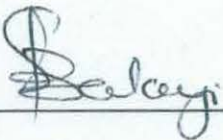


**COMMISSION INTO TRADITIONAL SUCCESSION
DISPUTES AND CLAIMS: BAKGATLA BA KGAFELA
TRADITIONAL COMMUNITY
FINAL REPORT**

HONOURABLE PREMIER

HEREWITH THE FINAL REPORT OF THE COMMISSION OF INQUIRY



MS BALOYI SC

(CHAIRPERSON)



HOSI AK MAHUMANI

(MEMBER)

DATE: 20 AUGUST 2019

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CHAPTER I

INTRODUCTION

A. Background

1. By Proclamation No. 19 of 2016 (Provincial Gazette Extraordinary No.7656, 15 June 2016) (the "Proclamation"), the Premier established the Commission *"to investigate to investigate traditional succession disputes and claims around*

1.1. Bakgatla Ba Kgafela traditional dispute and claim.

1.2. Batlhako Ba Leema succession and dispute.

1.3. Bapo I and II traditional disputes".

2. In terms of clause 5, the Commission is required to make recommendations to the Premier.
3. On 28 April 2019, a claimant to chieftainship of Bapo Ba Mogale obtained an Order of the High Court, North Gauteng (Case No. 30417/19) interdicting the release of the final report of the Commission to the Premier. On 30 July 2019, the court granted an order directing that the report on Bakgatla Ba Kgafela ("BBK") be released to the community.

4. In the light of the Court Order of 30 July 2019, it became necessary that we reconsider the format of the final report and to restructure it so that we report only on BBK. In doing so, we have endeavored to reconstruct the report without compromising the cohesiveness and completeness of each part of the report as it pertains to the different communities.
5. We accordingly present this Final Report to the Premier dealing only with Bakgatla Ba Kgafela and not as a single composite report on the four communities we were mandated to investigate, as mandated by clause 5 of the Proclamation.

B. Establishment of the Commission

6. The establishment of the Commission follows upon discord in the community of BBK Saulspoort arising from suspicion and dissatisfaction in the community about the administration of the financial affairs of the community, in particular the commercial transactions concluded by Kgosi Pilane with third parties and the application of income deriving therefrom. The suspicion and discord about the administration of the affairs of the Commission has a long history going back to the time of Kgosi Tidimane against whom allegations of maladministration of the affairs of the community were made. Over the years complaints were made to the government, the Public Protector and to the police which culminated in the prosecution and conviction of Kgosi Pilane and his later acquittal on appeal.

7. The dissatisfaction about the administration of the financial affairs of the community saw delegation attend to Kgosi Kgolo Kgafela II in Mochudi to demand that he deal with the complaints against Kgosi Pilane, a forensic investigation by the firm BDO Spencer instituted by the TC at the instance of Kgosi Kgolo Kgafela II with the co-operation of Kgosi Pilane, a resulting fall-out between Kgosi Pilane and Kgosi Kgolo Kgafela II, demands to the Premier and the Department of Cooperative Governance and Traditional Leadership (COGTA) to investigate the financial affairs of BBK and demands from the Auditor-General that the TC submit its accounts and financial statements for audit in the terms of section 31 of the NW Act.
8. The dissatisfaction has caused conflict, sometimes violent, and divided the community to take sides either in support of Kgosi Pilane and those who demand that Kgosi Pilane account to the community. The conflict arising from the accusations of maladministration has, directly or indirectly, birthed a dispute about the leadership of the community which manifests as a challenge to the institution and role of Kgosi Kgolo as it pertains to BBK in Moruleng.
9. It is against this background that the Premier established the Commission.
10. On establishing the Commission, the Premier appointed Commissioners –

10.1. Retired Judge GSS Maluleke (Chairperson).

10.2. Advocate MS Baloyi SC (Member).

10.3. Professor P Sithole (Member).

11. To assist the Commission, the Premier appointed evidence leaders - Advocates Benny Makola, Tembeka Ngcukaitobi, assisted by Advocates Morongwe Moagi, Naledi Mothapo and Pontsho Mosiane.

12. Following the resignation of Professor Pearl Sithole, the Premier reconstituted the Commission as follows –

12.1. Retired Judge GSS Maluleke (Chairperson).

12.2. Advocate MS Baloyi SC (Member).

12.3. Professor M Moleleki (Member).

13. By Proclamation No.49 of 2017 (Provincial Gazette No.7838, 20 December 2017), following the untimely death of Retired Judge GSS Maluleke, the Premier reconstituted the Commission as follows –

13.1. Advocate MS Baloyi SC (Chairperson).

13.2. Professor M Moleleki (Member).

13.3. Hosi Advocate AK Mahumani (Member).

14. In the course of the writing of this Final Report, Professor Moleleki unavoidably became unavailable to continue with the work of the Commission. As a result, the Commission continued its work with the Chairperson and Hosi Advocate Mahumani as permitted by clause 4(2) of the Regulations governing the Commission. Clause 4(2) reads *"Notwithstanding the composition of the Commission, the proceedings thereof shall not be affected by the absence of any member. It shall be competent for two Commissioners to proceed with the business of the Commission"*.

C. The Terms of Reference (ToR)

15. The ToR were published in Proclamation No. 19 of 2016 and did not change in the period since the Commission was established in June 2016.

16. The ToR require the Commission to investigate -

16.1. The role of the Paramount Chief in terms of the traditional custom, specifically in Botswana vis-à-vis in Moruleng.

- 16.2. The powers and procedure, if any, to appoint [a] senior traditional leader of Bakgatla ba Kgafela in Moruleng.
- 16.3. Determine who is the rightful heir in terms of the tradition and custom, had Tidimane Pilane not acted in the manner he did which led to the appointment [the manner and procedure is not in dispute] of Chief Nyalala Pilane.
- 16.4. The merits and demerits of Mr Ramono Merafe's claim as Senior Traditional Leader as was referred to North West Provincial Committee during 2014.
- 16.5. The role of Senior Traditional Leaders of Bakgatla ba Kgafela in Moruleng.
- 16.6. The correct relationship between Kgafela Kgafela II and the Senior Traditional Leader in Moruleng under our constitutional dispensation.
- 16.7. The role of the 32 sub-villagers officiating the appointment of the senior traditional leader of Moruleng Village.
- 16.8. The role of the 32 villages in Moruleng in the acquisition process.

16.9. The flow of financial benefits in any transactions conducted with any third party in the name of or on behalf of Bakgatla ba Kgafela by any person.

17. The ToR enjoin the Commission to apply section 39(2) and 212 of the Constitution of the Republic of South Africa, 1996 and any relevant case law in considering the content of customary law.

18. In considering the issues raised in the ToR, we have also considered and taken into account the customary law of Bakgatla Ba Kgafela; North West Traditional Leadership and Governance Act No. 2 of 2005 (the NW Act or Act); the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act); The Companies Act No. 71 of 2008 and the King Codes.

D. The Rules of the Commission

19. The Chairperson issued Directives to regulate the business of the Commission (Provincial Gazette Extraordinary No.7656, 15 June 2016).

20. The most pertinent directives and steps taken in terms thereof are -

20.1. In terms of **directive 4**, which provides that the Commission shall determine whether evidence presented to the inquiry or a representation to the inquiry is to be in writing or oral, the

Commission determined that evidence will be presented in writing and orally.

20.2. In terms of **directive 5**, which provides that the Commission shall determine a person can participate in the inquiry and the manner and extent of their participation, the Commission invited members of the public with an interest in the matters before the Commission to make written and/or oral submissions.

20.3. In terms of **directive 8**, which provides for the filing of written submissions, including statements under oath; documents; legal submissions or any expert opinion, the Chairperson determined dates for the submission of written submissions to the Commission's Secretariat.

20.4. In terms of **directive 10**, which provides for oral evidence, the Commission directed that persons who wished to present oral evidence must submit a written summary of the evidence and an explanation of why they should be permitted to participate, taking into account the factors in **directive 5**.

20.5. In terms of **directive 20**, which gives the Chairperson the discretion to permit cross-examination and re-examination of witnesses, the Chairperson permitted persons presenting evidence to cross-examine and re-examine witnesses, on application to the Chairperson.

20.6. In terms of **directive 21**, which prescribes that the Commission will hold hearings open to the public, the Commission held public hearings. The public hearings were held at the Rustenburg Municipality, Civic Centre, Rustenburg.

E. Participants

21. By widely publicised notice, including by direct written notice to Bakgatla Bakgafela in Saulspoort and Mochudi, Botswana, the Commission invited members of the community and other interested persons to participate in the Commission and to present evidence.

22. In response to the invitation to participate, the Commission received written and oral evidence from,

22.1. Members of the royal family Moruleng and Mochudi.

22.2. Members of the community

22.3. Members of the Traditional Council

22.4. Expert testimony on the history of Bakgatla Ba Kgafela

22.5. Expert testimony on financial and corporate governance matters

23. We are most grateful to all the persons who presented evidence and information to us on the issues we are mandated to investigate. Their participation greatly assisted us understand and interrogate the issues under investigation. A complete list of persons who presented evidence, and their legal representatives where applicable, appears in **Appendix A**.

F. Structure of the Report

24. We present the report in the format of chapters as follows –

24.1. Chapter 2 – Executive Summary of our findings and recommendations.

24.2. Chapter 3 – We discuss the evidence and information under each ToR and the findings we make in respect of each. We have not sought to set out the evidence of every witness as presented to us for we do not believe that it will serve any meaningful purposes except make the report unnecessarily lengthy. Unless necessary, we also do not identify witnesses by name in discussing the evidence. A full record of the evidence presented to and considered by us is available.

24.3. Chapter 4 – We set out the recommendations we make in respect of each issue raised by the ToR

24.4. Chapter 5 – Appendices. We have listed all persons whom presented evidence, whether oral or written, organogram of BBK companies, list of directors of BBK companies, key documents. A full record of documents is available.

CHAPTER II

EXECUTIVE SUMMARY

1. For ease of reference, we have considered it useful that we provide a summary of the Findings and Recommendations that we make in respect of each issue raised in the ToR. The reference to the ToR by number is as they appear in the Proclamation.

(i) ToR 1.1; 1. 2; 1.6 & 1.7

2. On the role of a Paramount Chief, the power and procedure to appoint a Kgosi, the correct relationship between Kgafela Kgafela II and Kgosi in Morulneg under the Constitution; and the role of the 32 villages in the appointment of a Kgosi, we find that according to the custom and tradition of BBK -

2.1 The title "*Paramount Chief*" is used interchangeably with "*Kgosi e Kgolo*" and "*Kgosikgolo*". In present day, the title "*Kgosikgolo*" is commonly used.

2.2 Both the communities and the royal family of Bakgatla Ba Kgafela in Mochudi and in Moruleng have historically recognized the institution of Kgosikgolo with jurisdiction in Mochudi and Moruleng.

- 2.3 Both the communities and the royal family in Mochudi and Moruleng have historically recognized the seniority of Kgosi to Kgosi in Mochudi and Moruleng.
- 2.4 Kgosi selects the Kgosi in Mochudi, Botswana and in Moruleng, Saulspoort. He has the power to remove the Kgosi.
- 2.5 Both the communities and the royal family in Mochudi and Moruleng have historically recognized the power of the Kgosi to select a Kgosi for each of the two communities.
- 2.6 There is no prescribed procedure for the selection of a Kgosi in Moruleng. Kgosi may, at his discretion, consult members of the royal family and/or other person(s) as he may determine.
- 2.7 A Kgosi may only be removed in circumstances provided for in sec 14(1) of the NW Act. If the Kgosi wishes to remove the Kgosi from office, he can only do so in accordance with sec 14(1).
- 2.8 Kgosi plays no role in the administration of the affairs of the community in both Mochudi and Moruleng. The administration of both communities is the province of Kgosi in both communities.

- 2.9 In Moruleng, Kgosikgolo becomes involved with administrative matters only upon the invitation of the Kgosi, the Royal Family or the community. He does not, of his own accord, become involved in matters that fall within the province of the Kgosi.
- 2.10 Kgosikgolo has no legal standing to be involved in the discharge of the functions of the Kgosi in terms of the NW Act. As the senior leader in terms of custom and tradition, he may act at the request of the community, but in doing so, may not assume the functions reserved for Kgosi by the NW Act and the Framework Act. Any involvement in matters which fall within the province of the Kgosi must be with the consent or acquiescence of the Kgosi, provided that it does not result in a derogation of the powers and functions of the Kgosi.
- 2.11 The NW Act recognises the State's duty to "*respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa*". BBK in Moruleng have historically elected to be governed by a system that recognises the institution of Kgosikgolo, his status as senior to Kgosi and his role to select a Kgosi. The State has a duty to uphold this choice of BBK of Moruleng. This does not offend the Constitution and is consistent with the constitutional recognition and protection of customary law and its leadership structures.

2.12 The 32 villages in Moruleng do not play any role in selecting or officiating the appointment of the Kgosi in Moruleng.

(ii) ToR 1.3 & 1.4

3. On the rightful heir and the merits and demerits of the claim of Mr Merafe Ramono for chieftainship, we find that -

3.1 Historically, Bogosi in Moruleng has not been hereditary. Kgosi kgolo in Mochudi selected the Kgosi in Moruleng. This was the case with Kgosi Ramono I, selected by Kgosi Linchwe I, and was the case with Kgosi Tidimane, selected by Kgosi Molefi. It was also the case with with current Kgosi Pilane who was selected by Kgosi Linchwe II.

3.2 All diKgosi in Moruleng were selected from the royal family.

3.3 The rightful heir to Bogosi in Moruleng would have been whomever Kgosi kgolo selected in accordance with practice and custom at the time. We are therefore unable to identify the person that the Kgosi kgolo would have identified "*had Kgosi Tidimane not acted in the manner that he did*" of seeking to appoint his eldest son Merafe Ramono.

3.3 Mr Merafe Ramono has no rightful or natural claim to bogosi by virtue of the fact that he is the eldest son of Kgosi Tidimane.

(iii) ToR 1.5

4. On the role of the Kgosi in Moruleng, we find that -

4.1 The role of the Kgosi is set out in sec 18 NW Act, read with Schedule II thereof. Only he has the power to administer the affairs of the community and to perform the functions ascribed to him in the Act.

4.2 Kgosi exercises only such powers and performs functions as the NW Act and the Framework Act permit. This includes such powers and functions as derive from customary law and tradition of BBK and in accordance with the customary law and customs of BBK.

4.3 Kgosi Pilane is singularly involved with the commercial activities conducted on behalf of or in the name of Bakgatla Ba Kgafela. This includes financial matters related to or arising from transactions with third parties.

4.3 Of the members of the Traditional Council, Kgosi Pilane has chosen to involve only Mr Kagiso Pilane, his nephew, in matters pertaining to commercial transactions with third parties.

4.4 Kgosi Pilane does not meaningfully consult with or seek the approval of the community in transactions with third parties, including the application of monies deriving from transactions with third parties.

4.4 Kgosi Pilane has established, or authorised the establishment of a web of companies to conduct business on behalf of or in the name of BBK. Persons involved with the companies report only to Kgosi Pilane.

4.5 Kgosi Pilane does not report or account to the TC about the activities of the companies. Neither does he report or account to the community.

4.6 Kgosi Pilane has failed to ensure that the Traditional Council prepares proper financial statements to account for the monies of the community and for the activities of the companies. He has also failed to ensure that the companies prepare financial reports and submit to the Traditional Council.

4.7 Kgosi Pilane has caused that the monies of the community are administered from bank accounts not authorised in terms of sec 30 of the NW Act. He has failed to ensure that the TC administers the finances of the community in accordance with sec 30(1) of the NW Act.

4.8 Kgosi Pilane has failed to ensure that the Traditional Council prepares financial statements of the community and that the statements are submitted to the Auditor-General for audit in terms of sec 31 of the NW Act.

4.9 Kgosi Pilane has failed to take any steps to resolve complaints of financial maladministration against him.

(iv) ToR 8 and 9

5. With respect to the role of the 32 villages in the acquisition process and the flow of financial benefits in transactions conducted in the name of or on behalf of BBK, we find that –

5.1 BBK have, under the leadership of Kgosi Pilane, concluded significant commercial transactions relating to their natural resources, the minerals in particular. From these, they have earned significant income and hold assets with great financial value.

5.2 The 32 villages have no meaningful involvement in decisions to acquire interests or to invest in commercial entities. Decisions to acquire and to invest are primarily made by Kgosi Pilane.

5.3 Except for,

- (i) a resolution signed by Kgosi Pilane on 12 April 2003 which is supposed to be a decision taken by the community in accordance with the requirements of IPILRA authorising an application for prospecting rights;
- (ii) a kgothakgothe decision in 2004 which authorizes registration of Itereleng Bakgatla Mineral Resources (Pty) Ltd for the purpose of applying for prospecting rights;
- (iii) a kgothakgothe decision of 26 November 2006 which ratifies agreements entered into by Kgosi Pilane to acquire 15% shares in Union Section Mine;
- (iv) a record of a meeting on 21 April 2007 of Lesetlheng village with Mr Kobedi Pilane and a representative of Barrick Platinum SA (Pty) Ltd *"to explain the process and progress of the mining activities subsequent to the completion of the prospecting"*;
- (v) a kgothatkgothe resolution of 28 June 2008 which ratifies agreements signed by Kgosi Pilane relating to the exercise of a mining right acquired by IBMR,

we have not find evidence of the involvement of the 32 villages in decisions that have resulted in and from transactions with third parties.

5.3 The Traditional Council does not have any process for the involvement of the villages in the acquisition process. There is no protocol or requirement in place to consult and report to the community before, during and after decisions are made by the TC and/or Kgosi.

5.4 Transactions with third parties are concluded through BBK companies. Kgosi Pilane is singularly responsible to interact with the companies. The directors and managers of these companies do not account to the TC or to the community.

5.5 The TC does not have a process to hold directors and Managers of BBK companies accountable to it.

5.6 The TC does not have a process to hold Kgosi Pilane to account to Members of the TC are entirely dependent on Kgosi Pilane for information and for decisions.

5.7 Income earned from transactions with third parties has resulted in improvements in the living conditions of the community. Projects financed with income earned from significant transactions with third parties include major infrastructure developments and employment opportunities for members of the community.

5.8 Due to the incomplete and unreliable nature of the financial records of the TC and BBK companies available to us, we cannot certify that all transactions and income earned from the transactions is accounted for. For the same reason we cannot certify that all income has been applied for the sole benefit of the community.

5.9 None of the income earned from significant transactions with third parties has been paid into the account administered by the government as prescribed by sec 30 of the NW Act.

5.10 BBK have not been granted authorisation by the Premier to operate a trust account and to pay into such account monies earned from transactions with third parties as prescribed by sec 30(2) of the Act.

5.11 BBK invested money in excess of R900 million without seeking or being granted authorisation by the Premier to invest surplus funds and required by sec 30(4) of the Act.

5.12 The accounts and financial statements of the BBK have never been audited by the Auditor General as prescribed by sec 31 of the Act.

5.13 The Department of COGTA has failed to exercise its statutory obligations to provide support to the TC and to ensure that members

of the TC have the necessary skill to perform their functions as required by sec 12(3) of the Act.

5.14 The Premier has failed to exercise his statutory powers and obligations to take measures to assist the TC to discharge its functions and to ensure proper administration and good governance (sec 9(3); 10(2)).

Recommendations

6. Based on the evidence and our findings, we make the following recommendations –

6.1. The Premier take note of our findings in respect of ToR 1 to 8 (paras 2 to 4 above).

6.2. The Premier exercise his powers in terms of secs 9(3) and 10(2) of the Act –

- (i) To appoint a person to take control of the affairs of the TC and to exercise the powers of the TC, including, to establish systems and processes for accounting by BBK companies; consulting, accounting and reporting to the community.

- (ii) To appoint a forensic investigation to conduct a comprehensive investigation of transactions and the financial affairs of the TC and its companies.
- (ii) To instruct the MEC of COGTA and/or the Department COGTA to take steps to assess the skills of members of the TC and to provide appropriate training in terms of sec 35.

CHAPTER III

A. THE ROLE OF THE PARAMOUNT CHIEF IN TERMS OF TRADITION AND CUSTOMS SPECIFICALLY IN BOTSWANA VIS-À-VIS IN MORULENG

1. The title "Paramount Chief" is historically used among BBK of Mochudi and Moruleng interchangeably with "Kgosikgolo" and "Kgosi e Kgolo". For the purposes of this report, we have elected to use Kgosikgolo. In the matter of Mmuthi Pilane v Kgosi Nyalala Pilane 2013(4) BCLR 431 (CC), the Constitutional Court noted that it was not necessary whether Kgosikgolo is defined in the Act, Provincial Act or any other Act, it is permitted by the customary law of the tribe. We accordingly do not consider that anything of substance turns on the use of the title "Kgosikgolo" or its other variations, but rather on the more substantive question whether BBK in Mochudi and Moruleng recognise – (i) the status of a leader or Kgosi senior to the Kgosi in Mochudi and Moruleng; (ii) the role of a leader senior to the Kgosi in Mochudi and Moruleng; and (iii) the powers of a leader senior to the Kgosi in Mochudi and Moruleng.
2. For convenience only, we refer to the various Kgosi by name only and use the title only where it is necessary to distinguish them from another person with the same name. Also for convenience, we refer to witnesses by name without title. In either case, we do not intend to be disrespectful of the persons we

refer to and tender our apology to any persons who may be affronted by our referring to them or any other person by name only.

The Evidence

3. The evidence comprises written statements, oral evidence, expert witnesses and writings on the history of BBK.
4. In a written submission on behalf of the BBK Mochudi, it is stated that the position of Kgosikgolo is a traditional or a customary office which has existed amongst the BBK since time immemorial and that it has always been understood that Kgosikgolo is, in his sole and absolute discretion, responsible to appoint the person to discharge the functions of Kgosi in Moruleng. In his statement, Morena Mmusi Kgafela, son of Linchwe II and brother to Kgafela Kgafela II, states that Kgosikgolo selects and may remove a Kgosi. In this regard Professor Bernard Mbenga refers to Schapera, *Ditarafalo*, in which Schapera writes that Linchwe I removed Mokae as Kgosi in SA, banishing him to Mochudi and appointed Dithake as Kgosi in his place, and latter Ramono I.
5. Explaining the history of BBK, Professor Frank Morton testified that *"In 1903 Kgosi Linchwe sent his brother Ramono to be his representative in South Africa. This is when he took on the title of Kgosi-e-kgolo (latterly also referred to as Kgosikgolo)".* He lists 13 *"Paramount Chiefs"* who ruled, starting with Kgamanyane (1848-1875) and ending with Kgafela Kgafela (2008 to date). This evidence of Morton was not disputed. Mbenga refers in his affidavit and

report to a "*Paramount Chief*" based in Mochudi with jurisdiction over BBK in South Africa. He also states that BBK in SA "*fully acknowledged not only the Mochudi chieftainship's seniority but also its complete jurisdiction over them*" and refers to a recordal of a journalist EF Knight (Knight South Africa After the War), referring to Linchwe's authority, that "*...in [the] Transvaal territory, there is no doubt that all the [Bakgatla] people regard him as their lord and would implicitly obey his orders*".

6. Merafe Ramono and Mrs Grace Meikie Masuku deny that there was ever an institution of Kgosi Kgolo among BBK with jurisdiction in SA. The position of current Kgosi Molefe Nyalala John Pilane and Mrs Ntshadi Martha Tsheole on the issue changed from an outright denial of the existence of such an institution to a more attenuated position which ranged from admitting the nomenclature but ascribing it to a referral to an elder brother of a Kgosi, to asserting that such nomenclature was wrongly used wherever found, and ultimately to acknowledgment of a Kgosi in Mochudi who appointed the Kgosi in Moruleng, including Kgosi Pilane.

7. We found references to Kgosi Kgolo, in addition to the writings of Morton, Mbenga and Schapera, in -

7.1. Photograph of Linchwe Kgamanyane Pilane with dates 1875 to 1924 describes him as "*Kgosi Kgolo ya Bakgatla*".

7.2. Letterhead of Linchwe (deleted and replaced with Isang) Pilane dated 24 September 1918 has the description "*Kgosi E Kgolo*".

- 7.3. Photograph of Molefi K Pilane with dates 1929 to 1958 bears the description "*Paramount Chief of Bakgatla Tribe*".
- 7.4. Undated photograph of Linchwe II describes him as "*Kgosi kgolo wa Bakgatla-Ba-Kgafela*".
- 7.5. Programme of the 20th anniversary celebration of the chieftainship of Linchwe II (1963-1983) describes him as "*Paramount Chief*".
- 7.6. Letter of Kgosi Pilane of 1 March 2010 to Department of Local Government and Traditional Affairs, NW which records that in November 1994 Bakgatla Ba Kgafela Botswana and Moruleng met at Kgothakgothe and resolved, *inter alia*, that they were and would continue to be one traditional community and fell under the leadership of then Linchwe II as their Paramount Chief and that he has the power to appoint a representative to lead the community in Moruleng.
- 7.7. Affidavits of Nyalala Pilane in various court applications.
8. From the evidence, the following appears –
- 8.1. BBK in Mochudi and Moruleng have historically recognised the institution of a Kgosi kgolo based in Mochudi, who is senior to the Kgosi in Mochudi and Moruleng.

8.2. The most significant role of the Kgosi kgolo is the appointment of the Kgosi in Mochudi and Moruleng, and matters incidental thereto, which according to the BBK in Mochudi includes the removal of a Kgosi. According to BBK Mochudi, Isang removed Dialwa as Kgosi in Saulspoort as a result of complaints from the community of Saulspoort.

8.3. The Kgosi kgolo's role to appoint a Kgosi for Saulspoort, first found official recognition by the government of now in 1903 when the Governor of the Transvaal, proposed and agreed that Linchwe I formally nominate a "deputy" or "representative" to act for him in the Transvaal. In this way, Linchwe I would in effect control and govern BBK in Saulspoort, while his deputy would be officially recognized as the chief. This position adopted by the Transvaal government was a compromise offered to Linchwe and BBK when that government rejected Linchwe's request that the government recognize the territory occupied by BBK in Saulspoort and Mochudi as his "reserve" and his status as chief over that territory.

8.4. According to Schapera (A History of Bakgatla бага Kgafela), Kgosi Ramono I was recognized and appointed as Kgosi by the government of the Republic of South Africa and acknowledged as a representative of Linchwe I. He writes that,

"Soon after the war was over, Lentswe asked to be recognised formally as chief over the Bakgatla in Transvaal and for the extension of his reserve to include all the land in the Transvaal which had at one time or another been occupied by Bakgatla. The latter request

was immediately turned down as preposterous. In regard to the former, he was told that he could not be officially recognised as having any authority in the Transvaal, since his main settlement was outside that Territory and he was not subject to the control of its Administration.

But a compromise was reached by which he was allowed to nominate a deputy to act for him in the Transvaal; in this way he could in effect control and actually govern the people there, while in theory his deputy was the chief officially recognised by the Transvaal Government. He accordingly sent his brother Ramono to Saulspoort in 1903 to act as his deputy".

- 8.5. On the basis of the concession granted to Linchwe I to appoint a representative in the Transvaal, in 1903 he appointed Ramono I as his "deputy" and "representative" and Ramono I was on that basis appointed by the Transvaal government as Kgosi whilst Linchwe I was acknowledged by the same government and the community as the effective chief (I Schapera, A Short History of the Bakgatla бага Kgafela of Bechuanaland Protectorate). Schapera further writes that ever since the time that Linchwe appointed Ramono I, the BBK in Saulspoort *"have acknowledged the chief in Mochudi as their head, paid him tribute, and fulfilled their other tribal obligations and responsibilities towards him in the same way as did the section in the Protectorate"*. Professor Morton stated in his evidence that, at the time that Linchwe appointed Ramono, Segale, a half-brother of Linchwe, was the chief in Mochudi and Linchwe I was the Kgosi above Ramono in the Transvaal and Segale in Mochudi.

8.6. In a memorandum dated 12 March 1917 from Transvaal government representative Barret to someone named Griffith and the communication below from Griffith to the Native Commissioner, Rustenburg dated 3 April 1917, Barret states that Ramono and the tribe "*would do nothing without first consulting*" with Linchwe I, including appointment of a successor to Ramono, which the government considered would be a waste of time and would not be accepted by (petty) Chief Dikeme Pilane of Saulspoort who succeeded upon Ramono I's death and the tribe, "*unless ... it was approved by Linchwe*". With this official concession to Linchwe I that he appoints a deputy or representative to represent him in the Transvaal, the government of the Transvaal acknowledged the leadership of Linchwe over BBK in Saulspoort, even if begrudgingly as appears later in the memorandum from Barret to Griffith.

8.7. A report dated 3 April 1917 from Griffith to the Native Commissioner, Rustenburg, states that "*Even when the late chief was alive Ramono he would do nothing without first consulting with Linchwe*". The letter further states "*I'm facing the impossible position of appointing the successor of the late Chief Ramono and unless such appointment is approved by Linchwe it would be such a waste of time*".

8.8. A petition with the heading "*Petition of the Chief and Councillors of Bakgatla ba Kgafela*" dated 8 April 1929, calls on the government of Transvaal that "*...We deserve that it be clearly laid down that we are people under the chieftainship of Isang Pilane acting for Molefi Pilane,*

Paramount Chief of the Bakgatla and of his lawful heirs and successors.

We acknowledge Chief Ofentse Pilane or his lawfully appointed successor as representative of the Chief at Saulspoort with full power and authority to act and judge for and on behalf of and subject to confirmation and approval of the chief himself".

8.9. The following persons were appointed to Saulspoort by the reigning Kgosikgolo following the death of Ramono I in 1917 –

- Dialwa, son of Kgamanyane, (Acting, **1917 to 1922**) and removed by Isang following complaints by the community against him.
- Ofentse Tlhabane, son of Linchwe I, (Acting, **1922 to 1942**). Morton states that he was appointed by arrangement between Mochudi and the Native Affairs Department before Molefi took office.
- Thari, son of Ofentse Tlhabane Linchwe appointed by Isang (Acting, **1942 to 1949**).
- Tidimane Pilane, son of Ramono appointed by Molefi (**1949 to 1993**). We note that Merafe Ramono disputes that Ramono I and Tidimane were appointed by the Kgosikgolo reigning at the time. We deal with this in paragraph D.
- Nyalala Pilane, son of Bogopa Pilane, appointed by Linchwe II (1996 to date).

9. Further evidence of the role of the Kgosikgolo in the appointment of the Kgosi in Moruleng is found in -

9.1. letter dated 11 November 1949 from the Secretary of Native Affairs to the Chief Native Commissioner. The writer records that Bogopa Ramono was the rightful heir according to records and asks "*For whom was Thari Pilane supposed to be acting and for whom Tidimane would be acting*". In a response dated 26 November 1949, the Chief Native Commissioner responded that "*It appears chiefs have in the past been appointed by the paramount chief, with the consent of the tribe, from the members of the Royal Family*".

9.2. record of an interview conducted by Morton with Tidimane dated 4 January 1982. Morton records that Tidimane informed him that before Ramono I took over, Mokae attempted to set himself up as chief in Saulspoort. When Thari reported Mokae's intentions to Lentswe I, Lentswe I decided to put Ramono in the seat and Mokae and his followers accepted the arrangement. The record also records Tidimane explaining that the reason why much time elapsed before Tidimane assumed chieftaincy in Saulspoort is that Molefi was out of the Mochudi seat when Ofentse died. Only Molefi, who was the eldest son of Lentswe's eldest son, could appoint Ramono's eldest son to the Saulspoort seat.

10. The evidence of the role of the Kgosikgolo in the appointment of Kgosi in Moruleng finds further support in the undisputed evidence that -

10.1. In 1993, Tidimane sent a delegation to Mochudi to inform Linchwe II of his intention to retire and to appoint his eldest son, Merafe Ramono to succeed him and to adorn him with the leopard skin.

10.2. Tidimane did not proceed with his intention to appoint his son and to adorn him with the leopard skin after Linchwe II disputed his right to select his successor-in-title and to adorn him with the leopard skin – Merafe Ramono confirms this evidence. It is our view that it is reasonable to conclude that Tidimane did not proceed with his stated intention because he accepted, even if begrudgingly and for whatever reason, that the matter was for Linchwe II to determine.

10.3. In November 1993, Linchwe II addressed a meeting of the tribe in Moruleng, arranged with the co-operation of Tidimane, to discuss the intention of Tidimane to appoint Merafe Ramono to succeed him and to adorn him with the leopard skin.

10.4. Linchwe II's right to appoint a representative in Moruleng was accepted by the Heads of Clans of Moruleng in a meeting.

10.5. A Minute of a meeting of the community in Saulspoort on 24 April 1994 records "A declarator" that "*Chief Linchwe II Kgafela is the Paramount Chief of the tribe, and notwithstanding his residence in Botswana, is entitled to rule the tribe directly and/or indirectly through an appointee of his choice, subject only to such appointee being of the royal family, in whatever degree removed from the*

Paramount chieftaincy". The same meeting declared that - (i) the chieftainship of Saulspoort is not hereditary and is appointed by the Paramount Chief, (ii) Tidimane did not gain the position of chief by reason of birth but by reason of appointment by Molefi as Paramount Chief; and (iii) Tidimane did not have the power to appoint his successor.

10.6. On 23 May 2009, Kgafela Kgafela II, as Paramount Chief, attended and participated in a Kgothakgothe hosted by Kgosi Pilane in Moruleng.

11. In more recent times, the institution and status of Kgosi Kgolo in custom and tradition *viz-à-vis* Moruleng was accepted by our courts in the matters of –

11.1. Mmuthi Pilane v Kgosi Nyalala Pilane (referred to above). The Constitutional Court accepted the evidence that *"Although all the villages that make up the Traditional Community are situated in South Africa, the Traditional Community recognises as their Kgosi Kgolo a traditional leader who lives in Mochudi, Botswana. His deputy, Mr Nyalala John Molefe Pilane, the first respondent, administers the affairs of the Traditional Community in South Africa and is based at Moruleng, North West Province, which is also the headquarters of the Traditional Council.*

11.2. Pilane v Linchwe (1995 (4) SA 686 (BG)). The court accepted the evidence that *"All the Paramount Chiefs of Bakgatla-ba-ga-Kgafela, including the Regents, were the Paramount Chiefs of the Bakgatla-ba-*

ga-Kgafela in both Botswana and South Africa. The Paramount Chiefs, resident in Mochudi, Botswana, have always had representatives at Moruleng who performed the resident functions of the Paramount Chief on the latter's behalf."

11.3. Pilane v Pheto (Case No.582/2011, 30 September 2011). The court accepted the evidence that *"the Paramount Chief in Mochudi rules both sections in Mochudi and in Moruleng of the Bakgatla-ba-Kgafela but does so with Kgosi representing him over Moruleng"*.

11.4. Nyalala John Molefe Pilane v MK Pilane (Case No.263/2010). The court accepted that *"The Paramount Chief in Mochudi has vested powers to appoint and enthrone the Kgosi to rule over the traditional community in the North West province, Moruleng by virtue of his office and status as Kgosikgolo. The Paramount Chief is also consulted on and approves any material governance issues in Moruleng."*

12. With the respect to the administration of the communities in Mochudi and Moruleng, there is a measure of agreement from the evidence that the Kgosikgolo does not become involved with the day-to-day administration of the community and that any involvement is at the invitation or request of members of the community, the royal family or Kgosi. The evidence shows

12.1. Morton records that Tidimane's former wife informed him that Molefi used to attend gatherings of the tribe in Moruleng. He also records Tidimane describing Molefi as "... *an occasional visitor to Saulspoort but mostly for social purposes and he popped in after his 1949 installation from time to time just for a chat*". In similar vein, Schapera writes "*Lentswe for his part kept in close touch with his people in the Transvaal, visiting them frequently and helping them in many ways. In particular, he early realised that it was necessary for them to buy the land they occupied, and to this end he not only imposed special levies upon them for the purpose, but helped them out of his own resources whenever necessary.*"

12.2. In a letter of 8 September 1956, the Native Commissioner, Pilanesberg, wrote to the Chief Native Commissioner, Transvaal, that Molefi, instructed Tidimane by telegram to convene a meeting of headmen in Saulspoort, and in a subsequent report dated 18 September 1956, reports that Molefi held a meeting in Saulspoort with headmen on 12 September 1956.

12.3. Kgosi in Moruleng was not required and did not report to Kgosi kgolo about the administrative affairs of Moruleng. He informed Kgosi kgolo only about important developments and sought advice or consulted with him as he considered necessary. Merafe Ramono referred to the following historical incidents as evidence that BBK Moruleng operated independently of Mochudi -

- (i) when the government of SA sought to dispossess BBK of the farm Spitskop and to incorporate it into SA from Bophuthatswana, Tidimane did not involve Linchwe II in resolving the matter with the government.
- (ii) About 1996/97, the government of Bophuthatswana sought to incorporate some of the BBK farms into the Pilanesberg Game Reserve. Tidimane did not involve Linchwe II in his dealings with the government and the resolution of the matter.

12.4. Linchwe II did not intervene of his own accord when there were disputes between Tidimane and members of the community relating to the administration of the affairs of the tribe. He became intervened at the request of the royal family and community. In *Pilane v Linchwe*, Linchwe II said about his involvement with the affairs of Moruleng “*I have never interfered in the affairs of the tribe at Saulspoort*”.

12.5. On 20 November 1993, Linchwe II addressed a meeting of the community in Moruleng arranged with the co-operation of Kgosi Tidimane to discuss the request of Kgosi Tidimane to retire and to appoint his successor.

12.6. In October 2008, a delegation of members of the royal family in Moruleng went to Kgafela Kgafela II in Mochudi to seek his intervention to resolve complaints of maladministration against Nyalala Pilane, and in February 2012, Kgafela Kgafela II, with the co-

operation of Nyalala Pilane, appointed BDO Spencer Forensic Accountants to conduct a forensic investigation into the financial affairs of the community and a report of the investigation was submitted to the Traditional Council (TC). We point out that none of the witnesses have disputed the authority or legitimacy of Kgafela Kgafela II to intervene and cause the forensic investigation.

FINDING

13. From the evidence, we find that custom and tradition of BBK recognize –

13.1. The institution of Kgosi kgolo. He is senior to the Kgosi in Mochudi and in Moruleng and they are his representatives in the community in their respective capacities as Kgosi.

13.2. The role of Kgosi kgolo to select the Kgosi in Mochudi and in Moruleng. This has been the case since 1903 up to the appointment of Nyalala Pilane. The power includes the power to remove a Kgosi. The exercise of the power to appoint and to remove is subject to the NW Act.

13.3. Kgosi kgolo does not become involved in the administration of the community in Moruleng. He does so at the invitation or request of the community, the royal family or the Kgosi.

**B. THE POWER AND PROCEDURE, IF ANY, TO APPOINT SENIOR
TRADITIONAL LEADER OF BAKGATLA BA KGAFELA**

14. Section 13 of the NW Act prescribes the power and procedure for the appointment of a Senior Traditional Leader. It states,

- "13.(1) Bogosi of a traditional community shall be in accordance with the customary law and customs applicable in such a traditional community (our underlining).
(2) The designation of a kgosi/ kgosigadi to bogosi of a traditional community shall be made by the Royal family in accordance with its customary law and customs.
(3) The Premier may recognize a person designated as contemplated in subsection (1) as kgosi/ kgosigadi of a particular traditional community.
..."*

15. In paragraph A, we discussed the institution and the role of Kgosi kgolo in terms of custom and tradition in the selection and appointment of Kgosi (also referred to as Senior Traditional Leader in the NW Act) in Moruleng. We found that according to custom and tradition, Kgosi kgolo selects the Kgosi and that this has been the case since 1903 at the latest, until and including 1994 when the current Kgosi Pilane was appointed. We also found that Kgosi kgolo, at his discretion, consults such members of the royal family as he may decide.
16. On the evidence available to us, we find that, other than consultation with the royal family, there is no procedure for the selection of a Kgosi.

16.1. According to Professor Morton, Thari was appointed by Isang after consultation with the people of Moruleng, who deferred to Mochudi.

16.2. Merafe Ramono testified that Molefi consulted with the royal family when he appointed Kgosi Tidimane.

16.3. Whilst in her initial evidence Mrs Ntshadi Tsheole disputed that Nyalala Pilane was selected by Linchwe II, in her later evidence she conceded that he was identified by Linchwe II who consulted with the Nyalala Pilane's family about his decision to appoint him and this was in accordance with practice and custom.

16.4. In Pilane v Pheto, the court accepted the evidence that the installation of Nyalala Pilane by Linchwe II followed the approval by both the members of the Royal Family and the community of Moruleng in a properly constituted community meeting in terms of customary law and custom. We have no reason to find otherwise on the evidence available to us.

17. Kautlwale Pilane, (older brother of Kgosi Pilane), told us that an inner royal family (Khuduthamaga), decides on the identification and appointment of the Kgosi. Its decision is relayed to the bigger royal family after which the decision goes to the Heads of Clans. In his capacity as Head of Heads of Clans, he meets with the clans to convey the decision of the Royal Family, after which the Heads of Clans meet with the Traditional Council to convey

the decision and the message is then relayed to the community. Headmen are also informed of the decision before the community is informed.

18. The process described by Kautlwale Pilane does not contemplate the involvement of Kgosi Kgolo in the identification and appointment of the Kgosi. It is also at odds with the evidence of Mrs Tsheole and the recorded history of appointments as we have set out and found in paragraph A and is not supported by other evidence before us.

FINDING

19. On the evidence before us, we find that –

- 19.1. The power to identify the Kgosi for Moruleng lies with the Kgosi Kgolo.

- 19.2. There is no set procedure to be followed by the Kgosi Kgolo in identifying the Kgosi.

- 19.3. According to custom and tradition, Kgosi Kgolo decides, in his discretion, who to consult about his choice of Kgosi. He may consult any person, including the community.

- 19.4. Sec 13(2) of the NW Act requires that a Kgosi is designated by the Royal Family in accordance with its customary law and customs. Accordingly, Kgosi Kgolo must exercise his power in a manner that is

consistent with sec 13(2) which contemplates a role for the Royal Family in the designation of a Kgosi.

19.5. It is our view that sec 13(2) obliges Kgosikgolo to consult with the Royal Family about his choice of a Kgosi.

20. Notwithstanding that the customary law and custom of BBK do not prescribe a procedure that the Kgosikgolo is required to follow in identifying a Kgosi, and that the choice of Kgosi is his, it is our view that sec 13(2) obliges Kgosikgolo to consult with the Royal Family about his choice.
21. The Premier appoints a Kgosi on notification by the Royal Family. When called upon to appoint, the Premier must satisfy himself that the designation of the person nominated is a decision of the Royal Family, taken in accordance with its customary law and customs. For BBK, the decision is the decision of the Kgosikgolo, albeit it having consulted with the Royal Family.
22. In accordance with customary law and customs of BBK, the choice of Kgosikgolo is a decision of the Royal Family as contemplated in section 13(2) of the NW Act. The Kgosikgolo having identified or selected the Kgosi, the Royal Family informs the Premier of the decision who in turn must issue the person selected with a certificate of recognition in terms of section 13(4) of the NW Act.

**C. THE RIGHTFUL HEIR IN TERMS OF TRADITION AND CUSTOM HAD
TIDIMANE PILANE NOT ACTED IN THE MANNER HE DID WHICH LED
TO THE APPOINTMENT (THE MANNER AND PROCEDURE IS NOT IN
DISPUTE) OF CHIEF NYALALA PILANE**

1. As a general rule of customary law, Bogosi among BBK devolves on the principle of male primogeniture, *i.e* the eldest son succeeds his father. However, this general rule of succession has not obtained in Saulspoort following the departure of Kgamanyane after which BBK in SA remained under the chieftainship of Mokae, Ditlhake and later Ramono I, none of whom were the eldest descendant sons of Kgamanyane.
2. There are contesting views of who the rightful heir is that should have succeeded Tidimane. According to some, Merafe Ramono was the rightful successor and should have been appointed Kgosi in accordance with the custom that the eldest son succeeds his father as Kgosi, in the same way that Tidimane succeeded his father Ramono I.
3. Merafe Ramono asserts that he is the rightful heir to Tidimane on two different basis which in their nature are not reconcilable and must be considered in the alternative. The first basis is that Kgosi Ramono created a new line of chieftainship independent of Mochudi and Kgosi Linchwe when he came from Mochudi to Saulspoort with other members of the royal family in 1903 to create a chieftainship in his line of succession. The second basis is

that Tidimane established a new line of chieftainship when he was installed in 1949 when Kgosi Molefi of Mochudi declared that BBK Saulspoort now had their chief and were now independent of Mochudi. The claim of a new line of chieftainship independent from Mochudi and Kgosi Kgolo, whether in 1903 or 1949, is not supported by any evidence before us and we are accordingly unable to agree with Merafe Ramono. We discuss under paragraph D why we are unable to accept Merafe Ramono's claim on this basis.

4. To accept Merafe Ramono's claim that BBK Saulspoort became independent of Mochudi and Kgosi Kgolo as he asserts, requires us to ignore and disregard the recorded history of the appointment of Kgosi of Moruleng by Kgosi Kgolo. If we should accept Merafe Ramono's contention, we must unavoidably conclude that BBK Mochudi and Moruleng constitute two independent tribes connected only by familial relations and that this has been the case since 1903, alternatively 1949. Such a conclusion would not be correct on the evidence before us, including the evidence of Mr Ramono.

The Evidence

5. From the evidence the following appears.
6. In the matter Kgosi Pilane v Linchwe II, Linchwe II stated that Merafe Ramono and Phulane Pilane, son of Thari, were possibilities for appointment to succeed Tidimane. He qualified this by saying that *"the decision as to who would replace the applicant (Tidimane) as the Paramount Chief's representative was that of the Paramount Chief."* Head of Clan, Mr William

Ntshole, part of the delegation that met with Linchwe II in Mochudi in 1993 sent by Kgosi Tidimane to convey his wish to retire and to be succeeded by Merafe Ramono, stated in the same matter that Linchwe II accepted Tidimane's retirement and *"he also indicated that Merafe Ramono could and would be considered as a replacement"*, amongst others, Kgosi Linchwe II adding that although the decision was ultimately his and that consultation in regard to a suitable replacement would have to be conducted before a decision was made.

7. BBK Mochudi also state in their submission before us that Kgosi Linchwe II *"... is likely to have appointed Merafe had Kgosi Tidimane not behaved in the manner that he did but he is deceased and the most we can do is express a likelihood and nothing more"*. This is also the position of Kgafela Kgafela II.
8. It also appears from video evidence of a meeting community meeting in Moruleng attended by Tidimane that Linchwe II was prepared to appoint Merafe Ramono but was concerned about the position in which he was installing him, in particular, whether he would acting Kgosi until the demise of his father after which Linchwe II would make a decision who to appoint, or he would be appointed as representative of Linchwe II in Moruleng, as was the case with his father and those that came before him, or further, whether he would be appointed as substantive chief ("Paramount Chief") with his own tribe apart from Mochudi. The latter two were unacceptable to Linchwe II.
9. Whilst it appears from the evidence that but for the dispute about Tidimane's intention to appoint Merafe Ramono as his successor and that he adorn the

leopard skin, Merafe Ramono may have been appointed by Linchwe II to succeed Tidimane, it is also clear from the evidence that he would be appointed in a capacity similar to all the other chiefs. He would be appointed as the choice of Kgosikgolo and as leader of one of two BBK communities that fell under the leadership of Kgosikgolo.

10. Kautlwale Pilane testified that the royal family in Mochudi and in Moruleng is *"one big royal family led by Kgosi Linchwe"* and *"because of the relationship they've always had with Mochudi and that all the Kgosi's have always come from Mochudi, there has always been that relationship between Moruleng and Mochudi. Because of the conflict between Kgosi Linchwe II and Kgosi Tidimane about succession, Kgosi Linchwe II had to act to lead the royal family to resolve the conflict"*. According to him, Mr Ramono was supposed to be appointed Kgosi and the reason that he was not was the differences over the leopard skin which Kgosi Tidimane wished that Mr Ramono should adorn. His view of the law of succession of BBK is that *"while the procedure of which has been followed in South Africa, if somebody passes away, then the royal family ... identifies somebody but they couldn't just give him a throne. By then the old people had to consult even Mochudi. Mochudi have to come, ceremoniously to come and agree whatever the royal family, this, in South Africa have identified and similarly this happened during Nyalala's identification. Succession depends on family decision and in the case of Mr Ramono, although he is the eldest son of Kgosi Tidimane, it didn't follow that he would be a kgosi and whilst preferably as the elder he should be but not necessarily or compulsory it should be it depends all on the royal family"*

decision from long ago". Whilst this evidence of Mr Pilane may appear contradictory in that whilst he asserts that Mr Ramono should have been appointed to succeed his father, he also states that the decision of who succeeds is the decision of the royal family, regardless of the birth position of the sons of the Kgosi, he nonetheless acknowledges that the eldest son did not become Kgosi by virtue of birth.

11. Nyalala Pilane, whilst stating that Mr Ramono *"was the one who was supposed to succeed his father"*, also described the chieftainship of Moruleng as follows in an affidavit deposed in the matter BBKCPA v Pilane, (Land Claims Court),

"The traditional community in Saulspoort have a historical consanguinity and attachment to the Bakgatla-Ba-Kgafela in Mochudi, Botswana. This affinity manifests itself in the tribal administration of the of the two tribes, among several other ways, in that the Kgosi of the Traditional Community is appointed by Kgosi kgolo Kgafela, the Paramount Chief of Bakgatla-Ba-Kgafela, who is based in Mochudi, Botswana.

*...
The Paramount Chief in Mochudi has vested powers to appoint and enthrone the Kgosi to rule over the Traditional Community in the North West Province, Moruleng by virtue of his office and status as Kgosi kgolo*

..."

12. We have referred to the evidence of Mrs Tsheole in which she conceded that diKgosi in Saulspoort were appointed by Kgosi in Mochudi. In her further evidence she stated that bogosi in Saulspoort is not hereditary and the Kgosi is identified by the Kgosi kgolo and the royal family and that in accordance with the custom that bogosi of Saulspoort is not hereditary, the house of

Bogopa, of which she and Nyalala Pilane are direct descendants, qualified to be to succeed Tidimane.

13. The above evidence is consistent with the recordal of history of Mbenga, Morton and Schapera of the customs and traditions of BBK.

14. Whilst it appears from the evidence that but for the dispute about Tidimane's intention to appoint Merafe Ramono as his successor and that he adorn the leopard skin, Linchwe II may have appointed Merafe Ramono to succeed his father, it is also apparent from the evidence that the successor to Tidimane would have been whomever Linchwe II selected from the royal family.

FINDING

15. We have found in paragraphs **A** and **B** that, on the evidence before us Kgosi in Moruleng, Ditlhake, Ramono I and acting Kgosi's to Nyalala Pilane were appointed by Kgosikgolo.

16. The custom and tradition that Kgosikgolo appoints the Kgosi, logically and unavoidably has the consequence that the descendants of Kgosi Tidimane have no rightful claim in custom and tradition to chieftainship in Moruleng by virtue of that fact alone. The rightful heir is the person that the Kgosikgolo, exercising a power bestowed him by custom and tradition, selects to be appointed as Kgosi in Moruleng.

17. In the event, on the evidence before us, we find that succession to the position of Kgosi in Moruleng is not hereditary. It lies at the discretion of Kgosi kgolo who has historically appointed persons from the royal family.

18. The successor to Tidimane would have been whomever Linchwe II selected. This is in accordance with the prevailing customs and tradition of BBK.

19. There is accordingly no rightful heir by virtue of birth in Moruleng.

D. THE MERITS AND DEMERITS OF MR MERAPE RAMONO'S CLAIM AS SENIOR TRADITIONAL LEADER AS WAS REFERRED TO THE NORTH WEST PROVINCIAL COMMITTEE DURING 2014

1. In 2014, Merafe Ramono lodged a claim with the NW Provincial Committee (of the National Commission on Traditional Disputes and Claims established in terms of section 22 of the NW Act to deal with disputes and claims relating to traditional leadership (the "Mafereka Commission"). He claimed Bogosi on the ground that he is the eldest son of Tidimane and therefore the rightful heir to succeed him. We have considered the Report of that commission, including the decision of the Premier on the recommendations of that committee as appears on the face of the Report.
2. Before us, Mr Ramono makes the following claims –
 - 2.1. The conclusion of the Mafereka Commission that he is the rightful heir to Tidimane and recommendation to the Premier to appoint him as Kgosi is binding on the Premier and must be implemented by the Premier.
 - 2.2. BBK Saulspoort and chieftainship are autonomous from Mochudi and the KgosiKgolo does not have the power to appoint a Kgosi for Saulspoort.
 - 2.3. Paramountcy of the KgosiKgolo and unity of BBK Saulspoort and Mochudi are unconstitutional.

We address each contention in turn.

The Mafereka Commission and the Premier

3. The Mafereke Commission concluded that Merafe Ramono is the rightful heir to Bokgosi and recommended that the Premier appoint him as Senior Traditional Leader.
4. It was submitted to us by Mr Ramono's counsel that the Premier "*did not immediately implement the recommendations of the Mafereka commission and instead appointed this commission*"; the Premier is bound to accept the recommendations of the Mafereke Commission, and that our "*primary recommendation*" to the Premier "*must be that (while the Premier may well have been entitled to appoint the current Commission in order to enrich his understanding of the matter), he is bound by applicable legislation to accept and implement the conclusion of the North West Provincial Committee (loosely referred to as "the Mafereka Commission") of the Commission on Traditional Leadership Disputes and Claims established in terms of the Traditional Leadership and Governance Framework Act, 41 of 2004 ("the Framework Act") and to recognise the claim of Mr Merafe Ramono*".
5. We consider the submission to be flawed for the following reasons –
 - 5.1. Firstly, it appears *ex facie* the Report that it is not factually correct that the Premier did not make a decision on the recommendations of the Mafereka Commission, if that is what the submission seeks to convey. The Premier elected not to accept the recommendation to appoint

Merafe Ramono and the reason he states on the face of the report is that the Committee did not consult with BBK of Mochudi.

5.2. Secondly, the submission misconceives our task and powers and is misplaced in law. We are not appointed to review the decision of the Premier not to accept the recommendations of the Mafereka Commission, or however else the Premier elected to deal with the recommendations of the Commission. We are a creature of the ToR which define our mandate and we have only the power to investigate the questions directed to us and to make recommendations in respect thereof. We must accordingly conduct our own investigation of Mr Ramono's claim as we are directed by the Premier, make findings in respect thereof and independent recommendations to the Premier. To do as submitted by Merafe Ramono's counsel would be to purport to exercise a power that we do not have. Merafe Ramono's dissatisfaction with the conduct or decision of the Premier in whichever way he chose to deal with the report and recommendations of the Mafereka Commission is not a matter we are competent to resolve and it appropriately falls to be resolved by a court of law.

5.3. Finally, our mandate, as appears from the ToR is to investigate the merits and demerits of Merafe Ramono's claim and to make recommendations to the Premier in this regard. We accordingly proceed to consider the merits and demerits of the claim.

(ii) The autonomy of BBK Saulspoort

6. The claim of autonomy from Mochudi and Kgosikgolo with the installation of Ramono in 1903 is asserted together with a claim for autonomy in 1949. At the outset we note that it is common cause that Ramono and Tidimane did not wear the leopard skin as is customary for Kgosi.

7. In support of his assertion of autonomy of Saulspoort in 1903, Mr Ramono said,

"what [Linchwe I] said at the time ... came from oral history that I heard from a number of sources. What he said at the time and I will say it in Tswana and then try and explain it in English, he said: (ethnic language). In other words, my mother has 2 breasts. I sucked and I was nourished on the right breast and my younger brother was nourished by the left breast. Therefore I am sending my younger brother ... in line with what you want to do, I am sending my younger brother to South Africa to ... the South African Bakgatla Ba Kgafela, and in Botswana, those who are in Botswana are represented by the right breast and those who are in South Africa by the left breast. ... What the Government of South Africa said at the time is that whoever you send we are going to recognise him as chief and therefore he then chose his brother and that is why he then made the statement that he made about the 2 breasts".

8. A letter from the Office of the Native Commissioner Rustenburg dated 6 June 1903 reports that *"upon representations from the Chief Lentswe and a request of the native population of Saulspoort, I have accepted Ramono as representative of Bakgatla at Saulspoort"*. A memorandum of November 1902 from the Secretary of Native Affairs to a Sir Godfrey Langden, reads -

"With reference to our recent conversation, I understand your views with regard to Linchwe's position in the Transvaal to be as follows:

Linchwe's headquarters being outside the Transvaal and the Transvaal Government not controlling him, he cannot

be officially recognised as having any authority in the Transvaal.

But if Linchwe's people residing in the Transvaal like to take him presents as there (sic) chief, or to carry their private disputes to him for settlement, the Transvaal authorities will make no objection.

Similarly, if Linchwe makes representations to the local Transvaal Native Commissioner, either personally, or by nominating a deputy to act for him in respect of his Transvaal interests, the Transvaal authorities will listen to him as speaking on behalf of his people in the Transvaal.

It is understood that-

The above depends wholly upon the voluntary recognition of Linchwe by his people in the Transvaal. If they wish to shake him off he cannot enforce his authority here.

That as far as Linchwe's interests in the Transvaal are concerned he must deal with the Local Native Commissioner, personally or by deputy. He cannot appeal to the resident Commissioner for the Bechuanaland Protectorate, who has no jurisdiction inside the Transvaal. If you agree with the above please let me know if I will send a copy to the Resident Commissioner for the Bechuanaland Protectorate. Perhaps you also would communicate with the Native Commissioner in the District."

9. Both the letter and memorandum are consistent with the recordal of Schapera that the Transvaal government allowed Linchwe I to exercise authority of BBK Saulspoort by appointing Ramono I as his deputy to act as his representative and on his behalf. Schapera also writes that following the appointment of Ramono I, "(E)ver since, the Bakgatla ba Kgafela in the Transvaal have consistently identified themselves with those in the Protectorate. Mbenga records this period as the start of the deputy chieftainship.
10. We have shown from the evidence and found that Ramono I was appointed after the request of Linchwe I to be recognized as Kgosi with jurisdiction in Saulspoort whilst he was a citizen of Bechuanaland. By arrangement with the

Transvaal government he was appointed as representative of Linchwe I and all the chiefs that succeeded him, acting or otherwise, were also appointed by Kgosi Kgosi in Mochudi. We have also showed from the evidence that in the time after Ramono I became chief, BBK in Saulspoor continued to regard Kgosi Kgosi as their leader and sought that he be recognized as such with formal authority recognize by the Transvaal government. There is no evidence that supports the claim of autonomy with the appointment of Ramono I.

11. In a petition sent to the Secretary for Native Affairs by Kgosi Ofentshe Pilane and his councilors of Saulspoor dated 8 April 1929, they recorded that,

"The position stated above has always been recognised by us and the people of Mochudi. We are one people with one chief. Four of the farms held by us at Saulspoor were bought with money sent from Mochudi by Chief LINCHWE PILANE. OFFENTSE PILANE holds authority in our eyes only as the chiefs (sic) representative at Saulspoor but the chief himself whether he be at Saulspoor or Mochudi has always had full lawful power over us." They pleaded that "Wherefore we humbly pray your honour by legislation or otherwise to make the Obtaining and correct position lawful under the European Code. We desire that it clearly be laid down that we are people under the chieftainship of Isang Pilane acting for Molefi Pilane Paramount Chief of the Bakgatla and of his lawful heirs and successors. We acknowledge Chief Offentse Pilane or his lawfully appointed successor as representative of the chief at Saulspoor with full power and authority to act and judge for and on behalf of and subject to the confirmation and approval of the chief himself." It was not disputed that the petition was from Ofentshe Pilane and "his councillors of Saulspoor".

12. We have referred to correspondence between government representatives Barret and Griffith dated 12 March 1917 in which the oneness of the

communities of Saulspoort and Mochudi and the role of Kgosi Kgosi in appointing a Kgosi for Saulspoort is acknowledged, *albeit* begrudgingly.

13. For the claim of autonomy in 1949, Merafe Ramono relies mainly on the evidence of Masellane Tsheole who was 9 years old at the time and was allegedly present at the installation of Kgosi Tidimane when he heard Kgosi Molefi say *"I am installing this chief for you, do not come back to Mochudi requesting for a chief. This would be your paramount chief, or your chief forever. Do not come back to Mochudi and request for a chief"*, and Professor Mohlamme who records that *"Those who were present on that memorable day of 14 October 1949, still remember distinctly that Chief Molefi, in addressing the Bakgatla, made it unequivocally clear to them that he had come to install a chief of the Bakgatla, and not a regent and that henceforth the new chief would act independently of Mochudi since he had full jurisdiction over Ramono's subjects, the Kgafela Kgatla"*.

14. A letter by an anonymous writer dated 23 August 1956 records that Molefi complains that Tidimane does not report to or consult with him about his activities in Saulspoort – the building and opening of a dam by Dr Verwoed; a kaross taken to the Minister without his knowledge; and that the Native Commissioner in Pilanesburg no longer recognize him since Tidimane became Chief. If we accept that these indeed were Molefi's complaints, which we have no basis not to accept on the evidence before us, it must follow that Molefi could not have granted autonomy to Saulspoort and to Tidimane on his installation in 1949.

15. A letter of 8 September 1956 from the Native Commissioner, Pilanesberg to the Chief Native Commissioner, Transvaal records that Molefi instructed Tidimane by telegram to convene a meeting of headmen in Saulspoort; and a subsequent letter of 18 September 1956 from the Native Commissioner, Pilanesberg to the Chief Native Commissioner Transvaal, reports that on 12 September 1956, Molefi held a meeting in Saulspoort with headmen with Tidimane present. The instruction and meeting described in the correspondence are inconsistent with the evidence that Molefi granted autonomy to Saulspoort in 1949.

16. Apart from the fact that the evidence of a 9 year old Tsheole is not corroborated by any other evidence and must therefore be treated with the necessary caution and is inconsistent with the record of evidence that we have described, and Mohlamme does not reference his sources, the following difficulties arise about relying on such evidence –

16.1. The declaration of Molefi would have been of great moment and we would reasonably expect records of such a momentous announcement and far-reaching development. None was presented before us.

16.2. The announcement by Molefi is inconsistent with the evidence of Merafe Ramono Kgosi Molefi attended the installation of Kgosi Tidimane as a guest and senior member of the royal family and not to install him as Kgosi. If he attended the installation as a guest, he would not make the declaration that he grants autonomy, for

autonomy must have been achieved at that point. He would also not pronounce that he is installing a Kgosi and the community must not again ask Mochudi for a Kgosi.

16.3. Tidimane does not appear to have asserted such independence bestowed by Molefi. In his affidavit in the matter Chief Pilane v Linchwe II, he does not assert the independence bestowed in 1949, a contention that was obviously relevant to the determination of the issue that was before the court.

16.4. Tidimane's conduct to dispatch or agree to the dispatch of a delegation to Linchwe II to discuss or, according to Merafe Ramono, to inform him, of his decision to appoint his son as successor, and his decision to allow Linchwe II to address a meeting of the community in Moruleng on 20 November 1993 and to defer the matter to the decision of Linchwe II, is not consistent with him holding the view that he was independent of Mochudi; and

16.5. Tidimane abandoning his intention and plan to appoint his successor after the intervention and objection of Linchwe II is inconsistent with the notion of independence bestowed by Molefi.

17. It is the obvious question to us to ask why Tidimane would tolerate interference by Linchwe II in the affairs of his community if he was independent of him as asserted. It could not have been for the sake of peace on so fundamental an issue. The reasonable explanation must be

that he considered that Linchwe II was his superior with the authority to select a Kgosi as he asserted.

18. In the record of the interview with Tidimane, Morton records the following from Tidimane *"Ramono and the Bakgatla here regarded Ramono as a chief independent of Lentswe. The political separation of the Bakgatla on both sides of the border took place with this installation"*; and *"Ofentshe and Thari ruled Saulspoort but they considered themselves residents of Mochudi"*. This evidence is inconsistent with records that Ofentshe and Thari were appointed by Mochudi and with the petition of 8 April 1929 (which we refer to above) which Ofentshe was party to. It is further inconsistent with Merafe Ramono's assertion of autonomy in 1949.

19. We note also the following in Morton's notes which is inconsistent with autonomy of Saulspoort –

19.1. Thari and Ofentshe's chieftainship in Saulspoort even though they considered themselves residents of and were appointed by Mochudi;

19.2. Tidimane's explanation that his installation to chieftainship was delayed because Molefi was absent from the Mochudi seat when Ofentshe died and only he could appoint him.

19.3. Tidimane did not mention to Morton that on his installation Molefi pronounced and granted autonomy to Saulspoort. Tidimane instead relied on autonomy having been obtained on the chieftainship of

Ramono I. The enormity of this alleged historical development of 1949 could not have escaped or been far from the mind of Tidimane and yet would have been inconsistent with his statement that independence and separation were achieved with the appointment of Ramono I by Linchwe I.

20. If Tidimane believed that BBK Saulspoort were autonomous and independent as he asserted to Morton, he would have no reason to indulge Linchwe's objections which, on the assertion of autonomy, would be without any basis in customary law. The conclusion that Tidimane did not persist with any of his wishes and intentions was because he knew and understood that only Linchwe II could appoint a successor is inescapable on the evidence.

21. Whilst Tidimane may have been selected as Kgosi because of his standing as the eldest son of Ramono I, and his appointment as substantive Kgosi following the appointment of acting Kgosis may have created the impression and expectation that his eldest son would succeed him, any such expectation and impression was unequivocally dispelled by Linchwe II who, whilst apparently not opposed to appointing Merafe Ramono in the place of his ailing father, rejected the demand that he succeed his father as Kgosi and be donned with the leopard skin. Linchwe II asserted instead that it was his right as Kgosikgolo, to appoint a Kgosi in Moruleng and to wear the leopard skin.

22. The position of the community as obtained at a meeting of 20 November 1993 convened with the co-operation of Kgosi Tidimane is recorded in the judgment in the matter Chief Pilane v Linchwe II as follows –

"The first respondent reported to the tribe and explained the request of the applicant. He also told them what decisions had been taken by the tribe at Mochudi in Botswana, which were the following - the tribe at Saulspoort and Mochudi were one and would remain one; The tribe always had one Paramount Chief and this should continue; The practice that the Paramount Chief appoint a chief to represent him at Saulspoort was to continue; If the tribe at Saulspoort wished to secede, and become separate, no one would stop them. The first respondent then asked the tribe to express their views as to the applicant's request. It appears that the vast majority held the view that the applicant had ruled in a tyrannical fashion and they accepted his proposal to retire. They further indicated their support for one united tribe with the first respondent as Paramount Chief and that he had the right and power to appoint anyone of royal blood to represent him at Saulspoort. They also indicated that they were not prepared to accept Merafe Ramono as the applicant's successor. It appears that only two people at the whole gathering, which was considerable, spoke in support of Merafe Ramono. The first respondent also invited the applicant to address the tribe and his (Tidimane) attitude was that they (the 2 people) were interfering in the affairs of chieftainship which was a family matter".

23. We have earlier also discussed the resolution of a Kgothakgothe of 24 April 1994 in which it is declared that Linchwe II has the power to appoint the Kgosi and BBK Mochudi and Saulspoort are one tribe.

24. We have not found any evidence from which it appears that BBK Saulspoort achieved autonomy from Mochudi and from Kgosi kgolo. There is also no evidence that in the period before and after Tidimane became Kgosi, the royal family and communities in Mochudi and Moruleng considered themselves separate and distinct communities with only social and familial relations. The evidence points to the contrary.

25. The evidence that Tidimane was not adorned with a leopard skin further suggests that he was not considered by Molefi and the royal family as autonomous.

26. Lastly, it is appropriate to refer to the evidence of Kgosi Pilane in which he states that BBK Moruleng and Mochudi were one tribe and still are. The Kgosis in Moruleng, including himself, were at all times appointed by Mochudi. Whilst he acknowledges the wish of some members of the royal family to seek separation and autonomy from BBK Mochudi and Kgosisikgolo, he concedes that this has not yet been realized and is the subject of discussion still. We find this to be the case on the evidence before us.

(iii) Paramountcy and unity is unlawful

27. It was asserted on behalf of Mr Ramono that,

"even if this Commission were to conclude (again, as a matter of fact) that the paramountcy principle is indeed part of Bakgatla ba Kgafela customary law, it is submitted that it cannot (as a matter of law) be recognised, because it is legally invalid and thus cannot be found to be part of the legally enforceable content of Bakgatla ba Kgafela customary law"; and that "irrespective of the historical merits of the argument of Kgosisikgolo Kgafela II regarding Bakgatla ba Kgafela customary law, it is simply not legally permissible in terms of applicable South African constitutional and statute law for the Kgosi of the Bakgatla ba Kgafela in Botswana to have the power to appoint the traditional leader of the Bakgatla ba Kgafela in South Africa. What is more, the Bakgatla ba Kgafela in South Africa is, as a matter of binding post-democracy South African constitutional and statute law, a distinct traditional community from the Bakgatla ba Kgafela in Botswana". The reason given for this assertion is that "because the paramountcy principle is contrary to applicable South African constitutional and statutory law. As such, this Commission is bound by its terms of reference to develop the customary law in a manner that is consistent with the said constitutional and statutory law". They further submit that "Of similarly far-reaching significance is the further issue

that, in terms of applicable post-democracy South African law, the Bakgatla ba Kgafela in Moruleng is to be regarded as a separate legal entity from the Bakgatla ba Kgafela in Mochudi. The unity principle is thus also not legally enforceable, even if it is found to be part of Bakgatla ba Kgafela customary constitutional law."

28. This submission is misplaced and ignorant of the following –

28.1. There is no basis in fact to describe the Kgosikgolo as the Kgosi of BBK in Botswana. As historical records show, the record of the conduct of BBK in Mochudi and Moruleng to accept the role of Kgosikgolo as their leader, and as the events of 20 November 1993 show, Kgosikgolo is the leader of BBK in Mochudi and Saulspoort.

28.2. That BBK Saulspoort are recognized as a distinct traditional community in terms of the NW Act does not offend their custom, tradition and practice that they consider themselves one with BBK Mochudi. Nothing in the Constitution or other law preclude them from continuing their relationship as one community under authority of Kgosikgolo in accordance with their custom and tradition, divided by the borders, provided that they each do not act in any manner that is in conflict with the laws that apply in their respective geographic territories.

28.3. The recognition by BBK Saulspoort of the institution of Kgosikgolo and its authority in accordance with their customs and tradition, is not inconsistent with recognizing the factual and legal existence of two communities in two territories separated by official borders and subject to different laws applicable to the different territories.

28.4. Historical circumstance imposed a geographic separation upon BBK which they have resisted, as is apparent from how they conducted themselves in their recognition of the authority of Linchwe I and his successors. By choosing to continue as one community under the leadership of Kgosikgolo in accordance with their customary law and tradition which they choose to continue to live by, they do not offend the Constitution or other applicable law. On the contrary, the Constitution protects communities who elect to live according to their customary law and traditions, provided that they do so without infringing the Constitution. The choice to recognize oneness with Mochudi and the leadership of Kgosikgolo does not offend any of the provisions of the Constitution. Merafe Ramono did not point us to any provision that is contravened by this choice of the BBK Moruleng and we could find none.

29. The question feared by Merafe Ramono whether Kgosikgolo is a traditional leader, Kgosi, Principal Traditional Leader or a King, in terms of the NW Act or Framework Act is irrelevant. Both the NW Act and the Framework Act define who qualifies to be appointed a Kgosi or King. Kgosikgolo has not sought such recognition before us, or as far as we are aware, to the Commission responsible for such. The issue is therefore irrelevant for our purposes. Perhaps it is useful to remember that in the matter Mmuthi Pilane v Kgosi Nyalala Pilane the Constitutional Court noted that it was not necessary whether Kgosikgolo is defined in the Act, Provincial Act or any other Act, it is permitted by the customary law of BBK.

30. Recognition of the oneness of BBK does not mean recognition that BBK Mochudi can assert any rights that derive from the Constitution, the NW Act and the Framework Act. We would have considered it not requiring mention that these legislative instruments are for the benefit of BBK Saulspoort and enforceable only by BBK Saulspoort. As the Secretary for Native Affairs stated in the memorandum of November 1902 (referred to above), should BBK Saulspoort elect not to recognize BBK Mochudi as one with them and the Kgosikgolo as their leader, such would bring an end to the recognition of these in terms of section 211 of the Constitution and the NW Act and Framework Act.

31. Our Constitution gives due and respectful recognition to customary law of BBK. Only if customary law is inconsistent with the Constitution does the question of its recognition arise. There is no factual or legal basis for the suggestion that the recognition of a Kgosikgolo and oneness of the two communities as one tribe is inconsistent with the Constitution or any other law. Quite the contrary is stated by the Constitutional Court in Muthi Pilane v Kgosi Nyalala Pilane as we have demonstrated. The qualification of constitutional consistency seeks to enhance the interest of the communities that chose to live according to their customs, traditions and practices developed over hundreds of years and it would be most ironic if the Constitution left a community such as BBK Saulspoort worse off than was the case under apartheid by altering their customs and traditions for no useful purpose under SA law. Indeed, it would have been most unreasonable and possibly arrogant of the drafters of the Constitution, by stroke of the pen, or

majority vote in the Constitutional Assembly, to obliterate a people's history where such people chose to live by a system which does not offend any provisions of the Constitution. We are unable to uphold this misplaced contention. The contention that the Constitution or other statute somehow ended the relationship between the two communities is equally misplaced for the same reason.

FINDING

32. On the evidence before us, we are unable to find that the claims of autonomy or independence is supported or otherwise established. There evidence before us shows that BBK Mochudi and Saulspoort have remained one tribe under the leadership of Kgosikgolo.
33. Neither the Constitution, the NW Act nor the Framework Act preclude BBK Saulspoort continuing as one with BBK Mochudi with Kgosikgolo as leader of both communities, if this is the relationship that the royal families and the communities choose to maintain.
34. In the event, we find that according to custom and tradition of BBK, Merafe Ramono has no rightful claim to be appointed Kgosi by fact of being the eldest son of Tidimane.

MORULENG'S QUEST FOR INDEPENDENCE

23. It is appropriate that we discuss at this point the evidence about the wish and intention of some members of the royal family Moruleng, to sever the historical ties with BBK Mochudi and to end the historical role accorded to the Kgosikgolo in terms of custom and tradition. These members wish to be autonomous from BBK Mochudi and from the Kgosikgolo and retain only a familial relationship and for the two communities to have only a social relationship.

24. The evidence shows that –

24.1. On 21 August 2012, members of the royal family, Moruleng met to discuss and consider a decision to secede from BBK Mochudi. Those in attendance included Nyalala Pilane, Segale Pilane, Kautlwale Pilane, Kobedi Pilane, Mochele Pilane, representatives of the royal houses of Matshego, Molefe and Pheto. They agreed, *inter alia*, that the royal houses would each discuss and consider the issue of Bokgosi and the future role of Nyalala Pilane.

24.2. A follow-up meeting convened on 5 and 6 October 2012 and was attended by members of the Pilane house (who describe themselves as “a ruling family”), comprising Kgamanyane, Tshomankane and Mantirisi houses. The minute of the meeting reflects, *inter alia*, that the meeting resolved to establish a “Royal Council” with a mandate to, *inter alia*, (i) identify the head of the Pilane family; (ii) advise on

compliance with custom and legislation relating to the recognition and installation of a rightful Kgosi; (iii) interact with BBK Mochudi about BBK Moruleng's independent administration and governance in accordance with its own customs and South African law.

25. Before us Mpule David Pheto has distanced himself from what is recorded as resolutions of the meeting of 5 and 6 October on the ground that the names that are attached to the resolution presented to us as approving a resolution to secede from Mochudi is not legitimate and is in fact a copy of the attendance register to the meeting whose purpose was not intended to endorse the resolution to secede from Mochudi. Ms Kaekoa Pilane, on behalf of the Motshegwe family, Dikgapetlana Pheto, on behalf of the Pheto family, and the Tshomankane house have also dissociated from the resolution to secede from Mochudi
26. Notwithstanding their desire and support for autonomy from Mochudi, which they repeated in their evidence before us, members of the Royal Family (Mrs Tsheole and Kautlwale Pilane), conceded that such a decision would have to involve the entire royal family and the community of Saulspoort and that this has not yet happened. They accepted that the present status of the relationship between Mochudi and Saulspoort is as it prevailed at the time of the appointment of Nyalala Pilane and that this is the true relationship between Kgosi Kgolo and Nyalala Pilane *i.e.* the Kgosi Kgolo appoints the Kgosi in Moruleng who is his representative.

27. The concession of Mrs Tsheole and Kautlwale Pilane that Kgosi Kgosi Kgosi appoints the Kgosi in Moruleng is in contrast with the evidence of Segale Pilane who holds the view that BBK Moruleng has been autonomous from Mochudi from the time that Kgamanyane left Saulspoort to ultimately settle in present day Botswana. According to Segale Pilane, all the persons who have ruled in Moruleng since then were appointed at the behest of BBK Moruleng. Suffice to say that this evidence of Segale Pilane is not supported by any of the recorded or documentary evidence or other evidence before us as we have shown and we could find no other independent evidence that supports the assertion. Neither is this account supported by any of the persons that testified before us.
28. For completeness, we mention that according to a resolution of the Kgothakgothe of 24 April 1994, the community decided that they did not wish to separate from BBK Mochudi. We note that Merafe Ramono contests that the meeting was attended by a representative number of the community. However, his evidence is not supported by any of the witnesses or other evidence from which it appears that the meeting was not a properly constituted meeting of the community.
29. In the event, the presently prevailing position is that BBK Moruleng has not seceded from BBK Mochudi with Kgosi Kgosi as their leader. We note however that nothing precludes either community from pursuing autonomy, should they so wish – indeed, Kgosi Linchwe II said as much when he contested Kgosi Tidimane's authority to choose his successor.

E. THE ROLE OF THE SENIOR TRADITIONAL LEADER

1. Section 13 NW Act, prescribes that bogosi of a traditional community shall be in accordance with the customary law and customs applicable in such a traditional community. We accordingly discuss the role of the Senior Traditional Leader, also referred to as Kgosi, as it should be in terms of customary law and traditions of BBK; the NW Act and as it has in fact been the case with BBK.
2. Kgafela Kgafela II told us that in custom and tradition, the Kgosi exercises delegated authority on behalf of the Kgosikgolo. The core duties of the Kgosikgolo are protection of human rights of the tribe; protection of the tribe's land and other property; protection of the tribe's history, heritage and destiny; uniting the tribe and ensuring peace and harmony amongst them; and the Kgosikgolo is obliged at all times to act in the best interest of the tribe. In turn, the Kgosi must also abide by these duties.
3. The NW Act sets out the role and functions of the Kgosi.
4. He is the chairperson of the Traditional Council (section 6(2)(d)). As chairperson of the TC, he must comply and also ensure that the TC complies with its obligations which include to –
 - 4.1. In terms of section 9(1), administer the affairs of the community in accordance with customs and tradition, and perform such other functions

conferred by customary law and customs, consistent with statutory law and the Constitution; promote the interest, advancement and well-being of members of the community; administer the finances of the traditional community; assist, support and guide traditional leaders in the performance of their functions; support municipalities in the identification of community needs; facilitate and ensure involvement of its traditional community in the development or amendment of the integrated development plan of a municipality in whose area that community resides; participate in the development of policy and legislation at local level through public hearings and active participation in local structures; (i) participate in developmental programmes of municipalities, provincial and national spheres of government.

4.2. In terms of section 11(1), at least once every month convene an ordinary meeting of the TC.

4.3. In terms of section 27(1), ensure that members of the TC are aware of the Code of Conduct, Schedule II to the Act, and abide by the Code.

4.4. In terms of section 30(1), cause and ensure that all monies accruing to the community in terms of section 30(3) are deposited into the trust account maintained by the government on behalf of the community and that expenditure is met from that account.

4.5. In terms of section 30(1), cause and ensure that all monies due to the community are paid into the account held by the government in terms of

section 30(1), unless the Premier grants approval to operate a trust account.

4.6. In terms of section 30(4), ensure that the TC any surplus funds are not invested without the approval of the Premier.

4.7. In terms of section 30(5), cause and ensure that the TC submits to the Premier estimates of revenue and expenditure for each financial year, to be made from the account held in terms of section 30(1).

4.8. In terms of section 30(6), ensure that the TC does not incur expenditure from the account in terms of section 30(1) which is not in accordance with the estimates submitted in terms of section 30(5).

4.9. In terms of section 31(1), cause and ensure that the TC prepares and submits the books and accounts of the community for audit by the Auditor-General.

4.10. In terms of section 35(1), seek the assistance of the Department of COGTA to evaluate the skills and needs of members of the TC and to provide necessary training to enable them to perform their functions and meet the required service delivery standards.

5. He is responsible, *inter alia*, to (section 18),

5.1. administer the affairs of the community.

- 5.2. maintain peace in the community, by conciliating and mediating disputes between members.
- 5.3. report to the competent authorities the commission of any offence which cannot lawfully be disposed through the exercise of the powers in cooperation with the traditional council and jurisdiction conferred upon the Kgosi.
- 5.4. take such steps, which are necessary and effective, to make known to the members of the traditional community the provisions of any new law or policy.
- 5.5. convene and attend meetings of the TC to discuss the affairs of the community: Provided that such meetings shall be convened at least once every calendar month.
- 5.6. convene and attend meetings of the community to discuss the affairs of the community: Provided that such meetings shall be convened and attended by members of community and shall be convened at least once every six months.
- 5.7. take note of any problems, grievances or matters, if any, raised by any member of the community at any meeting of the community and shall take such steps which are necessary to attempt to resolve such grievance, problem or matter, as the case may be.

- 5.8. generally seek to promote the interests of the community and take such reasonable steps as may be necessary to promote the well-being and advancement of the community.
6. In terms of section 10(1), the Kgosi shall endeavour to perform his/her roles and functions in the best interest of the community and is responsible to the Premier for the efficient and effective performance of the functions assigned to the TC and to the Kgosi by the Act.
7. The Kgosi may institute or defend legal proceedings by or against the community or traditional council in his/ her official capacity, provided that –
- 7.1. A community or TC shall not be responsible for the personal obligations of the Kgosi; and
- 7.2. In respect of the land occupied by the community or TC, be bound in any way whatsoever by any contract entered into or liability incurred by the Kgosi, unless it has been approved after having been adopted at a meeting in accordance with the rules governing land of the traditional community concerned (s32).

The role Kgosi Pilane has played

The Evidence

8. The evidence shows that –

8.1. Kgosi Pilane has been immensely instrumental and successful in mobilizing commercial transactions utilising the natural resources, especially minerals, of BBK. Significant income has accrued from such transactions, some of which has led to major visible infrastructure developments in the community.

8.2. Transactions with third parties are conducted by Kgosi Pilane through a web of companies wholly or partially owned by BBK, some of which he is a director, and in the case of at least 1, IBMR, also an Officer of the company. Only Kgosi Pilane is responsible to deal with the companies and the persons responsible for the companies. Kagiso Pilane, nephew of Kgosi Pilane, is the only other member of the TC who is involved with the commercial activities of the BBK companies and matters of transactions with third parties. Kgosi Pilane has not sought to involve other members of the TC or to empower them with information to effectively oversee and discharge their fiduciary duties as custodians of the assets of the community.

8.3. Only he has knowledge of the activities of the companies. However, he does not account or report to the TC about the activities or cause the persons responsible for the companies to report to the TC and to the community.

8.4. None of the income from the transactions with third parties is paid into the account administered by the government as prescribed by section 30(1). The TC has not obtained the approval of the Premier to

operate a trust account in terms of section 30(2). Neither has the TC sought and obtained the approval of the Premier to invest surplus funds.

8.5. Notwithstanding the significant income that has accrued to the community, the TC has not prepared and caused the books and accounts of the community to be audited by the Auditor-General as demanded by section 31(2). As a result, the investments, income and expenditure incurred from the income accruing to the community from commercial transactions with third parties have not been accounted for to the government.

8.6. Kgosi Pilane has not caused the TC to hold the persons responsible for the companies in which BBK conduct business to account to the TC. In particular, he has not ensured that financial reports of the various companies are available to the TC and that the TC considers the reports.

9. Whilst the TC convenes every month, chaired by Kobedi Pilane who has been appointed Deputy Chairperson and is responsible for the functions of the TC on a day-to-day basis, Kgosi Pilane has not caused that the TC establish a system and process for consulting with and reporting to the community. There is also no process or requirement for reports back from interaction with the community. These are matters that are left entirely to the discretion of the individual members. As a result of the failure to establish a mechanism and requirement for regular interaction with the community, Kgosi

Pilane does not interact with the community and does not report to it about its affairs. As a result, complaints about the administration of the affairs of the community have not been appropriately addressed, if at all. This has fed a culture of suspicion and distrust, which, from the evidence, are clearly a factor in the discord that presently bedevils the community. He has failed to discharge his function to *"take note of any problems, grievances or matters, if any, raised by any member of the community at any meeting of the community and shall take such steps which are necessary to attempt to resolve such grievance, problem or matter, as the case may be"*.

10. Since December 2012, the community has not held a meeting in terms of section 18(1)(g) or any other meeting of the community. As a result, the community has not been consulted about the affairs of the community and the work of the TC and the companies in which BBK hold investments. The community has also not received reports from the TC about the affairs and finances of the community and other matters of interest to the community since that time.

11. Kgosi Pilane has not convened a meeting of the community (Kgothakgothe) since the last meeting of 15 December 2012 which was aborted due to disruption and threats of violence erupting. The discord in the community has continued and been left unattended. There is no evidence before us that he has attempted or sought the assistance or intervention of the Premier to convene a meeting of the community or to resolve the discord and conflict in the community. The evidence shows that members of the community have unsuccessfully sought the intervention of the Premier to resolve the discord

and complaints of the community about the administration of the affairs of the community. Notwithstanding, Kgosi Pilane has not taken any measure to resolve the disaffection and in the course of the hearing and from his evidence, we gained the impression that he was very much a part of fostering the discord, by omission at best. He has not taken any measures to address complaints of maladministration, even if to show that they are unfounded. As a result, the community has remained divided between those who support Kgosi Pilane and others who allege maladministration and seek that Kgosi Pilane and the TC account. The latter group has coalesced mainly around Kgafela Kgafela II.

12. Finally, and for completion, we must mention that the purported appointment of Kobedi Pilane as Deputy Chairperson of the TC responsible for the day-to-day administration of the affairs of the TC and the community appears to be designed to relieve Kgosi Pilane of his daily duties as Chairperson of the TC. Kobedi Pilane regularly chairs meetings of the TC which Kgosi Pilane often does not attend.

- 12.1. The powers of the Kgosi as chairperson of the TC are prescribed by the Act and do not include a power to appoint a Deputy Chairperson, which position the NW Act does not make provision for in any event. Whilst nothing precludes a Kgosi appointing a member of the TC to assist him in the performance of his duties, such cannot be by creating a position not supported by the Act. It also cannot be that the person assumes the functions of the Kgosi as chairperson of the TC. Any such assistance must be of a temporary nature always.

12.2. Before us, Lebogang Maname and Marcus Diphoko, both members of the TC, expressed frustration that often members are unable to obtain meaningful responses to questions from Mr Pilane due to the fact that he has no knowledge of especially matters relating to commercial transactions and finances. Kobedi Pilane conceded as much. This is clearly a dereliction of duty and failure by Kgosi to effectively administer the affairs of the community.

FINDING

13. On the evidence before us we find that Kgosi –

14. has failed to provide effective leadership to the community. He has failed and has made no effort to attend to grievances and complaints of the community about the administration of the affairs of the TC and the community.

15. has failed to lead the TC and to make sure that it complies with its obligations prescribed in secs 30 and 31 of the Act.

16. has failed to ensure that the TC exercises effective oversight and control over the assets of the community. From the evidence, it is apparent that he has excluded the TC from the administration of the commercial activities and assets of the community and includes only his nephew, Kagiso Pilane.

17. does not account to the TC and to the community about the administration of the affairs and assets of the community.

**F. THE CORRECT RELATIONSHIP BETWEEN KGAFELA KGAFELA II AND
THE SENIOR TRADITIONAL LEADER IN MORULENG UNDER OUR
CONSTITUTIONAL DISPENSATION**

1. The question raised arises because of the fraught relationship between Nyalala Pilane and Kgafela Kgafela II, KgosiKgolo. Whilst the relationship was initially co-operative and mutually supportive, the relationship has dramatically deteriorated since 2012 and presently the relationship between them is hostile and non-existent. There is presently conflict about the powers of the KgosiKgolo and duties of the Kgosi particularly as it pertains to the administration of the affairs of the community. The hostility between them was apparent before us.
2. Sec 211(1) of the Constitution stipulates that the institution, status and role of traditional leadership, according to customary law, are recognized, subject to the Constitution. Sec 2(4) of the NW Act provides that traditional leaders may acknowledge or recognise the different levels of seniority among themselves in accordance with custom, and none of the definitions contained in section 1 must be construed as conferring, or detracting from, such seniority. Sec 2(5) provides that customs, traditions or customary laws relating to traditional leadership will continue to operate, subject to the Constitution, the Framework Act and the NW Act.
3. The NW Act does not make provision for the title of KgosiKgolo. It recognizes a Senior Traditional Leader at the head of the community and as chairperson of the TC. It is this person that the Act gives legal recognition to and imposes

legal obligations upon, arising from the Act and from the customary law and practices of the traditional community.

The Evidence

4. On the evidence, we have found that the institution and status of KgosiKgolo is recognized by BBK. He selects the Kgosi and is senior to him.
5. We have also found that the fact of the recognition of the institution of KgosiKgolo by BBK does not offend the Constitution and is in fact approved of by section 211 of the Constitution, which recognizes institutions of traditional leadership in accordance with customary law and tradition.
6. We have further found that KgosiKgolo does not become involved in administration of the community unless he is invited or requested by the Kgosi, the royal family or the community, and provided that his involvement does not result in a breach of the NW Act.
7. In Pilane v Pilane, Nyalala Pilane described the relationship as follows,

"The Paramount Chief rules both sections in Mochudi and in Moruleng of Bakgatla-Ba-Kgafela but does so with the Kgosi representing him over Moruleng. I am discharging this function at present. The two villages are not independent, but are inter-dependent, both in substance and in form. The communities are substantially intertwined. ...The fact that one village is in Mochudi, Botswana and the other in Moruleng, South Africa neither inhibits nor prevents the exercise of traditional laws and customs of the Bakgatla-Ba-Kgafela for the two Communities to enjoy their unique chieftainship. The two respective Governments of South Africa and Botswana

have mutual recognition and acceptance of the Bakgatla-Ba-Kgafela traditional community and both countries recognise the connection between the two traditional communities. The Paramount Chief in Mochudi has vested powers to appoint and enthrone the Kgosi to rule over the Traditional Community in the North West Province, Moruleng by virtue of his office and status as KgosiKgolo. The Paramount Chief is also consulted on and approves any material governance issues in Saulspoort".

8. We have described the duties of KgosiKgolo as explained by Kgafela Kgafela II which include, safeguarding the assets of the tribe and ensuring peace and harmony in the community, and that Kgosi must abide these duties which are also set out in the Act. None of the witnesses disputed this evidence.
9. We have discussed the evidence from which it appears that KgosiKgolo does not become involved with the administrative affairs of the community in Moruleng. This much was also declared by Linchwe II in Chief Pilane v Chief Linchwe II.
10. From the evidence, KgosiKgolo has only ever become involved in administrative matters when requested or invited to do so and he is obliged to do so as the Kgosi's senior and person that appointed him, and in discharge of his duty to safeguard the assets and property of the tribe and to maintain peace and harmony in the community. Segale Pilane testified that it is because KgosiKgolo appointed Nyalala Pilane and is his senior that the intervention he was called upon to intervene in the complaints against Nyalala Pilane. From this evidence, it is clear that the community sees a role for KgosiKgolo to resolve matters relating to his appointee.

11. Whilst it is so that the Kgosi kgolo does not become involved with the day-to-day administrative affairs of the community, and we did not understand Kgafela Kgafela II to disagree with this, his involvement with administrative matters which fall in the domain of the Kgosi, viz. to take note of and resolve complaints of maladministration, was at the instance of members of the royal family and community. They requested his intervention when they did not receive satisfactory responses to their complaints of maladministration of the finances of the community.

FINDING

12. From the evidence we find that -

12.1. Kgafela Kgafela II is in terms of custom and tradition senior to Kgosi. He is the head of the royal family and selects Kgosi in Moruleng.

12.2. In the exercise of his powers and duties, Kgosi must recognize Kgafela Kgafela II as his superior on whose behalf he leads the tribe, as was the case with all Kgosi of Saulspoort after the departure of Kgamanyane.

12.3. In terms of custom and tradition, Kgosi kgolo is obliged to act when complaints are brought to him against Kgosi. He does so by requiring that Kgosi act in accordance with both the customary law and the NW Act and that he resolve complaints. Kgosi is required by custom and tradition to recognise and respect this role of Kgosi kgolo.

12.4. The Royal Family, led by Kgosikgolo, is obliged to act against Kgosi if he fails to discharge his functions in accordance with both the customary law and the Act. This includes transgression of a customary rule, principle or code of conduct that warrants removal from office (sec14).

12.5. Whilst Kgafela Kgafela II has authority in terms of custom and tradition, and in terms thereof the Kgosi is his representative and accounts to him, he may not exercise any of the powers that are specifically assigned to the Kgosi by the NW Act or other legislation.

12.6. Kgosikgolo may also not exercise any of his powers in a way that contravenes the Act or require the Kgosi to act contrary to the Act. The Kgosi is, in terms of the Constitution and the NW Act, the bearer of all rights, duties and obligations imposed upon him by the NW Act. He alone is liable under the Act and Kgosikgolo may not require him to act contrary to the Act.

13. The Constitution, section 211, recognises the leadership structures as they exist according to BBK custom and tradition. It therefore recognizes Kgafela Kgafela II's seniority to the Kgosi in Moruleng. However, this recognition does not bestow upon the Kgosikgolo the powers assigned to the Kgosi by the NW Act. Neither do the obligations imposed on the Kgosi attach to Kgosikgolo.

14. Kgafela Kgafela II exercises only such powers as he carries in terms of custom and tradition. This is the correct relationship between Kgosikgolo and

Kgosi in Moruleng and the relationship is not inconsistent with the Constitution. It is supported by the Constitution.

**G. THE ROLE OF THE 32 SUB-VILLAGES IN OFFICIATING THE
APPOINTMENT OF THE SENIOR TRADITIONAL LEADER OF
MORULENG VILLAGE**

1. The evidence shows that the following governance structures exist in Moruleng -

- 1.1. The Royal Council, which consists of the representatives of the royal houses of Kgamanyane, Tshomankane, Mantirisi, Matshego, Pheto and Molefe. The royal council was apparently created by agreement between members of the royal houses and its function is to guide and advise the Kgosi.

- 1.2. The Heads of Clans. It is made up of Heads of clans of each of the 32 villages. Decisions of the Royal Family, including the decision about the appointment of a Kgosi, are conveyed to the community through the Heads of Clans. Before the community is informed of the royal family's choice of Kgosi, the Heads of Clans are informed of the decision of the royal family.

2. Save for the royal family's consultation with the Heads of Clans when a decision is made to appoint a Kgosi, the 32 villages in Moruleng play no role in the decision to appoint a Kgosi. The villages become involved after the Royal Family has made the decision. Their only involvement is attendance at

the ceremony and celebrations to install the chief. This is the only role that the villages play.

3. The above role of the villages accords with the custom and tradition that the decision to identify and appoint a Kgosi is not a matter open to democratic processes that involves the community. Indeed, the NW Act and the Framework Act do not contemplate a role for the villages.
4. However, nothing precludes the royal family, if it so chooses, to seek the views of the community on its decision to appoint a Kgosi, as appears to have been the case when Linchwe II consulted with the community before the appointment of Nyalala Pilane.
5. On the evidence before us, we find that save for any consultation at the discretion of the Kgosisigolo, the villages play no role in the appointment of the Kgosi, other than attendance at the installation and celebration of the installation of the Kgosi. This accords with the custom and tradition of the community.

H. THE ROLE OF THE 32 VILLAGES IN THE ACQUISITION MAKING PROCESS

1. The customary law and tradition of BBK, the Constitution, the NW Act, the Framework Act, IPILRA, the Companies Act 2008, the King Codes and relevant decisions of our courts must be considered in evaluating the role of the community in matters affecting their land, natural resources and other assets. All these prescribe and emphasise a participatory, democratic, transparent and accountable governance of the affairs of the 32 villages that make up the community of BBK. They also recognize and protect the right to property and prescribe that such right may be interfered with only with the consent of the rightholders or after compliance with procedure that they prescribes consultation with the rightholders.

(i) The role of the villages as it should be

2. It is appropriate to start with the principles of governance as have developed under customary law. Mbenga and Dr Sonwabile Ndamase describe governance under the customary law of baTswana as one where power was exercised and important decisions made by leaders and their followers at the local (ward) level, without any undue interference by the kgosi and, where governance was by consultation and consent and not by diktat. They further state that *"it was unthinkable for a chief to take a decision even over a relatively unimportant matter, without consulting at least some of the more*

important members of his community”, and Mbenga adds “The importance attributed to the ideal of good governance is repeatedly stressed; to the Tswana ..., it implies a commitment to rule by consultation and consent”.

3. The above characterization of customary law and its application to BBK is confirmed as follows by, among others Kgafela Kgafela II “...customary law by its very nature, it promotes consultation, consultation is at the very, very core of customary law, whether it was not done in one case of another. To the extent which consultation is very central, then of course, those rules occupy the villages, they must be consulted in one form or another; by Nyalala Pilane “*The Traditional Council cannot do anything that has not been, sort of mandated, by the tribe*”; and by Mpule David Pheto “*When you deal with the property of Morafe which is the community, you need to engage the Traditional Community. That is the principle is consultation and consent of the Traditional Community which is required*”.
4. These customary law principles of governance are also reflected in (i) the Constitution, secs 32(1)(b); 33(1) and 195(1) as incorporated by reference in sec 2(e) Code of Conduct, NW Act (for members of TCs), all of which entrench principles of democratic, open and accountable governance, and sec 211 which gives constitutional recognition to customary law; (ii) the Framework Act and the NW Act which prescribe, in their respective preambles that “*the institution of traditional leadership must be transformed to be in harmony with the Constitution and the Bill of Rights so that democratic governance and the values of an open and democratic society may be promoted*”; and (iii) sec 9(1) of the NW Act which prescribes that a TC must

administer the affairs of a traditional community in accordance with these principles of governance, subject to the Constitution. The Code of Conduct also prescribes public administration governed by constitutional democratic values, which include the principles of participatory democracy, transparency and accountability, which principles "*safeguard the interests of members of traditional communities and empower them to participate in the management of a communal property....*" (Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority [2015] ZACC 25). It is therefore clear from all the above that the administration of the affairs of the 32 villages must include the participation of the 32 villages in decision-making.

5. By prescription of law, the TC is the decision-making body in matters relating to the financial affairs of the community. It is also the representative of the community as shareholder in the companies in which BBK hold interests. It is therefore responsible to ensure participation of the villages in matters pertaining their property, transactions and investments.
6. According to the evidence, most of BBK land is held in trust by the Minister of Rural Development and Land Reform. Tenure on the land is protected and secured by the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA) which provides primary legal protection for traditional communities to control their own land according to customary law. Section 2(1) gives protection against deprivation of any informal right to land without consent of the occupier, subject to, *inter alia*, section 2(4). Section 2(2) stipulates that "*(w)here land is held on a communal basis, a person may, subject to*

subsection (4), be deprived of such land or right in land in accordance with the custom and usage of that community", and section 2(4) that "custom and usage of the community" must at least require the support of the majority of the members of that community. In the matter Maledu and others v Itireleng Bakgatla Mineral Resources (Pty) Ltd and Another, 2019 (2) SA 1 (CC), the court accepted that IPILRA applies to land of Lesetlheng village which comprises the farms Wilgespruit, Legkraal, Rooderand and Koedoesfontein, held in trust by the Minister on behalf of the community. Accordingly, decisions concerning land must be taken in accordance with the principles of customary law as we have set out, and at a minimum comply with the requirements of IPILRA, namely that a minimum of 50% of the affected land rightsholders' consent to the decision.

7. The evidence also shows that BBK are shareholders in companies which they wholly own or partly own with third parties. As shareholder, BBK have the right in terms of the Companies Act 2008, to participate in meetings of shareholders and to appoint directors to boards of the entities (section 61 & 68). They (should) do so through shareholder representatives at meetings of the companies. Section 18(1)(g) of the NW Act in turn prescribes that the Kgosi must convene and attend meetings of the community at least once every six months. The meetings are, in our view, a vehicle for the TC and Kgosi to, (i) consult with the community, (ii) obtain mandates and instructions from the shareholder, and (iii) report on the affairs of the TC and companies of BBK in general, including matters of transactions and investments with third parties.

(ii) The role of the 32 villages as has in fact been the case

The Evidence

8. We were provided with records of what is said to be minutes of the TC (most written by hand and not signed) and "Administrative, Commercial and Development Resolutions" spanning the period December 2007 to August 2015. We have also been provided with records of meetings and resolutions of the Kgothakgothe. The evidence, as appears from documents and members of the TC and community shows -

- 8.1. The 32 villages are organized into clusters which overlap with the various clans with the following governance structure –

- Heads of Clans. The institution is recognized by custom. Decisions of the Royal Family are reported to the Heads of Clans before they are reported to the community. They are consulted about/before the appointment of a Kgosi; advise when there is conflict in the community; advise and resolve issues relating to traditional leadership).
- Dikgosana/Headmen. The institution is recognized by custom and by the NW Act. Dikgosana are heads of villages and work closely with the TC and Kgosi in the administration of the affairs of the community.

- The TC. The TC comprises Kgosi, Dikgosana, members appointed by Kgosi and elected members.
- Kgothakgothe gathering of the entire community. An attendance register and minutes of the meeting are taken.

9. Decisions concerning land start, or at least are supposed to start, at the village that stands to be directly affected where their "consultation or consent" is sought, and then go through the structures until the TC. When the decision has been approved by every structure, it will finally be taken to a Kgothakgothe where the decision is debated and finally approved. Nyalala Pilane explained it as follows,

"But the resolution of the tribe mostly happens when there is an issue relating to land or major development which have [sic] to effect the usage of land in any part of the community. Then what normally happens before that resolution is taken, we would go to the villages that are directly going to be effected [sic] and get their consent or debate until we get their consensus and we would then take it to other far distance villages to inform that there is going to be this kind of major development which is going to affect these people in the area. That is their position. And now we want to engage the entire tribe. And the reason for doing that is because the land in the community or in the tribal land, its jointly owned and equally by every member, irrespective it is where you stay or where you don't, you are part of the tribe. What we can [is it is] undivided share".

10. He describe the decision-making process that do not concern land as follows

- decisions of importance that affect the community, excluding land decisions, are first discussed and decided by the Royal Family. The decision is then relayed to the Heads of Clans and then to Dikgosana. Dikgosana convene meetings of their respective villages which discuss and decide on the report

to the TC. He also stated that the *"final word"* on the well-being of the community is with the TC *"which is statutorily enacted to discharge executive and administrative functions"*.

11. Members of the TC, Kobedi Pilane, Lebogang Maname and Marcus Diphoko told us that all commercial transactions are decided and controlled by the Kgosi. This was also the evidence of Zitha Dube, former Chief Financial Officer of Bakgatla Ba Kgafela Traditional Authority (BBKTA). He involves only Kagiso Pilane, his nephew and member of the TC, including dealing with the BBK and associate companies, investments and monies pertaining thereto.

12. Kobedi Pilane candidly conceded that he has no knowledge of the transaction concluded on behalf of or in the name of BBK as only Kgosi and Kagiso Pilane deal with these and make all the decisions

13. Legogang Maname and Marcus Diphoko told us that they are prohibited by Kgosi from removing documents, including minutes and transaction documents, from the offices of the TC for purposes of consultation with their villages. This was confirmed by Kobedi Pilane and not denied and not denied by Kgosi.

14. Kgosi has required and caused members of the TC to sign confidentiality agreements in which they undertake not to disclose and to keep confidential matters and documents discussed or presented in TC meetings. The confidentiality extends to the community. To their credit,

Diphoko and Maname have defied this obviously unlawful instruction which violates and is inimical to principles of participatory and deliberative consultation, transparent and accountable governance.

15. Lebogang Maname and Marcus Diphoko also told us that the TC takes wide-ranging commercial decisions "*without a mandate*" from the community and decisions taken by Kgosi are only presented to the TC for ratification. Members of the TC are routinely required to ratify significant financial transactions and decisions with significant financial implications after they are concluded with third parties without full information and discussion. One such transaction being the Siyanda Chrome Investments – we point out that Kgosi and Kobedi Pilane disputed that the transaction was not presented to the TC for discussion. Whatever the correctness or incorrectness of this evidence, we point out that there is no evidence before us that the community was consulted before, during or after the transaction was concluded.

16. Kobedi Pilane, Maname and Diphoko also expressed frustration that members of the TC do not interrogate matters of transactions presented by Kgosi, when that happens, and defer to Kgosi. Members of the TC, and therefore the community, have no insight into the commercial affairs and activities of the TC and the BBK and associate companies.

17. The TC does not have a protocol or process that requires it to consult with communities on the affairs of the community, including transactions with third parties and the activities of BBK and associate companies. Maname and

Diphoko told us that they, of their own accord, report to and discuss with their villages commercial matters which serve before the TC.

18. The following are some of the transactions that warrant specific mention –

8.1 In 1998 and 1999, the Land Bank provided a loan of **R13 075 million** to Nyalala Pilane in his personal capacity to purchase 8 farms on behalf of the tribe. In 2006, the loan was repaid settled in the amount **R26 271 232 million**. The repayment money came from a transaction with Rustenburg Platinum Mine (Pty) Ltd (RPM) - we discuss the transaction in detail in the next heading. It appears (from the records of the criminal trial in which Kgosi was criminally charged) that future royalties were pledged as security. There is no evidence before us that – (i) the decision to purchase the farms and to finance the transactions through the loan from the Land Bank were preceded by consultation with and approval of the community; (ii) the 32 villages were consulted and approved the terms of the transactions; (iii) the 32 villages were informed of the source of the loan repayment money and how the amount was arrived at; and (iv) the 32 villages approved the loan settlement amount.

8.2 It is of no consequence in our view that the purchase of the farms and the loan from the Land Bank were for the benefit of the community, or that the amount repaid to the Land Bank was a fair and correct amount due on the loan. The community is by law, including customary law, required to be consulted in matters that affect them. This includes use of their monies to acquire the land financed with the loan from the Land

Bank - as was the case with the loan repayment amount of R26 271 232 million. The law also requires transparency and accountability. On the evidence before us, we are unable to find that Kgosi Pilane acted in a manner that is consultative, transparent and accountable. We are unable to find that he consulted with and/or obtained the approval of the community to purchase the land and to pay the settlement amount from monies received from the RPM transaction.

8.3 In 2006, BBK acquired a 15% interest in Swarklip Union Section mine; 26% interest in the prospecting rights over the farm Magazynkraal; and 55% interest in prospecting rights over farm the Rooderand. Mpule David Pheto told us that the transaction was presented to a meeting of the community on 25 November 2006 only to ratify what was already negotiated. The meeting was presented with a draft contract agreed with counter-parties and required to approve the contract. This does not accord with the requirements for transparent and informed consultation and decision-making.

8.4 In 2004 Itereleng Bakgatla Mineral Resource (Pty) Ltd (IBMR), a BBK wholly owned BBK company, obtained prospecting rights over the farm Wilgespruit. For the purposes of financing the prospecting, BBK transferred 15% of their shares in IBMR to Barrick. The decision to register IBMR for the purposes of applying for a prospecting right was authorized by a resolution of the Kgothakgothe signed by Kgosi Pilane on 12 April 2003.

8.5 On 28 June 2008, Nyalala Pilane, also a director of IBMR, signed what is described on the document as a "*tribal resolution*" at a meeting described as a Kgothakgothe. The resolution ratified previous agreements signed by him relating to the exercise of the mining right held by IBMR. According to the resolution, the community agreed to enter into a surface lease over Wilgespruit.

8.6 It is alleged that at a meeting in Lesithleng prior to the "*tribal resolution*" of 28 June 2008 authorising the lease agreement over Wilgespruit, Kobedi Pilane told the people of Lesithleng that they could not refuse the mine coming onto the land as the BBK had promised Barrick the deal three years earlier. In the matter of Maledu that we mentioned earlier in the report, the Constitutional Court found that IBMR did not consult with the community and obtain its consent as required by IPILRA when it obtained a mining right in 2008. It follows from the non-compliance with IPILRA as it pertains to consultation that there was also no consultation with the villages in accordance with the customary law of BBK.

8.7 On 25 October 2008, a resolution purporting to be a IPILRA resolution was taken to authorise the development of the Moruleng Mall. There were only 210 community members present at that meeting. Kgafela Kgafela II said that to the best of his knowledge the community was not consulted before the resolution was taken and we have not seen evidence otherwise.

8.8 In the period 2003 to 2010, the TC concluded transactions with Barrick to conduct a Bankable Feasibility Study, contemplated to be funded by Barrick and would result in Barrick acquiring a 10% interest in IBMR. In 2009, Barrick did not proceed with the transaction and in 2010 BBK bought back the shares that were held by Barrick in IBMR. There is no evidence before us that the community played any role in approving the transaction with Barrick. In particular, there is no evidence that the villages were consulted about the transaction with Barrick, the method of funding the transaction and the purchase back of the shares in IBMR.

8.9 In 2008, an agreement was concluded with Pallinghurst which resulted in a joint venture, the Bakgatla Pallinghurst Joint Venture (Pty) Ltd (BPJV). The purpose of the transaction was to build a "mega mine". The TC advanced an amount of **R542 262 million** to BPJV to fund the acquisition of the Moepi Group and its subsidiaries, to repay certain loan facilities and fund the conversion of Boynton Investments preference shares into equity shares. There is no evidence before us of consultation with the community to obtain approval of the transaction and payment of monies.

8.10 Lebogang Maname also referred to a transaction with Sibanye Gold in which the TC was required and did approve payment of **R45 million** to consultants. He told us that the TC had not previously approved the transaction. Whilst Nyalala Pilane and Kobedi Pilane deny that the transaction with Siyanda was not discussed by the TC, they did not

assert that it was discussed and approved by the community and there is no evidence before us that this was the case.

8.11 BBK concluded an agreement with Siyanda Investment Resources.

There is no evidence of consultation with or approval of the transaction by the community.

8.12 BBK acquired shares in the company Siyaya Free to Air TV (Pty) Ltd.

We did not find evidence of consultation with or approval of the transaction by the community.

8.13 The TC and BBK Financial Services (BBKFS) concluded a contract with the company Resource Finance Advisors Consulting (Pty) Ltd (RFA) in terms of which RFA was employed as consultant to BBKFS. Significant amounts fees were paid to RFA. There is no evidence of consultation and approval of the community to appoint RFA as consultant and to pay the amounts paid as fees.

FINDING

- 9 It is clear from the evidence that as a matter of common practice, the 32 villages play no meaningful role in commercial transactions and acquisitions. Neither does the TC. Only Kgosi and Kagiso Pilane have involvement and knowledge about the commercial activities of BBK. Apart from the obvious risk that this creates, it also denies the TC, as custodian of the assets and property of the community and on behalf of the community, from exercising

any effective oversight. The community is as a result also excluded from participation and involvement in decisions that pertain to its property and assets.

- 10 For reasons that in our view must be obvious, it is also undesirable that the only 2 people involved with sourcing, negotiating and structuring commercial transactions with third parties, are also the only people responsible to oversee the performance of the transactions and with intimate knowledge of the transactions and activities pertaining thereto. This means that the management of risk pertaining to such transactions is woefully poor, if existent at all. This is compounded by the fact that the accounts and financial statement of the community are not audited as required by law. The evidence that only Kgosi Kagiso Pilane know about transactions with third parties is most disconcerting and goes against all principles of good governance. And yet, this can be easily fixed by ensuring that Kgosi and other persons who source and negotiate investments on behalf of BBK, do not represent the community as shareholder. The community at the Kgothakgothe can select whoever it wishes, including persons who are not members of the TC or persons who are otherwise independent but with the skills to oversee the interests of the community in the companies investments of BBK. Such persons would report to the TC and/or the community.

I. THE FLOW OF FINANCIAL BENEFITS IN ANY TRANSACTIONS CONDUCTED WITH ANY THIRD PARTY IN THE NAME OF OR ON BEHALF OF BAKGATLA BA KGAFELA BY ANY PERSON

1. According to Mosiamise Business Consulting (MBC) in its "Close-Up Report" for the corporatisation of BBK entities, as at 30 June 2013, BBK investment in the mining sector amounted to approximately **R5.459 billion**. The approximate value of BBK farms was **R425 million**. This is value accrued mainly, if not wholly, under the leadership of Nyalala Pilane. The MBC Close-Up Report is Appendix **B**.
2. It is important that we record at the outset that due to the absence of complete audited accounts and financial statements and proper and complete records, we have not been able to determine with any accuracy or certainty the fullness of transactions and income that has accrued to BBK over time from transactions with third parties and the application of income from such transactions. We are unable to say that the transactions and flow of monies presented in the evidence before us represent a complete account.
3. Commercial transactions with third parties have been concluded on behalf of or in the name of BBK through a web of companies either wholly owned by BBK or owned with other parties. Monies deriving from the transactions have been administered through accounts under the control of attorney firms directly and through BBK companies. **Appendix C** is an organogram of BBK and associated companies and entities.

4. As a point of departure, it is important to record that in terms of the NW Act, the TC is, by prescription of law, responsible for the administration of the finances of the community and to account therefor ((sec9(1)(c)); and Kgosi is responsible to administer the affairs of the community and to account therefor (sec18(1)(a)). Both are therefore responsible to ensure that the accounts and financial statements of the community are submitted to the Auditor-General, NW for audit (sec31(1)). It is for these reasons that we expected that they must be the primary source of the evidence about commercial transactions conducted on behalf of or in the name of BBK, and the flow of financial benefits from any such transactions. This was not the case.
5. Information about the transactions that we discuss below and the movement of monies relating thereto comes principally from the evidence of George Nicholas Papadakis CA (SA), a Forensic Accountant. The updated report of Papadakis is **Appendix D**. Godfrey Itumeleng Serithi CA (SA), a Forensic Accountant, presented evidence on behalf of Kgosi and the TC. According to his report titled "*Report on Mr Papadakis Expert Report dated 19 January 2017*", he was instructed to do no more than review the report of Papadakis and supporting documents. The report of Serithi is **Appendix E**. Geo Paul of the office of the Accountant-General, NW testified that his responsibilities include tribal and trust accounts administered by the government in terms of section 30 of the Act, the so-called "D-Account". His evidence pertained to monies received into and disbursed out of the BBK account and the failure of the TC to submit

accounts and financial statements for audit as required by section 31(1) of the Act.

6. In 2012 Kgafela Kgafela II, with the agreement of the TC and Nyalala Pilane, caused that a forensic investigation into the affairs of the TC be conducted by the firm BDO Spencer following complaints to him of maladministration. BDO Spencer issued a report which was presented to Nyalala Pilane and to the TC. A copy of the report is **Appendix F**.
7. Obakeng ER Gaitate, a former non-executive director of IBMR presented evidence on behalf of Kgosi and the TC. It is convenient that we deal with the nature of his evidence at this stage. It was sought that his evidence be admitted as expert evidence. This was opposed by the evidence leaders and other parties on the ground of his previous involvement with IBMR as a remunerated non-executive director in which position he was involved with matters that are the subject of the enquiry. Whilst we have no reason to doubt that Gaitate holds the qualifications and experience that he proclaims, it is so that by virtue of his position in IBMR, he was part of the decisions that are now implicated in the enquiry. We do not doubt that by virtue of such position, he would have been involved and have personal knowledge of matters pertaining to IBMR and we expect that he should also have personal knowledge of dealings pertaining to dealings between IBMR, Kgosi and the TC. He is therefore potentially implicated in the enquiry and as is human nature (we do not hold that this is what he has done with his evidence), he would be expected to defend the decisions made in respect of at least matters pertaining to IBMR. For this reason, it

is inappropriate that he should be regarded as an independent expert witness, as the term suggests. He is in fact a factual witness to the events that fall in his personal knowledge. The balance of the matters that he deals with in his "report" are matters which Papadakis has dealt with and which we will consider together with the evidence of the other factual witnesses and as commented upon by Papadakis. The report of Gaitate is **Appendix G.**

8. Bridgeman Sojane of BBK Communal Property Association (CPA). He is the chairperson of the CPA and presented to us evidence relating to land which is part of the Pilanesberg Nature Reserve restored to BBK in terms of the Restitution of Land Rights Act, 2005 and is presently administered by the NW Parks Board in terms of a Management Agreement with the CPA with income accruing therefrom paid into the D-Account.
9. In addition to the oral evidence and accompanying reports, we have had regard to written statements of Mrs Emily Tjale, Ms Sasha Wells, accounts and financial statements, minutes of the TC, contracts of major transactions, bank statements and invoices and the Bakgatla Master Plan which sets out a 30-years road-map with milestones for the development of BBK. We have listed what we consider the key documents in **Appendix H.** A complete record of documents is available.

10. We did not receive any evidence from COGTA to explain its role in the administration of the affairs and monies of the community, notwithstanding the clear evidence that the department was called upon to address complaints of maladministration by the community. Accordingly, any findings and recommendations that we make, we do so without the benefit of submissions of COGTA, the department with statutorily prescribed responsibility to support and assist the TC.

11. We regrettably find it necessary to mention that our investigation was hampered by the failure and a perceived reluctance of Nyalala Pilane to fully disclose relevant documents, even under rulings of the chairperson compelling disclosure of documents. Most documents were disclosed only after demand by the parties, and not voluntarily as should be expected from a person who considers themselves under obligation to account to the community and to the government as prescribed by law. Regrettably, whilst a significant number of relevant documents were disclosed in compliance with rulings of the chairperson, many remained undisclosed up to the completion of evidence and the public hearings. We cannot over-emphasise that this conduct will only serve to feed continuing suspicion about the administration of the financial affairs of the community and is most unsatisfactory for persons who control the assets of the community in a fiduciary capacity.

12. Finally, in this body of the report we mention only specific witnesses. We do so for no reason other than that their evidence provides details about the transactions and flow of monies that have been presented to us. Our

failure not to mention the other witnesses should not be considered a slight on their evidence or that we do not consider their evidence of assistance. We have considered all the evidence before us in arriving at our findings and the recommendations we make and thank all persons that gave evidence for their assistance to our understanding the issues we are required to determine.

13. We have divided the discussion under this heading into 3 Parts as follows –

(I) – the evidence; (II) – the applicable law; (III) – findings

The Evidence

14. The evidence shows that –

14.1 BBK have commercial interests in the mining, tourism and agriculture sectors. As principals, the TC and Kgosi Pilane are directly involved in, and responsible for all decisions, administration and management of the financial affairs of BBK.

14.2 The TC administers its affairs through a separate entity, previously BBK Management Service which on corporatization was dissolved into BBK Traditional Authority NPC (BBKTA), an entity which, according to MBC is registered mainly to gain certain tax benefits for the TC. BBKTA has (or is supposed to have) an executive management led by a Chief Executive Officer and employs staff responsible for the daily administration of the TC including, *inter*

alia, preparation and presentation of the annual budget to the TC, preparation of accounts and financial statement, preparation of reports to the community. We point out that notwithstanding, the TC remains accountable for the administration of the financial affairs of the community.

14.3 In 2013, the TC embarked on corporatization process of their commercial enterprises to, *inter alia*, "*consolidate all assets and liabilities under a single balance sheet for reporting purposes*". The main commercial entities of BBK are Bakgatla Ba Kgafela Investment Holdings (Pty) Ltd (BBKIH); Bakgatla Ba Kgafela Strategic Investment Company (Pty) Ltd (BBKSIC); Lexshell 36 General Trading (Pty) Ltd (Lexshell 36); Lexshell 703 (Pty) Ltd (Lexshell 703), Bakgatla Ba Kgafela Financial Services (Pty) Ltd (BBKFS); Lexshell 38 (Pty) Ltd (Lexshell 38). **Appendix I** is a list of the names of the directors and trustees of each entity and the share percentage held by BBK in each entity.

14.4 Income earned from the significant transactions that we discuss was administered through accounts held with attorney firms Cliffe Dekker Hofmeyer Inc. (CDH) and Werksman Attorneys (Werksman). Payments were made as instructed in transaction documents and/or on the instruction of Kgosi Pilane. Payments from these accounts were made to, *inter alia*, transaction counter-parties, creditors, BBK companies, consultants and persons authorized by Kgosi Pilane.

14.5 Notwithstanding ownership of the companies in **Appendix I**, the TC has, in its (only) audited consolidated Annual Financial Statements for the periods ending 31 December 2012 and 2013, accounted for only 2 subsidiaries, Lexshell 703 and Moruleng Property Development. As a result, it is not possible for the purposes of this report to give a complete account of the income earned by BBK entities over time, and yet it is apparent from the expenditure accounted for in the evidence before us that BBK income far exceeded the amounts accounted for in the audited consolidated financial statements.

SIGNIFICANT TRANSACTIONS

15. There are significant mining transactions identified in the evidence before us. The transactions yielded a gross income well over **R3 billion**.

(i) Union Section Mine

16. The investment in Union Section Mine ("Union Section") is the only recorded asset of Lexshell 36, a wholly owned subsidiary of Lexshell 703. Lexshell 703 is wholly owned by the TC.

17. Nyalala Pilane's account of this transaction is only that Lexshell 36 acquired 15% share in Union Section mine (owned by Anglo Platinum and operated by RPM for **R435 million** in cash, (financed with a loan from Rand Merchant Bank (RMB), guaranteed by Anglo Platinum), and a contribution of surface rights. As security for the loan, BBK entered into a Hedge Agreement for

6 years. According to Papadakis and Gaitate, and transaction documents, in 2006 Lexshell 36 acquired,

17.1 15% shares in Union Section mine for **R420 million** financed with a loan from Rand Merchant Bank (RMB) of **R438 9 million**, the VAT component thereof funded by RPM to be repaid on Lexshell 36 receipt of the VAT. According to Gaitate, Lexshell 36 realized a dividend in 2007 – there are no particulars of the dividend and where it was paid to.

17.1 An initial 26% in the prospecting rights over the farm Magazynskraal, with the possibility of an increase to 80% if Lexshell 36 secured funding for a Bankable Feasibility Study (BFS).

17.2 55% share in the prospecting rights over the farm Rooderand, with RPM retaining the balance of 45% shares.

18. The transaction included –

18.1 cancellation of Anglo's royalty obligations to BBK in exchange for equity.

18.2 BBK contribution of various surface rights for future mining and processing activities for a fee.

19. The AFS of Lexshell 703 and Lexshell 36 for the financial years 2006 to 2015 record cash income from the transaction in the amount **R1 180 billion**. For the same period, Gaitate records cash income of **R1 165 billion**. Lexshell 36 records further income of **R68 575 million** in the same period (which we assume is interest earned on the **R1 180 billion**, considering that Union Section Mine is the only asset and therefore only source of income for Lexshell 36).

20. Gaitate also records,

20.1 Interest earned by Lexshell 703 in the amount **R18 275 million**. There is no explanation of the source of this income and we assume therefore that it is part of the interest earned on the **R1 180 billion** which would accord with the **R68 575 million** which we have assumed is interest. The amount appears to be the difference between the further income earned by Lexshell 36 (**R68 575 million**) and the amount recorded by Gaitate as interest earned by Lexshell 36 (**R50 799 million**).

20.2 Vat refund in the amount **R32 277 million**.

20.3 Loan from shareholder in the amount **R97 388 million**. There are no particulars for this payment.

20.4 Loan from RPM in the amount **R53 003 million**.

20.5 Other net receipts in the amount **R7 950 million**.

21. For the same financial period, the TC records a dividend of **R256 million** received from Lexshell 703. The amount corresponds with the AFS of Lexshell 703 which records a declared dividend of similar amount for the same period.

22. In the same period, Lexshell 36 records expenditure as follows –

22.1 Loan repayment to RMB (**R368 million**). Nyalala Pilane told us that the loan amount of **R435 million** from RMB was paid "*in advance of the 8 years' maximum debt period*" whilst Gaitate said that **R438 935 million** was repaid to RMB. This conflicting evidence leaves a possible expenditure of at least **R67 million (R435-R368 million)** unexplained. There is no explanation from Nyalala Pilane and from Lexshell 36 of the difference in the amounts given as repayments to RMB and we could not find any in the evidence before us. We consider that this warrants further investigation.

22.2 Platinum Swap Agreement (**R287.3 million**). The Platinum Swap Agreement was an agreement between Lexshell 36 and First Rand Bank Limited concluded for the period 1 December 2006 to 30 December 2011 in terms of which Lexshell 36 contracted to trade ounces of platinum at a fixed price of **R8 567.26** per ounce bi-annually. The purpose of the agreement was to fix prices in advance of trades to secure against the risk of adverse changes in the price of platinum which would otherwise negatively affect receipts from the Union

Section investment. **R287.3 million** is the amount paid to secure the fixed price.

22.3 Mining Royalties (**R62 2 million**). We note that notwithstanding that Lexshell 36 earned no income after 2012, it appears to have continued to incur a mining royalty expense for the period after 2012. The audited consolidated AFS of the TC and the AFS of Lexshell 36 do not account for this payment. There is no evidence explaining the payment, including the recipient of, and basis for, the payment. We also found none from any of the evidence available to us and are therefore unable to provide any information and explanation concerning the payment. We consider that the payment of **R62.2 million** warrants further investigation.

22.4 Dividend to Lexshell 703 (**R262 million**). Of this amount, Lexshell 703 paid **R256 million** to the TC. There is no explanation from Kgosi Pilane and the TC of what became of the balance of **R6 million** or how it was expended by Lexshell 703. Gaitate also records a payment to shareholder of **R89 707 million**. There are no particulars of the shareholder paid and the amount does not appear to be accounted for in the AFS of the TC. We consider that the amounts of **R6 million** and **R89 707 million** warrant further investigation.

22.5 Finance Costs (**R96.5 million**). The expense relates to the RMB loan that funded the acquisition in Union Section. Gaitate records total interest paid of **R78.2 million** of which **R65 888 million** was paid by

Lexshell 36 and **R12 400 million** by Lexshell 703. He offered no explanation for the difference of **R18 250 million**. Whilst the lesser expenditure indicated by Gaitate is favourable to BBK and may therefore not appear to warrant investigation, it nonetheless casts doubt on the reliability of the financial information on which the evidence before us is based. We consider the difference of **R18 250 million** to warrant further investigation.

22.6 Taxation (**R171 4 million**). Gaitate accounts for total tax of **R151 352 million** paid by Lexshell 36 (**R125 352 million**) and Lexshell 703 (**R26 million**). On the evidence before us, there is no explanation for the difference of **R20 million**. This is yet another instance where information provided by TC must be treated with caution as unreliable. We consider that this warrants further investigation of actual tax paid.

22.7 General - **R8 8 million**. There is no information what this expenditure is. This warrants further investigation.

23. Gaitate also records the following further payments which are not accounted for in the audited consolidated AFS of TC and the AFS of Lexshell 36 and therefore not discussed by Papadakis in his evidence -

- Vat on RPM acquisition of **R30 212 million**.
- RPM shareholder advance of **R44 683 million**.

- Debt repayment to RPM of **R24 259 million**.
- Other payments of **R16 634 million**. There is no particulars for this payment.

(ii) IBMR and Platmin Limited

25. IBMR is wholly owned by BBK. Its Directors' Report for the period ending 31 December 2008 details the operations of IBMR and agreements concluded with third parties dealing with the Platinum Group Metals (PGMs). It describes a series of transactions which provided the basis for the consolidation of Boynton, Magazynskraal and Sedibelo mines with the following recorded cash flows -

26. On 22 March 2011,

26.1. The TC acquired 10% shares held by Barrick in IBMR for **USD15 million**, technical data for **USD5 million** and Contractor Camp items for **USD30 000**.

26.2. According to a Management Agreement between the TC and BBKFS, RFA Consulting (Pty) Ltd (RFA) - the consultant appointed to arrange the transaction - was to negotiate a **USD32 million** loan from Ivy Lane Capital to fund BBK's acquisition of the Barrick 10% shares in IBMR. The audited AFS of IBMR for the year ended 31 December 2012 record payment by IBMR of an amount of **R352 million**, comprising

R346.8 million for the buy-back of shares and **R5.2 million** for repayment of a portion of the TC loan account. TC AFS and other financial records do not account for this transaction or any payments relating thereto.

26.3. Together with the sale of the Sedibelo West portion of the Sedibelo Platinum project by IBMR to Platmin South Africa (Pty) Ltd (Platmin) for **USD50 million**, Platmin paid **USD25 million** to the TC for, *inter alia*, the facilitation of the sale of Sedibelo West and the agreement to procure surface rights use over Sedibelo West for Platmin. Accordingly, a total sum of **USD75 million** was paid as consideration. The AFS and other financial records of the TC do not account for this transaction.

26.4. According to the audited AFS of Platmin, Platmin acquired Sedibelo West for approximately **USD82 million** (approximately **R540 million**) from IBMR – the amount **USD82 million** is made up of the **USD50 million** and **USD25 million** that we refer to above plus an addition **USD7 million**.

27. The financial information provided does not explain the apparent discrepancy between the approximately **R540 million** as reported by Platmin in its AFS and the **R346.8 million** reported by IBMR in its AFS. No supporting documents were presented before us to establish the exact amount deposited in an Escrow Account held with the firm of attorneys CDH, the Escrow Agent nominated in the agreement to receive payments relating to the transaction. The result is that the difference of **R194.8 million** is

unexplained on the evidence available to us. We consider that this warrants further investigation.

28. On 31 October 2012, IBMR became part of the Platmin group through the acquisition of a 49.9% interest in IBMR by the PGM Consortium for **USD99.8 million**. This was the culmination of the acquisition of two contiguous properties, namely, Sedibelo and Magazynskraal mines. The TC would remain owner of the balance of 50.1%. The **USD99.8 million** was deposited into an Escrow Account held with CDH nominated in the transaction agreement for that purpose. The 50.1% held by the TC was subsequently acquired by Platmin and on 29 November 2011, Platmin issued 1,576,621,600 common Platmin shares as payment for the acquisition of the Sedibelo Central and East and Magazynskraal mineral properties and for a non-controlling interest of Newshelf 1101 (Pty) Ltd (Newshelf) and Platmin (Pty) Ltd (Platmin SA), distributed as follows:

Shareholder	Number of Shares
BBKTC	688 902 020
RPM	165 716 314

Pallinghurst Ivy Lane	722 004 266
TOTAL	1 576 621 6000

The TC AFS for 2013 records a shareholding of 25.69% in Platmin valued at **R6.2 billion**.

(iii) Bakgatla Pallinghurst JV (Pty) Ltd (BPJV)

29. Gaitate gives the following account of the transaction. Several transactions were entered into with Pallinghurst resulting in the consolidation of platinum properties into the Sedibelo Platinum Mine which realized 25% shareholding for BBK. The transactions were,

29.1. Acquisition of Moepi Group, an empowerment partner of Boynton Investment (later changed to Platmin South Africa (Pty) Ltd).

29.2. Fulfilment of the condition precedent for BBK to increase its shareholding in Richtrau 123 from 25% to 80% and the subsequent sale to Pallinghurst.

29.3. Further purchase of Pallinghurst.

29.4. Sale of BBK 49% shares in IBMR to Pallinghurst.

29.5. Consolidation of the platinum assets for a mega mine development.

30. Pallinghurst provided funding for the BFS over Magazynkraal 3 in respect of which Richtrau 123 held a prospecting permit. As a result, Pallinghurst was able to increase its shareholding in Richtrau 123 to 80%, after it acquired 50% of the BBK shareholding (40%). Pallinghurst was to acquire BBK's 40% for **R2 billion** but was unable to raise the whole amount and only managed to raise **R1 675 776 billion**. According to Gaitate, this amount was applied as follows from the accounts of CDH –

30.1. **R500 million** to acquire 100% of Moepi Group, resulting in a 27.61% BPJV shareholding in Boynton.

30.2. **R482 million** for BBK 50% contribution to acquire the remaining 72% shares in Boynton.

30.3. **R369 million** for commission paid to RFA. A commission of 20% of the sale price of equity in Magazynkraal 3 was payable to RFA by agreement. 20% on the reported sale price of **R1 675 776 266 billion** is **R335 155 245 million**. In the event, the apparent difference of **R34 million** is not explained or accounted for. We consider that this warrants further investigation.

30.4. **R72.7 million** – BBK contribution to cost of BFS.

30.5. **R14.6 million** – PIC Loan Account.

30.6. **R3.5 million** – CDH Escrow fees.

30.7. **R233 million** – Payment to BBKTA, Nedbank Acc No. 1284129632.

There is no evidence before us relating to the bank account. This warrants further investigation.

31. Gaitate reflects the following financial flows for the period 2010 – 2012 -

Income:

- **R72 million** - facilitation fee on Magazynkraal)
- **R559.8 million** - sale of Sedibelo West
- **R775 9 million** - sale of 49.9% IBMR shares
- **R10.5 million** – receipt from Ivy Lane
- **R54.9 million** – withdrawal of Nedbank investment. We have no particulars pertaining to this investment and consider that it warrants further investigation.

Expenditure

- **R926 5 million** – PSG Investment
- **R231 6 million** – payment to Ivy Lane
- **R92 9 million** – RFA fees

- **R78 million** – payment to Lexshell 703. The payment warrants further investigation.
- **R54.9 million** – VAT
- **R44.9 million** – payment to BBKFS. The payment warrants further investigation.
- **R20 million** – Selalelo Investment fee for facilitating the issuance of a mining licence by the Department of Mineral Resources. There is no evidence of who is Selaelo Investment and what facilitation was paid for with the amount. We consider that this warrants further investigation.
- **R15 million** – payment to BBKTA. There is no evidence before us of or relating to a BBKTA bank account. We consider that the BBKTA account warrants further investigation.
- **R5 million** – Mothuloe Attorney. There is no evidence before us of what this payment was in respect of. The payment warrants further investigation.
- **R264 721** – other costs

32. The audited AFS of BPJV for the year ending 31 December 2011 record a monetary advance by the TC to BPJV in the amount of **R542 262 million** to -

(i) fund the acquisition of the Moepi Group and its subsidiaries; (ii) repay certain loan facilities; and (iii) fund the conversion of Boynton Investments preference shares into equity shares. The capital contribution is unissued

equity *i.e* the TC did not receive shares in BPJV in return for the capital contribution although there was a stated intention to convert the capital contribution into shares. Mr Gaitate states that the TC paid **R500 million** and **R14 million** to acquire Moepi Group and to a PIC loan account and makes no mention of a cost of conversion of Boyton preference shares to equity shares with the result that it appears that there is a difference of **R28 million**. On the evidence available to us, we are unable to find the explanation for this apparent discrepancy. We consider that this warrants further investigation.

33. As at 31 December 2015, the TC capital contribution had not been converted to equity with the consequence that the TC contributed **R542 262 million** to BPJV but did not receive any equity in return for this significant monetary contribution. Notwithstanding that TC contributed 50.1% of the capital contribution, which funds were utilised to fund the Moepi Group acquisition, 50.1% of the issued share capital in BPJV is registered in the name of an entity Orkid S.a.r.l, a company incorporated in Luxembourg. There is no evidence before us of the shareholders of Orkid S.a.r.l or its relationship, if any, with BBK. No explanation was provided to us of the owners company and its relationship to BBK and we did not find any from the evidence available to us. This transaction, in which it appears that the TC provided substantial funding to purchase shares for an entity not related to BBK and for no apparent benefit in return warrants further investigation.

34. During the 2011 financial year, the investment in Moepi Group was impaired in full (the value of the investment written down to zero). The amount of the

impairment was **R789 718 million**. The AFS of the TC presented before us do not account for the capital contribution to BPJV.

(iv) Richtrau 123 (Pty) Ltd (Richtrau 123)

35. Richtrau 123 owned new order prospecting rights for PGMs and related minerals over the farm Magazynskraal 3. The prospecting rights were acquired from RPM. RPM held 74% shares and Lexshell 38 held the balance of 26% in the company. As at December 2006, the prospecting rights were valued at **R26.23 million**.

36. Lexshell 38 AFS for the years ending 2006 to 2011, records the shareholding in Richtrau 123 as the only asset of the company. As at 31 December 2008, Lexshell 38 owned 46.7% shares and acquired an additional 586 ordinary shares for **R87 357million** funded by the TC. We were told that Lexshell 38 increased its shares to 80% by procuring funding for the BFS. Lexshell 38's 80% reduced to 40% because of the BPJV agreement, with 40% sold to Pallinghurst through Pallinghurst company SPV Clidet 832 (Pty) Ltd (Clidet 832) for **R1.6 billion** – we discuss this in para (iii) above.

37. In 2009 Clidet 832 acquired 33.4% shares in Richtrau 123. By 31 December 2011, Clidet 832 and Lexshell 38 each owned 40% in Richtrau 123, Lexshell 38 having divested itself of 6.7% interest in favour of Clidet 832. RPM is recorded as the holding company of Richtrau 123, notwithstanding that RPM only owned 20% of Richtrau 123 as at 31 December 2009. As at 31 December 2009, Lexshell 38 interest was valued at **R133.9 million** (this

figure is arrived at based on the net asset value of Richtrau 123 as at 31 December 2009).

38. During the 2010 financial year, Richtrau 123 made a loss of **R71.5 million**, with the consequential impact on the valuation of the investment in the accounts of Lexshell 38 to reflect the loss in value. In the same year, exploration costs in the amount of **R78 million** was incurred and a further **R46 million** was expended in the 2011 financial year. In the 2011 financial year, the loss increased to **R169 million**, with the consequential impact on the valuation of the investment in the accounts of Lexshell 38 declining to **R18.5 million**. In the same year, the prospecting rights to which the value of **R126 million** was attributed in Richtrau AFS for year ended 31 December 2006 was written down to zero, and the **R87 357 million** invested by the TC was consumed in exploration costs.

39. On 31 October 2012, the contiguous properties Sedibelo East and Magazynkraal 3 were consolidated. They were acquired from IBMR for **USD99.8 million** – we discuss this in para (ii) above.

40. TC AFS for 2014 records sale of prospecting rights for the amount of **R32.9 million**. Assuming that this refers to the prospecting rights owned by Richtrau 123, which is not clear from the evidence, this would mean that the TC ultimately incurred a loss of approximately **R54 million** on this investment.

41. According to Serithi, **USD10 million** was received into CDH escrow account from PIC relating to Richtrau 123. There is no supporting documentary evidence relating to this payment and what it was for.

(v) Rooderand Portion 2

42. This transaction comprised the transfer by RPM of prospecting rights over Portion 2 of the Farm Rooderand 45, to BBK company Lexshell 49 (Pty) Ltd (Lexshell 49) for a 45% shareholding in Lexshell 49 with the TC holding the balance of 55%. The TC was to control the exploration and development activities of Lexshell 49. RPM provided a loan of **R45 million** to the TC to finance its 55% shareholding. **R35 million** of the loan amount was paid to the TC on signature of the agreement interest free for one year, and, according to Kgosi Pilane, was used to repay the Land Bank loan that we discuss in para H. The balance of **R10 million** was to be advanced after 12 months. The TC appears to have discounted the **R10 million** with RMB and received **R9 million** upfront. The loan amount of **R44 million** is not accounted for in the accounts of the TC.

43. For the period 1 January 2007 to 31 December 2015, Lexshell 49 incurred losses of approximately **R750 000**. The TC funded a loan of **R474 000**. Over this period, no exploration activities over Portion 2 were undertaken. As at 31 December 2015, the value of the prospecting right was **USD13 million**.

44. The value of the shares held by BBK in Lexshell 49 is not accounted for in the audited AFS of the TC.

ATTORNEY ACCOUNTS

45. The following known attorneys accounts were used to receive and to disburse BBK monies deriving from the transactions we describe above.

(i) CDH

46. The monies received for the benefit of the BBK arising from the transactions that we discuss above were paid into the Escrow Accounts held with CDH as escrow agent nominated by the parties in the transaction contracts, and accounts administered on behalf of the TC at the instruction of Kgosi Pilane. In the period 2008 – 2014, CDH operated and administered the following known accounts on behalf of the BBK and BBK entities. According to Gaitate, the movement of monies that he describes above is monies paid into and out of CDH accounts, but he does not identify any accounts by name.

- Trust Account No. 1979312176 - Account Name: Bakgatla
- Account No. 9016548692 - Account Name: Bakgatla Ba Kgafela Tribe, US10 Trust Account ito Attorneys Act, section 78(2A)
- Account No. 9017209887 - Account Name: Bakgatla Ba Kgafela Tribe Investment, Trust Account ito Attorneys Act, section 78(2A)
- Account No. 9017209926 - Account Name: IBMR (Pty) Ltd, Trust Account in terms of Attorneys Act, section 78(2A)

- Account No. 7710019978 - Account Name: CDH Foreign Exchange Account
- Account No. 9017617323 - Account Name: Bakgatla Ba Kgafela Tribe Trust Account ito Attorneys Act, section 78(2A)
- Account No. 9016764151 - Account Name: BBKFS Trust Account ito Attorneys Act, section 78(2A)

47. The following is a summary of the amounts administered by CDH relating to the transactions we have discussed above –

Inflows

- **US\$10 million** - relating to the Third Addendum to the Magazynzskraal Loan and Conversion Agreement
- **US\$99.8 million** - sale of 49.9% of shares to PIC
- **US\$82 million** - sale of Sedibelo West assets

Outflows

- **R25 015 million** - BBKFS
- **R104 397 million** - RFA

- **R926 900 740 million (R926 555 590 million** plus interest of **R345 150 million)** - PSG Online Securities (PSG) with payment dates 27 June 2012 and 2 July 2012

(ii) Werksman

48. We did not come upon particulars of bank accounts operated and administered on behalf of BBK and yet there is the following movement of monies from the firm.

Inflows

- **R35 million** - loan amount from RMB to the TC. (The payment is discussed in para (v) above)

Outflows

- **R26 271 232 million** - Land Bank in full and final settlement of a loan amount of **R13 075 million** plus interest. (The payment is discussed in para H above).
- **R456 000** - Snowden. There is no evidence who is Snowden and the reason for payment.
- **R14 283 488 million** - RFA.

- **R228 000** - Andisa Treasury.
- **R136 800** - Gumbo Attorneys.
- **R66 400** - Roger Schoon. There is no evidence who is Roger Schoon and the reason for payment.
- **R256 500** - to Werksman.
- **R3 513 580 million** to the TC. There is no evidence before us of the account into which this amount was paid. This warrants further investigation.

THE PSG INVESTMENT

49. A resolution of the TC of 15 June 2012 signed by 15 members authorised the investment of **R926 900 740 million** held by CDH, and authorized Kgosi Pilane to operate the account and to give payment instructions and to settle the terms of any agreement with PSG in "*his sole and absolute discretion*". The resolution also ratified any action that he may have already taken to enter into an agreement with PSG and to give any payment instructions.

50. The amount was paid to PSG by CDH for purposes of investing in terms of a Advice Agreement and Product Agreement entered into between PSG Konsult and Kgosi Pilane. The investor of the funds is described in the agreement as Kutlwano Jeremia Motlhabane, a director of BBKFS which is

contrary to the resolution of the TC authorising Kgosi Pilane to operate the account. There is also no evidence before us what the consequence, if any, of naming Mr Jeremiah Kutlwano Motlhabane as investor was and why Kgosi Pilane was not the named investor as authorized by the TC.

51. The investment is accounted for as an asset in the AFS of the TC and BBKFS as follows –

- **R756 385 965 million** at 31 December 2012
- **R844 679 882 million** at 31 December 2013

52. TC management reports show income of **R67.6 million** in 2013 and **R136.7 million** in 2014. According to Serithi, this income derives from the investment in PSG.

53. A PSG Statement of Movement in Holdings for the period 1 March 2013 – 28 February 2014 records a gain of **R67 554 915 million** on the investment - this appears to be the same amount in the preceding paragraph. It is not apparent from this whether the amount is a value increase in the investment holdings or realized gains resulting from the sale or disposal of stocks and shares, receipt of dividends from the investment or withdrawals from the investment account.

54. An Income Tax Certificate shows a capital gain for **R135 190 307 million** for the period 28 February 2015 – 29 February 2016. We did not come upon any

evidence which accounts for this amount in the AFS or other accounts of the TC.

55. At the end of the statement cycle July/August 2017, the investment had a zero balance. There is no evidence before us how the investment reduced to a nil balance over time **BUT** we note that a TC Finance report dated December 2015 states that *"The sole liquid asset for the BBK is the investment facility managed by PSG. The available balance in the portfolio as at the end of November (2015) was **R201 million**. We have estimated that with a funding requirement of **R22 million** per month for group operations plus repayment of the PSG and Anglo loans, we have enough cash to operate until May 2016. Thereafter, our projections show a deficit unless other strategies for inflow of funds are successful"*. In the evidence available to us, there is no explanation of the PSG and Anglo loans referred to and whether and when they were repaid. These warrant further investigation.

56. According to a presentation to the "TC Task Team" on the "Financial Position of the BBK Group" dated 8 December 2017, withdrawals from PSG as per bank transactions for the period 2012 to November 2016 amounted to a total of **R1 301 billion** as follows (the Task Team is made up of members of the community and of the royal family to investigate the financial affairs of the TC)

—

- **R134 315 million – 2012**

- **R262 100 million - 2013**

- **R340 million** - 2014
- **R330 million** - 2015
- **R235 442 million** - 2016

57. The withdrawals are not reflected in the AFS or accounts of the TC, BBKFS or Lexshell 703 and there is no other record that we became aware of that explains the withdrawals and the utilization thereof. We are therefore unable to say that the amount in excess of **R1.3 billion** was utilized for the benefit of BBK or what part of it was not. We consider that this warrants further investigation.

58. But for an Investor Statement dated July/August 2017 for the PSG Asset Management Offshore fund portfolio, no investor statements were presented before us which would otherwise provide accurate information about the transactions, account activity and the monies invested in the PSG portfolios.

Resource Finance Advisors Consulting (Pty) Ltd (RFA)

59. RFA was a company employed by the TC as consultant. According to an unsigned and undated Asset Management Agreement between the TC, BBKFS and RFA, RFA was appointed as a consultant in November 2010 to manage the assets of the TC. The Asset Management Agreement makes reference to a Consulting Agreement entered into between the TC, BBKFS

and RFA as "principal party". The Consulting Agreement presented in evidence before us is unsigned.

60. The Asset Management Agreement provided for remuneration of RFA as follows (clause 5) –

"All expenses incurred in the performance of its obligations in terms of the agreement.

*On the signature date a signature fee of **R18 131 370.12 million**, being 20% of the savings of the settlement with Actis and 20% of the proceeds on the disposal of 6.67% in Magazynskraal to Ivy Lane Capital (plus VAT).*

*On the Sedibelo West closing date an amount of **\$11.4 million (plus VAT)**, being 20% of the proceeds on the sale of Sedibelo West from IBMR to Platmin less its base cost.*

*On the IBMR closing date an amount of **R10 million (plus VAT)** as a consolidation fee agreed between BBKT and RFA, in terms of a consolidation mandate.*

20% of the profits realised on the disposal of any asset by the BBKT.

On the termination date, 20% of the unrealised profit on each asset not disposed of by the BBKT. The 20% to be paid at the election of the BBKTC in either cash or shares in the listed entity used to consolidate the assets"

61. The Consulting Agreement in turn provides that RFA would, if it facilitated the Sedibelo and associated consolidation project successfully, receive from BBKFS, *inter alia*, the following –

- **R13 million** on signature date.
- **USD8 million** on the closing date for Sedibelo West.
- **R10 million** on IBMR closing date.

62. The above do not accord with the amounts recorded in the Asset Management Agreement and it is not clear whether these amounts were intended to be additional to the amounts earned in terms of the Asset Management Agreement.

63. An undated Investec letter to "whom it may concern" records payment of R800 00 on 1 August 2011 to Leratadima with "reference or account number Bakgatla Ba Kgafela". There is not any evidence before us of Leratadima and its relationship with BBK.

64. We consider that the payments to RFA warrants further investigation.

BBKTC SOURCES OF INCOME

65. Below we provide a summary of the known sources of income earned by the TC for the financial years 2007 to 2015. These amounts are extracted from the "management reports" of the TC as presented for the financial years 2007 to 2013 and unsigned AFS of the TC and its companies for the financial years ended 31 December 2012 and 2013:

Source	Amount (Rmillion)
Dividends from Lexshell 703	R233 140
Dividends from Lexshell 36	R22 898

Dividends PSG Investment	R69 292
Werkman Trust Account	R3 649
Interest from Lexshell 703	R12 503
Rent ABSA Kiosk	R28
Royalty Income (Boynton)	R394
Sales Prospecting Rights	R32 923
Richtrau Proceeds	R233 350
CDH Rental Income	R67 417
TOTAL	R929 084

66. Whilst the above appears to be the only income received by the TC in the period, Papadakis correctly points out that the expenditure indicated by the TC, including the major infrastructural projects we discuss later in the report, incurred expenses far in excess of the amounts indicated in the audited consolidated statements. The possible explanation for this apparent anomaly is that monies were spent from other accounts, including attorneys' accounts and the accounts of BBK companies, without being accounted for in the

books of the TC and as a result of which the evidence is not before us. This is another reason why caution should be exercised in placing any reliance on the financial information before us.

67. In addition to the above, the TC is also funded from monies received and deposited into the D-Account. This income is not significant in comparison and is fully accounted for in the accounts of the Treasury, NW.

68. We set out in **Appendix I** a list of the financial records that have been presented in evidence and their status. These are the only records that have been presented to us as recording the financial dealings of BBK in the relevant periods and they are the basis for the evidence of Papadakis and Serithi that we describe below.

Application of funds as accounted for in the AFS of the TC and subsidiaries

69. According to the audited consolidated AFS of the TC and its subsidiaries Lexshell 703 and Moruleng Property Development for the financial years ended 2012 and 2013, losses incurred in that period are attributed primarily to the following -

- **R21.5 million** - Advertsing
- **R115 million** - Employee Costs. From a group perspective, the total employee costs is **R139 million**

- **R119 million** - operating expenses for financial year ending 2012, (approximately **R41 million** of this is employee costs and temporary services and **R22 million** is legal expenses). The income earned, excluding passive income of rental, dividend and interest earned, is **R0**
- **R163 million** - operating expenses for financial year ending 2013 (**R65.6 million** of this is employee costs). The income in the same period, excluding passive income of rental, dividend and interest earned, is **R0**

70. In the same period, Lexshell 703 incurred total expenses in the amounts of **R615 million** and **R603 million** against total non-investment revenue of **R394 019** and **R4 million**.

Loans to subsidiaries, related entities and persons

71. The following are recorded loans made from BBK monies –

71.1. Nyalala Pilane - **R500 000** Interest free and unsecured personal loan (per audited AFS of BBKTC for 2011 financial year). It appears that as at 31 December 2014, the loan had increased to **R1 216 million** and remained unpaid as at financial year ending 2018.

71.2. BBK entities (according to TC management report 2014) – loans to some of the companies remained unpaid as at end of financial year 2018.

TC Investments in companies and entities not included in the consolidated AFS of the TC

Bakgatla Ba Kgafela Strategic Investment Company (BBKSIC)

72. BBKSIC is a wholly owned BBK company. Its business is "*investment and management of industrial and manufacturing projects*". MBC state in the Close-Up Report that BBKIH would take over BBKSIC as part of corporatization.

73. According to the draft AFS of 2015, BBKSIC received loans from the TC of **R248 405 million**, which amounts includes loans disbursed to the entities listed in the following paragraphs in the amount **R154 554 million**. Of the balance of **R93 851 million**, **R62 018 million** was applied predominantly to fund the expenses of BBKSIC. Gaitate states that **R265 million** was loaned to BBKSIC by the TC in the period 2011-2015 but offers no explanation for the discrepancy between his amount and the amount recorded in the AFS. In the event, there is no explanation for the difference of **R17 million** and we consider that this warrants further investigation.

74. The subsidiaries and associate companies of BBKSIC with the percentage shareholding, and the amount of loans totaling **R154 554 million** to these entities as at 31 December 2015 are:

Bakgatla Tshipi (51%) - **R24 996 million**

75. Established in 2013 with interests in steel fabrication engineering services in the mining and construction industries. BBKSIC holds 51% shareholding in the company and the balance of 49% is owned by Kgahliso Investment (Pty) Ltd which, on the evidence before us, does not appear to have any relation to BBK. There is no evidence before us that Kgahliso Investment paid consideration of any form to acquire the interest of 49%.

76. In the period 1 January 2013 to 31 December 2015, the company incurred losses of approximately **R24 million**. The losses were wholly funded over the period by BBKSIC (**R24 996 million**). There is no evidence before us that the 49% shareholder, Kgahliso Investment availed any monies to fund the activities of the company in this period.

77. An amount of **R16 339 million** and another **R6 646 million** was advanced in the 2014 financial year. As at 31 December 2014, Kgahliso Investment had provided a loan of only **R1 719 million** to the company. For the same period, the independent auditors note that the Bakgatla Tshipi did not have adequate systems in place to record revenue, cost of sales or to document the expenditure.

78. The 49% shareholder appears to enjoy the benefit of a significant shareholding without the funding responsibility and there is no evidence or explanation before us for what appears to be a financial favour to Kgahliso Investment for no obvious benefit to BBK. We consider that the transaction warrants further investigation.

Bakgatla Bio-Flame (80%) - R30 181 million

79. The business of the company is the manufacturing of Bio-logs. It commenced operating in 2012, during which year it acquired a manufacturing plant for the production of Bio-logs. For the period 1 January 2011 to 31 December 2015, the company made recorded losses of approximately **R31.8 million**, funded with loans from the TC (**R10 207 million**) and BBKSIC (**R30 181 million**). There is no evidence who the holder of the balance of 20% shares is and what contribution, if any, it has made to fund the company. The transaction warrant further investigation.

Bakgatla Protective Garments (74%) - R21 777 million

80. The business of the company is to produce protection garments for the mining industry. There is no evidence before us of the owner of the balance of the shares and what contribution they made to fund the company. The transaction warrants further investigation.

BBK Property Development (100%) - R19 992 million

81. The company commenced operating during the financial year ended 31 December 2014. Its reported business is to provide property development and rental services to companies within the BBK group of companies and other non-related enterprises.

82. In the period 1 January 2014 to 31 December 2015, the company incurred losses of approximately **R18 583 million** wholly funded by loans from BBKSIC (**R19 997 million**).

83. There is no evidence before us of how and to what the loan amounts we refer to above were employed.

BBK Shared Services (100%) - R22 370 million

84. The company commenced operating during the financial year ending 31 December 2014 and its reported business is to provide accounting, human resources, payroll, and procurement and information technology services to companies within BBK group of companies and other non-related enterprises.

85. In the period 1 January 2014 to 31 December 2015, the company incurred losses of approximately **R13 885 million**. These losses were wholly funded by BBKSIC (**R22.37 million**).

86. There is no evidence before us of how and to what the loan amounts utilised.

Siyaya Free to Air (40%) - R35 238 million

87. The business of Siyaya is recorded to be interests in the media industry and it commenced operating in financial year ending 28 February 2012.

88. The AFS of the company do not identify the owner(s) of the balance of shares of 60% and no evidence was presented to us in this regard.

89. In the period 1 March 2011 to 29 February 2016, the company incurred losses of approximately **R24 127 million**. This amount does not include the financial performance for 2015 financial for which year no AFS or other financial records are available to us. The losses of **R24 996 million** were funded mainly by BBKSIC and there is no evidence that any of the other shareholders provided any funding in the relevant period.

90. The AFS for financial year 2015 are particularly relevant in the light of a reported loan to the company by the TC in the amount of **R75 113 million**. **R25 million** of this amount was advanced during the 2015 financial year to acquire SAFA rights and **R50 113 million** advanced during the 2016 financial year. Siyaya made no major acquisitions during the 2016 financial year. We point out that the auditors of BBKSIC note that the financial results of Siyaya for the 2015 financial year have not been audited. The same AFS record interest free, unsecured loans with no terms of repayment to related parties in the amount **R10 932 million**. There is no evidence before us of the persons or entities who received the recorded loans from the amount of **R10 932 million**. This warrants requires further investigation.

91. The AFS of BBKSIC which record the above significant money trail are unreliable as appears from the audit opinion of the independent external auditors that, *"Siyaya Free To Air (Pty) Ltd has not been audited for the*

current financial period which resulted in the unreliability of the figures given at year end."

Concerns about the reliability of BBKSIC and subsidiaries' AFS

92. A significant proportion of the declared expenses are recorded as consulting fees and employee costs. Expenses are simply recorded as "other", and these exceed the total revenue of BBKSIC in that period. No evidence or particulars to explain the expenses was available to us.
93. In financial year 2013, the total revenue generated by BBKSIC was **R6 283 million** against which provision for bad debts of **R5 063 million** was raised. This must be read in conjunction with the qualified opinion of the independent auditor of Protective Garments and Bio-Flame on the basis, amongst others, that *"the company did not have adequate systems in place to maintain records of revenue."*
94. A qualification in respect of BBK Property Development and BBK Shared Services confirms the poor collection processes resulting in the need to raise provisions for bad debts.
95. BBKSIC provides for a discount on services it rendered during a financial year in which the revenue from services rendered was zero. There is no explanation for what appears to be an obvious anomaly.

96. BBKSIC records finance costs incurred in the 2014 and 2015 financial year and yet there is no recorded or evidence of interest bearing debt.

BBK Financial Services (Pty) Ltd (BBKFS)(100%)

97. The company is described as wholly owned by the TC but the report of MBC shows that on corporatization, it became a wholly owned subsidiary of BBKIH. Its business is described as an Asset Manager providing consulting services. On the evidence before us, BBKFS is not registered as a Financial Services Provider with the Financial Services Board, as required of all Asset Managers by the law. It therefore operates unlawfully as an Asset Manager.

98. Notwithstanding that the company is recorded as owned by the TC, neither the AFS nor the management reports of the TC make any reference to BBKFS. They also make no reference to loans given to or income, if any, earned from the company.

99. A letter from Investec dated 6 July 2012 records BBKFS as "*nominee of BBKT*" relating to bank account number 110020114620 records that the account held a balance of **R25 028 370.56 million**. Another account number 1100201146219 is recorded on the same date as holding a balance of **R141 078 032.88 million**. We have not received any further information relating to this bank account and the movement of funds into and out of the account. This warrants further investigation.

100. According to BBKFS AFS for the period ended 30 June 2011 to 2015,

100.1. The company earned income from "consulting services" in the amount of **R108 855 million** against which it incurred consulting/professional fees and commissions in the amount of **R139 388 million** and thus incurred expenses in excess of the revenue (the 2012 AFS records sales of approximately **R100 million** and consulting and professional fees expenses of approximately **R94.8 million**). The AFS do not state the recipient or clients from whom the income of **R108 855 million** was generated and the service provider to whom the amount of **R139 388 million** was paid. Papadakis concludes that it appears that the recipient of the consulting and professional fees incurred is RFA, in terms of an asset management agreement entered into between the TC and BBKFS in terms of which RFA was appointed consultant to manage the assets of BBK.

100.2. The TC advanced **R37 954 million** to BBKFS as at 30 June 2015. The source of the balance of **R101 434 million (R139 388 million - R37 954 million)** recorded in BBKFS AFS as expenses is not accounted for in the TC AFS and management reports. According to Mr Serithi, a total of **R129 412 million** was paid from the CDH escrow account (approximately **R25 015 million (BBKFS)** and **R104 397 million (RFA)**). Without source documents of BBKFS, which were not availed to us, it is not possible to verify the amounts paid to RFA and whether the amounts are consistent with the payment agreed in Asset Management Agreement (clause 4).

100.3. The company incurred losses of approximately **R33 677 million**, wholly funded by a TC loan of **R37 954 million**.

100.4. Fees payable to RFA in respect of savings associated with the settlement with Actis are not supported by evidence before us of a dispute with the company known only as Actis involving any of BBK entities, the nature of the dispute or any savings pursuant to settlement of a dispute.

Ivory Tree Hotel (Ivory Tree)(10%)

101. Ivory Tree is situated in the Pilanesberg National Park. BBK hold 10% shares through BBK Community Trust which shareholding, according to the website of the company, was valued at **R5 million** as at February 2018. There is no evidence before us of who the owner of the balance of the shares of 90%.

102. The company is not accounted for in accounts and AFS of the TC and there is no evidence before us of the financial flows from or to the entity, including relating to the acquisition of the 10% shareholding. There is also no evidence that the company is accounted for in the accounts or AFS of of the Trust.

103. A further investigation of this investment is warranted.

Lexshell Investments 688 (Pty) Ltd (15%)

104. Lexshell 36 owns 15% of the company which holds or would hold a mineral lease on corporatization in what MBC describes as "Union unincorporated joint venture".
105. According to the audited AFS of the company for the period 1 January 2010 to 31 December 2015, the company was dormant and did not trade in that period. There is no evidence that the company owned any assets or incurred liabilities.
106. There is no evidence before us whether any monies were expended by the TC or Lexshell 36 in relation to the company. The company is also not accounted for in the accounts or AFS of the TC.

Crown Hill Properties 274 (Pty) Ltd (Crown Hill)(100%)

107. The TC owns 100% of the company. The reported business of the company is to hold shares in the company Siyanda Chrome Investments (Pty) Ltd (Siyanda) in which it holds 4% shareholding. As at 28 February 2016, the investment in Siyanda was valued at **R28 853 million**.
108. Over the period 1 March 2009 to 28 February 2016, the company received dividends in the amount **R5 246 million** from the investment in Siyanda

Resources and a further **R4 053 million** was due as at 28 February 2016.

There is no evidence before us whether this further amount was paid.

109. Of the dividend of **R5 246 million**, **R2 008 million** was applied to expenses but there is no evidence before us of what the expenses are. A dividend of **R679 000** was paid in financial year 2011 leaving a balance of **R2 559 million** from the dividend of **R5 246 million**. There is no evidence before us of the recipient of the dividend of **R679 000** but it should have been paid to the TC. We have not come upon any evidence of this and therefore could not verify whether this was in fact the case. There is also no evidence before us to what the balance of the dividend in the amount **R2 559 million** was applied to.

110. The investment in Crown Hill is not accounted for in the AFS or management reports of the BBKTC. Neither has the dividend in respect of the 2011 financial year from Crown Hill Properties 274 (**R679 000**) been accounted for.

111. We consider that the expenditure, including the dividend paid (**R679 000**) and due (**R2 559 million**) warrant further investigation.

BBK Investment Holdings (Pty) Ltd (BBKIH)(100%)

112. BBK's Sedibelo Community Trust is the holding entity of BBKIH, incorporated in June 2013. According to MBC, the purpose of the company is to manage the commercial assets of BBK through ownership and

management agreements with BBK companies. As part of corporatization, it was intended that BBKSIC, BBKFS and Crownhill would be transferred to the company.

113. MBC state that the company adopted "as far as it is applicable" the King Code on Good Governance Principles for South Africa 2009 ("King III") as the standard for corporate governance. There is no evidence before us that the company has in fact served its purpose of managing the assets of BBK or any involvement with any of the BBK companies.

114. In the period 2014 to 2015, the company incurred losses of approximately **R12 958 million**, comprising mainly employee costs and consulting fees. These losses were funded by loans from the TC in the amount **R16 178 million**. According to the management reports of the TC, loans advanced to the company as at 31 December 2014 amounted to **R10 163 million**.

115. As at 31 March 2015, the company owned assets valued at **R2 894 million** (motor vehicles, IT equipment and furniture).

116. We consider that the loan amount and expenditure warrant further investigation.

Clidet 1011 (Pty) Ltd (20%)

117. BBK own 20% shareholding through BBKIH and Vukile Property Fund Limited owns the balance of 80%. The company's reported business is property investment through direct ownership of immovable property.
118. We discuss later the 50-year lease agreement entered into with the company in terms of which the company would build a mall on the property of BBK and pay an annual rental of **R13 000**. We point out that the mall is listed by Gaitate as the property of BBK built at its expense and yet the lease agreement stipulates that the company would build a mall on the leased property.
119. The accounts and financial statements of the TC do not account for this investment notwithstanding that it is an associate company of the TC.
120. As at 28 February 2014, a loan of **R2.5 million** was advanced to the company by the TC. The loan is recorded as repaid during the financial year ended 31 March 2016. There is no evidence before us of income accruing to TC or any of its entities deriving from the lease agreement between the company and the TC.
121. According to the 2015 AFS of the company, a dividend of **R1 608 million** was declared during the 2015 financial year and paid during the 2016 financial year. There is no evidence before us of the recipient of the dividend and the accounts and financial statements of the TC for the

financial years ended 31 December 2015 and 2016 do not account for a dividend from the investment in the company.

122. Curiously, the management reports of the TC report that as at 31 December 2014 loans in the amount **R2 233 million** were advanced to the company relating to Moruleng Stadium. No evidence before us explains any involvement of Clidet 1011 with Moruleng Stadium. A further difficulty with the amount recorded as loan is that this amount recorded by the TC as loans to the company does not accord with what is recorded in the company's audited financial statement. The payment requires further investigation.

NON-COMMERCIAL BBK ENTITIES

Mphebatho Cultural Museum Trust

123. The Trust was established as an educational institution and its stated object is to assist the community in preserving the cultural heritage of BBK in Saulspoort and Botswana. The Trust received the following contributions from the TC –

- **R8 970** – financial year 2013.
- **R554 023** – financial year 2015.

124. The contributions to the Trust are not accounted for in the financial statements of the TC.

Bakgatla Land Trust

125. The object of the Trust is "to carry out public benefit activities". The Trust holds Portion 1 of Farm Vogelstruisdraai 268 KP ("Dwarsberg Farm") which was purchased as a going concern with game on it.

126. The Trust is supposed to be accounted for in the accounts and financial statements of the TC. It is not.

127. We consider that the administration of and income earned from the property requires investigation.

Bakgatla Trust

128. We did not have sight of the Trust Deed of this entity. According to MBC Close-Up Report, the Trust has "no definable objectives" and the beneficiaries are not the broad community of BBK but rather members of the BBK selected by the Trustees.

129. The Trust is intended to hold commercial BBK land and as at date of the Close-Up Report, the amended Trust Deed allowing for holding of commercial land was yet to be submitted to the Master of the High Court. We have not come upon evidence of what, if any, commercial land is held

by the Trust and the registration of the Trust and none was presented to us by Kgosi Pilane. This warrants further investigation.

Bakgatla Sports, Arts & Culture Trust

130. The object of the Trust was to engender sporting and recreational development serving "as a conduit for the construction, improvement, maintenance and management of sports and recreational facilities. There is no evidence before us whether any monies were expended by the TC or any of its entities to fund the Trust.

BBK Traditional Administration Non-Profit Company (BBKTA)

131. BBKTA was registered to assist the TC *"in delivering its socio-economic and welfare activities to the community and region"*. It has a public benefit objective and allows BBK to have a separate legal entity which can contract directly with third parties to acquire goods and services. To this end, BBK Management Services, the administrative arm of the TC, was absorbed into BBKTA resulting in BBKTA being the administrative arm of the TC.

132. Notwithstanding the purpose of BBKTA, no evidence was presented before us of the funding and other financial activities of the entity. We have discussed evidence of payments to BBKTA and yet we did not come upon evidence of bank account(s), financial statements and accounts of the entity. This requires further investigation.

Sedibelo Community Development Trust

133. The Trust is a discretionary Trust of BBK and holds the commercial assets of the BBK. The community is the sole beneficiary of the Trust and the Trust is the sole shareholder of BBKIH.

134. Administratively, funds should flow to the Trust as a dividend from BBKIH and the Trustees decide when and how much to distribute to the community, the TC and other entities of BBK. This has not been the case and in fact the decision appears to have been made by Lexshell 703 and Lexshell 36.

Vesting Trust

135. The Trust was proposed to be registered to hold funds which the community does not need to use which would otherwise devolve to Sedibelo Community Trust as the holding entity of BBKIH. The scheme was devised to address concerns about tax implications on interest income on excess funds which might be invested by Sedibelo in short term investments before distribution to the community.

136. According to MBC, the Trust Deed was approved by the Master of the High Court. We have not had sight of the Trust Deed and there is no evidence before us of any financial transactions or activities involving the Trust. This requires further investigation.

Cooperatives

137. In the Close-Up Report, MBC record that BBK applied to the CIPC to register 73 cooperatives and that as at date of the report, 5 of the 73 cooperatives had been registered. The cooperatives are planned to spread over 7 clusters spread over the 32 villages and would be involved in various activities, including – manufacturing (wood and roofing), brick making, livestock & vegetable farming, leather manufacturing, bakery, carpentry and services. There is no evidence before us on any of the cooperatives. This warrants further investigation.

OTHER SIGNIFICANT EXPENDITURE

BBK Integrated Master Plan (“BMP”)

138. In March 2012, the TC and BBKTA appointed MBC to develop the BMP, “a *guiding document for the transformation of the traditional (tribal) area*” over a 30-year period. The BMP is an impressive plan which sets out developments to be achieved with milestones. On the face of it, if implemented, it will transform BBK land and the community into a developed and self-sustaining community. According to BMC, the BMP was delivered to the TC and BBKTA in February 2013 even though a Service Level Agreement between BBKTC, BBKTA and MBC was only concluded on 28 February 2013.

139. On 6 June 2013, the TC authorized the Corporatisation Project with the main purpose to *"effectively and efficiently manage the assets, grow them and maximize returns"*. MBC would consider and report on a Proposed Group Structure; Opinions on Tax Efficiency; Treasury Structure and Policies; and Investment Strategy.
140. On 18 September 2013, the TC approved a group structure proposed by MBC with the aim to, *inter alia*, *"consolidate of all assets and liabilities under a single balance sheet for reporting purposes"*. We note that this has not happened and in fact Kgosi Pilane strenuously asserted that consolidated reporting is not appropriate for an entity such as the TC.
141. We have not been able to ascertain the cost incurred on the development of the BMP. However, from the work produced, including the corporatization project, it clear that a significant amount was expended.
142. Several funding proposals that MBC initiated to fund the projects identified in the BMP include (as appears in the Close-Up Report),
- 142.1. a Participation Agreement was signed between BBKTA and the National Empowerment Fund on 22 August 2014 in terms of which the parties set up a **R125 million** SMME Incubator Fund. BBK contributed **R50 million** into the fund with the NEF to contribute the balance of **R75 million**. There is no evidence before us what became of this project, whether the NEF made its contribution, whether any benefit was derived by BBK, who authorized entering

into the agreement and the expenditure. We have also not come upon evidence of the expenditure relating to the BMP in the accounts or financial statements of the TC.

142.2. Setting up Bakgatla Infrastructure Fund for which fund raising would be undertaken.

142.3. A BBK/ABSA Joint Initiative to fund projects. MBC records that ABSA (Barclays) has given conditional approval.

142.4. A total of 73 cooperatives to be registered (5 already registered) with fund-raising proposals to fund these.

Infrastructure

143. The following expenditure is indicated as incurred solely by the BBK or in partnership with other parties –

- Administration Offices (**R42.6 million**).
- Bulk water Infrastructure (**R38 million**). Mr Gaitate records an amount of **R19 million** for Bulk Water Treatment. On the evidence before us, it is not apparent that this amount is the same as for Bulk Water Infrastructure. This further speaks to the unreliability of information provided of the TC.
- Moruleng Stadium (**R170.9 million**).

- 15 ML Water Reservoir (**R14 million**).
- Moruleng Boulevard (**45 million**).
- Roads improved and tarred (**R74 million**).
- Urban Development Plans (**R15.9 million**).
- Moruleng Mall (**R5.9 million**).
- Cultural Museum (**R18,6 million**).
- Bakgatla Village Development Programme (**R50 million**). This expense is attributed to support and improvements of village schools, clinics, and other infrastructure built in partnership with business partners including PPM; costs incurred to Moiloa Architects and Design with SATPlan to develop - (i) Aerial Photography and Flood Risk Modelling; (ii) Spatial Development plan for all villages; (iii) survey of the character of the villages and infrastructure, to ready prepare for future developments and proper land use (We have not seen any evidence of the 3 items or a report of Moiloa Architects and Design relating thereto); the road linking Moruleng with Kraalhoek, Mopyane, Swartklip, Sefikile and Mononono developed in partnership with Anglo, Moses Kotane Local Municipality and North West Public Works whose financial contribution to the project has not been quantified before us. We point out that according to MBC, the Department of Roads and Public Works, NW and Amplats contributed

an amount of R112 million in the completion of a 29.3km road between Sefikile and Kraalhoek and it was expected that the remaining 6km would be completed by BBK in partnership with the Moses Kotane Local Municipality.

144. Gaitate also states that the following additional income and expenditure accrued to BBK -

- Bursaries (**R13.398 million**) & School Outreach Programmes (**R13.626 million**) – 2009 to 2015 financial years.
- Tirisano Mmogo Trust, donation received from Barrick of **R9 million** and applied to repair and build ablution facilities at school, acquire computers for school and support for agricultural activities - 2004 to 2007 financial years. This is obviously not monies expended from the funds of BBK.

OTHER INCOME

145. We discuss this income separately because it is not implicated in the questions of transactions with third parties. This other income is paid into and expended from the D-Account. The D-Account holds monies on behalf of different communities and for other purposes not related to traditional leadership and, according to Mr Paul, the account does not distinguish or hold monies separately for each community. A ledger account is operated on behalf of each community which records receipts and expenditure relating to each community.

146. Monies paid into the account are monies appropriated by the provincial legislature and the North West treasury/accountant general; income earned and paid into the account through the BBK "tribal office"; income earned from the land under the management of the Parks Board and paid into the account by the Parks Board and other monies collected by the BBKTA such as fines. Expenses managed or processed through the tribal office are paid from this account. The expenses of the TC relating to the functions set out in section 9 of the Act are paid from this account.

147. All other income earned and expenditure incurred by BBK is not deposited or accounted for in the D-Account. Most of the income and expenses have been conducted through attorneys' accounts (CDH and Werksman) and through a bank account operated by the TC and its service provider BDO Spencer through Lexshell 703, described by Kgosi Pilane as a "*payment agent*". According to Kgosi Pilane, the reason for this is that he does not have confidence in the management of the D-Account due to the fact that the account does not segregate monies per community. A further reason offered is that counter-parties contracting with BBK require that BBK hold bank accounts with commercial banks. Notwithstanding this evidence, Kgosi Pilane also told us that the TC has previously applied to the Premier for approval to operate a bank account and that no response was received. As matters stand, the TC does not have approval to operate a bank account.

148. For completeness, it is necessary that we mention that in a letter from Mr H Scholes of Werksman to Kgosi Pilane dated 14 December 2006 enclosing

cheques to BBK creditors pursuant to a payment instruction from Kgosi Pilane. The letter reads *"I furthermore confirm having been advised by you that it is lawful for these payments to be made by Werksmans Inc directly to the creditors of the Tribe and that it is not necessary for the aggregate amount of the cheques to be paid to the North West Provincial Government for disbursement on behalf of the Tribe. ..."*. Kgosi Pilane confirmed this instruction in writing.

LAND

149. The evidence shows that BBK land includes,

149.1. land held under Deed of Transfer T6015/1898BP measuring 25 590 653sqm is leased to Clidet 1011 in terms of Notarial Lease Agreement dated 18 October 2012 entered into between Clidet 1011 (name of representative that appeared before the Notary Public is redacted on the copy of the lease presented to us. KJ Motlhabane is indicated as the contact person of the lessor, Clidet 1011). Kgosi Pilane and the Minister of Rural Development and Land Reform as owner of the land in trust of BBK concluded a lease agreement in respect of the land valid for 50 years at a rental of **R13 000** per annum, with an annual CPI escalation. According to the Notarial Lease Agreement, Kgosi Pilane was authorized by resolution of BBK dated 10 February 2010 to enter into the lease agreement – we have not seen a copy of the Resolution (we note that the same lease agreement gives another description of the leased land as follows

"Remaining Extent, Portion 1 Saulspoort No. 38 measuring 8, 8444 hectares". It is not clear to us that this relates to the same property as described under Deed of Transfer T6015/1898BP). Clause 1.2.10 of the lease provides that Clidet 1011 would develop a Shopping Centre on the leased land.

149.2. Portion 1 of Farm Vogelstruisdraai 268 KP (Dwarberg Farm) held by Bakgatla Land Trust. The farm has game in it. According to the Close-Up Report, as at 7 July 2014 the farm had "biological assets" valued at **R334 180**.

149.3. Letlabane Game Reserve which has game and as at 7 July 2014 had "biological assets" valued at **R2 554 191 million**.

149.4. Middlekop Farm

149.5. Dwaalboom

150. According to MBC, the value of all BBK farms is approximately **R425 020 million** as at date of the Close-Up Report which valuation is based on valuation by professional independent valuers. The report further states that the valuation reports and asset register were given to BBK – we have not seen any of these but have no reason to doubt what is recorded by MBC.

151. There is a further two contracts between the NW Parks Board and Spring Light 119 (Pty) Ltd pertaining to Moruleng Lodge; and with Legacy Hotel

and Resorts pertaining to land in the Pilanesberg. Other than the contracts submitted in evidence, we are unable to determine whether these relate to the land held by the CPA.

THE LAW AND ITS APPLICATION TO WHAT WAS DONE

152. The following are some of the laws applicable to the administration of the assets and financial affairs of BBK - the NW Act, including the Code of Conduct (where necessary, we make reference to the Framework Act; the Companies Act and King Codes. The conduct of the commercial entities and the persons involved therewith must be measured against the provisions of the Companies Act, 2008 and the King Codes.

The NW Act

153. The Act governs the conduct of members of the TC and the Kgosi. It also regulates the affairs of the TC. Sec 9 prescribes that the TC is responsible to administer the affairs of the community and to assist, support and guide the Traditional Leader in the performance of his functions. Sec 9(1)(b) prescribes that the TC must promote the interest, advancement and well-being of the community, and sec 9(1)(c) prescribes that the TC must administer the finances of the community. Section 9 (3) empowers the Premier to take steps to ensure proper administration and good governance by the TC.

154. Section 10(1) requires that the TC and Kgosi "*endeavour to perform their roles and functions in the best interest of their traditional community and be responsible to the Premier for the efficient and effective performance of the functions assigned to such traditional council and kgosi/kgosigadi in terms of this Act*". In similar vein, the Code of Conduct prescribes that a traditional leader must, *inter alia*, perform the functions allocated to him or her in good faith, diligently, honestly and in a transparent manner; fulfill his or her role in an efficient manner; comply with any applicable legislation; act in the best interest of the community; and promote the principles of a democratic and open society (sec 1(a), (b), (d), (e), (l)), whilst sec 2 prescribes that the TC must perform the functions allocated to it in good faith, diligently, honestly and in a transparent manner; execute its duties in an efficient manner; comply with any applicable legislation; act in the best interest of the traditional community it serves; and give effect to the principles governing public administration set out in section 195 of the Constitution (sec 2(a), (b), (c), (d), (e)). Sec 27(2) of the Act gives the Premier the power to charge and convene an inquiry against a traditional leader and members of the TC where there is a reasonable suspicion of breach of any provision of the Code of Conduct and if guilty of the charge, the Premier may suspend the person.

155. Sec 10(2) of the Act gives the Premier the power to, subject to the provisions of the Act and the Constitution and with due observance of the traditions applicable in a traditional community, take such steps as may be necessary to ensure the due performance of the functions in sec 10(1).

Sec 12 permits the TC, with the permission of the Head of Department, to appoint staff and employees as may be necessary to perform the duties and functions of the TC, such persons to be remunerated from the funds and accounts held in terms of sec 30, and sec 12(3) permits the Premier, on the recommendation of the Head of Department COGTA, to second an officer on the establishment of the Department to a TC to assist the TC in the execution of its functions in terms of the Act.

156. Sec 30(1) prescribes that *"the Premier shall cause to be opened for each traditional community a trust account into which shall be paid such amounts as are specified and from which all expenditure incurred in connection with any specified matter within the duties and functions of the traditional community shall be met"*. Sec 30(2) empowers the Premier, on good cause shown by a TC and being satisfied that there are sufficient controls and financial systems, to permit a TC to open a trust account, into which shall be paid monies accruing to the community and from which all expenditure incurred in connection with any matter specified within the duties and functions of the traditional community concerned shall be met. Sec 30(4) permits the TC, with the approval of the Premier, to invest any surplus funds from a traditional community's account with any financial institution or body corporate.

157. Sec 31(1) prescribes that the books and accounts of every traditional community, recognized in terms of section 3 must be audited by the Auditor-General;. Sec 31(3) stipulates that in the execution of any audit in terms of sec 31(1), the provisions of sec 188 of the Constitution and sec 3

of the Auditor-General Act, 1995, now the Public Audit Act 25 of 2004, shall be applicable. Sec 188 of the Constitution sets out the functions of the Auditor-General and in sec 188(1)(c) prescribes that the Auditor-General must audit and report on the accounts, financial statements and financial management of *"any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General"*. Sec 4(1)(f), Act 25 of 2004 similarly prescribes that the Auditor-General must audit and report on the accounts, financial statements and financial management of *"any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General"*.

158. Sec 34(3) mandates and obliges the government to monitor the work of the TC whilst sec 35 obliges the Head of Department, COGTA to assess the needs of a TC and its members, formulate a skills needs base and provide a training programme to improve the skills of TC members to perform their functions and meet the required service delivery standards. Sec 39 makes the willful and unlawful failure or refusal to comply with any procedural provisions in the Act or the regulations an offence punishable with a fine or imprisonment not exceeding six months".

Non-compliance with the Act

Section 30(1); (2) & (3)

159. The TC has not been granted permission by the Premier to operate a bank account, trust or otherwise, into which to receive and expend monies

accruing to the BBK. Whilst MBC records that an application to the Premier was prepared, it also records that the TC did not submit the application to the Premier. This is contrary to the evidence of Nyalala Pilane that an application was submitted to the Premier and that no response was received on the application.

160. Nyalala contends that monies earned through commercial activities belong to the various BBK companies and that the monies must therefore be deposited and expended from the accounts held by these companies. It is important we mention this has not been shown to be a view shared by other members of the TC and is also inconsistent with the evidence of an application letter to the Premier dated July 2015 prepared MBC seeking the approval of the Premier to operate a bank account.

161. Nyalala Pilane's professed understanding of the ownership of the monies derived from the property of BBK is misconceived and frankly disingenuous. It flies in the face of the letter prepared by MBC to apply to the Premier for "financial independence" from the government which would enable them control over their monies and to account for that. We therefore doubt that the views he expresses are indeed held in good faith.

162. Sec 30(3) clearly prescribes that there shall be paid into an account opened as referred to in sec 30(1) and (2) –

- "(a) all fees, charges and voluntary contributions which are payable to the traditional community;*
- (b) all cash proceeds derived from any property or right to title of the traditional community;*

- (c) *any donation or gift made by any person, institution or organization to and for the benefit of the traditional community;*
- (d) *any other amounts derived from any sources whatsoever for the benefit of a traditional community."*

163. There is no justification in the wording of sec 30(1) to exclude the monies earned from commercial exploitation of the resources of the community. The monies received and expended by the companies which form the web of BBK companies manifestly fall within sec 30(3)(b), (c) and (d). The TC is clearly in breach of sec 30(1) in respect of such monies. It follows that we do not accept this justification for non-compliance with sec 30(1) and (2).

164. As we have shown, receipts from transactions and disbursements have been conducted through accounts held with and administered by CDH and Werksman on the instruction of the Nyalala Pilane and payments have been made from these accounts to recipients as directed by him or as mandated in transaction documents. Payments have included the operational expenses of the BBKTA and its companies and payments to creditors, consultants and other persons instructed by Nyalala Pilane but not mandated by transaction documents.

165. The administration of monies due to BBK through attorneys' accounts and BBK companies not only violates the law. It also denies members of the TC any meaningful role in the discharge of their duty to administer the financial affairs of the community. For all practical purposes, the TC abdicated its statutory duties to the Kgosi and chairperson of the TC.

Section 30(4)

166. The TC did not seek or obtain the approval of the Premier to invest surplus funds as prescribed by sec 30(4). This is especially applicable to the PSG investment of **R926 900 740 million** which should have been invested with the approval of the Premier. This is yet another instance where significant monies that belong to the community were treated as if they are the asset of the companies and not of the community as contemplated in sec 30(3)(b) and (d).

167. The TC acted unlawfully and did not provide a satisfactory explanation, if any, for the obviously unlawful conduct .

Section 31(1)

168. None of the accounts and financial statements of the BBK have been audited by the Auditor-General as prescribed by sec 31(1). Many of these are in draft form and are not signed.

169. Nyalala Pilane holds the view that the Auditor-General is responsible to prepare the accounts and financial statements for audit and that the non-compliance with sec 31(1) is the fault of the office of the Auditor-General for failing to prepare AFS for audit. We do not accept that this view is held in good faith. In a letter of 18 March 2011 to the Royal Family, the Auditor-General's office confirmed that it had not received any financial statements from the BBKTC/A since 2005, and could not perform any audits writing to

the TC that *"in terms of section 31 of the North West Act, the Auditor-General must audit the books and accounts of every traditional community. Since promulgation of the North West Act In 2005 we Have, not received financial statements for the Bakgatla Ba Kgafela community, consequently no audit have been done to date"*. It is most concerning that the Kgosi and Chairperson of the TC appears to have little, if any, regard for the clear prescript of the law and is not candid about his reasons, and the TC to the extent that it had any say in the matter, for non-compliance with the law. He does not appear to be concerned about his fiduciary and legal duty and appears to consider himself not bound by the Act.

170. In the event, we find that the TC failed, without good reason or satisfactory explanation, to comply with the requirement to submit the accounts and financial statements to the Auditor-General for audit as prescribed by sec 30(4). It is in flagrant breach of the law.

171. The failure of the TC to comply with the law notwithstanding, and without absolving the TC and its Chairperson, we must mention our concern that the Premier and the Department of COGTA have also failed the TC, and therefore the community, by not taking steps to ensure that the TC performed its functions in accordance with the law. The department in particular must have been aware that significant commercial transactions with significant income were conducted in the name of and involving the property of BBK. If for no other reason, then for the simple reason that the department would have been aware of the significant infrastructure

developments rolled out on the land of BBK and the significant transactions which are matters of public record.

172. The Premier and the department have dismally failed to discharge their obligation to support the TC and the community notwithstanding the clear prescription of secs 9(3); 10(2); 34(3) and 35. The department failed in its statutory obligation notwithstanding its declaration on its website that *"In the main the Chief Directorate: Traditional Affairs seeks to: provide strategic support to the institution of traditional leadership to improve governance, performance and accountability, building capacity of the institution, reviewing and strengthening the policy and regulatory framework of the institution; supporting and monitoring performance of institutions of traditional leadership and resolving disputes"*.

173. The government parties failed to support and assist the TC and the community notwithstanding requests from the community to take steps and a recognition by them that the TC was not complying with its legal obligations. This appears from -

173.1. Kgafela Kgafela II expressed the need for a forensic audit on a number of occasions.

173.2. The Chief Directorate: Traditional Affairs, Department of Local Government and Traditional Affairs wrote to Kobedi Pilane in his capacity as "Kgosi in Council" on 17 December 2009, copying the

MEC and confirming that it is considering instituting a forensic audit. Nothing appears to have come of this.

173.3. On 19 October 2009, Mr Victor Modimokwane addressed a letter to the Chief Director of the Department of Local Government and Traditional Affairs bringing allegations of maladministration by the BBKTA/C to the attention of the government. Concerned members of the community have requested the Premier as early as November 2012 that a forensic investigation is conducted into the administration of the community by the BBKTC/A.

174. There is manifestly a need for financial training of members of the TC. BBK own considerable natural resources the exploitation of which involve complex interaction and transactions with third parties. It is most unfair to members of the TC and to the community that they should be left to their own devices and completely at the mercy of Kgosi Pilane. This explains how it is that the Kgosi is single-handedly responsible to make all the decisions about transactions and finances. The failure of the government parties to take steps permitted and required by the law has quite obviously been to the great detriment of BBK.

175. Sec 39 makes the willful and unlawful failure or refusal to comply with any procedural provisions in the Act or the regulations an offence punishable with a fine or imprisonment not exceeding six months". This, in our view, applies to -

- 175.1. The failure to deposit all monies derived for the benefit of BBK into the D-Account, in the absence of the approval of the Premier to operate a trust account.
- 175.2. Failure to obtain approval of the Premier to invest the amount of **R926 900 740 million** with PSG.
- 175.3. Failure to submit accounts and financial statements to the Auditor-General for audit.
- 175.4. Failure to convene meetings of the community as prescribed by the Act.
176. In the event, the Premier must act in terms of sections 9(3); 10(2) and appoint a person to take control of the functions of the TC with the power to administer the financial affairs of the community. The power must include to prepare accounts and financial statements for audit by the Auditor-General in terms of sec 31(1).
177. The Premier must Act in terms of sec 39 to investigate whether any member of the TC must be held liable for the breach of the Act, including secs 30 and 31.
178. The TC and its Chairperson have also failed to ensure that the BBK companies comply with the laws applicable to them. The most obvious and relevant prescripts applicable to the evidence before us are -

(i) Standard for Directors & Liability of Directors – Companies Act 2008,
secs 76 and 77

179. AFSs must be approved by the board of directors and signed by an authorised director; and be presented to the first shareholders meeting after the statements have been approved by the board.

180. Regulation 25 of the Act prescribes that a company must keep accounting records in an official language of the Republic, as necessary to provide an adequate information base sufficient to - (a) enable the company to satisfy all reporting requirements applicable to it, as set out in sec 28(1) read with sec 29(1); and (b) provide for the compilation of financial statements, and the proper conduct of an audit, or independent review, of its annual financial statements, as applicable for the particular company. The accounting records must include - (a) a record of the company's assets and liabilities including, but not limited to - (i) a record of the company's non-current assets, showing for each such asset or, in the case of a group of relatively minor assets, each such group of assets (aa) the date the company acquired it, and the acquisition cost.

181. The memoranda of incorporation or constituting documents of BBK companies TC that transacted in the name of the BBK community, require that AFS be audited by an independent auditor and that annual general meetings of the companies must be held. These are both statutory and self-imposed requirements. The companies have overwhelmingly not

complied with this requirement and no satisfactory explanation was provided for the non-compliance. As custodian of the assets of BBK, the TC has a duty to ensure that its companies comply with these prescripts and it must in turn report and account to the community.

(ii) The King Codes

182. The King Codes I – IV are a set of voluntary principles and good practices.

They apply to companies under the Companies Act, including non-profit companies, trusts and other entities that have legal personality and corporate status. In adopting the 2012 BDO report, the BDO review committee, of which Kgosi Pilane was a member, and the TC, accepted the King Codes as part of its reporting template. This also appears from the MBC Close-Up Report.

183. The standards for directors and the King Codes require, *inter alia*, that reports should present a balance between the positive and negative aspects of the activities of the company. King III specifically provides that the board should disclose that the company is a going concern, and whether it will continue as a going concern (para 51) and para 60 provides that the board should consider the consequences involved where it becomes evident that the company will be unable to pay its debts as they fall due in the ensuing six months, or if it is evident that the company will become insolvent in the immediately ensuing six months. King IV emphasises the role of disclosure in managing stakeholder relationships.

184. In the light of the 2012 BDO report, it is difficult to reconcile the statement of MBC that *"The Traditional Council ("TC") could not adopt the principles for governance of the King III report because they are designed for companies and can be too onerous. In the same manner that companies are regulated by the Companies Act, the TC is regulated by the North West Traditional Leadership and Governance Act No.2 of 2005"*. The statement appears to overlook that the TC as custodian of the assets of the community, must report on the activities of its companies.

185. The NW Act and the King Codes are in our view compatible with necessary changes to take into account the true nature of the TC. They both are premised on accountability and transparency. Having chosen, albeit out of necessity, a corporate structure to hold and manage the community's investment and commercial activities, the King standards must be adhered to by the TC especially because it is the holding entity for the companies under it and the body with legislative duty to account to the community about the conduct of the companies and the financial affairs of the BBK.

186. It is our view that with proper advise and professional assistance to devise a reporting format suitable to the TC, there is no hindrance to the TC complying with the principles of the King Codes as are appropriate. The TC did this with the AFS of 2012/2013 and there is no reasonable or satisfactory explanation why this cannot be done with the necessary changes. This is a matter that the department must investigate further to develop an appropriate reporting format for the TC.

FINDINGS

On Governance

187. The TC has failed to prepare accounts and financial statements to account for all its entities. It has also failed to ensure that its entities comply with the requirements of the Companies Act and the King Codes applicable to them. No valid reason has been provided for the failure to prepare accounts and AFSs of the TC and its entities.
188. Many of the financial statements presented in evidence are in draft form and not final. As a result, they cannot be relied upon as a true and complete reflection of the assets and income deriving from transactions with third parties. On the evidence before us, we are unable to find this to be the case. Similarly, we are unable to say with any degree of certainty that the financial statements are a true reflection of the flow of monies earned from transactions with third parties.
189. The TC has failed to hold its entities and their directors to account for their administration of the assets and monies of the community. From the evidence, the TC, willingly or unwillingly, abdicated to Kgosi Pilane and directors of entities its statutory responsibility and duty to the community to safeguard and oversee its assets.
190. As the custodians of the community's assets, the directors of the entities and the TC, including the Chairperson, have fallen short of what is

expected of reasonable persons entrusted with the assets and finances of the community. The TC in particular has not exercised any meaningful oversight over its Chairperson and BBK companies. They have failed to comply with the applicable obligatory provisions of the Act and the Code of Conduct, and to ensure that the companies of BBK comply with the provisions of the Companies Act, 2005 and regulations, and the principles of the King Codes as applicable to each entity. For the same reason, the TC is unsurprisingly unable to provide a proper account of these entities in its own accounts and AFSs.

191. The TC has failed to submit its accounts and financial statements for audit by the Auditor-General as it is obliged to do by sec 31(1) of the NW Act. No valid reason was given for this failure to comply with the law. In this regard, it is instructive to have regard to King Code I which states that *"in addition to being a statutory requirement, an external audit provides an independent and objective check on the way in which the financial statements have been prepared and presented by the directors. An annual audit is an essential part of the checks and balances required and is one of the cornerstones of corporate governance"*. Whether or not the King Codes apply to the TC, the purpose of an external audit, which the audit in terms of section 31(1) is, is as much valid for the TC as it is for its entities governed by the Companies Act, 2005.

192. Members of the TC have failed to hold each other to account to the TC and to the community. This was apparent from the evidence of members of Kobedi Pilane, Lebogang Maname and Marcus Diphoko who expressed

frustration about the manner in which the business of the TC is conducted with members deferring to Kgosi Pilane primarily.

193. Members of the TC lack the financial and commercial skills to effectively hold Kgosi Pilane and persons involved with the entities of BBK to account for their management and administration of the assets and financial benefits deriving therefrom. The level of skills of members of the TC understandably affects their ability and effectiveness to engage with the often complex transactions that BBK, through the Kgosi, have concluded with third parties. The Department has not taken meaningful steps, if any, to provide skills to members of the TC to enable them to perform their functions and discharge their duties properly and effectively.

194. Kgosi Pilane has failed since December 2012 to convene meetings of the community as he is obliged to do by sec 18(1)(g) of the NW Act. As a result, the TC has not accounted to the community about the administration of their assets and the financial matters relating thereto, including the application of income derived from transactions with third parties.

195. Notwithstanding the power and duty to take steps to ensure proper administration and good governance in terms of sections 9(3); 10(2); 34(3) and 35, the Premier and the Department have failed to take any measures to support the TC in the administration of assets of the community. They have also failed to hold the TC and the Kgosi to account for the administration of the finances of the community.

On administration of finances

196. Except for income paid into and disbursed out of the D-Account, the TC, Nyalala Pilane in particular, has, in contravention of sec 31(1) NW Act, administered monies through accounts held and controlled by attorneys CDH and Werksman, and through BBK company Lexshell 703 which is designated as "payment agent". We are unable to state with any degree of certainty that all the monies and BBK accounts held with the attorneys have been fully accounted. From the evidence available to us, it is clear that not all monies due to BBK from the transactions and bank accounts through which the monies have been administered are accounted for before us.
197. The Investment of surplus funds of the BBK with PSG in the amount **R926 555 590** million was done without the approval of the Premier as required by sec 30(4). This conduct is unlawful.
198. The TC has failed to prepare and to ensure that its entities prepared audited financial statements and that its own statements are audited by the Auditor-General as prescribed by sec 31(1). As a result, little reliance, if any, can be placed on the reliability of the financial information on which the evidence before us is based. The failure to comply with sec 31(1) is unlawful.
199. Not all monies expended appear to have been expended for the benefit of BBK. One example is the expenditure of approximately R500m to fund an investment which appears to have benefited Orkid S.a.r.l, a company which

on the evidence before us is unknown to the TC and has no apparent connection to BBK. There is no explanation at all for what appears to be a generous gift to an unrelated company.

200. An amount of **R20 million** was paid to the company Selaleo Consultant purportedly for facilitating the issuance of a mining licence by the DMR. There is no evidence that the entity rendered the service, what service was rendered and why the service was required considering the nature of the service.

201. BBKFS is not registered as Asset Manager with the Financial Services Board as required by the Financial Services Act. As a result, it acts in breach of the law. The TC has failed to ensure that the company complies with the law relating to registration of Asset Managers.

CHAPTER IV

RECOMMENDATIONS

We make the following recommendations (reference is to the alphabetic numbering of the various ToR in the report)

1. Paragraphs A; B & G

The Premier take note of our findings that:

1.1. the customary law and tradition of BBK recognizes the institution of Kgosi kgolo.

1.2. According to custom and tradition, Kgosi kgolo selects a Kgosi for Moruleng and can remove.

1.3. There is no procedure for the appointment of a Kgosi in Moruleng

1.4. The community place no role in officiating the appointment of the Senior Traditional Leader in Moruleng

2. Paragraphs C & D

The Premier should take note of our findings that:

2.1. BBK are one tribe made up of BBK Mochudi and BBK Moruleng.

2.2. According to BBK custom and tradition, the Chieftainship of Saulspoort is not hereditary.

2.3. The rightful heir is the person selected by Kgosi kgolo who may, at his discretion, consult with members of the royal family.

2.4. According to custom and tradition of BBK, the claim of Mr Merafe Ramono to chieftainship by virtue of his status as eldest son of Kgosi Tidimane is without merit.

3. Paragraph E & F

The Premier should take note of our findings that:

3.1. The role of Kgosi in Saulspoort is prescribed by the NW Act, Sec 18, and as prescribed by customary law and tradition.

3.2. The correct relationship between Kgosi kgolo Kgafela Kgafela and Kgosi in Saulspoort is as prescribed by custom and tradition. He is the senior leader of Kgosi in Moruleng.

3.3. Kgosi kgolo does not become involved in the administration of the community. He becomes involved only at the request and invitation of the community, the royal family or Kgosi.

4. Paragraph H

Legislation

5. The Premier should require the MEC and the Department of COGTA to consider amendment of the NW Act to -

- 5.1. insert provisions that require and oblige the TC and Kgosi to comply with the requirements of IPILRA and customary law before any person living within a traditional authority area can be deprived of their rights to land wholly or partly.

- 5.2. prescribe information that must be provided to communities for the purpose of consultations in terms of IPILRA and customary law.

- 5.3. prescribe that a report of such consultations and compliance with IPILRA and customary must be submitted to the Minister or the Premier before a decision is made to alienate a any part of the land or diminish any right in respect thereof.

- 5.4. provide for the removal of members of the TC for failing to discharge their any of their functions, including non compliance with any provision of the Code of Conduct.

- 5.5. provide for the appointment of an officer to take over the affairs of the TC in circumstances other than the recommendation of the Royal Family in terms of sec 10(3). We consider that section 10(2) may be used for the

purpose and yet much certainty will be achieved with the recommendation we make.

Governance

6. The Premier must require the Department of COGTA to develop a written Protocol for the BBKTC which prescribes –

- 6.1. a requirement that the TC must report annually to the community about the all transactions concluded with third parties.

- 6.2. that the TC must present to the community annually annual financial statements audited by the Auditor General.

- 6.3. that the TC must present to the community annually a report of the business activities of all BBK and associate companies

- 6.4. a process for the community to call directors and managers, to account and sanctions and recall in cases of severe non-compliance. This should include encouragement by the board for shareholders to attend AGMs, and it should be ensured that the community members are furnished with sufficient and timely information concerning the date, location and agenda of the meetings, as well as full and timely information regarding the issues to be decided at the meeting.

6.5. a requirement that an entity may not sell or encumber the property of the community, or any substantial part of it, without the consent of the community, and clear directions as to how such property disposal decisions can be taken;

7. The Premier must exercise his powers in terms of sec 9(3) of the NW Act to -

7.1. instruct Kgosi Pilane to resign from all positions that he holds in BBK and associate entities within 30 calendar days of the instruction from the Premier, or such other longer time as the Premier may consider but not exceeding 60 calendar days.

7.2. Instruct Kagiso Pilane to resign from all positions that he holds in BBK and associate entities within 30 calendar days of the instruction from the Premier, or such other longer time as the Premier may consider but not exceeding 60 calendar days.

7.3. instruct members of the TC to convene a meeting of the community for the purpose of appointing persons that will represent the community in BBK and associate companies, such persons not to include Kgosi Pilane. The TC should be required to report its choice to the Premier within 60 days of the instruction.

7.4. instruct the MEC and/or the Department of COGTA to develop a Protocol which includes -

7.4.1. criteria, after consultation with the community, for any person to be appointed to represent the community in BBK and associate entities as shareholder.

7.4.2. a requirement that the community must annually consider whether or not to reappoint persons appointed to BBK and associate entities.

7.4.3. reporting by the community's shareholder representatives to the community and to the Department.

8. Paragraph I

8.1. Appointment of an Administrator to take over the affairs of the TC

8.1.1. The Premier should act in terms of section 9(3) and 10(2) to urgently appoint an Administrator to take control of the affairs of the TC.

8.1.2. The Administrator must have the power to exercise and perform any power, authority or function conferred or imposed by law, including customary law, upon the TC and shall be deemed to have been exercised or performed by the TC.

8.1.3. The Administrator should be competent and have the power to exercise any power, authority or perform functions that would

ordinarily be conferred upon the TC in respect of the subsidiary companies and shall be deemed to have been exercised or performed by the TC.

8.2. The appointment of an Administrator should be reviewed by the Premier after a period of 180 days and extended as the Premier may decide.

8.3. The Administrator should oversee the development of a governance framework suitable for the TC, taking into account –

8.3.1. the nature of the entities under its control and in which it has interests.

8.3.2. the complexity of the commercial transactions with which BBK are involved.

8.3.3. the Code of Conduct for members of the TC, and those principles of the King Code which are appropriate to apply to the TC. To this end, we point out that the Close-Up Report records that MBC drafted the following policies – Induction Policy for Council Members; Code of Ethics for Traditional Council members and Headmen; Policy on Governance Structure, roles and functions of Kgosi, Headmen and the Traditional Council; and conflict of interest policy of TC and Dikgosana.

Whilst none of the policies referred to in the Close-Up Report were presented before us and no evidence was presented in respect thereof, we expect from the names of the policies that if implemented properly, the policies must address the issues that have become the source of discontent about the administration of the financial affairs of the community.

9. Forensic Investigation

10. Whilst the evidence of Papadakis, Serithi, Paul and Gaitate was of great assistance to provide information about the transactions and flow of monies, it is apparent from the incompleteness of the documents that we do not have full insight into the flow of funds earned in the name of BBK and that even these documents cannot be relied upon as a true and full reflection of all transactions entered with third parties and all income derived from such transactions. They also cannot be relied upon as complete evidence of how and that all income was applied for the sole benefit of the community. This will be the function of a forensic investigation to unravel. We did not conduct such an investigation and also did not have the capacity or the mandate to do so.

11. We have discussed transactions that we conclude require or warrant further investigation. It is accordingly necessary that a comprehensive investigation into the flow of funds from transactions with third parties is conducted. To this end, we recommend that a comprehensive forensic investigation must be

conducted, to include transactions concluded by BBK entities and the flow of any finances into and out of the entities.

12. The forensic investigation should seek to determine the extent of the irregularities and potential unlawful conduct, as relates to the handling of the funds and assets accruing for the benefit of the BBK, including but without limitation, -

12.1. The Asset Management Agreement in terms of which BBKFS was appointed as the Asset Manager of BBKTC and RFA its consultant and the monies paid arising from the arrangement.

12.2. The income earned by BBKFS for sales **(R108 million)** and expenditure for professional and consultant's services **(R198 million)**..

12.3. The payment of R20 million to Selalelo Consultant for facilitating the issuance of a mining licence by DMR.

12.4. The ownership of the company Orkid S.a.r.l and its relationship with BBK, in particular, the circumstances in which the company obtained shareholding arising from the transaction between BBK and Pallinghurst.

12.5. The existence or not of Bakgatla Infrastructure Fund referred to in the close-up report and any transactions or activities relating thereto.

12.6. The status of applications for funding referred to in the MBC report for the follow projects –

- Bakgatla Feedlot – Conditional approval by Land Bank. Application by MBC. We point out that MBC also records that BBKSIC sought to withdraw the application to Land Bank which was at an advanced stage of approval.
- AAC Bricks Manufacturing – Application pending.
- Crocodile Farming – Application pending. Application by MBC/BBKSIC.
- Aquaculture Farming – Application pending. Application by MBC /BBKSIC.
- Egg production – Application pending.
- Water tanks – Application pending.
- Clay Bricks Manufacturing – Application pending.
- Bakgatla Hotel – Application pending.
- Hydroponic Farming – Application pending. Application by MBC & BBKSIC.

- Protective Garment Production – application pending.

- The establishment of a BBK/National Empowerment Fund for a **R125 million** SMME Incubator Fund referred to in MBC report as completed by BBKTA and NEF in respect of which MBC reports that BBK contributed **R50 million** and the NEF **R75 million**.

- Establishment and activities of Bakgatla Development Fund which MBC reports as Work in Progress.

- Establishment of Bakgatla Housing Scheme (Fund) which MBC reports as pending. The parties responsible for this are BBK/Old Mutual/RBA.

- BBK/ABSA Joint Venture initiative to fund BBK projects. According to MBC, a Memorandum of Understanding was signed between ABSA and BBK and ABSA (Barclays) gave conditional approval.

- Any funding provided by the Department of Trade and Industry for Cooperatives. MBC reports that application by MBC for funding was pending.

- Possible funding by the Department of Agriculture referred to in the Close-Up Report.

13. The forensic investigation should also determine whether any person, including directors of entities, has committed any offence or misconduct pertaining to monies deriving from transactions and recommend the action, if any, to be taken against any such persons, including but without limitation, laying criminal charges, civil claims to recover any loss, removal of any persons and trustee or director and other relief against such persons as may be available in law.
14. The Premier must instruct the MEC and/or Department of COGTA to urgently conduct an evaluation of the skills of members of the TC and to provide a formal training programme on financial matters and the duties of members in that regard, taking into account the complexity of the transactions concluded to date.
15. The Treasury and office of the Accountant-General, or other appropriate department as the Premier may determine, should be required to assist the Administrator to develop a simple but compliant reporting system that is suitable to an entity such as the TC with its web of commercial and non-commercial entities. Reports should also be suitable for reporting to the community.

CHAPTER V

CONCLUSION & ACKNOWLEDGEMENTS

1. From the evidence, it is clear that urgent steps are required to be taken to- (i) remedy the non-compliance with the various prescripts applicable to the TC and its entities; (ii) conduct a comprehensive forensic investigation into the financial affairs of the community; and (iii) report to the community about transactions concluded utilising the resources of BBK and the flow of monies therefrom.
2. We fervently hope that structural changes are made to the manner of accounting to the community. Compliance with the prescribed laws that govern the administration of assets and finances of the community must, in our view, enhance accountability and transparency in dealing with monies accruing to the community. The Premier and the Department of COGTA are instrumental to the optimal performance and accounting of the TC and the Kgosi in dealing with the financial affairs of the community.
3. We make the recommendations that we do with the expectation that if accepted by the Premier and implemented, they will go a long way to correct the shortcomings and to create processes that will enable the TC and its entities to conduct the financial affairs of the community optimally and with the community being the sole beneficiary.

4. We hope and trust that the findings we have arrived at, and the recommendations we make will be considered by the community and the principal role players as an opportunity to rectify and improve the manner in which the affairs of the community are conducted and to the full benefit of the community. The BMP and the MBC report are ambitious tools which are realizable if the natural resources of BBK are applied primarily for the benefit of the community, even if this means that the TC, in the charge of its duties to administer and safeguard the finances of the community, must close some of the entities that have only ever served to expend monies without any income or real prospect of earning any.
5. We are confident that enhanced transparency and accounting to the community must go a long way to restore confidence in the TC and those that run the BBK entities. Restored confidence in these must translate to a restoration of peace in the community and cooperation in the development of the community.
6. Our heartfelt gratitude must go to all the people who presented evidence to us. Without their participation, our task would have been more difficult and they each contributed to make it lighter. For this we thank all of them.
7. We also extend our gratitude to Mr Papadakis and to the Legal Resources Centre and LAMOSA for the work that they did to investigate the significant financial transaction of BBK and to avail the information to the Commission. We are immeasurably grateful to Mr Papadakis in particular for continuing to avail his assistance to the Commission when the Legal Resources Centre

and LAMOSA became unable to continue financially supporting his assistance to the Commission.

8. We must especially thank the communities of Saulspoort and Mochudi for their attendance at the public hearings at their own cost, their support and patience as we took oral evidence, and for the respectful manner in which they conducted themselves, not only towards the Commission but also to the witnesses who presented evidence.
9. We would be remiss if we did not mention and express our gratitude to the Commission Secretariat, Mr Itumeleng Pule of Pule Attorneys, Rustenburg and Mr Guy Gumbo of Guy Gumbo Attorneys, Rustenburg. Without their support and able administration, our work would have been harder. We also must extend our gratitude to Ms Yvonne Mosiane and Mr S Ruthoane of COGTA who both ensured that we had the necessary tools to discharge our task and that we were properly provided for as we conducted the investigation.
10. Finally but not least, we must acknowledge and thank the Rustenburg Local Municipality for availing to us its premises, the Civic Centre, for public hearings and accommodating the often large numbers of members of the public who attended the public hearings.

**COMMISSION INTO TRADITIONAL SUCCESSION DISPUTES AND CLAIMS:
BAKGATLA BA KGAFELA TRADITIONAL COMMUNITY REPORT**

**RECOMMENDATIONS APPROVED/ ~~NOT APPROVED/ APPROVED WITH~~
~~AMENDMENTS:~~**

Approved



PROF. T.J MOKGORO

PREMIER OF THE NORTH WEST PROVINCE

DATE: *26 Aug 2019*