IN THE NORTH WEST HIGH COURT

MAFIKENG

CASE NO.:1221/12

In the matter between:

KGOSI BOB EDWARD MOGALE	**1st Applicant**
RADIBOKONYANE EMAUS MOGALE	**2nd Applicant**
JORGE LUCAS MOGALE	**3rd Applicant**
RAMOGAPI ISRAEL MOERANE	**4th Applicant**
MESCHAK JOSEPH MOGALE	**5th Applicant**
SOLLY BUTE MOGALE	**6th Applicant**
JULIUS MOGALE	**7th Applicant**
ABINAL OPHINAL MOLETSANE	**8th Applicant**
OUPA MOKOMELE	**9th Applicant**
CHURCHILL ALBANIUS MADUMO	**10th Applicant**
MANGE ELIPHUS MAGWETE	**11th Applicant**
MARTIN MAKOE	**12th Applicant**
MARY MAJOAKI PETLELE	**13th Applicant**
MONTY DANIEL MAFATE	**14th Applicant**
MOITSHEKI DINAH RALERU	**15th Applicant**
MARANG SILAS KWAPENG	**16th Applicant**
MTSI MODISAKENG	**17th Applicant**
TINY SENAKALENG MOGALE	**18th Applicant**

AND

ITUMELENG MOERANE MASHIGO	**1ST RESPONDENT**
BAILE MOGALE	**2ND RESPONDENT**
SHEILA MOERANE TLHATLOSI	**3RD RESPONDENT**
EGGIE MAIMANE	**4TH RESPONDENT**
ELIAS RATSHEKI MAIMANE	**5TH RESPONDENT**
FREDDIE MOGALE	**6TH RESPONDENT**
PHILIUS RAKGATLA MOGALE	**7TH RESPONDENT**
RONNIE M MOERANE	**8TH RESPONDENT**
TOIKIE WILLIAM MAIMANE	**9TH RESPONDENT**
ITUMELENG MAIMANE	**10TH RESPONDENT**
CHARLES MOGALE	**11TH RESPONDENT**
GEORGE RANGENGA MOGALE	**12TH RESPONDENT**
JOHN MOERANE	**13TH RESPONDENT**
LESLIE MAIMANE	**14TH RESPONDENT**
REUBEN KAISE	**15TH RESPONDENT**
MONAGENG MONANA	**16TH RESPONDENT**
RONNIE MOERANE	**17TH RESPONDENT**
NICKY MADUPE	**18TH RESPONDENT**
PHISTUS MOGALE	**19TH RESPONDENT**
MATLAKALA MOGALE	**20TH RESPONDENT**
OUPA MASHIKE	**21ST RESPONDENT**
JOHANNES MODISAKENG	**22ND RESPONDENT**
ITUMELENG MAIMANE	**23RD RESPONDENT**
EPHRAIME MORALO	**24TH RESPONDENT**
SIMON MATABOGE	**25TH RESPONDENT**
CHARLES KGOSIEMANG	**26TH RESPONDENT**
RODRICK MONAMA	**27TH RESPONDENT**

GEORGE MOGALE	**28TH RESPONDENT**
PHILIUS RAKGATLA MOGALE	**29TH RESPONDENT**
THE PREMIER OF THE NORTH WEST PROVINCIAL GOVERNMENT	**30TH RESPONDENT**
THE MEC, NORTHWEST PROVINCIAL GOVERNMENT FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS	**31ST RESPONDENT**
PWC (PRICE WATERHOUSE COOPERS)	**32ND RESPONDENT**

CIVIL MATTER

KGOELE J

DATE OF HEARING	**:**	**29 NOVEMBER 2013**
DATE OF JUDGMENT	**:**	**17 JANUARY 2013**
FOR THE APPLICANTS	**:**	**Advocate H. Eiser**
FOR 1st -14th RESPONDENTS	**:**	**Advocate Lebala With Him Ms Mere**

JUDGMENT

INTRODUCTION

KGOELE J:

[1] This application was initially brought as a matter of urgency. It was held to lack urgency by the ruling of Matlapeng AJ dated 31/08/2012.

[2] After initially participating in this application as the first applicant, the Kgosi of the community, Kgosi Bob Edward Mogale, withdrew his opposition. As a result thereof the applicants indicated that the relief sought in paragraphs 2.1.1 and 2.3 of their notice of motion are not persisted in.

[3] Only the first to the fourteen respondents (the respondents) opposed this application. The fifteenth up to the twenty-ninth respondents did not file any opposition. The thirteen and the thirty first respondents being the Premier of the North West and the MEC for Traditional Affairs respectively, withdrew their opposition too. The thirty-second respondent, namely Price Waterhouse Coopers, only delivered an explanatory affidavit, but did not oppose the relief sought.

[4] The application is for a series of declaratory orders in order to stop the first to twenty ninth respondents from continuing with the purported installation of the seventh respondents as acting Chief together with the consequent removal of the Kgosi and the Rangwane of the Bapo Ba Mogale Community (the community), and further, to stop them from administering or participating in the administration of the Community's vast and complex affairs, pursuant the decision taken at the meeting of the Royal Family on the 18th August 2012.

[5] The respondents filed their answering affidavits wherein they raised a number of Points *in Limine*. At the beginning of the hearing of the matter, this court granted condonation to the fourteen respondents for the late filing of their heads of argument as it was not opposed. Arguments were only heard by this court relating to the Points *in Limine* raised.

BACKGROUND

[6] Applicants brought an application, by way of urgent proceedings on the 30th august 2012 in this Court, seeking the following:

"*1. The application is heard as one of urgency and the usual forms and time period s stipulated in the rules of Court are dispensed with.*

2. Pending the final outcome including all appeals of the action to be instituted by the applicants as set out in hereunder;

2.1 the first to fourteenth respondents are hereby interdicted and restrained from:

2.1.1 taking any steps whatsoever including calling any meetings or proposing or passing any resolutions either themselves or in concert with any other member or members of the Royal Family of the Bapo ba Mogale Community (the Community) with the intention or which will have the effect of in any way undermining the position of the first applicant Bob Edward Mogale as Kgosi of the Community;

2.1.2 taking any steps to appoint or in any other way have the seventh respondent Philius Rakgatla Mogale or any other person appointed or installed as acting Chief of the Community;

2.2.3 playing any role whatsoever in terms of section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community's affairs;

2.1.4 appointing any of its members or any other members of the Community or whatsoever in terms of section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community's affairs;

2.1.5 acting individually and/or as a group and/or any of them acting as a sub-group;

2.1.5.1 playing any role whatsoever in terms of section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community's affairs;

2.1.5.2 appointing any of its members or any other member of the Community or any other individual or legal entity to act on its behalf in playing any role whatsoever in terms of section 9(1) of the North West Traditional Leadership and Governments act 2 of 2005 in the administration of the Community's affairs.

2.2 The decision of any person or body within the Community or outside of the community appointing any one or more or all of the first to twenty ninth respondents acting individually and/or as a group/s and/or as a sub-group/s, to play any role at all in terms of section 9(1) of the North West Traditional Leadership and Governance Act 2 of 2005 and/or any other powers which any of the said respondents purports to have and/or have exercised the administration of the community's affair is hereby declared unlawful and of legal force or effect, and all actions and decisions taken by the first to the twenty ninth respondents acting as aforesaid are hereby declared to be unlawful of no legal force and effect and are set aside;

2.3 The decision taken at the meeting of the Royal Family on 18 August 2012 to remove the first applicant as Kgosi of the Bapo ba Mogale Community in any manner or from is hereby declared unlawful and set aside;

2.4 The decision taken at the meeting of the Royal Family on 18 August 2012 to appoint the seventh respondent Philius Rakgatla Mogale as acting Kgosi of the Bapo Ba Mogale Community in any manner or form is hereby declared unlawful and set aside.

2.5 The decision taken at the meeting of the Royal Family on 18 August 2012 to request the thirteen and/or thirty first respondent to pay to the thirty second respondents the money of the Community or any part thereof held in trust in terms of section 30 of the North West Traditional Leadership and Governance Act 2 of 2005 is hereby declared unlawful and set aside;

2.6 the decision taken at the meeting of the Royal Family on 18 August 2012 to pay any of the first to twenty ninth respondents any money at all in connection with and/or related to any of the said respondents exercising any power of administration over the Community's affairs whether in terms of the North West Traditional Leadership and Governance Act 2 of 2005 or otherwise is hereby declared unlawful and set aside;

2.7 the decision taken by any person, and/or any person or body in the Community to pay any one or more or all of the first to twenty ninth respondents any money at all for any reason associated with or related to or connected with any exercise by any one or more or all of the said respondents of any powers in terms of section 9(1) of the North West Traditional Leadership and Governance Act 2 of 2005 and/or any other papers which any of the said respondents purport to have and/or have exercised is hereby declared unlawful and of no legal force and effect.

2.8 The seventh respondent Philius Rakgatla Mogale is hereby interdicted and restrained for holding out that he is the acting Kgosi of the Community or of accepting any such appointment as acting Kgosi unless he is so appointed by the thirteen respondent in terms of section 16 of the North West Traditional Leadership and Governance Act 2 of 2005;

2.9 The thirteenth and thirty first respondent are hereby interdicted and restrained from making payment to any of the first to twenty ninth respondents of any money at all for any reason associated with or related to or connected with any exercise by any one or more or all

of the said respondents of any powers in terms of section 9(1) of the North West Traditional Leadership and Governance Act 2 of 2005 and/or any other powers which any of the said respondents purport to have and/or have exercised.

2.10 The thirteen and thirtieth first respondents are hereby interdicted and restrained from paying or transferring any part of the money held in trust in terms of section 30 of the North West Traditional Leadership and Governance Act 2 of 2005 to the thirty second respondents or to any other person or legal entity which is substituted for the thirty second respondent."

3. The action referred to in paragraph 2 above seeking final relief in respect of the interdicts an orders set out above as amended or supplemented as circumstances change, shall be instituted in this Court within 30 days of the grant of the order set out in paragraph 2 above, and pending the institution of the said action for final relief in respect of the matters set out in paragraph 2 as a mended or supplemented as circumstances change and finalisation of the said action including all appeals the order and interdicts in paragraph 2 shall stand and be interim interdicts and orders.

4. The South African Police Services is hereby ordered to take such steps necessary including the removal and arrest of any of the first to twenty ninth respondents from the Community's premises at Skoolplaas Section Bapong, to give effect to the above interdict and orders.

5. Further or alternative relief.

6. Costs of this application are reserved for the trial Court save if any of the respondents oppose the relief sought, in which event costs are sought against the said respondents jointly and severally the one paying the other to be absolved.

[7] The respondents filed their answering affidavit wherein they raised a number of points *in limine.* The points *in limine* were as follows:

3.1 *Locus standi* of deponent;

3.2 *Res judicata*;

3.3 Contempt of Court;

3.4 *Lis Alibi Pendens* – Review application: Applicants' have filed a review application requesting the above Honourable Court to grant orders similar to orders sought in paragraphs 2.1.1, 2.3 and 2.4 of the Notice of Motion.

3.5 *Lis Alibi Pendens* – Appeal proceedings: a judgment was handed down on the 24th March 2011 by Gura J. Both the applicants and the respondents have since filed applications for leave to appeal.

[8] The matter was adjudicated based on a point of law on urgency raised by Counsel for the respondents. The matter was subsequently dismissed with costs for lack of urgency.

[9] After this ruling, the applicant attorney proceeded to set the matter down on the normal opposed Motion Court roll.

LOCUS STANDI OF THE APPLICANT

[10] During the initial stage of submissions, Adcovate Lebala SC, appearing on behalf of the respondents challenged the authority of Advocate Eiser on behalf of the applicants that he did not have an authority to act on their behalf. Advocate Eiser handed in a copy of a power of attorney. Advocate Lebala SC still objected to the handing of the said document. This Court turned down his objection as his basis was not sound.

[11] Respondents' Counsel further submitted that:-

11.1 According to the submissions made by the 'purported' legal representative, this application is brought in terms of section 38 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

11.2 There are allegations made by the 'purported' legal representative that the applicants are the traditional leadership of the community as set out in section 8 of the Traditional Leadership and Governance Act 41 of 2003 (Governance Act)[1].

11.3 If the allegations made in the above paragraph are accepted to be true, then the applicants ought to put before the Court a resolution that authorise them to litigate against the respondents.

11.4 Matters of customary law cannot and/or ought not to be unilaterally appropriated unto individual parties, hence, the need for a special resolution to qualify the interest allegedly being represented by the applicants and the context in which it is claimed. It will be argued at the hearing that the applicants claim the right set out in Section 38 of the Constitution in the abstract. This is so as the applicants are alive to the fact that they as individuals could only bring this litigation in their own interest having respected custom and practice, i.e., soughting resolutions from enabling core customary institutions to permit them to bring this litigation.

11.5 Equally important is the fact that the applicants cannot and/or ought not to bring this application on behalf of abstract/fictitious entitles

without attaching any resolutions form such entities. Such entities are not identified let alone are they mentioned by name. Equally important is the fact that the applicants fail to explain whether they act in the interest of the public or in the public interest.

11.6 Relying on the dicta in **National Union of Mine Workers v Free State Consolidated Gold Mines Operations 1989 (1) SA 409 (O) at 413 H/J** distinguishable, HATTINGH J said:

> *"In my judgment, Applicant has no **locus standi in judicio** and the objection raised in this regard succeeds. There is a further ground upon which the Applicant must be non-suited. Applicant cannot bring the present application in a representative action on behalf of the public, even if Applicant intended to protect the interest of the public in addition to those of its members, because ….**actiones populares** generally becomes obsolete in the sense that a person is not entitled to protect the rights of the public or champion the cause of the people".*

11.7 In the light of the above, the 1st to 14th respondents submit that the 2nd to 18th applicants have failed to attach a resolution of any structure they allege to be representing to establish that the deponent is duly authorised to depose to the affidavit on behalf of himself and the other 16 applicants. It is therefore asserted that this application should be dismissed with costs for the applicants' lack of *locus standi*.

[12] Applicants' counsel on the other hand submitted that:-

12.1 It is contended that the second applicant, who is the deponent to the founding affidavit does not have the necessary *locus standi,*

as there is no resolution of the other applicants or the community.

12.2 As far as authority from the other applicants is concerned, they have each signed confirmatory affidavits which say *inter alia*, that they have read the founding affidavit of the second applicant and confirm and support all that is said therein. This is more than sufficient to vest *locus standi* in the second applicant insofar as the other applicants are concerned.

12.3 The respondents also contend that a resolution of the community authorising the bringing of this application is required. It is expressly stated in para 1.7, p14 of the papers that the application is brought in terms of section 38(b) and (c) of the Constitution which states:-

> 38. **Enforcement of rights** – Anyone listed in this section has the right to approach court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –
>
> (a) …….
> (b) anyone acting on behalf of another person who cannot act in their own name
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) ……..
> (e) ……..

12.4 In the case of **Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA)** per **Cameron JA** said:-

[4] In the type of class at issue in this case, one or more claimants litigate against a defendant not only on their own behalf but on behalf of all other similar claimants. The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt of it. The class action was until 1994 unknown to our law, where the individual litigant's personal and direct interest in litigation defined the boundaries of the court's power in it. If a claimant wished to participate in existing court proceedings, he or she had to become formally associated with them by compliance with the formalities of joinder. The difficulties the traditional approach to participation in legal process created are well described in analysis that appeared after the class action was nationally regularised in the United States through a Federal Rule of Court 8 more than 60 years ago.

'The cardinal difficulty with joinder … is that it presupposes the prospective plaintiffs' advancing en masse on the courts. In most situations such spontaneity cannot arise either because the various parties who have the common interest are isolated, scattered and utter strangers to each other. Thus while the necessity for group action through joinder clearly exists, the conditions for it do not. It may not be enough for society simply to set up courts and wait for litigants to bring their complaints – they may never come.

What is needed, then, is something over and above the possibility of joinder. There must be some affirmative technique for bringing everyone into the case and for making recovery available to all. It is not so much a matter of permitting joinder as of ensuring it.'

[5] The class action cuts through these complexities. The issue between the members of the class and the defendant is tried once. The judgment binds all and the benefits of its ruling accrue to all. The procedure has particular utility where a large group of plaintiffs each has a small claim that may be difficult or impossible to pursue individually. The mechanism is employed not only in its country or origin, the United States of America, where detailed rules governing its use have developed, but in other

countries as well. The reason the procedure is invoked so frequently lies in the complexity of modern social structures and the attendant cost of legal proceedings:

'Modern society seems increasingly to expose men to such group injuries for which individually they are in a poor position to seek legal redress, either because they do not know enough or because such redress is disproportionately expensive. If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all'.

[6] It is precisely because so many in our country are in a 'poor position to seek legal redress' and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice that both the interim Constitution and the Constitution 14 created the express entitlement that 'anyone' asserting a right in the Bill of Rights could litigate 'as a member of, or in the interest of, a group or class of persons'. [own emphasis]

12.5 The group or class is the Bapo Ba Mogale Community of which the applicants are the admitted statutorily recognised leaders. There can be no doubt as to the applicants' *locus standi* to have brought this application on behalf of the community.

[13] The argument of the respondents' counsel in as far as the issue of the Power of Attorney is concerned fell away instantly after the ruling by this court of the objection. In as far as the issue that there is no resolution of the other applicants or the Community is concerned, I am of the view that the arguments of the respondents' counsel cannot succeed based on the remarks made by Cameron JA in the Nqxuza case quoted above, especially those that were made under paragraph [6] of his judgment. In this matter, the situation is even better in that the other applicants have each signed a confirmatory affidavits which confirm and support all that was said in the founding affidavit of the second applicant.

RES JUDICATA

[14] Respondents contends that this matter is *res judicata* for the following reasons:-

14.1 That this application was argued on the 30th August 2012 and it was dismissed for lack of urgency. At the hearing of this matter on the 30th August 2012, counsel for the 1st to 14th respondents showed this Court that the application is not urgent by traversing the merits. The court *a quo* had the benefit of hearing both Counsel for the applicants and the 1st to 14th respondents on the merit of this matter. This point renders the matter to be *res judicata.*

14.2 Further that the order of the court dismissed the whole application. He quoted a number of authorities that deals with the requirements of *res judicata* in support of his arguments.

[15] Applicants' Counsel disagreed with the argument of the respondents' Counsel. He mentioned that Matlapeng AJ only ruled in as far as urgency is concerned. Further that it will also appear on the record of the judgment that urgency was argued in the context of some of the merits.

[16] The necessity to peruse the record of the proceedings in question became necessary which this court did. The following are extracts from the judgment of Matlapeng AJ in the transcribed proceedings, which forms the basis of my decision which is to the effect that I fully

agree with the submissions made by the applicant's counsel that the issue raised of *res judicata* cannot succeed.

16.1 "The two parties were invited to address me on the question of urgency. However, despite this invitation they decided to venture into the realm of the merits of the application under the guise that urgency cannot be argued in vacuum.

As a result what could have been done in a matter of an hour or two, turned into a marathon. I do not intend to deal with all the issues that the parties raised except confine myself to the issue of urgency as I see it.

16.2 "MR KGOMO: With respect, M'Lord, I do not want to unnecessarily interject and, but what my learned, my learned friend's submissions have nothing to do with urgency. With respect. He is really now transverse into the merits of the matter. As Court pleases.

COURT: Mr Eiser

ADV. EISER: My Lord, this is what you allowed Mr Lebala to do and, and I must be given an opportunity to reply because I did not deal with, I dealt with this fleetingly upfront. Mr Lebala did not deal with this and I will show you, M'Lord, that contrary to what paragraph 24.2 says, that is 24.2 of the Answering Affidavit, they took over, the Royal six, the power of the administrator and did so expressly, and M'Lord, having allowed Mr Lebala to go way beyond urgency and in fact Mr Lebala tried to limit me yesterday and you said you, I think your words were that you cannot be prescriptive.

M'Lord, I submit that in order for a fair hearing to take place I must be allowed to deal with everything that he said. And you will remember I said last night that I would be long because of all the matters which he traversed and, M'Lord, I must take you through that.

COURT: I will allow you to go through that."

16.3 "COURT: Well, the matter was, was the matter argued by your senior yesterday?

ADV. EISER: No

MR KGOMO: No, no, it is in respect to other points *in limine* Which are raised. I can go to the Notice of Motion. Urgency is not the only point *in limine* raised. The locus standi of the applicants is also challenged.

COURT: I am aware, I am aware, Mr Kgomo. You know the problem that I am having with the conduct of this matter is that I tried to serve the House Rules, that you are going to argue on urgency.

` MR KGOMO: Yes

COURT: We forgot about …….. [intervene]

MR KGOMO: Other …….. [intervene]

COURT: I was informed that you cannot argue urgency in vacuum. I allowed certain issues to come in. Now it seems like everything is being traversed.

MR KGOMO: Yes

COURT: But at the end of the matter I am only going to decide on urgency."

[17] In addition the following authorities have also been considered in the conclusion that I had reached that the arguments of the respondent cannot succeed on this Point *in Limine.*

Yellow Star Properties v Department of Developmental Planning and Local Government (Gauteng) (549/07) [2009] ZA SCA 25 (27 March 2009):-

17.1 "It has been recognised though that the strict requirements of the exception, especially those relating to *eadem res petendi* cause (the same relief and the same cause of action), may be relaxed where appropriate. Where a defendant raises as a defence that the same parties are bound by a previous judgment on the same issue (viz. *idem actor and eadem quaestio*), it has become commonplace to refer to it as being a matter of so-called 'issue estoppel'. But that is merely a phrase of convenience adopted

from English law, the principles of which have not been subsumed into our law, and the defence remains one of *res judicata*. Importantly when dealing with the issue of estoppel, it is necessary to stress not only that the parties must be the same but that the same issue of fact or law which was an essential element of the judgment on which reliance is placed must have arised and must be regarded as having been determined in the earlier judgment".

17.2 In the case of **David Wallace Zietsman v Electronic Media Network Limited and Multichoice Africa (Pty) Limited**, unreported judgment of the Supreme Court of Appeal **(771/2010) [2011] SCA 169 (29 September 2011) in paragraph 14** the following was said:-

"In order for the defence of res judicata to be sustained it must be shown that the earlier judicial decision on which reliance is placed was a decision on the merits. It has been said that, 'it is not the form of the order granted but the substantive question (did it decide on the merits or merely grant absolution?) that is decisive in our law and that what is required for the defence to succeed is a decision on the merits….."

17.3 See also the case of **United Enterprises Corporation v STR Pan Ocean Co Ltd 2008 (3) SA 585 (SCA) para. 9** wherein the following was said:-

"It was common cause before us that Cleaver J, following *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) 509 (D), was correct in applying the lex fori. It is clear that in our law a defendant who has been absolved from the instance cannot raise the *exception rei judicatae* if issued again on the same cause of action: see *Grimwood v Balls* (1835) 3 Menz 448; *Thwaites v Van der Westhuyzen* (1888) 6 SC 259; *Corbrige v Welch* (1892) 9 SC 277 at 279; *Van Rensburg v Reid* 1958

(2) SA 249 (E) at 252 B-C; Herbstein and Van Winsen, *The Civil Practice for the Supreme Court of South Africa*, 4 ed, 1997, 544 and 684. It was held in *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 563 G-H that the dismissal of an application (which ordinarily would be regarded as the equivalent to granting absolution from the instance: *Municipality of Christiana v Victor* 1908 TS 1117, *Becker v Wertheim, Becker & Leveson* 1943 (1) PH F34 (A) can give rise to the successful raising of the exception *rei judicatae* where, regard being had to the judgment of the court which dismissed the application, 'the **import** of the order [was] clearly that on the issue raised the Court found against the appellant [which had been the applicant in the previous proceedings], and in favour of the respondent'. It is thus clear that it is not the form of the order granted but the substantive question (did it decide on the merits or merely grant absolution?) that is decisive in our law and that what is required for the defence to succeed is a decision on the merits. [my own emphasis].

[18] In my view the effect the judgment of Matlapeng AJ is that it removed the matter from the roll of urgent applications as it only ruled on urgency. Even though if the application was dismissed, Matlapeng AJ did not deal with the merits as it is explicit from the extracts quoted in paragraph 16.1 above. It is simply not so as contended by the respondents' counsel that the merits were pronounced on in detail. Accordingly, the doctrine of *res judicata* cannot be relied upon by the respondents in the circumstances of this matter.

NON JOINDER OF KGOSI BOB EDWARD MOGALE

[19] The 1st to 14th Respondent raises the non-joinder of Kgosi B E Mogale because the Applicants' 'purported' legal representative persists with the following prayers:

2.1.1 taking any steps whatsoever including calling any meetings or proposing or passing any resolutions either themselves or in concert with any other member or members of the Royal Family of the Bapo ba Mogale Community (the Community) with the intention or which will have the effect of in any way undermining the position of the first applicant Bob Edward Mogale as Kgosi of the Community;

2.1.2 taking any steps to appoint or in any other way have the seventh respondent Philius Rakgatla Mogale or any other person appointed or installed as acting Chief of the Community;

2.3 The decision taken at the meeting of the Royal Family on 18 August 2012 to remove the first applicant as Kgosi of the Bapo ba Mogale Community in any manner or from is hereby declared unlawful and set aside;

2.4 The decision taken at the meeting of the Royal Family on 18 August 2012 to appoint the seventh respondent Philius Rakgatla Mogale as acting Kgosi of the Bapo Ba Mogale Community in any manner or form is hereby declared unlawful and set aside.

2.8 The seventh respondent Philius Rakgatla Mogale is hereby interdicted and restrained for holding out that he is the acting Kgosi of the Community or of accepting any such appointment as acting Kgosi unless he is so appointed by the thirteen respondent in terms of section 16 of the North West Traditional Leadership and Governance Act 2 of 2005.

[20] It is palpably clear that 2nd to 18th applicants cannot approach this Court and seek the above mentioned prayers without having joined

Kgosi B E Mogale as a co-applicant as all the above stated prayers are anchored on Kgosi B E Mogale's interests and rights.

[21] It was held in **Gordon v Department of Health 2009 (1) BCLR 44 (SCA) at page 50, para 9** as follows:

> "the court formulated the approach as, first, to consider whether the third party would not have locus standi to claim relief concerning the same subject matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or "judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interest" of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined".

[22] The applicants' counsel at the onset of the proceedings indicated that he does not persists with prayer 2.1.1 and 2.3. He maintained that the others can be granted without Kgosi being joined. I unfortunately do not agree with the respondents' counsel that Kgosi should be joined in this proceedings for the remaining prayers. Paragraph 2.1.2, 2,4, 2.8 of the applicants' notice of motion as quoted by the respondents' Counsel, affects the rights of the seventh respondent, Phillius Rakgatlha Mogale as Acting Kgosi. The order or judgment sought in these prayers can be sustained and carried into effect without necessarily prejudicing the interest of Kgosi who is not joined. The relief sought further concerns new developments regarding a different cause of action which occurred on the 18/08/2012.

CONTEMPT OF COURT

[23] The respondents' counsel submitted that the applicants and their legal representatives are in clear contempt of a Court Order handed down by Sithole AJ. It is worth emphasizing that Kgosi B.E. Mogale and anyone were interdicted from interfering with the administration of the community affairs as contained in paragraph 4 of the order which provides:

> *"Everything done by each of the First to Fifth Respondents individually and / or in concert with one or more or all of them and / or in concert with any other person or legal entity, on or after 27 March 2008 in the name of the Applicant and / or the Applicants Traditional Council and / or representing and / or purporting to represent the Bapo Ba Mogale Community is declared unlawful and of no legal force or effect."*

[24] From the aforesaid it is luminous that Kgosi B. E. Mogale and anyone allegedly acting on the instruction and on behalf of Kgosi B.E. Mogale do not have *locus standi* to interfere and prevent the respondents from carrying out their duties and functions. They could only do so if the above said Court Order is set aside.

[25] He submitted further that as indicated in the preceding paragraphs, Kgosi B E Mogale has withdrawn his authority to be represented by 2nd to 18th applicants' legal representative, and has also indicated that he does not desire to be a party to these proceedings, it is palpable clear that the applicants' legal representative is still insisting on prayers that will affect Kgosi B E Mogale directly and also that the subsequent prayer are anchored on prayer 2.1.1. that affects Kgosi B E Mogale directly.

[26] I fully agree with the submissions by the applicants' counsel that the respondents misread the said court order. Perusing the court order itself it is apparent that all the applicants in this matter were not party to those proceedings. They further cannot be said to be acting jointly with Kgosi.

COMPLIANCE WITH THE NOTH WEST TRADITIONAL LEADERSHIP AND GOVERNANCE ACT

[27] I fail to understand why the respondents' counsel had included this issue as a *Point in Limine*. The submissions made here both in their heads of arguments and the arguments in court, are best placed to be submitted during the merits. I therefore decline to deal with them.

LIS ALIBI PENDES BOTH IN RESPECT OF THE REVIEW APPLICATION AND THE APPEAL

[28] The respondents' counsel submitted also that on the 13th March 2012, the first and second applicants instituted proceedings in this Court against respondents for the following orders:-

15.1.1 Reviewing, correcting and setting aside the resolutions/decision of the First Respondent (Royal family) as per annexure "KBM2" to the Founding papers taken on 9 July 2011 purporting to remove First Applicant as Kgosi of the Bapo ba Mogale Traditional Community;

15.1.2 Reviewing, correcting and setting aside failure of the Second and/or Third Applicant to take a decision or

refusal to take a decision validating and/or nullifying the said resolution of the Royal Family taken on 9 July 2011 purporting to remove First Applicant as Kgosi of the Bapo Ba Mogale Community;

15.1.3 Declaring the said resolution as per annexure "KBM2" to the founding papers, taken by the Royal Family of the Bapo Ba Mogale on 9 July 2011 purporting to remove the First Applicant as Kgosi of the Bapo Ba Mogale Community as unlawful, invalid, improper and of no force or effect; and

15.1.4 Declaring that the said resolution purporting to remove First Applicant as Kgosi of the Bapo Ba Mogale Community taken by the Royal family on 9 July 2011 is contrary to or in violation of the statutory provisions of Section 12(1) of the Traditional Leadership and Governance Framework Act No. 41 of 2003 and Section 14(1) of the North West Traditional Leadership and Governance Act No. 2 of 2005, and as such inconsistent with the constitutional principle of legality.

[29] Those proceedings are still pending and have not been disposed of.

[30] In the present action, first and second applicant again claim the following relief:-

(a) Taking any steps whatsoever including calling any meetings or proposing or passing any resolutions either themselves or in concert with any other member or members of the Royal Family of the Bapo Ba Mogale Community ("the Community") with the intention or which will have the effect of in any way undermining the position

of the First Applicant Bob Edward Mogale as Kgosi of the Community;

(b) The decision taken at the meeting of the Royal Family on 18 August 2012 to remove the First Applicant Kgosi of the Bapo Ba Mogale Community in any manner or form is hereby declared unlawful and set aside;

(c) The decision taken at the meeting of the Royal Family on 18 August 2012 to appoint the Seventh Respondent Phillius Rakgatla Mogale as acting Kgosi of the Bapo Ba Mogale Community in any manner or form is hereby declared unlawful and set aside;

[31] Further that the orders sought in the present action are the same as those prayed for in the action brought on the 13th March 2012.

[32] On the 17th March 2011, the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth and Sixteenth Applicants instituted proceedings in this Court against the Respondents for the following orders:

(a) The Royal Family of the Community and the Royal Family Executive thereof and/or any other body or grouping thereof is hereby interdicted and restrained from:

(b) Playing any role whatsoever in terms of Section 9(1) of the North West Traditional leadership and Governments Act 2 of 2005 in the administration of the Community's affairs;

(c) Appointing any of its members or any other member of the Community or any individual or legal entity to act on its behalf playing any role whatsoever in terms of Section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community affairs;

(d) Each of the Second to the Sixth Respondents acting individually and/or as a group and/or of them acting as a subgroup;

(e) Playing any role whatsoever in terms of Section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community affairs;

(f) Appointing any of its members or any other member of the Community of any other individual or legal entity to act on its behalf in playing any role whatsoever in terms of Section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community affairs;

(g) Each of the Seventh to the Twelfth Respondents acting individually and/or as a group and/or of them acting as a subgroup;

(i) Playing any role whatsoever in terms of Section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community affairs;

(ii) Appointing any of its members or any other member of the Community of any other individual or legal entity to act on its behalf in playing any role whatsoever in terms of Section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community affairs;

(h) The appointment by the Royal Family of the Community and/or any one or more of the Second to the Sixth Respondents acting as a group or as a sub-group, of the Seventh to Twelfth respondents to play any role at all in the administration of the Community's affairs in terms of section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 hereby declared unlawful and of legal force or effect, and all actions and

decisions taken by the Seventh to the Twelfth Respondents are hereby declared to be unlawful and of no legal force and effect.

(i) The decision by the Royal Family of the Community and / or any one or more or all of the second to the sixth respondents acting as a group or as a sub-group to pay themselves any amount at all is hereby declared unlawful and of no legal force and effect.

(j) The decision of the Royal Family of the Community and / or anyone or more of the sixth respondents and / or any one or more or all of the seventh to twelfth respondents to pay any amount at all to anyone or more or all of the seventh to twelfth respondents is hereby declared unlawful and of no legal force and effect.

[33] Judgment was given on the 24th March 2011. Respondents filed an application for leave to appeal on the 27th May 2011. Both the applicants and the respondents in this matter have requested to be allocated a date for the hearing of the application for leave to appeal. The matter was allocated to be heard on the 02 September 2011 but unfortunately, due to some unforeseeable mishaps, it was wrongly enrolled and therefore could not be heard.

[34] In the present action, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth and Sixteenth Applicants again claim for the following relief:-

(a) Playing any role whatsoever in terms of Section 9(1) of the North West Traditional leadership and Governments Act 2 of 2005 in the administration of the Community's affairs;

(b) Appointing any of its members or any other member of the Community or any individual or legal entity to act on its behalf playing any role whatsoever in terms of Section 9(1) of the North

West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community affairs;

(c) Acting individually and / or as a group and / or any of them acting as a sub group;

(d) Playing any role whatsoever in terms of Section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community affairs;

(e) Appointing any of its members or any other member of the Community of any other individual or legal entity to act on its behalf in playing any role whatsoever in terms of Section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 in the administration of the Community affairs;

(f) The decision of any person or body within the Community or outside of the community appointing anyone or more of the First o Twenty Ninth Respondents acting individually and/or as a group and/or as a sub-group/s, to play any role at all in terms of Section 9(1) of the North West Traditional Leadership and Governments Act 2 of 2005 and/or any other powers which any of the said Respondents purport to have and/or exercised the right of the administration of the Community affairs is hereby declared to be unlawful and of no legal force and effect and are set aside;

(g) The decision taken at the meeting of the Royal Family on 18 August 2012 to appoint the Seventh Respondent Phillius Rakgatla Mogale as acting Kgosi of the Bapo Ba Mogale Community in any manner or form is hereby declared unlawful and set aside;

(h) The decision taken by any person, and / or any person or body in the Community to pay any one or more or all of the first to twenty ninth respondents any money at all for any reason associated with or related to or connected with any exercise by any one or more or all of the said respondents of any powers in terms of section 9(1) of the North West Traditional Leadership and Governance Act 2 of 2005 and / or any other powers which any of the said respondents purport to have and / or have exercised is hereby declared unlawful and of no legal force and effect.

[35] Lastly the orders sought in the present action are the same as those prayed for and granted in the action brought on the 17 March 2011.

There is therefore litigation pending between the parties on the same cause of action and in respect of the same subject matter.

[36] The first matter that the respondent referred to is a Review application and the second one, an Appeal.

[37] The applicants' counsel on the other hand submitted that there are two fundamental requirements for a defence of *lis alibi pendens.* The first is that the parties must be the same, and the second is that the cause of action must be the same and the subject matter must be the same. The respondents fail on both grounds.

[38] Only 2 of the 18 applicants in this matter were parties to the review application. None of the 14th to 29th respondents nor the 32nd respondent were parties.

[39] Further that the relief claimed was, as evidenced by what is stated in paragraph 6.5, P215 to P217, limited to the relief about and connected to the resolution of 9 July 2011 to remove the 1st applicant and impose the 7th respondent on the Community as acting chief. None of the other relief claimed in this matter which is extensive, was dealt with. In addition the resolution referred to in the review application is dated 9 July 2011 and the one in this matter is dated 18 August 2012. The latter shows a different cause of action at very least, and probably different subject matter.

[40] As far as the Appeal matter is concerned, only 7 of the remaining 17 applicants in this matter were parties to the review application. None of the 14th to 29th respondents nor the 32nd respondents were parties.

[41] Lastly that the resolution referred to in the appeal matter was dated from 11 to 13 February 2011. The resolution in this matter is dated 18 August 2012. Again different cause of action and subject matter.

[42] I fully agree with the submissions by the applicants' counsel. Perusing the papers and the pleadings in this matter, it is quite clear that the applicants are now relying on the new cause of action, the new resolution and or actions purportedly taken by the Royal family and or Royal Six on the 18th August 2012, after the orders in the two judgments in issue were already handed down and further litigation started.

[43] Of significance is the fact that in the judgment by Gutta J which is the subject of review, the person who has been purportedly appointed by the Royal family is one Leslie Maimane who was the tenth respondent in that matter. In this matter before me the person who has been purportedly appointed by the Royal family is different, one Phineas Rakgotha Mogale, who is the seventh respondent.

[44] In the case of **Nestle (South Africa) Pty Ltd v Mars Inc 2001 (4) SA 542 (SCA)** the court held that:-

> "the defence of *lis alibi pendens* shared features in common with the defence of *res judicata* because they shared the common underlying principles that there should be finality in litigation. Once a suit has been commenced before a tribunal, competent to adjudicate it, the suit should, generally, be brought to a conclusion before that tribunal and should not be replicated".

[45] The current proceedings relating to the incident / resolution / actions of the 18 August 2012 have not yet commenced before any court except

in this matter. This Point *in Limine* by the respondents also cannot succeed.

[46] Consequently the following order is hereby made:-

46.1 All the Points *in Limine* raised by the first to the fourteenth respondents are dismissed with costs.

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A M KGOELE
JUDGE OF THE HIGH COURT

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