Reportable:	YES/ **NO**
Circulate to Judges:	YES/ **NO**
Circulate to Magistrates:	YES/ **NO**
Circulate to Regional Magistrates:	YES/ **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION - MAHIKENG

CASE NO: M106/23

In the matter between:

ROYAL BAFOKENG NATION **APPLICANT**
N.O KGOSI LERUO TSHEKEDI MOLOTLEGI

and

THE PREMIER: NORTH WEST PROVINCE **1ST RESPONDENT**
N.O KAOBITSA BUSHY MAAPE

MEMBER OF THE EXECUTIVE COUNCIL
THE DEPARTMENT OF CO-OPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS
NORTH WEST PROVINCIAL GOVERNMENT **2ND RESPONDENT**

MINISTER OF CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS **3RD RESPONDENT**

THE NORTH WEST PROVINCIAL HOUSE OF
TRADITIONAL AND KHOISAN LEADERS **4TH RESPONDENT**

DR RUTH SEGOMOTSI MOMPATI LOCAL HOUSE OF TRADITIONAL AND KHOISAN LEADERS **5TH RESPONDENT**

NGAKA MODIRI MOLEMA LOCAL HOUSE OF TRADITIONAL AND KHOISAN LEADERS **6TH RESPONDENT**

BOJANALA LOCAL HOUSE OF TRADITIONAL AND KHOISAN LEADERS **7TH RESPONDENT**

AFRICORE ADVISORY (PTY) LTD **8TH RESPONDENT**

JUDGMENT

REDDY AJ

Introduction

[1] The application before this Court, instituted on or about 7 March 2023 is premised on the review provisions of the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA") read with the principle of legality, which is embedded within the supreme law, the Constitution of the Republic of South Africa Act 108 of 1996. The applicant by way of judicial review seeks an order reviewing and setting aside the Premier's decision to promulgate the Regulations regarding the Constitution and Reconstruction of

Traditional Councils, as well as an order declaring these Regulations constitutionally invalid. The Regulations were promulgated in terms of section 21(2) of the Traditional and Khoi San Leadership Act, 3 of 2019("the TKSLA") and published in Provincial Gazette No. 8433 on 8 November 2022. Predicated on the latter, the applicants sought the following relief:

[1] The decision of the First Respondent to promulgate the Regulations on the *Constitution and Reconstitution of Traditional Councils* ("**the Regulations**") by publication under Provincial Notice No. 404 in the Provincial Gazette No. 8433, dated 8 November 2022, is hereby reviewed, and set aside.

[2] The Regulations are declared unconstitutional, unlawful, and invalid, in that:

2.1 the Regulations violate section 235 of the Constitution, by depriving members of traditional communities sharing a common cultural and language heritage, the right to self-determination; and

2.2 the Regulations are *ultra vires*, unreasonable and irrational.

[3] The declaration of invalidity is suspended for a period of twelve (12) months, from date hereof, to afford the First Respondent time, after consultation with all interested parties, to review, revise, amend and re-publish the Regulations, with due consideration to (a) the scope of section 21(2)(a) of the Traditional and Khoi-San Leadership Act 3 of 2019 ("the Khoi-San Act"), and (b) the limitations the provisions of the Regulations have on the rights guaranteed to members of traditional communities in the Bill of Rights and section 235 of the Constitution of the Republic of South Africa, 1996.

Alternatively, to prayers 1 to 3 above, are prayers 4 to 6 below

[4] Regulations 3,4, 10, 11 and 18(2) of the Regulations are declared unconstitutional, unlawful, and invalid, to the extent that these regulations are ultra vires the powers of the First Respondent to promulgate regulations in terms of section 21(2) of the Khoi-San Act.

[5] Regulations 10(b) and regulation 18(20) of the Regulations are declared unconstitutional, unlawful, and invalid:

5.1 to the extent that these regulations fail to recognize the right of non-resident members of a traditional community to participate as voters in the elections of the traditional community to which they belong; and

5.2 to the extent that these regulations entitle resident non-members of a traditional community to participate as voters in the elections of traditional communities to which they do not belong.

[6] Regulation 11(b) of the Regulations is declared unconstitutional, unlawful and invalid:

6.1 to the event that it fails to recognise the right of non-resident members of traditional community to stand for and accept nominations as candidates in the traditional council election of the traditional community to which they may belong; and

6.2 to the extent that it entitles resident non-members of traditional community to stand for and accept nominations as candidates in the traditional council election of traditional communities to which they do not belong.

[7] The First and Second Respondents are to pay the costs of this application, jointly and severally, the one paying the other to be absolved, including costs for the employment of two counsel.

The description of the parties

[2] A proper introduction of the parties is peremptory for the ease of reading and establishing the legal *nexus* between them.

[3] The applicant is the Royal Bafokeng Nation, a *universitas personam* and a traditional community, recognized as such in terms of the TKSLA, duly represented by the reigning senior traditional leader(Kgosi) Leruo Tshekedi Molotlegi, in his capacity as Kgosi, pursuant to section 32 of the North West Traditional Leadership and Governance Act 2 of 2005.

[4] The first respondent is the Premier of the North West Provincial Government, vested with the executive authority of the North West Province in terms of section 125 of the Constitution of the Republic of South Africa Act 108 of 1996, with the principal address situated at Garona Building, South Wing, 3rd Floor, Dr James Moroka Drive, Mmabatho, North West Province.

[5] The second respondent is a Member of the Executive Council of the Department of Co-operative Governance and Traditional Affairs for the North West Provincial Government, in her capacity as such, appointed by the Premier, with same principal address as the first respondent.

[6] The third respondent is the Minister of Co-operative Governance and Traditional Affairs, in her capacity as such, with principal address situated at 87 Hamilton Street, Arcadia, Pretoria, Gauteng Province.

[7] The fourth respondent is the North West Provincial House of Traditional and Khoisan Leader's, recognized and established in terms of the North West House of Traditional Leaders Act 3 of 2009, situated at 1 Lowe Building, Old Parliament, Modiri Molema Road, Mmabatho, North West Province.

[8] The fifth respondent is the Dr Ruth Segomotsi Mompati Local House of Traditional and Khoisan Leaders, recognized and established in terms of North West House of Traditional Leaders Act 3 of 2009, situated at 1 Lowe Building, Old Parliament, Modiri Molema Road, Mmabatho, North West Province.

[9] The sixth respondent is the Ngaka Modiri Molema Local House of Traditional and Khoisan Leaders, recognized and established in terms of North West House of Traditional Leaders Act 3 of 2009, situated at 1 Lowe Building, Old Parliament, Modiri Molema Road, Mmabatho, North West Province.

[10] The seventh respondent is the Bojanala Local House of Traditional and Khoisan Leaders, recognized and established in terms of North West House of Traditional Leaders Act 3 of 2009, situated at 1 Lowe Building, Old Parliament, Modiri Molema Road, Mmabatho, North West Province.

[11] The eighth respondent is AfriCore Advisory (Pty) Ltd ("AfriCore"), a private company duly registered and incorporated in accordance with the company laws of the Republic of South Africa, having its principal place of business at The Corner House, 1st Floor, No.77 Commissioner Street, Johannesburg. AfriCore has been contracted to the Department as an electoral agency to assist the Department with the proposal elections pursuant to the reconstitution of the traditional councils in the North West Province, in terms of the TKSLA.

[12] The first, second, fourth, fifth, sixth and seventh respondents entered a notice of intention to oppose which was delivered out of time. In the subsequent application for condonation, the first, second and third respondents sought leave from the Court to condone the non-compliance with the Uniform Rules of Court. The fourth to eighth respondents do not oppose the relief.

Background facts

[13] The applicant initiated relief in terms of Rule 53 of the Uniform Rules of Court ("the Rules") for an order to review and set aside the Premier's decisions in terms of section 21(2)(a) and (b) of the TKSLA, to publish the Regulations for the Constitution and Reconstitution of the Traditional Councils in the North West Province in the Provincial Gazette No.8433 with Provincial Notice 404 on 8 November 2022 ("the Regulations").

[14] Notwithstanding certain procedural deficiencies this Court on 17 May 2023, ordered the following.

3.1.1 The First, Second and Fourth to Seventh Respondents ("the Respondents") are permitted to file an application for condonation of the late filing of their notice of intention to oppose, as per their undertaking, via email on 17 May 2023, within 30 minutes of the Order being granted;

3.1.2 The Applicant may submit an answering affidavit to the aforesaid application by 16h00 on Monday, 22 May 2023;

3.1.3 The Respondents shall deliver their replying affidavit, if, any by 16h00 on Tuesday, 23 May 2023;

3.1.4 The application for condonation will be heard at 8h30, on a virtual platform;

3.1.5 **The Respondents were ordered to pay the Applicant's wasted costs of two Counsel appearances on 11 May 2023 and 17 May 2023, jointly and severally, the one paying the other to be absolved.**

3.1.6. The scale of costs, however, to be argued on 25 May 2023, together with the condonation application.

[15] On 25 May 2023, there appeared to be some confusion as regards the hearing of the application on the virtual platform, which resulted in it being set down for 31 May 2023.

[16] On 30 May 2023, the Constitutional Court in *Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14; 2023 (9) BCLR 1099 (CC), made the following unanimous order:

1. It is declared that Parliament has failed to comply with its constitutional obligation to facilitate public involvement before passing the Traditional and Khoi-San Leadership Act 3 of 2019 (Act).
2. The Act was, as a consequence, adopted in a manner that is inconsistent with the Constitution and is therefore declared invalid.
3. The order declaring the Act invalid is suspended for a period of 24 months to enable Parliament to re-enact the statute in a manner

that is consistent with the Constitution or to pass another statute in a manner that is consistent with the Constitution.

4. Those respondents that opposed the application are directed to pay the applicants' costs, including the costs of three counsel, in the following proportion:

   (a) The sixth, eleventh and twelfth respondents are directed to pay the costs occasioned by their respective opposition to the application.

   (b) The first and second respondents are to pay all remaining costs.

[17] As an automatic consequence of the *Mogale* judgment, both parties were called upon to make written submissions addressing, the mootness of the current relief. I detail the submissions herein under.

Applicant Submissions

[18] Mr. Seleka contended that the challenge is straightforward in that the Premier, in promulgating the Regulations, acted outside the powers vested in him by the enabling legislation, the TKSLA, more pertinently section 21(2)(a) thereof, when he purported to prescribe regulations on the 60% constituent of traditional councils and to prescribe eligibility criteria for 40% constituent when in fact his powers are, as conceded by the respondents, only limited to prescribing regulations on the procedure and timeframes for the election of 40% constituent of traditional councils.

[19] In *Mogale* the Constitutional Court, declared the TKSLA, constitutionally invalid, due to parliament's failure to comply with it's constitutional obligation to facilitate public involvement before

the passing of the TKSLA, but suspended the order of invalidity for a period of twenty- four (24) months to enable parliament to re-enact the statute in a manner that is consistent with the Constitution, or to pass another statute in a manner that is consistent with the Constitution.

[20] Mr. Seleka asserted that the invalidity does not have immediate application and certainly not retrospective application. This, in the view of Mr. Seleka, resulted in the untenable situation that the **TKSLA will remain valid and applicable for two (2) years**. The latter fact has been conceded by the respondent. However, Mr. Seleka contends that notwithstanding this concession, the respondents aver that the declaration of invalidity of the TKSLA, renders the present *lis* moot is unsustainable.

[21] The contention by Mr. Seleka goes that this conclusion by the respondents is clearly misplaced and ignores the very point by the Constitutional Court prior to the issuing of an order of invalidity in paragraph [84] of *Mogale,* where the following was posited:

"An immediate order of invalidity would withdraw the recognition granted to Khoi-San communities and traditional leaders and restore the TLGFA [the Framework Act]. Causing immense disruption, as the TLGFA hugely differs from the TKLA [Khoisan Act] (for example in the manner in which traditional councils are constituted and recognized and the powers and responsibilities that they have). Some steps have already been taken to implement the TKLA. Suspension will allow Parliament, at its discretion, to hold a new legislative process to pass the TKLA, a modified version of it, or an entirely new bill. This allows the new amended provisions (created following the appropriate public participation process) to come into force after the completion of the legislative process."

[22] Mr. Seleka asserts that the apex court appreciated that a declaration of invalidity, with immediate effect was undesirable as it would cause immense disruption and undo steps already taken in terms of the TKSLA and resuscitate the old Framework Act. Resultantly, the Constitutional Court suspended its order of invalidity to take effect only on a future date. This means that the offensive Regulations, vis-à-vis, the TKSLA, continue to exist in fact and in law, and have a binding effect until revised or replaced.

[23] It follows, so the opinion ran, that the present review application is far from being moot. Mr. Seleka avows that the *lis* raised can only be considered moot if the Premier gives an undertaking or assurance that he will not, for the next two (2) years, seek to implement the offensive Regulations until new compliant legislation has been promulgated.

[24] Notwithstanding, the parties' diverse views on the mootness of the present review, the Premier regards the offensive Regulations as invalid and does not intend to implement same until a new Act has been enacted. Such an approach by the Premier would be an answer to the main relief sought by the applicant in the review application. This concession by Mr. Seleka was rightly made.

[25] Dealing with the practical effect, the contention goes that it is essential that this Court pronounce on the validity of the offensive Regulations. Such a pronouncement will not be academic, as it stands to benefit the members of the traditional communities in the

North West Province and preserve their right to self- determination, which optimally will serve the public interest.

[26] Turning to costs, Mr. Seleka opined that the litigating conduct of the respondents have been reprehensible. Expounding, on this, the argument goes that the respondents have taken every procedural step that could possibly be taken which was an outright abuse of the court process, which should be met with a firm show of the court's displeasure. Consequently, the applicant moved for an order as per the main relief set out in the Notice of Motion in the review application, together with costs against the respondents on the scale between attorney and client including costs of two counsel, and to include the costs of hearings on **17, 25, and 31 May 2023**.

Submissions by respondents

[27] Mr. Mphahlele, contended that considering *Mogale*, the consequence of this Court giving judgment is that any order made would have no practical effect on the applicant or the public at large, and would serve no purpose but an academic one. Given the declaration by the Constitutional Court in *Mogale*, the applicant's collateral challenge to the Regulations has become moot. To this end, Mr. Mphahlele referred to several decisions *inter alia***,** J*ohn Walker Pools v Consolidated Aone Trade & Invest 6 (Pty) Ltd (in liquidation) and Another* 2018 (4) SA 433 (SCA), *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6.

[28] Mr Mphahlele, submitted that a court has a discretion to decide a moot case in exceptional circumstances. There are two discernible exceptions to the judicial policy governing moot cases. The first would be when it is in the public interest or society at large to decide the matter. The rationale would be that the case is moot only as between the parties, but there remains a need to guide future situations of a similar nature. The second intertwined with the first, is when the offending practice or conduct is capable of recurrence. In *casu,* it was averred that there exist no exceptional circumstances for the court to decide this application.

[29] Regarding costs, Mr Mphahlele, submitted that the respondents entered the Notice to Oppose, believing the respondents had a proper case and a proper defence. Dealing with the suggestion that a punitive cost order be considered for postponements of 11, and 17 May 2023, there was no justification for same. This was further ameliorated by indicating that the respondents were not vexatious, unscrupulous, dilatory, or mendacious. See *Du Toit NO v Thomas NO and Others* (2016) 8 BLLR 745 (LAC) at paragraph [36].

[30] In the premises Mr Mphahlele was of the view, that the application before this Court has been rendered moot, for the lack of any practical import or effect. As the first, second and third respondents, and applicant can simply treat the impugned Regulations as invalid, for all intents and purposes. Consequently, the review application by the applicant cannot be entertained as the relief it seeks will have little or no practical effect. To this end,

this application stands to be dismissed with costs on an attorney and client scale, including costs occasioned by the employment of two counsel and costs of 25 and 31 May 2023.

Discussion

[31] This application was overtaken by events. On 30 May 2023, in *Mogale and Others v Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14, the Constitutional Court made the following order:

1. It is declared that Parliament has failed to comply with its constitutional obligation to facilitate public involvement before passing the Traditional and Khoi-San Leadership Act 3 of 2019 (Act).
2. The Act was, as a consequence, adopted in a manner that is inconsistent with the Constitution and is therefore declared invalid.
3. The order declaring the Act invalid is suspended for a period of 24 months to enable Parliament to re-enact the statute in a manner that is consistent with the Constitution or to pass another statute in a manner that is consistent with the Constitution.
4. Those respondents that opposed the application are directed to pay the applicants' costs, including the costs of three counsel, in the following proportion:
   (a) The sixth, eleventh and twelfth respondents are directed to pay the costs occasioned by their respective opposition to the application.
   (b) The first and second respondents are to pay all remaining costs.

[32] The parties are *ad idem,* that the TKSLA, was adopted in a manner inconsistent with the Constitution and therefore is invalid. Further thereto, the order declaring the Act invalid was suspended for a period of twenty-four (24) months to enable Parliament to re-enact the statute in a manner that is consistent with the Constitution or to

pass another statute in a manner that is consistent with the Constitution. Resultantly, this leaves a *lacuna* in the law.

[33] Whilst Mr Seleka correctly surmises the law on the Regulations and that the discretion is that of the Premier, the Premier is hamstrung without the TKSLA, which was the enabling legislation. The TKSLA and the Regulations are intertwined, notwithstanding the obsequiousness of the Regulations to the TKSLA. The Premier is not ordained with explicit power to act contrary to an order of the Constitutional Court and the rule of law.

[34] It would be apposite to address the import of Regulations in general. As we know, regulations are subordinate legislation. It is trite law that subordinate legislation must be created within the limits of the empowering statute. If they are not, the exercise of the power is unlawful and may be set aside like an unlawful act of any other functionary who has acted outside the powers conferred upon him/ her by the Legislature. See *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 at paragraph [41].

[35] What is unassailable is the that the Premier is legally jettisoned. In *Singapi v Maku* 1982 (2) SA 515 (SE), at 517C-D the following was posited regarding regulations made by the Minister, which ventured beyond the scope of powers conferred by their empowering statute:

> **"When subordinate regulations are under consideration, however, it is necessary to consider them in relation to the empowering provisions under which they have been made. No matter how clear and unequivocal such regulations may purport to be, their interpretation and validity are dependent upon the empowering**

provisions which authorise them. One must therefore have regard to the intention of the Legislature as reflected in the Act, it being the enabling statute under which the Election Regulations were promulgated, in order to ascertain whether the regulations are in conformity, and not in conflict, with such intention, for to the extent that they are in conflict with such intention they are *ultra vires*."

[36] The exercise of public power, must be in consistent compliance with the bounds set for the exercise of that power as provided for by the applicable law and the Constitution. In *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) , the Constitutional Court said:

"**It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.** At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality."

[37] Whilst two of the arms of government are specifically identified in *Fedsure,* it is beyond question that the Provincial Government headed by the Premier would also be bound by court orders in general and the substance of the order in *Mogale*. The Premier does not have an unfettered legal discretion to exercise power outside the framework of the law. The Constitution of the Republic of South African Act 108 of 1996, Chapter 1, Section 1(c) says that the Republic of South

Africa is founded on the **"supremacy of the Constitution and the rule of law**". This means, that the Constitution is the highest law of the land, and no other law may conflict with it; nor may the government do anything that violates it. The Premier is not veiled with unlimited regulatory power.

[38] Mr Seleka's concerns regarding the potential conduct of the Premier retroactively of *Mogale*, is misplaced on two scores. Firstly, the Premier has given an undertaking that no further steps will be taken so far as the Regulations to the TKSLA are concerned, which to my mind is completely unnecessary and futile, simply due the explicit coherence with orders of court, which is integral to the rule of law and the proper function of a constitutional democracy. Secondly, any action taken by the Premier will be *ultra vires* given the synergy that is extant between the enabling act and regulations. The present regulations are effectively stillborn in the absence of the enabling act. The contemplation of future regulations by the Premier is futile, given the order of the apex Court in *Mogale*.

[39] As far as the contention that a pronouncement that the offensive Regulations is essential as it stands to benefit the members of the traditional community and preserve their right to self-determination which optimally will serve the public interest, is misdirected. The Constitutional Court has made a declaration and it is superfluous to dovetail on that order. This application at its genesis was essential to the traditional community, it has now been overtaken by *Mogale*. Resultingly, the application has become moot.

[40] I now turn to the issue of costs. In *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at paragraph [8] Mogoeng CJ noted that "**[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process."**

[41] In *Plastics Convertors Association of SA on behalf of Members v National Union of Metalworkers of SA and Others* (2016) 37 ILJ 2815 (LAC) at paragraph [46], the Labour Appeal Court stated:

"The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium."

[42] The respondents litigating conduct deserves censure by this Court. The chronology of this application indicates overtly the respondents lack of appetite for the review application to gain momentum and reach its logical conclusion. This is illustrated by the import of the court order made by this Court on 17 May 2023. I align myself with the sentiments echoed by Mr Seleka.

[43] In the premises, I make the following order:

(i) The application is struck from the roll.

(ii) The respondents are ordered to pay the costs, jointly and severally the one paying the other to be absolved, on an attorney and client scale including the costs for the hearing on 17 May 2023 which costs are to include costs of two counsel.

(iii) No order in relation to costs is made for 25 May 2023.

A REDDY
ACTING JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the Applicant:	Mr. Seleka SC
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Mmabatho

Date of hearing: 31 May 2023

Written Heads Applicant: 21 June 2023

Written Heads Respondents: 21 June 2023

Directive to proceed on written heads: 11 July 2023

Date of judgment: 11 October 2023