



# **PILANE v PILANE: A SUMMARY OF THE CONSTITUTIONAL COURT JUDGMENT**

***September 2013***

## **BACKGROUND**

On 28 February 2013, the Constitutional Court decided a case which upheld the rights of community members to have meetings at which they discuss concerns about the governance of their community. This has great significance in a context where a series of judgments in the North West have prevented certain groupings living on “communal land” from having meetings.

The case was a dispute about whether a group of people could convene a meeting at which they would discuss the possibility of breaking away (also referred to as “secession”) from the larger traditional community. On one side of the dispute were Mmuthi Pilane and Ramoshibidu Dintwe (the “applicants”), from Motlhabe Village in the North West, who attempted to convene such a meeting. On the other side of the dispute (the “respondents”) were Nyalala Pilane, the officially recognised senior traditional leader (kgosi/chief) of the Bakgatla baKgafela Traditional Community, and the Traditional Council, who wished to stop the meeting from taking place on the basis that only traditional leaders who were officially recognised by government could call such a meeting.

Mr Mmuthi Pilane and Mr Dintwe took the case to the Constitutional Court in order to challenge a 2011 decision favouring the kgosi and traditional council by Judge Landman in the North West High Court in Mafikeng.

## **WHAT WAS DECIDED IN THE NORTH WEST HIGH COURT?**

Judge Landman granted a court order that would prevent Mr Mmuthi Pilane and Mr Dintwe from having meetings without getting the permission of the kgosi and traditional council and from identifying themselves in ways that suggest they have authority within, or represent, the traditional community. The problem was that they had referred to themselves as the Motlhabe “traditional authority” in advertising the meeting. The judge also prohibited them from acting contrary to certain laws and customs. Judge Landman’s decision imposed many restrictions, which is why Mr Mmuthi Pilane and Mr Dintwe applied to have his judgment overturned in the Constitutional Court.

## **WHAT WAS DECIDED IN THE CONSTITUTIONAL COURT?**

A majority in the Constitutional Court, consisting of eight judges, decided that it was incorrect for Judge Landman to grant these orders and decided the case in favour of Mr Mmuthi Pilane and Mr Dintwe.

The Court's majority judgment, written by Judge Skweyiya, first looked at the technical legal requirements for granting an order that prevents someone from taking certain actions (called an interdict). According to ordinary legal requirements, a judge is only allowed to grant an interdict if it is proved that a clear right is being threatened and if there is no other remedy for the situation. The same requirements would apply to all the other North West cases in which similar court orders have been granted in the past.

The Constitutional Court said that the kgosi and traditional council had not proved that any of their rights were being threatened by the proposed meeting in the evidence before the High Court. The kgosi and traditional council tried to argue that they had an exclusive right to act as traditional authorities in the community. They argued further that Mr Mmuthi Pilane and Mr Dintwe were threatening to usurp their identity and exclusive right by calling themselves the Motlhabe traditional authority and calling meetings to discuss the community's governance concerns.

However, the Constitutional Court pointed out that Mr Mmuthi Pilane and Mr Dintwe were not trying to claim the authority of the kgosi and traditional council as their own – instead, they were explicitly acknowledging the separate existence of that authority by wanting to discuss breaking away from it. The Court also said that the use of a name such as “traditional authority” does not mean that Mr Mmuthi Pilane and Mr Dintwe were trying to assume the identity of the senior traditional leader or traditional council.

Since the legal requirements for granting an interdict were not met, the Constitutional Court overturned Judge Landman's previous court order.

The Constitutional Court then looked at the constitutional rights that would be infringed if Mr Mmuthi Pilane and Mr Dintwe were prohibited from holding meetings to discuss their concerns about governance in the community and the possibility of splitting off from the larger group. Prohibiting such meetings would negatively impact on the applicants' rights to freedom of expression (section 16), assembly (section 17) and association (section 18) in the Constitution. The Court said that democracy and accountability is strengthened by allowing opposing voices to be heard and warned that the law would not tolerate the kgosi and traditional council using the courts to silence criticism against their leadership.

The Court therefore emphasised that **people living in traditional communities have the right to meet for discussions about possibly breaking away from a larger group**. This right could be restricted in terms of the Constitution, only if the restriction was “reasonable and justifiable in an open and democratic society” (section 36). However, in this case the kgosi and traditional council did not prove that the rights of Mr Mmuthi Pilane and Mr Dintwe were allowed to be restricted in this way.

#### OTHER IMPORTANT COMMENTS MADE BY THE CONSTITUTIONAL COURT

An important comment made by the Constitutional Court in the case is that, because officially recognised traditional leaders and traditional councils perform public functions in terms of statute law and the Constitution, they are organs of state. What this means is that **traditional leaders and councils must function in an open, accountable and democratic manner** similar to government. However, the Constitutional Court also acknowledged that other forms and institutions of customary leadership can co-exist alongside officially recognised structures. This implies that a person could function as a customarily recognised leader in a community without the Premier having issued that person with a certificate of recognition. In this way the Court emphasised that the authority of traditional structures has its source in customary law, not in official government recognition.

### **WHAT DID THE CONSTITUTIONAL COURT *NOT* DEAL WITH IN THE JUDGMENT?**

The majority Court did not decide outright whether or not a portion of community members can split off from a larger traditional community under statute law or customary law. The Court also did not decide the question of whether under customary law anybody can call a traditional community meeting (specifically referred to as a “Kgotha Kgothe” in the judgment) or whether only a senior traditional leader or his traditional council is allowed to do so. The issue decided by the Court was whether it was correct under common law for Judge Landman to stop Mr Mmuthi Pilane and Mr Dintwe from calling meetings without permission and to stop them from using certain names when referring to themselves.

### **DID ANY JUDGES DECIDE DIFFERENTLY IN THE CASE?**

A small minority of judges in the Constitutional Court, consisting of Judge Mogoeng and Judge Nkabinde, decided the case differently to the other eight judges. They thought that Judge Landman was correct to grant a court order to stop Mr Mmuthi Pilane and Mr Dintwe from calling meetings to discuss the possibility of breaking away from the larger community. These two judges were primarily concerned with what they perceived as a potential for disorder, chaos, lawlessness and the undermining of official traditional authorities. They implied that the need for order in the broader traditional community superseded the basic tenets of democratic governance and the constitutional rights of Mr Mmuthi Pilane and Mr Dintwe to freely associate and express themselves.

Since they were outnumbered by a majority, the decisions of these two judges have no authority in law. The law that applies from the time of the judgment is that which was established in the decisions of the majority judges.

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