

Schedule 1

The Commission of Inquiry (herein referred to as the Commission) shall conduct investigations under the following Terms of Reference (as gazetted under gazette number: 7838)

1. Bakgatla Ba Kgafela

- 1.1 The role of a Paramount Chief in terms of the tradition and custom specifically in Botswana *vis a vision* Moruleng;
- 1.2 The powers and procedure, if any, to appoint senior traditional leader of Bakgatla Ba Kgafela in Moruleng;
- 1.3 To determine who the rightful heir is 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;
- 1.4 The merits and demerits of Mr Ramono Merafe's claim as senior traditional leader as was referred to the North West Provincial Committee during 2014;
- 1.5 The role of senior traditional leader of Bakgatla Ba Kgafela in Moruleng;
- 1.6 The correct relationship between Kgafela Kgafela II and the senior traditional leader in Moruleng under our Constitutional dispensation;
- 1.7 The role of the 32 sub villages officiating the appointment of the senior traditional leader of Moruleng Village;
- 1.8 The role of the 32 villages under Moruleng in the acquisition-making process;
- 1.9 The flow of financial benefits in any transactions conducted with any third party in the name of or on behalf of Bakgatha Ba Kgafela by any person;

1.10 In considering the content of customary law, the commission shall be enjoined to apply sections 39(2) and 212 of the Constitution and any relevant case law.

Given under my hand and seal at **MAHIKENG** on **November 2017**

PREMIER: NORTH WEST PROVINCE

MEC: CULTURE, ARTS AND TRADITIONAL AFFAIRS

Schedule 2

To investigate the succession dispute around the Chieftainship of the Batlhako Ba Leema in Tlhatlhaganyane (as gazetted under gazette number: 7838)

- 1.1 To identify the descendants of the late Kgosi Tlhogoane, and determine the rightful person to have succeeded in after his death.
- 1.2 To identify the legitimate members of the Royal Family and Khuduthamaga of the Batlhako Ba Leema Traditional Community.
- 1.3 To investigate the ascendancy of the Makabe house to the chieftaincy of Batlhako Ba Leema traditional community and the legitimate of such ascendancy.
- 1.4 The commission will further investigate whether the Royal Family and/or Council of Batlhako Ba Leema had in terms of customary practice and in line with their tradition paid any *bogadi* (bridewealth) for Kgosi Kgadi Nkibi Batleng on behalf of Kgosi Leema Batleng.

Given under my hand and seal at **MAHIKENG** onNovember 2017

PREMIER: NORTH WEST PROVINCE

MEC: CULTURE, ARTS AND TRADITIONAL AFFIARS

Schedule 3

The Commission of Inquiry (herein referred to as the Commission) shall conduct investigations under the following Terms of reference (as gazetted under gazette number: 7838)

The Commission is established by the Premier to investigate claims relating to the bogosi of the Bapo Ba Mogale and to determine:

1. Bapo I

- 1.1 Hierarchy of the houses constituting the Bapo Ba Mogale royal family.
- 1.2 The rightful ruling house.
- 1.3 The rightful heir to the bogosi of the Bapo Ba Mogale.
- 1.4 Members of the Bapo Ba Mogale royal family.
- 1.5 Members of the Khuduthamaga of the Bapo Ba Mogale.

2. Bapo II

- 2.1 To investigate whether the bogosi of the Bapo I and II traditional community is properly constituted and in accordance with the customs of the traditional community and determine the rightful successor to the bogosi of the Bapo I and II traditional community.
- 2.2 To determine the relationship amongst the Mogale clan, the Maimane sub-clan and the Moerane sub-clan.
- 2.3 To identify the legitimate members of the Royal Family and the Khuduthamaga of the Bapo I and II traditional community.

Given under my hand and seal at **MAHIKENG** on**November 2017**

PREMIER: NORTH WEST PROVINCE

MEC: CULTURE, ARTS AND TRADITIONAL AFFAIRS

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 Kgosi to Kgosi in Mochudi and Moruleng.
- 2.4 Kgosi 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 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 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 Kgosi wishes to remove the Kgosi from office, he can only do so in accordance with sec 14(1).
- 2.8 Kgosi 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 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 Kgosikgolo.

1.2. According to custom and tradition, Kgosikgolo 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.