‘The Richest Tribe in Africa’:
Platinum-Mining and the Bafokeng in
South Africa’s North West Province,
1965–1999*

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The Bafokeng are a Setswana-speaking community long settled near present-day Rustenburg. This article focuses on their protracted legal battle with Impala Platinum in recent times to improve their royalties. It also analyses the interconnection of this struggle in the 1980s with the political consequences of Bafokeng incorporation into the apartheid ‘homeland’ of Bophuthatswana under Mangope. The injustices of the Mangope era endured by the Bafokeng are detailed extensively here. Subsequent Bafokeng court action against the powerful mining conglomerates made legal history. The final outcome in 1999, very favourable to the Bafokeng, changed forever the relationship between mineral owners and holders of mining rights in South Africa.

Introduction

The Bafokeng are Setswana-speaking people who lived as a distinct community close to the modern town of Rustenburg from the end of the seventeenth century (see figure 1). Their capital towns were established at Phokeng and Luka by the mid-nineteenth century. Enduring the vicissitudes of the difaqane and the arrival of the Voortrekkers in their region in the first four decades of the nineteenth century, the Bafokeng began to acquire land, most of which had been occupied by the immigrant Boers. By the turn of the century, 22 farms had been purchased. In the twentieth century, another eleven farms were bought. Initially, they were registered in the names of the missionaries of the Hermannsburg Missionary Society who worked among the community from 1867. Later, when the legislation regarding land purchase changed, several others were purchased in trust for the Bafokeng and registered in the name of the Superintendent of Native Affairs or the President of the South African Republic (or the Transvaal). These measures were resorted to because the Bafokeng, like all Africans in the Transvaal, could not acquire formal title to land. It left their status as regards ownership of the land in later years somewhat imprecise. This property was communally purchased, under the auspices of the Bafokeng chiefs, to use for stock-grazing and for agriculture, although the quality of the soil and general aridity rendered several of the farms fairly unproductive. The procedures involved in purchasing land were complex and gave rise to numerous and enduring legal administrative problems with the missionaries, the state and local Boers that continued until the 1930s.1

* We are grateful to the late leader of the Bafokeng, Lebone Molotlegi II, the Royal Bafokeng Council, Mrs Semane Molotlegi and individuals from among the Bafokeng who have assisted in this project, part of a larger history of the Bafokeng which has recently been completed. A special word of thanks goes to James Sutherland, lawyer for the Bafokeng, whose assistance in the compilation of this article was invaluable. For their courage and endurance, we acknowledge all of them.

Figure 1. The location of the Bafokeng.
In 1921, an ore-bearing reef, known as the Merensky reef, was discovered in the so-called Bushveld Complex, spanning South Africa’s present-day North-West, Northern and Mpumalanga Provinces. This discovery and clear evidence of platinum ore close to Rustenburg, initiated a scramble for mineral rights and dozens of companies were formed overnight, shares being bought and sold at staggering prices.\(^2\) It soon became evident that most of the best platinum-bearing ores were on Bafokeng land, and numerous deals between private and often shady prospectors and the Bafokeng were entered into. Unscrupulous individuals attempted, of course, to obtain the best options available, and rights were often sold off to other prospectors without Bafokeng knowledge. Similarly, individuals among the Bafokeng tried to enter into private contracts without the permission or knowledge of the majority. The result was that the Bafokeng were forced to take the litigious route to safeguard themselves, but they quickly grasped the benefits to be gained by resorting to the law; and the tactic was ultimately to prove profitable. Generally speaking though, platinum-mining, because of the complexity of the extraction process and the huge capital outlay required, was not particularly profitable. By the 1960s, although the royalties the Bafokeng earned could be described as a windfall, they were by no means substantial, and tended to fluctuate as mineral rights changed hands or simply lapsed. By the late 1960s, however, this situation had changed dramatically.\(^3\)

In 1968, Impala Prospecting Company, a subsidiary of Gencor, entered into certain Notarial Prospecting Contracts with the Bafokeng. Prior to this, Anglo-American Platinum (Amplats) had been the major platinum-producer in South Africa. These two companies broadly represented the interests of English and Afrikaner capitalists, Gencor having originally been the Union Mining Corporation, an initiative (despite its name) of the National Party government to empower an Afrikaner capitalist class. A major shareholder in Gencor is Sanlam, in turn controlled by the Rembrandt group, both bastions of Afrikaner economic power and control. With the acquisition of leases on Bafokeng-owned land, moreover, Impala positioned itself to become the second largest producer of platinum in the world. The capital reserves and mining skills Impala and Amplats introduced to platinum mining led to increased production and unprecedented profits. This development catapulted the Bafokeng into a new, potentially hazardous state of affairs. This article traces how the Bafokeng ‘took on’ these powerful mining conglomerates to emerge after a protracted dispute in a very strong position with regard to royalties. This struggle had two distinct dimensions, legal and political, although – as will become evident – they became inextricably linked. The political dimension was caused largely by the fact that, from 1977, the Bafokeng found themselves living within the borders of Bophuthatswana, a South African ‘homeland’ under the control of Lucas Mangope. From the outset, the Bafokeng experienced problems with this situation, which became more pronounced as the fight for mineral control heated up. The extent and nature of the political oppression brought to bear on the Bafokeng by the Mangope regime are documented fully for the first time here. As will be seen, this contest made legal history and changed forever the relationship between the mineral owners and the holders of mining rights in South Africa.

**Impala and Royalties: The Early Period**

Under South African mining law, Impala approached the Bafokeng in 1966 to obtain a prospecting agreement, which gave the company the right to explore their reserves to determine their viability. Under this agreement, a provision was made to grant Impala the

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\(^3\) As outlined in the paragraph below and the account following, which is drawn substantially from interviews with James Sutherland attorney with Bell, Dewar and Hall, who represented the Bafokeng.
right to exercise an option to obtain a mining permit to mine the mineral reserves. This was
demed acceptable because of the enormous costs incurred in prospecting. The prospecting
agreement also sets out the royalties the owner of the mineral rights should receive, and the
period for which those rights would be granted, should the company take up its option to
mine. After completion of the prospecting, Impala approached the Mining Leases Board for
a mining permit, the granting of which had to be accompanied by proof of the viability of
the reserves. The company’s financial capacity to undertake mining in the Bafokeng
reserves was then formalised in a mining lease or title. The owner of the mineral rights did
not have to be approached in order to obtain the mining lease, and the mining company was
given power of attorney for those rights on their behalf. The odds, therefore, were stacked
against the owners of the mineral rights even in law.\footnote{Interview with James Sutherland, 3 August 1999.}

The Bafokeng approved of these arrangements, but only after a general meeting of the
community had passed a resolution expressly authorising the Minister to enter into
agreements on their behalf. In 1977, the mining leases in respect of what was termed the
First and Second Bafokeng Areas were registered. For the sake of convenience, we refer to
these as the ‘1977 agreements’, although they came into effect at an earlier period. The
royalty payable to the Bafokeng, in terms of the ‘agreements’, was 13 per cent of taxable
income. Impala had the right to mine for a period of 35 years, from the time that the mining
permit had been granted – in other words, until the right terminated in 2003. This right
enabled them to mine two reefs, the Merensky and UG2 (reef). In the mid-1980s, Impala
became aware of the need to obtain access to the third Bafokeng area, known also as ‘the
Deeps,’ because the UG2 reef was becoming less profitable to mine, and ‘the Deeps’ held
the promise of better reserves.

At this point, some attention needs to be given to the issue of royalties. Historically, the
relationship between a mining company and the owners of mineral rights in South Africa
has been an unequal one or, as James Sutherland (lawyer to the Bafokeng from the
mid-1990s) puts it, ‘the playing fields are skewed’. The owners, usually farmers or black
communities, are not able to match the high-powered mining experts that the big companies
employ, and are not knowledgeable enough to analyse or evaluate the information, which
relates to mining operations or mineral exploration. According to Sutherland, he was
informed by a ‘doyen’ of the mining industry, who sat in on meetings between mining
representatives and the owners of mineral rights, that the owners would have to ‘listen to
a litany of lies as the mining representatives told the owner what the deal was about’.\footnote{Ibid.}

In the case of base metals, where there is a more plentiful world supply, the chances of a
disproportionate deal between owner and mineral exploiter is less than the case with rare
metals, because supply and demand have ensured the emergence of a general pattern of
royalties. In the case of platinum, however, the Bushveld Complex, the site of the Bafokeng
platinum reserves, contains the only identified significant reserves of the metal in the world.
Approximately 90 per cent of the market is in the hands of South African mining houses,
60 per cent under Anglo-American and 30 per cent in the hands of Impala Platinum. The
struggle to control and mine these reserves, therefore, takes on a more pronounced emphasis
in which powerful mining interests will invest significantly more resources in order to
obtain the best terms possible.

On examination, both the pattern and amount of royalties paid to the Bafokeng reveal
a very interesting picture. First, there is no clear rate or means of determining the royalty
sum. Thus, the first royalty provided for 4 per cent of taxable income. This increased over
the years to 5 per cent, then 7 per cent, then 10 per cent, which was the Amplats royalty
figure, paid before 1968. The basis of determining royalty is, therefore, purely arbitrary, and usually just an improvement on a previous rate. Secondly, in arriving at taxable income, mining companies are entitled not only to deduct their capital expenditure but also their future capital expenditure, on the basis that the high capital costs of establishing a mine require a form of tax relief to allow for a reasonable cash-flow release. The effect of this deduction is that, in certain years, a mining company can make a substantial profit, but because there is provision for future capital expenditure, there is no taxable income. However, having made a profit, the company will have a distributable income, which it will distribute as a dividend to its shareholders, but the owner of the mineral rights, because royalty is based on taxable income, might very well receive no or very little payment in royalties. Thus, not only are the cards in a legal sense stacked against the mineral-owner, but so, too, the mining company holds the financial aces.

A glance at the returns on capital investment from 1971 shows that, up to 1978, the annual dividend paid to Impala’s founding shareholders varied from 30 per cent to 50 per cent on the capital provided. From 1980, shareholders received the following approximate returns on capital investment.6

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<thead>
<tr>
<th>Year</th>
<th>Return on Investment (%)</th>
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<tr>
<td>1980</td>
<td>88%</td>
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<tr>
<td>1981</td>
<td>97%</td>
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<td>1982</td>
<td>66%</td>
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<td>75%</td>
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<td>1985</td>
<td>117%</td>
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<td>1986</td>
<td>119%</td>
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<tr>
<td>1987</td>
<td>141%</td>
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A statement by the Bafokeng community in the Sunday Times, South Africa’s largest selling newspaper, concluded that ‘it would be fair to say that Impala has been the cash cow of the Gencor Group, providing the Group with a significant portion of the capital that has enabled it to become one of the leading mining houses in South Africa’.7

The Bafokeng, however, did not receive their first royalty until 1978. ‘It seems breathtaking’, they later observed, ‘that … the Bafokeng Community, the owner of the ore reserves, is referred to for the first time in Impala’s Annual Report published in 1988, twenty years after Impala commenced mining operations. In that same report, the amount paid for royalties during the financial year was set out separately for the first time!’8 Indeed, had the Bafokeng not been embroiled by then in a legal dispute with Impala, probably no reference would have been made to them at all in the report. The Bafokeng were paid interest-free advances on royalties to be paid in the future, being equivalent to 10 per cent of the dividends declared. To conclude, the Bafokeng by the mid-1980s had received royalties for only seven years, which in any event were pretty paltry. Furthermore, as Sutherland observed, ‘at no stage did Impala acknowledge that there was an inherent problem in the manner in which royalties were calculated and agree to another fairer formula’.9

In 1985, for reasons already mentioned, Impala approached the Bafokeng to obtain an expansion of mining operations to include the Third Bafokeng Area or ‘the Deeps’. This provided their leader at the time, Kgosi (King) Edward Lebone Molotlegi,10 with the

7 Ibid.
8 Ibid.
9 Interview with James Sutherland, 3 August 1999.
10 The Bafokeng prefer to refer to their chiefs as ‘kings’, and we use the terms interchangeably.
opportunity to put forward a number of queries and complaints regarding the issue of royalties, describing the payments made to the Bafokeng as a ‘pittance’ and raising the thorny issue of trusteeship over Bafokeng land. The Managing Director of Impala, D. A. Ireland, wrote back attempting to clear up ‘possible misunderstandings’, and arguing that the royalty presented by the South African Development Trust Corporation was in respect of base mineral mining in South Africa, ‘where the going rate is 10 per cent of the net profit’.11 Needless to add, platinum cannot be viewed as a base metal. Ireland, however, did agree to raise the royalty from 13 per cent to 18 per cent of taxable income. The same letter sets out the royalties paid from 1979, which indicate that the Bafokeng received only 11.5 per cent of taxable income prior to the deduction of royalties.12 This led to correspondence between the two parties, which was settled in 1987 by an ex gratia payment to the Bafokeng of R4.5 million. In addition, it was agreed that the rate be changed from 13 per cent to 14.9425 per cent, which equated exactly to 13 per cent of taxable income prior to the deduction of royalties.

The Bafokeng, or certainly Kgosi Molotlegi, had by this time made overtures to another company, Bafokeng Minerals. This is suggested by the appointment of Charles Orbach and Company as Bafokeng accountants, the same firm as acted for Fred Keeley, chairman of Kelgran, South Africa’s major granite-producer. In December 1986, the Bafokeng concluded a deal with Bafokeng Minerals, which granted the company the right to mine the Third Bafokeng Area, or ‘the Deeps’. The company was 75 per cent owned by Keeley, with the Bafokeng and Edward Molotlegi owning the remaining 25 per cent. As the Bafokeng were unhappy with the position in relation to Impala, the motives for this deal are perhaps understandable. However, its wisdom could be questioned. In terms of the agreement, Bafokeng Minerals had little understanding of the finer financial aspects of mining. Indeed, one is forced to see Keeley’s motive in terms of the acquisition of mineral rights to ‘the Deeps’, which he then could sell off to a third party. And indeed, this is precisely what did happen in 1991, when Keeley sold off the mineral rights to Genmin for R7 million.

The right to mine ‘the Deeps’ was, however, of little value unless it was accompanied by information relating to prospecting and mineral deposits in that region, information that was extremely costly and arduous to obtain. The Bafokeng, therefore, attempted to obtain such information from Impala, which had more substantial knowledge and experience at hand. This triggered off a series of events which pitched the Bafokeng, on one hand, and the Bophuthatswana regime and Impala on the other, into a prolonged course of conflict and litigation, which, if avoided, would have saved both parties, and those thousands of people who had a stake in them, enormous amounts of time, money and stress.

Impala initiated an approach to the Bophuthatswana government, essentially to see if there was any means of forestalling the Bafokeng demand for access to information and to inquire if the ‘homeland’ government could in any way assist in obtaining a mining lease over ‘the Deeps’. Representatives of Impala and Gencor met the Bophuthatswana Minister of Economics, Energy Affairs and Mining, E. Keikelame, and then Lucas Mangope, in October and November 1987. Finally, it was agreed that Impala would write to Keikelame stating its objection to furnishing the information, and would then invite his intervention.

Keikelame duly responded on 9 December 1987, instructing Impala not to divulge any information unless ‘instructed to do so by the trustee of the tribe’.13 This decision was

12 Taxable income is income less expenditure. In arriving at income one has to deduct all expenditure, including payment of royalties. This is a complex and circular calculation, but the Bafokeng were being paid less than the amount of 13 per cent.
13 High Court of South Africa, Bophuthatswana Provincial Division, Case No.1716/95, between Bafokeng Tribe (Applicant/Plaintiff) and Impala Ltd, and Bophuthatswana Ministers of Departments of Energy Affairs, Land Affairs and President of the Republic of South Africa (Respondents), p. 12 (henceforth Case No. 1716/95).
transmitted by Impala to the Bafokeng on 10 December 1987. The Bafokeng lawyers, Melamet and Hurwitz, then wrote to Impala’s attorneys, advising them that their client intended to apply for a declaratory order that the notarial cession had been cancelled. This was perhaps not a prudent step; a better course of action might have been to apply for a mandamus, or an order compelling a party to furnish certain information. Nevertheless, it led to a series of further meetings between senior officials of Mangope’s government and Impala so that they could prepare a common defence to the Bafokeng application.

To sum up, the significance of this development was, first, to pitch Impala and the Bophuthatswana government into an alliance that would harden the differences between them and the Bafokeng and, secondly, to introduce a marked political dimension to the conflict, inserting into the legal dispute the notion of trusteeship as a crucial argument. It also offered certain Bophuthatswana officials the opportunity to extend their venal interests. The salary of the Bophuthatswana Minister of Finance, Leslie Young, was ‘augmented’ by Gencor. Later, the lawyers acting for the Bafokeng were able to allege that payments had been made to other officials as well.

Inevitably, when the matter came to the Bophuthatswana Supreme Court, it was ruled by Judge Smith that the Bafokeng could not terminate a contract between them and Impala. Judge Smith could have dismissed the action on perfectly sensible legal grounds. The first of these was that the land over which the mining leases were granted included not only the Bafokeng’s First and Second Areas, but also land owned by the South African Development Trust (SADT), or state land, and in order to terminate the agreement it would have required the consent of the owner of the SADT land, because it was an indivisible contract. Secondly, a breach of this nature, over refusal to disclose information, does not warrant termination. However, in Sutherland’s words, Smith ‘went on a complete frolic’. He went on to dismiss the action on the ground that the Bafokeng did not own the land, but that the trustee, Mangope, in fact did so. Mangope’s trusteeship, it should be remembered, arose from the fact, that, as ‘president’ of Bophuthatswana, he now assumed the powers of the former Minister of Bantu Affairs in South Africa. In the short term, this was extremely damaging to Bafokeng interests and their legal standing, but later, the Bafokeng lawyers were able to turn Smith’s contention on its head.

**Political Turmoil in Bophuthatswana**

However, this is to anticipate later events. In the short term, the Bafokeng were not able to appeal against the judgement because it became impossible to convene tribal meetings to pass the appropriate resolutions to do so. How this transpired, and the political events ensuing, will now be considered. In February 1988, a former politician and leader of the People’s Progressive Party in Bophuthatswana, Rocky Malebane-Metsing, attempted to overthrow Mangope in a coup, which was aborted, largely due to the intervention of the South African Defence Force. Metsing was from the Bafokeng area, which was also the site of all six of the opposition seats in the Bophuthatswana parliament. This played into Mangope’s hands, for it gave him the opportunity to single out the Bafokeng, and Lebone Molotlegi especially, for special treatment. Major-General Seleke, Bophuthatswana’s particularly severe Commissioner of Police, pronounced Kgosi Molotlegi to be ‘one of the pioneers of the coup’. Subsequently, this was modified to Molotlegi having lent Metsing

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14 Case No. 1716/95, p. 52 and p. 111. It emerged when Mangope wrote to Sol Kerzner, Chairman of Sun International and renowned hotelier, asking him to make an ‘adjustment’ to Young’s salary augmentation by Gencor to take account of inflation. This would amount to R20,000 per annum, and would have been ‘appreciated as another contribution you are making to Bophuthatswana’. See Mangope to Kerzner, 6 April 1987.
money, presumably to finance the coup. According to Kgosi Lebone Molotlegi, Mangope ‘frequently took the Bafokeng tribe to task for having elected members of the opposition party’.15

Kgosi Lebone was in Johannesburg at the Brenthurst Clinic, receiving treatment for a heart condition, when he heard news of the attempted coup. A few days later, on 14 February, a contingent of police arrived at his house allegedly looking for Metsing. Although Lebone had been requested to return to Johannesburg to receive the results of a medical test, he was taken to Mafikeng police station and then to Rooigrond prison near to Mafikeng, where he was interrogated about his illegal connections to the People’s Progressive Party.16 He then made a statement denying any connection to Metsing or his actions. He explained that he knew Metsing and had lent him money because, as a consequence of forming the opposition party, certain of Metsing’s loans had been foreclosed. His captors were served with an urgent court application, after which he was released. On 19 February, he returned to the clinic he had attended. The stress caused by his incarceration necessitated a blood transfusion.

On 19 March, on returning from work, Lebone found a large contingent of police at his house. As it was obvious that he would be re-arrested, he made good his escape in a kombi, which was mistaken by the Bophuthatswana security forces for a van belonging to a carpet company. He returned to Johannesburg and flew secretly from Lanseria airport to Botswana a few days later. Up to that point, only his wife knew his whereabouts.17 Later he took up residence at the Gaborone Sun Hotel, in the company of several bodyguards. The decision to flee to Botswana was obviously facilitated by his wife’s family connections in that country, and served to worsen relations between Bophuthatswana and Botswana, already strained by border disputes and wrangles over water rights.18

In the meanwhile, his wife, Mrs Semane Molotlegi, was also detained and spent ten days in Rooigrond prison, near Mafikeng. She, like her husband, was never charged, and was held in a cell with 51 other women of the Bafokeng Women’s Club. The injustice resolved them to ‘sue the police for the humiliation and inconveniences they had put us through’,19 but subsequently the women decided to leave the matter in abeyance. Though Mrs Molotlegi was able to return to Phokeng, the houses both of her family and of the other women were frequently raided by police allegedly looking for Metsing.

The Struggle for Leadership of the Bafokeng

Matters now turned from bad to worse. Lebone’s departure meant now that his position as King was vacant and it offered the opportunity for his opponents to interfere in Bafokeng affairs. The most senior person in the community was Cecil Tumagole, the King’s rrangwane (uncle). He was genealogically the most senior surviving grandson of the late James Manotshe, and had often stood in when the Kgosi was absent from Phokeng. For a few months, however, neither the lekgotla nor any of the tribal authorities could meet as Mangope had banned all meetings in the area. On 14 June, Tumagole and some senior men were instructed to come to Mafikeng to meet with Mangope personally. On being told that Tumagole had been requested to take over for Lebone Molotlegi, Mangope asserted this

15 Supreme Court of Bophuthatswana. Matter between Chief E. P. L. Molotlegi and Cecil Tumahole (Applicants) and President of Bophuthatswana and George Molotlegi (Respondents), Case M74/89, p. 7.
16 Case No. M74/89, p. 10.
17 Interview with Mrs S. Molotlegi, 11 March 1999.
was a ‘bedroom affair’ (i.e. an inside arrangement), and instructed them to call a meeting of all headmen to ascertain the position. Eventually, on 27 June, Tumagole summoned a meeting of over 70 headmen, accompanied by about 170 ward heads. The vast majority elected Tumagole as the rightful representative of King Lebone. A small group, led by Glad Mokgatle, indicated that they preferred Mokgwaro George Molotlegi, the Kgosi’s younger brother, as leader. Interestingly, this group comprised mainly members of Mangope’s Democratic Party who had been defeated in the 1987 elections. The government was reluctant, however, to accept the majority decision, and called for a second meeting of headmen on 1 July, at which government representatives were present. The result of this meeting was the same as the first. However, just to confirm the correctness of this decision, it was decided to refer the matter to the Bakgosing, or ward of the royal family. The two decisions were confirmed, even Glad Mokgatle agreeing to go along with the majority.

However, this led to the Bakgosing being summoned to Mmabatho to explain their decision to Mangope. At a series of meetings between July and September 1988, Mangope tried to get them to agree to a kind of joint control over the Bafokeng by Tumagole and Mokgwaro George Molotlegi. At this stage, Mangope’s preference for Mokgwaro, which had become obvious, was based more on the fact that Lebone had nominated Cecil Tumagole and it followed, therefore, that he would support the policies of the Bafokeng ruler, even though he was in exile.

On 3 October, although Tumagole and George were still ostensibly working together, Tumagole received a letter from the Secretary of the Bafokeng Tribal Authority terminating his employment as a councillor, as ‘it has become increasingly difficult for me [presumably meaning George] to work with you’. George had, with Mangope’s backing, effected a coup of his own. George packed his seven-man management committee with Mangope loyalists. As Tumagole concluded, ‘it is now accordingly clear that the tribe is being governed from Mmabatho, and not by its approved leaders’.

In March 1989, Bell, Dewar and Hall, the lawyers now acting for the Bafokeng, brought an urgent application to have George’s appointment as Bafokeng Chief set aside and Cecil Tumagole validly installed as Lebone’s deputy. It was contended that it was not necessary to have an acting chief whilst the current chief was in place, although in exile, and that Mangope had transgressed the Bafokeng’s law and custom in making the appointment. The case was heard before Judges Smith and Friedman in April 1990. The Bafokeng had wanted a referral to evidence, but the court rejected this and found that the Traditional Authorities Act empowered Mangope, as President, to ‘appoint and recognise George Molotlegi as acting chief of the tribe’, and that he had done so with due observance of the law and customs of the Bafokeng.

However, as Sutherland points out, ‘a tribe is an indigenous community and is governed by its own law and custom … it is therefore a voluntary organisation and you cannot impose a leader on a voluntary organisation’. Clearly then, the judgement was a poor one because it rested on wrong information. Naturally the Bafokeng, on advice from their lawyers, appealed against his judgement, and this appeal was duly heard before Judges Stewart, Galgut and Kotze. Kotze was a retired Judge of the South African Appellate division and Galgut had been an acting Judge in the same court.

20 Case No. M74/89, Affidavit of Cecil Tumagole, p. 4.
21 Case No. M74/89, Affidavit of Cecil Tumagole, p. 5.
22 See Secretary Bafokeng Tribal Authority to Mr C. Tumagole, 25 November 1998.
25 Interview with James Sutherland, 3 August 1999.
The Defamation Case

Before the appeal was heard, however, an interesting and significant cameo was played out involving a Pretoria academic by the name of R. D. Coertze. Professor Coertze published a book, *Bafokeng Family Law of Succession*, the first edition of which suggested at one point that Edward or Lebone was the ‘only’ son of James Manotshe. In fact, this was a transcription error in the translation from Afrikaans. The relevant sentence should have read, ‘As Edward was the eldest [not only] son, he was considered the only natural successor’ i.e. the phrase ‘oudste seun’ became ‘enigste seun’. In fact, at several other points Coertze makes quite clear that Manotshe had two sons, Edward and George. However, in the politically charged context of the time, Coertze’s statement could have proved damaging to Mangope and George’s position. The professor was summoned to Mmabatho to see Mangope and was forced to publish a retraction, which was read out in its entirety on radio and television on 16 March 1989 and published in the *Mafikeng Mail* and *Sunday Times*. However, in this extraordinary and ill-conceived alternative, Coertze went several steps further than was necessary. In the radio statement, he reduced Lebone’s status to that of ‘former kgosi’ of the Bafokeng, and then published a second edition of the book in which George’s status was elevated way beyond his rank. Even worse, he insinuated that the original error occurred because Lebone had deliberately misled him over the issue. In addition to this he erroneously referred to Cecil Tumagole as Cecil Molotlegi.26

Not surprisingly, Coertze was served with an action for defamation by Bell, Dewar and Hall acting for Kgosi Lebone. Initially, he was served with a letter demanding that he apologise to Lebone Molotlegi. Its contents were communicated to George and Mangope, and their advice was sought as to how to respond. Coertze added that he had no desire ‘in any way to be associated with that man’ [E. P. L. Molotlegi]. Coertze was in fact in a complete double bind. Clearly he had defamed Kgosi Lebone and reduced his role in the affairs of the Bafokeng. Yet he had publicly retracted his earlier findings and now to contradict himself by means of an apology would both appear ludicrous and antagonise his new patron in the person of Mangope. An apology was therefore not given and the defamation case then proceeded.

It was evident to Coertze’s lawyers that he had defamed the Bafokeng king; he therefore admitted the defamation and offered to pay compensation. The only issue was the sum he should pay. Coertze made a payment into court of R30,000. If the plaintiff could not prove damages in excess of this amount, Coertze would then not have to pay the costs of the case. However, according to Sutherland, ‘both Edward and I felt that the matter should go to court because it was an opportunity to expose the skulduggery of both George and Mangope’. In addition to this, because Coertze was employed by the University of Pretoria, the case could be heard in the Supreme Court in Pretoria, rather than risking the vagaries of a Bophuthatswana court. In his judgement, Justice I. W. B. de Villiers found that Coertze had exhibited ‘ulterior motive’ in the content of the press statement and the second edition of his book and that he was ‘the tool of others’, obviously George and Mangope who wished to ‘decrease the role that the plaintiff played in the affairs of the tribe and his achievements’.27 The Judge criticised Coertze’s continued failure to apologise satisfactorily to Mr Molotlegi despite admitting the defamation, this being a ‘factor which aggravates the damages to be awarded to the plaintiff’. That Mangope was probably prepared to bankroll the costs of the action is suggested by Justice de Villiers himself when he criticised Coertze for being ‘apparently quite prepared to have an action for damages instituted against him’.

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26 See Case No. 14286/89, Supreme Court of South Africa, Transvaal Division, Matter between E. P. L. Molotlegi (Plaintiff) and R. D. Coertze (Defendant), Judgement of Justice J. de Villiers, pp. 20–29.

27 Case No. 14286/89, Judgement of Justice de Villiers, p. 51.
The result was a stunning legal victory for the Bafokeng. Their Kgosi was awarded damages to the tune of R40,000 – at that time ‘by far the highest amount ever awarded in South Africa for personal defamation’. The amount was not the principal issue, however. As James Sutherland stated, it ‘showed the extent to which George and Mangope were prepared to collude to do anything in their power to try and discredit Edward’. Even more importantly perhaps was that the defamation case had an impact on the mind of Judges Stewart, Galgut and Kotze, who were preparing to give judgement in the Appeal Court over the chieftainship issue.

In September 1991 the first judgement on this issue was overturned on the grounds that Mangope was required to observe tribal law and that the matter should be referred for oral evidence to the court a quo. The costs of the appeal were to be borne by the respondents. In effect, however, the result of this judgement did not overturn George’s appointment as ‘Acting’ chief, and Mangope’s lawyers did everything they could to prevent the matter from coming to court. Another obstacle was the impossibility of holding tribal meetings, which were necessary to discuss the issue and obtain the rightful mandate upon which to act. In fact, the matter dragged on until 1994, after Mangope’s fall from power following the advent of a new political order in South Africa. So a kind of stalemate existed from 1991 to mid-1994 regarding the chieftainship issue.

Mrs Semane Molotlegi and the Bafokeng Women’s Club

This was not the end of Mangope’s hounding of the Bafokeng. He now turned his attention to the Bafokeng Women’s Club (BWC), in which Mrs Semane Molotlegi was an active participant. Formed in 1970 as a welfare organisation, the BWC’s object was to promote ‘social, Christian education and good fellowship’, and to raise living standards in the community. It also ran a sewing project called Mahube Fashions. From 1983 tension arose between Mangope and the Women’s Club, because he saw it as in opposition to the Women’s League, which openly supported the ruling party in Bophuthatswana, and whose President was Mangope’s wife. Mrs Molotlegi’s response to this was to suggest that she had offered women in Phokeng the opportunity to join either organisation, as was their right in a so-called democratic dispensation. Harassment of the Women’s Club continued however, and in April 1987 the police stopped it from addressing pupils in the local schools. In order to try and resolve the issue, the BWC executive held a meeting with Mangope during which he alleged that the club ‘turned to politics and that it was using teachers’. It was pointed out that the BWC had never been a political organisation. Shortly after the attempted coup, in June 1988, the BWC was banned from holding meetings and effectively ceased to function. Although Mrs Molotlegi requested reasons for the club’s closure, no response was forthcoming and she was visited at her home and warned not to try to hold any meetings.

The closure of the BWC and its affiliate, Mahube Fashions, was accompanied by personal harassment of Mrs Semane Molotlegi and other members of the club. First, the telephones at home were cut off, then their passports were confiscated and the keys of the Civic Centre taken from them so the building could be searched. On 14 February, without search warrants, the Molotlegi home and that of the Kgosi’s late mother were searched. Mrs Semane Molotlegi was then detained, like her husband, and held in Rooigrond prison.

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29 Case M170/88, Affidavit of Semane Molotlegi, p. 22.
31 Case No. 70/88, pp. 12–13.
finally being released on 23 February after attorneys had issued an urgent application for her release. No charges were laid against her, nor was she informed as to why she had been detained. This was followed by what can only be interpreted as a threatening letter from Mangope. Details regarding her personal identity documents were requested, she was advised that she should not call meetings or threaten people, and should realise that she ‘was only the chief’s wife and not the chief himself’. Her answers to these questions were recorded. She denied most charges, but pointed out that she had the authority, indeed it was her responsibility, to assist her husband in his duties. As proof of Bafokeng acceptance of her status, she explained that she was affectionately known as ‘Mmemogolo’ (grandmother) by them.

Four ‘searches’ of the Molotlegi home were conducted in April and May, all of them in the early hours of the morning, all of them without the production of a warrant. In mid-May Mrs Molotlegi became ‘concerned about the psychological effect which these searches at all hours of the night’ would have upon her family. On 3 June, during working hours, the police entered her house to demand where she was holding the ‘meeting’, a palpably ridiculous question as she had been applying to the authorities for permission to hold meetings to discuss the current crisis and in any event returned to her house from Johannesburg shortly after the search commenced. At this point Mrs Molotlegi decided to write to Mangope to see whether he would be willing to meet to ‘discuss the various problems which I and [the Bophuthatswana Minister of Law and Order] were encountering [with one another]’. The letter was sent to Mafikeng with Cecil Tumagole, on one of his regular summonses to the seat of government, but Mangope refused to accept it, responding only to say that ‘he did not talk to women’. She faxed it the next day, only to have the fax returned. A similar pattern of harassment – searches, demands to give up the whereabouts of the Kgosi interrogations at the Phokeng police station – continued into July. In August, Bell, Dewar and Hall, on behalf of Mrs Molotlegi, brought an urgent application before the Supreme Court of Bophuthatswana to interdict Mangope, the Minister of Law and Order and the police from banning meetings, interfering with the activities of Mahube Fashions or harassing Mrs Molotlegi in the ways described above.

In November, the Judge, Justice M. Friedman, ruled in favour of the Applicants. He ruled that the ban on meetings of BWC was unlawful, as was that on the operations of Mahube Fashions, and he interdicted the relevant government ministries and officials from interfering with the affairs of these two organisations and from ‘unlawfully harassing’ Mrs Molotlegi in the manner described above. This success was, however, short-lived as the interdict was overturned by the Bophuthatswana Supreme Court in December, the Judge (A. J. Lawrence) finding that the Applicant (Mrs Molotlegi) had failed to discharge the onus on her to show male fides on the part of the Minister of Law and Order, nor did she show conclusively that the Minister had acted in an ‘arbitrary and/or capricious manner’ or that he failed to ‘exercise a proper discretion’ in carrying out his duty. The overturning of the interdict was an enormous disappointment, but according to Mrs Molotlegi, she and the women in the BWC had been expecting that Mangope’s courts would ultimately side against them.

Early in 1989, Mrs Molotlegi was advised to apply for permanent residence in Bophuthatswana, as she possessed South African documents, and was granted a three-month visa. When this expired in March, it was not renewed and she heard on the radio that she should be out of Phokeng by midnight on 21 March. She left for Johannesburg, where she lived with her son, the current Bafokeng leader, for a year. She remained in contact with

32 Case No. 70/88, p. 19, and interview with Mrs S. Molotlegi, 11 March 1999.
the Bafokeng through this period. The Roman Catholic Mission near Phokeng actually lay outside the border of Bophuthatswana and from here it was possible to liaise with her Bafokeng supporters.34

By late 1991, with the court actions pertaining to political issues now over or temporarily in abeyance, the lawyers acting for the Bafokeng could take up the issue of mining and royalties with more determination. In its 1990 Annual Report, Impala Platinum recorded that the 1990 agreements had been concluded and that their relationship with the Bafokeng had been restored. The report claimed that, at a meeting of 72 Bafokeng ‘councillors and headmen’, it had been resolved to authorise Mangope to act as Trustee. Other conditions in the alleged deal with the Bafokeng included:

- Impala’s right to mine the existing lease area until reserves were exhausted.
- Impala had acquired exclusive rights to prospect the ‘Deeps’ and intended to apply for a mining lease in respect of the ‘Deeps’.
- A royalty of 16 per cent would be payable in respect of taxable income on mining operations on the ‘Deeps’; and
- The Bafokeng acquired the right to subscribe for up to 7 per cent of the equity of the Impala group.

These conditions did not substantially improve the Bafokeng’s royalty earnings, for the 16 per cent royalty on the ‘Deeps’ was only 1 per cent more than that which applied to the existing areas, and was less than an offer made in 1985 to pay an 18 per cent royalty on the same area.

The Bafokeng ruling family and many headmen felt these ‘facts’ bore little resemblance to the truth. Therefore, on Kgosi Edward’s investigation, it was decided, as a matter of strategy, to attend Impala’s annual shareholders’ meeting, in order to make known to shareholders this deliberate misrepresentation of the facts. James Sutherland and a number of other legal figures (advocate Robert Levin SC, Chummy Hurwitz and Mark Antrobus) obtained 65 shares in Impala, which enable them to attend the annual general meeting in 1992.35 On 14 September, Sutherland wrote to Gencor Managing Director, Mike McMahon, giving notice that the legality of the lease and other matters, particularly the allegation that a harmonious relationship existed between the two parties when the rightful Bafokeng leader was in exile, would be raised. McMahon in turn warned Sutherland not to make reckless accusations against Impala’s management. The tone was obviously set for a hostile meeting, which it was. The meeting, which took place in the basement of Gencor’s Union House, was described by the press as a ‘brawl’, and Sutherland and his team as the ‘LA Law team’, in reference to the popular television programme about ‘activist’ lawyers.36 Gencor Chairman, Brian Gilbertson, described the lawyers’ questions as outrageous and was clearly rattled by the ‘corporate raid’. Sutherland retorted that Gilbertson’s attitude was ‘arrogant’. The Sunday Star claimed that ‘neither side won the brawl’, but in retrospect, the action was highly successful in publicising Edward Molotlegi’s claims and raising doubts in shareholders’ minds about the legitimacy of Gencor’s alleged deal with the Bafokeng. This in turn would impact negatively on the share price of Impala. As Sutherland says, the raid was part of a strategy to ‘keep the issue alive’, at a time when Impala and Mangope had the upper hand.

34 Interview with Mrs S. Molotlegi, 12 March 1999.
35 Interview with James Sutherland, 3 August 1999.
Mangope’s Fall: Towards a Restoration of Normality

The next episode in the saga of Bafokeng late twentieth-century history began with the ousting of Mangope. Political pressure mounted on Mangope after the unbanning of the ANC but, frustratingly for most of the Bafokeng, he adopted a policy of political alliance with the white right wing and prevented the ANC from operating in Bophuthatswana. While such uncertain circumstances persisted, Edward Molotlegi could not return to Phokeng, nor could his wife. In March 1994, however, in a dramatic and popular uprising, Mangope was ejected from power. The scene was now set for the Bafokeng to resume the struggle for control over their political and economic affairs.

Edward returned to Phokeng in mid-1994. In August, the Supreme Court of Bophuthatswana put aside the ruling of the Appellate division on the grounds that a ‘reviewable’ error had occurred. George’s appointment was overturned, Edward was reinstalled, and Cecil Tumagole got his job back at the Bafokeng Administration. Costs, including those of the expert witness, Professor M. W. Prinsloo, were borne by the new government of the North-West Province.

As far as the impasse with Impala was concerned, Kgosi Lebone Molotlegi, after his return, opted for a course of mediation. For ten weeks, Bell, Dewar and Hall entered into discussions with Impala. What was significant about this mediation was that Sutherland, who was heading the legal team, accompanied by financial and mining experts, had complete access to Impala’s finances and its activities, which was a legal breakthrough for the owners of mineral rights in South Africa. Although the talks went off fairly well, the Bafokeng turned down the proposal which was arrived at. These talks were confidential, which makes it difficult to arrive at precise reasons for the failure of the attempted mediation. Sutherland, however, is on record as saying that talking to Impala was like ‘talking to a brick wall’. Had this mediation been successful, it would have been the end of enormous expenditure of resources for all parties concerned.

Bell, Dewer and Hall were therefore instructed to continue action to set aside the 1990 agreements. The fact that they had been given full access to information, which had formerly been confidential, gave Sutherland ‘the ammunition to negotiate on a meaningful basis in the future’. In November 1995, King Lebone, who had not enjoyed good health for several years, passed away. His death and the subsequent assumption of power by his son, Kgosi Lebone Molotlegi II, obviously slowed down legal proceedings to some extent. However, in January 1996, the action was instituted to set aside the 1990 agreements. The intention was not necessarily to terminate all dealings with Impala but to obtain a fair royalty deal that would be binding on the company.

An interesting development which then occurred was the opening of negotiations for a merger between Impala and the British-based mining company Lonrho, because it would have legal implications, necessitating the matter going to the European Commission for approval. In addition, the platinum reserves to which Lonrho had established rights were shallower than those of the Bafokeng and could be mined more cost-effectively. There was an element of risk, therefore, that Lonrho might not be prepared to negotiate with them. In February 1996, an offer was made to Impala before the merger had been concluded, whereby the Bafokeng proposed an extension of the royalty rate to 21 per cent, with a minimum rate of R10 million per annum, escalated at the rate of inflation. There was also provision for a capital sum for social development of the community, and for various verification procedures. Because of the impending merger, Impala were given a deadline by

38 Interview with James Sutherland, 4 August 1999.
which to respond, which they simply ignored. As Sutherland explained, ‘we couldn’t understand why they ignored the offer as it was an olive branch from the new Kgosi who was anxious to resolve this matter’. McMahon’s response was to put out a press statement implying that the Bafokeng were pointing a gun at their heads. Sutherland speculated that the reason for this blank refusal to consider the offer was that Impala had a good relationship with Kgosi Lebone Molotlegi II while his father was in exile, and felt they might be able to strike a more advantageous deal. However, it was soon apparent that the new king differentiated between his private relationship with the company before he assumed power and his responsibility as leader after he did so.

The Bafokeng lawyers now turned to another approach. As Lonrho was soon to be a major player, an approach was made to Tiny Rowland, the head of Lonrho, via his lawyers, to request that the Bafokeng be allowed to participate in the negotiations leading to the merger. Sutherland was informed that he could not participate in his own right, but could attend the hearing as part of the Lonrho team. The implications of the Lonrho–Impala merger need to be identified at this point. When Impala signed the 1990 agreements, they concluded that they need not renew the 1977 agreement, whereas in fact the agreement had to be renewed after 15 years, then for further periods of ten years. Perhaps this was a tactical blunder on their part; perhaps it was a sign of overconfidence. If, however, the 1990 agreement had been terminated, the Bafokeng could have asked Impala to account for its profits from mining from 1993. The motive for the merger may lie in this fact, because it would have allowed Lonrho to mine reserves in the Bafokeng area and therefore mitigate any possible future claims for damages against Impala specifically. A further possible motive might have been to afford Impala the opportunity of mothballing or sterilising their reserves and to mine on the Lonrho reserves, which would have put an end to the Bafokeng royalty stream. The merger was presented to the Impala shareholders as a *fait accompli*, before it had been presented to the European Commission for draft approval, an event that Sutherland labelled as ‘irresponsible’.39

At this point, Impala went on the offensive. It would seem that this was an ill-advised step, given that a new political dispensation was in the offing, and that the dissolution of Bophuthatswana meant that Impala had lost an important ally. Conversely, this insecurity may have been precisely the reason for the decision by Impala to take exception to the Bafokeng allegation of ownership of the platinum-rich reserves. Their case rested on the issue of *locus standi*. Impala wanted to challenge the status of the Bafokeng as legal owners of the land, because if they were not, then it would render them incapable of bringing the case against the Company to set aside the 1990 agreements. Secondly, Impala alleged that the Bafokeng were not owners of the land, but merely beneficiaries of a trust.

The matter was set down for hearing in March 1997. As both sides delivered voluminous heads of argument, it was set down for one and a half weeks. After receiving the Bafokeng’s heads of argument however, Bowman and Gilfillan, the lawyers acting for Impala, contacted Sutherland and offered to withdraw the exception if negotiations could be re-opened. This was agreed to by the Bafokeng, provided the 1990 agreements were considered invalid. This was a without prejudice concession. The Bafokeng Supreme Council then decided to enter into confidential negotiations, and a joint press statement was drawn up to inform all stakeholders of developments in this regard. The negotiations were to be held in two stages, the first being the ‘soft’ stage where a range of social issues relating to development of the Bafokeng community would receive attention. This would hopefully restore a semblance of understanding before the tougher financial issues were to be hammered out. This first stage, which took nearly

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39 Interview with James Sutherland, 3 September 1999.
three weeks, was very successful, in the sense that both parties were able to find common
ground.

However, when negotiations reached the second level, Impala gave a presentation on 27
April 1996, the gist of which was to inform the Bafokeng that the royalties they were
receiving were too high, but that Impala would accept the status quo. This was in
contravention of the agreement to negotiate on the basis that the 1990 agreements were
invalid. Having been brought to the negotiating table in bad faith, the Bafokeng delegation
withdrew, informing the Supreme Council that they believed they no longer had a mandate
to continue, a decision the Council endorsed. The results of this were published in the press
by the Bafokeng.

The Bafokeng’s legal team had accumulated an enormous amount of information on
Impala’s financial history in preparation for the hearing. Principally for the Bafokeng,
Sutherland published in the Sunday Times a summary of the arguments that he had intended
to present at the negotiations. Gilbertson, the Gencor chairman, apparently sought legal
advice on the report, believing that it defamed Impala. Nothing materialised, however, and
the report was almost entirely ignored by the financial press, an indication of the press’s
general bias towards the interests of the powerful corporate world, and the way in which
it could be manipulated by the financial giants. A short item in the Financial Mail called
the report ‘ruthless’. Sutherland’s counterpoint was that Impala had ‘used every trick in the
litigation process’ to prevent the Bafokeng from pressing their claims and that he was
justified in issuing the report. The decision to publicise the Bafokeng objection to
continuing negotiations with Impala in the national press did, however, bring it to the
attention of shareholders, and in many respects marked a watershed – Impala’s share price
did not recover again until February 1999, when the whole matter was finally settled.

The Bafokeng legal advisors therefore re-embarked upon steps to nullify Impala’s rights
to mine on Bafokeng land.\(^{40}\) Impala was now forced to plead their exception, setting out
their defence in two special pleas, one (already referred to) disputing the local standi of the
Bafokeng, the other a plea of issue estoppel (also known as res judicata). This argued that
certain issues had already been decided in the Bophuthatswana Supreme Court, which
precluded the Bafokeng from raising them again. Impala indicated that they were going to
apply for a separate hearing to deal with the two special pleas, which concerned the
Bafokeng legal team, because it felt that the evidential aspects of the special pleas would
overlap with the rest of the case, delay the process and add to costs. One also gains the
impression Impala was delaying the litigation process and turning it into a kind of war of
attrition.

In the meantime, the Minister of Land and Agricultural Affairs, Derek Hanekom, in his
capacity as the new Trustee of Bafokeng land, served his plea, essentially a carbon copy
of Impala’s. This came as a huge shock for the Bafokeng. It seemed incomprehensible that
an ANC Minister could side with Impala in such a matter. Their response was, as
Sutherland says, ‘fairly ruthless’, and a full-page advertisement was taken out in the press,
pointing out that no previous government had denied that the Bafokeng owned the land. The
Bafokeng legal representatives felt that Hanekom should simply abide by the decision of the
court. After meetings with his legal advisors, the Minister duly withdrew his opposition on
12 March 1998 and stated that he would abide by the court’s decision.\(^{41}\)

The hearing for the separation was merely for an order whereby the two special pleas
would be heard separately. Impala’s justification for this was that, if a court found in its
favour on the special pleas, then it would dispose of the entire action. Although the

\(^{41}\) G. M. Budlender, Director General, Department of Land Affairs, to Bell, Dewar and Hall, 13 March 1998.
Bafokeng lawyers believed otherwise, Judge Friedman, who presided over the hearing, adopted the attitude that it was in the interests of both parties that the special pleas be dealt with separately. This did not necessarily mean that the disposal of the issue would bring an end to the action. However, as an aside, Judge Friedman made two comments, the first that the Appeal Court had not disagreed with his finding in the chieftainship case, the second that it was in the interests of Impala that the matter be swiftly finalised, from which it was inferred that he felt Impala was going to succeed on the two special defences.

After the hearing, a discussion ensued between Sutherland and the Bafokeng leadership. The Bafokeng were incensed by Friedman’s comments about the reliability of his findings vis-à-vis the chieftainship issue, particularly as the Appellate division had differed with Friedman as to whether Mangope had followed the proper steps in arriving at his decision, and voiced their concern that the Bafokeng would not get a fair hearing in a Bophuthatswana court. (Bophuthatswana was at that stage undergoing legal incorporation into South Africa.) Although the Bophuthatswana court was by this time a South African court and subject to the South African appeal process, it was decided, in view of repeatedly expressed fears of the Bafokeng about its past neutrality, to investigate the whole question of the independence of the Bophuthatswana judiciary in the period of the homeland’s legal existence.

Sutherland then began to make enquiries in regard to the general security of tenure of judges in Bophuthatswana, particularly in the light of increased executive powers over the preceding years, something which he had personally experienced in defending the Bafokeng and when he was banned from Bophuthatswana, thus restricting the Bafokeng right to legal representation. Sutherland then received from a firm of attorneys in Mafikeng an appointment letter from the Bophuthatswana Minister of Law and Order to Judge E. A. T. Smith, dated 9 August 1983. It stated that Smith had been appointed as an ‘acting Judge with effect from 17 August 1983 to 16 September 1984’. Suspecting that Smith’s appointment had not been regularised after 16 September, Sutherland made further enquiries from the Department of Justice in the two relevant political entities. He finally located, however, a letter from the Minister of Law and Order, confirming a decision by Mangope to appoint Judge Smith to the Supreme Court until the end of May 1987. The inability of the relevant departments to locate a further letter or appointment after this date ‘obviously raised the fundamental question of whether Smith J had held a valid appointment at the time the matter [regarding chieftainship and trusteeship] before him was argued and judgement was delivered.’

Sutherland then felt it prudent to contact directly the then-retired Judge E. A. T. Smith, formerly of the Bophuthatswana Supreme Court, and second in rank to the Chief Justice, to ascertain from him the precise position regarding his appointment. It should be noted that what was more at stake than Smith’s ‘state of mind or attitude’ was his ‘status and relationship to the executive branch of government, to be gathered from the objective guarantees of independence contained in the relevant legislation and the practice of the executive branch of government in relation to such guarantees’. Judge Smith agreed to supply what information he had, on the understanding that he would furnish Impala’s lawyers, Deneys Reitz, with the same information. In April 1998, Judge Smith phoned Sutherland and read out a certificate of appointment signed by Mangope in March 1986. Sutherland was then informed by Deneys Reitz that Mike Tselentis, leading counsel for

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42 Affidavit of James Angus Sutherland, Case No. 1716/95 in the Matter between Bafokeng Tribe and Impala Platinum, Director-General Mineral and Energy Affairs, Minister of Land Affairs, President of Republic of South Africa, Minister of Mineral and Energy Affairs, p. 13.
43 Case No. 1716/95, Plaintiff’s replying affidavit, p. 12.
Impala, had been appraised by Judge Smith of the passage of information between the two men. It was simply ‘put on record’ by Impala’s lawyers and did not warrant a response as far as Sutherland was concerned. The significance of this approach to Smith will become clearer at a later stage.

After the separation of the special pleas was granted, the Bafokeng legal team came to the conclusion that, in order to show the extent of collusion between Mangope and Impala, on which much of their case rested, they should introduce special amendments to the pleadings, which they called ‘special circumstances’ or considerations of public policy. These amendments, which were widely publicised to the Bafokeng via the press, were as follows:

1. To plead that even if the court found that a trust was created through which Bafokeng land was held, ownership of the land nevertheless was vested in the Bafokeng.

2. To plead that there was a conflict of interests between the duties of the Minister of Land Affairs and his obligations as a trustee of Bafokeng land [even after Hanekom withdrew his opposition it was felt ‘prudent to amend the Royal Bafokeng Nation’s (RBN) particulars of claim to specifically plead this conflict of interest on the part of the Minister’].

3. To plead that there had been ‘collaboration and an improper relationship between ex-president Mangope and Impala at the stage of the previous application’ in that:

   (1) There was collaboration between the two parties in preparing for and conducting the application;
   (2) Impala and its holding company, Gencor, were augmenting the salary of Leslie Young, the Bophuthatswana Minister of Finance;
   (3) There was a ‘substantial body of evidence’ that showed that the Bafokeng as well as their trustees and Impala had interpreted the terms of the trust as conferring ownership of the land and the power to deal with it on the Bafokeng themselves.
   (4) Smith J was wrong in that he failed to consider the nature and effect of a trust in which ‘the donor and the beneficiary were one and the same person’, namely the Bafokeng, and that it was not the state’s intention to take away ownership of the land from the Bafokeng;
   (5) Impala had ‘unduly influenced’ Mangope to contend before Smith J that he was the owner of the land.

4. To plead that if Mangope was a trustee of the Bafokeng then he owed them a fiduciary duty to act in their best interests and therefore should not have collaborated with Impala.44

Incidentally, this press release was published the day before Impala released their mid-year financial results, for which the production figures were impressive, but there was no improvement in the share price.

Despite the rational and persuasive nature of these amendments, Impala objected to their being granted. The matter was set down for August 1998, with a three-week hearing because of the complexity of the issues. It was not merely a case of the amendments being granted, as the questions of issue estoppel and locus standi would clearly be argued at the same time because the amendments related to these two issues. Sutherland and the Bafokeng legal team did not want to raise the question of the independence of the Bophuthatswana judiciary as one of the special circumstances that they would introduce, as they felt this was an issue the Appeal Court would deal with in any event during the course

of the hearing. However, Patrick Brasher, Impala’s lawyer, did Sutherland an enormous favour by responding in their answering affidavit to the fact that Sutherland had approached Judge Smith regarding his appointment. In the affidavit Brasher states as follows, ‘I submit that Mr Sutherland’s extraordinary approach to Smith J, and the absence of any reason for supposing that Smith J might not have been properly appointed as a Judge when he gave his judgement, is symptomatic of a willingness on the part of the plaintiff to raise any issue and explore any avenue in its endeavours to escape the application of res judicata/issue estoppel and its present reliance on “special circumstances” must be seen in that light’.45 In making this observation Impala had virtually sent Bell, Dewar and Hall a open invitation to deal with the issue. Indeed, one can conjecture that this may have been the intention behind the whole approach to Judge Smith, and that Brasher could not resist the temptation to question Sutherland’s personal motives, an act that played right into the Bafokeng lawyers’ hands. As Sutherland records, ‘to be perfectly honest I did about six or seven cartwheels in the corridor of the office!’

In his replying affidavit, Sutherland was able to explain that the approach to Smith J was not ‘extraordinary’ and was indeed an act of ‘prudence’ since ‘security of tenure is the first essential condition of judicial independence’, and the circumstances in Bophuthatswana placed a question mark over the ‘institutional independence of the judiciary of Bophuthatswana during the Presidency of Mangope’.46 Sutherland was then able, however, to raise several pertinent examples of the ways in which Bophuthatswana was a fundamentally one-party state with Mangope having complete control over the National Assembly, which was ultimately responsible for appointing or dismissing judges. Suffice it to say that the Bafokeng lawyers were able to turn Mangope’s very suppression of his own people to advance this argument, thus hoisting Mangope, and the entire legal edifice upon which Impala’s case rested, on its own petard. It was no doubt an irony that did not escape the Bafokeng and Sutherland himself.

James Sutherland was able to deal also with findings in the chieftainship case, pointing out that Friedman was mistaken in ruling that Mangope had made his decision ‘with due observance of the laws and customs of the tribe concerned’ in that he (Mangope) had not consulted with the Bafokeng at all, and had no right to pronounce the Bafokeng appointment of an acting chief as invalid. The learned Judge went on to make the extraordinary statement that ‘even if (the President’s) view of tribal law and customs can be regarded as being incorrect, it does not alter the position that he took them into account in recognising the second respondent’ (acting chief George). Adding strength to Sutherland’s argument of course was the fact that the Appeal Court had found that ‘observance of the wrong law and customs cannot be proper observance of the law and customs’.

The vexatious nature of this litigation illuminates the seriousness of what was at stake. Impala’s lawyers applied for an order that costs on a scale as between attorney and own client should be granted or what can be described as the most adverse cost order that can be granted. Impala arrived at the August hearing with three senior counsels and a junior counsel, as opposed to one senior counsel and one junior counsel for the Bafokeng. This impressive showing was intended, in Sutherland’s estimation, to attempt to ‘intimidate’ Judge Friedman. In his opening statements, Mike Tselentis, of Deneys Reitz, issued what can be interpreted as a ‘command’ to Friedman, suggesting that the learned Judge did not have in his court the jurisdiction to rule in favour of the Bafokeng, and that this was a matter for the Appeal court to decide.

It will be recalled that the two essential issues that formed the focus of the August

45 Case No. 1716/95, Answering affidavit of P. A. Bracher, p. 14.
46 Case No.17776/95, Plaintiff’s replying affidavit, pp. 4–5.
hearings were the two special pleas of *locus standi* and issue estoppel, on which basis Impala argued that only the trustee had the *locus standi* to bring the application. In order to ensure that Impala did not preclude the Bafokeng from leading evidence, their lawyers decided that they should specifically plead what was known as the Benningfield exception. This involved the principle whereby, if a trustee is involved in misconduct, the beneficiaries of the trust must have a right to bring a court application. In this case, obviously it was being alleged that Mangope had acted against the interests of the Bafokeng. Impala’s counter-argument was that Mangope was no longer the trustee, and that Hanekom, as the new trustee, was an innocent party. Despite the apparent clarity of the Benningfield ruling, an awful amount of time and energy was expended by Impala’s legal team in trying to construe the case law in its favour, or in questioning whether the Bafokeng’s claim fell within the Benningfield exception.\(^\text{47}\)

On the plea of issue estoppel or *res judicata*, a principle that precludes a court from ruling on an issue already decided in a previous court, Impala’s lawyers were arguing that the issues of ownership and *locus standi* had been decided by Smith in the 1988 application. The Bafokeng counter to this was that Smith’s judgement applied to the 1977 agreements and what was at issue at that point in time was the matter of the 1990 agreements. In other words, the *res*, the subject matter, was different and the principle of *res judicata* could not be applied to a different subject matter. Again much discussion focused around the case law, much to the frustration of Sutherland and his colleagues. In Sutherland’s view, the Impala legal team were the victims of poor advice from an earlier date and consequently they ‘did not believe that their arguments would hold water in any court of appeal and that as a tactic they would bully and bamboozle Friedman into a ruling in their favour’.\(^\text{48}\) No doubt Impala’s lawyers believed that if they could secure a ruling in their favour it would render the Bafokeng vulnerable to a ‘soft settlement’. Such was their optimism that they devoted two pages to the litigation in their 1998 annual report, concluding with an upbeat statement that the matter would in all likelihood be disposed of by the court.

Given the weight of evidence against his earlier decision, Judge Friedman probably had little option but to find in favour of the Bafokeng, in the process repudiating his own earlier opinions. He ruled that the case law that the Bafokeng had relied on supported the contention that they had *locus standi*, and that issue estoppel did not apply. He found that the ‘common law principle of the Benningfield exception applies in the case under consideration’.\(^\text{49}\) Friedman went even further and accepted the constitutional arguments advanced by the Bafokeng lawyers, namely that it would have been a miscarriage of justice if the Bafokeng had not been granted *locus standi*. The two claims, it must be remembered, were aimed at preventing access to the courts by the Bafokeng, whereas the Constitution was particularly clear about denying a litigant the right to go to trial and presenting a case. Friedman did not accept, however, an alternative argument that the Bafokeng were beneficiaries under a conventional trust, and were the beneficial owners of the land. In other words, it remained open to argument whether the practice whereby land was registered in trust for African communities conferred ownership on them.

**Towards a Settlement**

With the legal diversions of the royalty disputes now resolved, the next step was to find a way to bring the two parties to a new stage of negotiations, which would lead to a

\(^{47}\) Case No. 1716/95, Answering affidavit of A. P. Brasher, p. 7.

\(^{48}\) Interview with James Sutherland, 4 August 1999.

settlement. The crucial element in this manoeuvre was the shareholders of Impala. Sutherland and the Bafokeng leadership had consistently taken the view that Impala had misled its shareholders. Indeed, part of the reason for ‘going public’ on the case was to inform Impala’s shareholders of developments relating to the Bafokeng claim, and to controvert the one-sided coverage given in Impala’s annual reports. Shortly after the judgement was granted, a firm of brokers requested that the Bafokeng meet with certain of their clients who were major shareholders. Bell, Dewar and Hall took the opportunity to inform them that they would meet with all major shareholders, except Gencor. A meeting of fund managers was arranged and they were briefed fully on the historical and legal issues, concluding that the Bafokeng would be amenable to a fair settlement that would improve their position by roughly 50 per cent.

It was mentioned above that Gencor had been excluded from these deliberations. This was because Gencor was seen by the Bafokeng and their representatives as an obstacle to progress. Gencor was at this stage unbundling its base metal interests and Gilbertson was transferred to London. In Sutherland’s view, his departure was linked to his general obstreperousness over the Impala/Bafokeng problem.

After the shareholder meeting, Sutherland went on record as saying that a settlement was possible if Impala would come to the table, a statement that was picked up by the press. Shortly thereafter, the approach came and the tone of the discussions indicated that, for the first time in five years, Impala was prepared to negotiate seriously. The role of independent analysts in bringing the two parties to the table is important, for they were able to present the kind of arguments that made good financial sense in terms of tax efficiency and share ratings. Accompanying this was a general thawing out of relations. Impala MD, Steve Kearney, was reported as saying that the two sides had spoken on a ‘principle to principle’ basis, and had ‘aired long-standing complaints’. Even so, such was the complexity of the issue that it had to go to the European Commission in Brussels because of Impala’s impending merger with Lonrho. These final touches to the negotiation process, however, are confidential.

By early 1999, the two parties reached an agreement on the basis on which the litigation between them had been settled. The agreement incorporated the following terms:

- The royalty payable to the Bafokeng would be increased to 22 per cent of taxable income in respect of the Bafokeng First, Second, Third, Fourth and Fifth areas. This replaced the royalty rate of 14.9425 per cent in respect of the First and Second Bafokeng areas and 16 per cent in the Third area (‘the Deeps’). The Bafokeng were guaranteed a minimum royalty of 1 per cent of the gross selling price, which would apply if the royalties payable were less than the minimum royalty.
- The Bafokeng would receive one million shares in Impala Platinum Holdings, thus enabling them to participate in the growth potential of the group.
- The Bafokeng could nominate one person to sit on the Board of Impala Platinum.

In addition, various arrangements were ‘designed to enhance the long-term relationship between the parties’ to reduce the potential for further conflict. The financial press hailed the ‘generous terms’ of the settlement, particularly the equity stake that was equal to about R100 million at the time. In cash terms, the increase in royalties amounted to approximately R100 million for the Bafokeng, although this sum was obviously likely to fluctuate annually. Furthermore, the deal with Impala brought

other considerations into play, specifically negotiations with Impala’s rivals, Anglo American Platinum (Amplats), to open up new mines on Bafokeng land. In February it was reported that Amplats and the Bafokeng were investigating expanding its Bafokeng Rasimone mine at an estimated cost of R900 million. Any future developments in this regard would have to consider world demand and prices for platinum. In addition to their platinum deposits, the Bafokeng possess other mineral-bearing properties, specifically chrome, which can be cheaply mined to produce ferrochrome. These are developments that may lie ahead.

It was, in the end, highly beneficial to Impala. While about 8 per cent was shaved off its annual earnings, the settlement paved the way for the merger with Lonrho. More significantly, however, it ensured the company the right to mine Bafokeng land. Given this situation, it was not surprising that Impala’s share price rocketed. Just before the August 1988 hearings, the share price was R43.50, by February 1999 it was at just under R100 and by April 1999 it had broken the R200 barrier.

Thus, ten years of costly and acrimonious litigation were brought to an end. In retrospect, one is forced to wonder why, if the settlement was mutually beneficial, Impala showed such obstinacy in negotiating, particularly in the context of a new political order that was theoretically sensitive to the need to right past injustices. However, vast sums of money were at stake and Impala’s tactic, it would seem, was to prolong the litigation, despite its cost, to obtain a ‘soft’ settlement. The 1990 agreements were indefensible, but this was perhaps not the point. Impala wanted to win the war of legal attrition. As Sutherland confirms, ‘I have no doubt that Impala would have been happy to litigate for ten or fifteen years’. Added to this possibly was the attitude of a number of senior managers at Impala, for whom the contest became an issue of pride and ultimately one for which they put their careers on the line. Sutherland, whose background was more as a human rights lawyer, graphically expressed this:

I have taken on governments – the apartheid government, the Bophuthatswana government, KwaNdebele – and I can tell you now that … litigation against the mining industry makes taking on government like a Sunday afternoon picnic. When you are dealing with the government, you are dealing with ideology, when you are up against the mining industry you are up against greed. Greed is a far more powerful emotion than ideology.

Despite the enormous waste of resources expended in the battle between Impala and the Bafokeng, one positive point emerges. The litigation ‘changed the rules’ (Sutherland’s phrase) between the mineral rights-owner on the one hand and mining institutions on the other, a relationship that was initially vastly skewed in favour of the mining companies. Or, to give Sutherland the last word, ‘the days of the Bafokeng when they were ripped off by mining companies, they are over, that’s really the conclusion’.

Postscript

The primary intention of this article was to unravel a complex legal battle between the Bafokeng and those forces opposing their access to, and control over, platinum resources. While some of the struggles within the Bafokeng social formation have been alluded to, it is apparent that the existence of further internal divisions and contradictions reveal an even

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54 Interview with James Sutherland, 4 August 1999.
55 *Ibid*.
56 *Ibid*. 
more complex picture of events. This account reflects therefore the ‘official’ version of what transpired, according to the Royal Bafokeng Administration and the ruling family.

More recent research would suggest that not all Bafokeng approved of the decision by Edward Lebone to proceed with the granting of mining leases in the first instance, as it was realised that such a course of action would lead also to land alienation. Not all within the royal family, it would appear, agreed with the kind of strategies employed by Edward Lebone, and there are suggestions of tension and division regarding the leadership on his return from exile. Furthermore, claims of abuse of power and misuse of Bafokeng funds date back more than a decade and have intensified in recent years. Coupled with this has been the growth of a huge pool of mineworkers, residing in hostels, rooms or shacks within Bafokeng villages. These ‘ethnic strangers’ have never been welcomed by the Royal Bafokeng, but have support from significant elements of the ruling party on the grounds that, as legitimate workers, they are entitled to similar rights as others under the new political dispensation. The cascading of important resources and powers to the level of local government presents yet another dilemma for the Bafokeng Administration – whether to cooperate with the District Council, and share resources, or ‘go it alone’ in the realm of local government. Indeed, there are now competing claims for Bafokeng land itself, from at least one other community (the BaPhiring), and doubts about whether the proposed Minerals Development Bill will confirm the Bafokeng’s hard-won control of mineral-bearing land, or force then to reapply, along with other rights-holders, for mining rights. Problems have not simply disappeared now with the ‘victory’ over mining conglomerates and the advent of a democratic political order. The signs would indicate, therefore, that a new and potentially more intense factiousness will dominate Bafokeng politics in the coming years.

Much depends on how such issues are resolved by the Bafokeng Administration. The stock response of many officials, perhaps not without some justification, is that it was inevitable, once the sacrifices had been made, that opportunistic elements would seek to get their hands on a share of Bafokeng wealth. Along with this, it is argued that the Royal Bafokeng Administration is both representative and accountable, and resources can neither be misused nor diverted for personal gain. But this would seem to be glossing over real grievances held by social forces with significant political weight. The untimely death of Kgosi Lebone Molotlegi II in March 2000 further disrupted Bafokeng affairs and has possibly slowed the quest for a form of accommodation between the Royal house and competing claimants to its resources.

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57 This is emerging from the work of Gavin Capps, a doctoral student at the London School of Economics, who is researching the current political economy of the Bafokeng administrative area. We are grateful for the chance of sharing information with him.
58 We are grateful to Gavin Capps for discussion and sharing of information on these issues.
59 Lebone Molotlegi II was born in 1965 and educated in Botswana and the United States, where he gained a degree in Communications. As a young and ‘modern’ leader, he would have been well placed to take the kind of decisions that now face the Bafokeng royal family.