
- 9.1.5 The claim for the restoration of the kingship of Vhavenda as a whole by Toni Peter Mphephu Ramabulana is successful.
- 9.2 In the circumstances, the kingship of Vhavenda as a whole is restored under the lineage of Mphephu Ramabulana.

AMAKWAYI

CLAIMANTS: MTHOBELI BALFOUR

VELA BALFOUR

The Commission has carefully considered your claim and the decision is as follows:

1. AmaKwayi lost their kingship through war which was the norm at the time.
2. The event happened/occurred during the fifteenth century. No good grounds have been furnished to the Commission to go beyond 1927 as provided for in the section 25(2)(a)(vi) of the Framework Act.
3. The claimants are referred to the determination on the kingship of amaXhosa for further clarity.
4. The claim is dismissed.
5. Further reasons may be furnished on request.

AMAKHONJWAYO

THE CLAIMANT: DUMISANI GWADISO

The Commission has carefully considered your claim and the decision is as follows:

1. There is no evidence that amaKhonywayo established a kingship after crossing the Umzimvubu river.
2. The events on which your claim is based occurred round about the fifteenth century. No good grounds have been furnished to the Commission to go beyond 1927 as provided for in section 25(2)(a)(vi) of the Framework Act.
3. You are referred to the determination on amaMpondo kingship for clarity.
4. Further reasons may be furnished on request.

INCOMPLETE INVESTIGATIONS

The Commission on Traditional Leadership Disputes and Claims has investigated claims to new kingship by the parties as listed below. The investigations remain incomplete as the term of office of the Commission came to an end.

Name of Claimant	Kingship claimed	Date of hearing	Venue
Mokoto	Modjadji kingship	08/03/2006	Mokwakwaila Community Hall
Modjadji	Modjadji kingship	28/03/2006	Mokwakwaila Community Hall
Paulos Moloji	Bakgolokwe kingship	13/02/2006	Qwaqwa Old Legislature
AmaBomvana	AmaBomvana kingship		Mtata