

Chapter 7

The Handling of Traditional Leadership Disputes and Claims by the Nhlapo Commission and the Courts: The Case Between Sekhukhune and Mampuru Royal Houses

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Introduction

The Commission on Traditional Leadership Disputes and Claims under the leadership of Thandabantu Nhlapo as chairperson was appointed by President Thabo Mbeki in 2004 to investigate and decide all kingship disputes and claims by considering and applying 'customary law and the customs of the relevant traditional community as they were when the events occurred'.¹ It was announced to the public through the *Government Gazette* published on 22 October 2004.² Its mandate was to restore senior traditional leadership among African ethnic groups to its rightful bearers. Who the rightful king of the Bapedi is was one of the disputes to be decided and the claim to be resolved. It explains its methodology used in its attempt to do justice to its mandate referred to as 'the procedure adopted at the hearings' as follows:

In the process of its investigation, the Commission conducted hearings into stages:-

The first stage was used to gather evidence and information. The Commission conducted separate hearings for the royalties of Kgagudi Sekhukhune, Rhyne Thulare Sekhukhune and Mampuru.

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

¹ The Commission on Traditional Leadership Disputes and Claims is referred to throughout this chapter as the Nhlapo Commission or the Commission.

² The Commission's members as Professor R.T. Nhlapo, chairperson, Advocate J.C. Bekker, Ms P.P. Robinson, Dr. R.M. Ndou, Professor P.P. Ntuli, Advocate S. Poswa-Lerotholi, Ms S.R. Mdluli, Professor M.A. Moleleki, Advocate S.D. Ndengezi, Mr A.S. Hlebela, Advocate Z.P. Pungula and Professor J.B. Peires are provided in T.M. Mbeki, President, *Appointment of the Members of the Commission on Traditional Leadership Disputes and Claims, General Notice, Notice 2394 of 2004*, The Presidency, Pretoria, *Government Gazette, Republic of South Africa*, Vol. 472, No. 26927, 22 October 2004, and Muzamani Charles Nwaila, *Findings of the Commission on the Traditional Leadership Disputes and Claims, Presentation to the Portfolio Committee: Implementation of the Findings of the Commission on the Traditional Leadership Disputes and Claims*, Professor Muzamani Charles Nwaila, Director-General, Department of Traditional Affairs, 1 November 2011, Pretoria.

The parties had been furnished with a set of questions arising from the research of the Commission. They were expected to respond specifically to the said questions at the hearing. During this stage, the hearing was held jointly. (Commission on Traditional Leadership Disputes and Claims, 2008:8-9)

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

Public hearing in which selected members of the Kgagudi Sekhukhune, Rhyne Thulare Sekhukhune and Mampuru royal houses and others appointed by them testified under oath and referred the Commission to supplementary research material;

This was followed by an opportunity for commissioners to raise questions and seek clarity from the presenters;

Interested parties were afforded an opportunity to challenge the version of the royal house and state their case;

Members of the public were permitted to pose questions to the presenters and make comments. (This was only applicable to the first stage). (Commission on Traditional leadership disputes and Claims, 2008:9)

The Commission provides a historical background of ba ga Sekhukhune as follows:

The Bapedi community originates from Bakgatla ba Makau, a Batswana clan, which resided near the Vaal River during the sixteenth century. They were led by Tabane who had five sons namely, Diale, Kgwadi, Kgetsi, Matsibolo and Mosia.

Diale was the heir and successor to Tabane. Diale had a wife, Mmathobela. According to legend the child cried whilst in her womb. The community wanted to kill both mother and child, as they perceived this incident to be a bad omen.

Diale left with his wife and followers. He eventually settled at Fateng, close to the present Fort Weeber.

The Bakgatla who left with Diale were later to constitute the core of Bapedi.

Thobela, the son of Diale, founded the Bapedi traditional community round about 1650. He settled at Mohlake, at the foot of Leolo Mountain. His royal palace was at Tšate. (Commission on Traditional Leadership Disputes and Claims, 2008:10-11)

The Commission concluded that the 'kingship of Bapedi resorts under the lineage of Sekhukhune' Commission on Traditional Leadership Disputes and Claims, 2008:41).

The issue is the question as to whether it did justice to its mandate to restore the kingship of the Bapedi to its rightful bearer. It acknowledged that Kgagudi Kenneth Sekhukhune was appointed as 'the acting paramount chief' (Commission on Traditional Leadership Disputes and Claims, 2008:33) or the acting king of the Bapedi. He was appointed by royal councillors to serve as acting king to ensure that the future king would be born. Nancy Khudu Sekhukhune was married to the Marota royal house in 1981 as a candle wife from Mphahlele royal house for this purpose. She is the mother of Sekwati Sekhukhune. This decision and its outcome are that Sekwati Sekhukhune should be the king of the Bapedi. The Commission was established in terms of the Traditional Leadership and Governance Framework Act 2003 (Act 41 of 2003) to restore the dignity and integrity of traditional communities and the institution of traditional leadership by correcting the settler colonial distortions. Kgagudi Kenneth Sekhukhune was appointed as acting king of the Bapedi by the royal council with popular support by the community to preserve the dignity and integrity of the Bapedi and their institution of senior traditional leadership. This was in line with the principle that traditional leaders are not the final arbiters of the Bapedi. According to Bapedi customs, traditions and laws guiding the succession to the traditional leadership, the royal council shoulders the responsibility of choosing and confirming a successor. Central to this principle is that *kgoši ke kgoši ka batho* or *sechaba* (a chief is a chief by the people or the nation). In other words, a chief is a chief not by the state, the government or the court(s). The Commission's findings that Kgagudi Kenneth Sekhukhune's appointment as acting *kgošikgolo* or king was not in line with the customs, traditions and laws of the Bapedi Marota is ahistorical and incorrect. It basically dismissed the decision of the royal council based on a popular and democratic community support. The issue for this chapter is not so much that Rhyne Thulare and his son, Victor Thulare should not have been recognised as the legitimate kings of the Bapedi, but whether the Commission was correct in deciding that the 'kingship of Bapedi resorts under the lineage of Sekhukhune', not that of Mampuru. It is for this reason that it agrees with the fact that Bapedi Mamone Marota challenged its decision and the rulings of the High Court of South Africa, Gauteng Division, Pretoria, and the Supreme Court of Appeal, based on this decision.

Opportunities and Challenges of the Commission

Central to the Commission's opportunities was that it had 'judicial status', which meant that it was 'entirely independent of government' (Peires, 2014:8). The Commission was instructed by section 25(3) of the Traditional Leadership and Governance Framework Act 2003 to 'consider and apply customary law and the customs of relevant traditional communities' and to be 'guided by ... customary norms and criteria' (Traditional Leadership and Governance Framework Act 2003). Customary law, customary norms and criteria were not defined in the Traditional Leadership and Governance Framework Act. Customary institutions or structures were defined only or merely as 'institutions and structures established in terms of customary law'. The task of applying them to