

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – MTHATHA**

Case No: CA 07/2021

In the matter between:

SIMPIWE SYDWELL MOLOSI	First Appellant
NTOMBENKONZO MASETI	Second Appellant
DOSINI ROYAL FAMILY	Third Appellant

and

PHAHLO ROYAL FAMILY	First Respondent
LUZUKO MATIWANE	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Fourth Respondent
PREMIER OF THE EASTERN CAPE PROVINCE	Fifth Respondent

JUDGMENT

MAKAULA J:

A. Introduction:

[1] This is an appeal, with the leave of the Supreme Court of Appeal (SCA), against the judgment of the court *a quo* delivered on 14 January 2020, *inter alia*, declaring that the third appellant is not a royal family entitled to and responsible for identifying the second appellant as the king of AmaMpondomise.

[2] The respondents brought an application before the court *a quo* on a semi urgent basis seeking the following order:

- “1. That the resolution dated 31 May 2019, Annexure “G56” attached to the founding affidavit, issued by the third respondent in terms of which it

identified Ntombenkonz Maseti (“second respondent”) as the King or Queen of AmaMpondomise is declared unlawful and void *ab initio*, and accordingly set aside.

2. Declaring that the third respondent is not a royal family entitled and responsible for the identification of any person and making recommendations to the fourth respondent in terms of section 9 of the Traditional Leadership and Governance Framework Act No. 41 of 2003, to assume kingship or queenship of AmaMpondomise, which position was left vacant by King Mhlontlo.
3. That the first and third respondents are finally interdicted from identifying a person to assume kingship or queenship and making recommendations to the fourth respondent in terms of section 9 of the Traditional Leadership and Governance Framework Act No. 41 of 2003, to assume kingship or queenship of AmaMpondomise, which position was left vacant by King Mhlontlo.
4. The fourth respondent is directed to recognise the second applicant as King of AmaMpondomise, and to comply, within 30 days of this order, with and implement the first applicant’s resolutions in terms of which the second applicant (“Luzuko Matiwane”) is identified as the King for AmaMpondomise.
5. The letter. Annexure “E” to the founding affidavit, written by Dr Lubisi, dated 2nd August 2019, advising the fourth respondent not to implement the resolutions of the first applicant is declared unlawful and invalid, accordingly is set aside.
6. That the respondents are ordered to pay the costs of this application only in the event of opposing the application”.

[3] The court *a quo*, after hearing the matter, issued the following order:

- ‘1. It is declared that the resolution dated 31 May 2019, Annexure “G56” attached to the founding affidavit, issued by the third respondent in terms of which it identified the second respondent as queen of AmaMpondomise is unlawful and accordingly set aside.
2. It is declared that the third respondent is not a royal family entitled to identify any person as king or queen in terms of section 9(1)(a) of the Framework Act 41 of 2003 to assume kingship or queenship of AmaMpondomise which was left vacant by king Mhlontlo.
3. The first to third respondents are finally interdicted from identifying a person to assume kingship or queenship and in terms of section 9(1)(a) of the Traditional Leadership and Governance Framework Act 41 of 2003 to assume kingship or queenship of AmaMpondomise, which position was left vacant by king Mhlontlo.
4. The fifth and fourth respondents are directed to comply with their obligations provided for in section 9(1)(b) of the Traditional Leadership and Governance Framework Act 41 of 2003 within 30 days of this order and consider the first applicant’s resolution in terms of which the second applicant is identified as the king of AmaMpondomise.
5. The first, second and third respondents are directed to pay the costs of this application including costs occasioned by the employment of two counsel where applicable’.

B. The grounds of Appeal:

[4] The grounds of appeal are captured in the notice of appeal and copied in the heads of argument. I shall refer to them as they appear in the heads of argument and the authorities relied upon in support thereof. Furthermore, the grounds capture most of the facts relevant herein. The grounds of appeal are as follows:

1. The court *a quo* erred and/or misdirected itself in fact and in law in that it misconstrued the issues placed before it for decision by the parties, as well as the law applicable to such issues, particularly in respect of

urgency, prior jurisdictional facts or process as required by the Traditional Leadership and Governance Framework Act¹ and costs.

2. The court *a quo* erred and for misdirected itself in fact in that in its judgment of 14 January 2020 it inexplicably ignored the following undisputed and common cause facts:

- 2.1 The material concession expressly made by counsel for the first and second respondents that the third appellant is also the Royal Family of the AmaMpondomise;

- 2.2 The first and second appellants are of the Royal Family;

- 2.3 The third appellant is the Royal Family in the Great House of AmaMpondomise; and

- 2.4 the Family Tree reflecting the third appellant as the Great House and which was annexed to the appellants' answering affidavit in the application which served before the court *a quo* as Annexure NM7.

3. The court *a quo* further erred and/or misdirected itself in finding in paragraphs [46], [48], [69] and [70] of its said judgment that "*the parties did go to the Commissions previously and (t)here is no internal remedy, in my view, provided for in the Framework Act that the applicant was, in the circumstances, obliged to exercise first before coming to this Court*".

This is particularly so in that –

- 3.1 it was common cause that the two Commission of Nhlapo and Tolo did not deal with the issue at hand and that their decisions had been set aside by the Court in *Matiwane 1* and *Matiwane 2*;

¹ No 41 of 2003, sections 9, 21 and 25.

- 3.2 in terms of the decision of the Constitutional Court in *Sigcau & Another v Minister of Co-operative Governance and Traditional Affairs and Others*, the process in terms of s 9 of the Framework Act by the third respondent and/or s 25 by the Commission, must be followed and exhausted where the Commission's decision had been set aside;
- 3.3 it had been common cause and also expressly accepted and recorded by the court *a quo* in paragraph [23] of its judgment dismissing the appellants' application for leave to appeal on 29 August 2020 that in terms of the previous decision of the Court per Brooks J in *Matiwane v President of the Republic of South Africa and Others* ("*Matiwane 2*") there is "*principally two reasons why the Court did not deal with the [second] respondent's claim to be entitled to succeed [as King of AmaMpondomise]*", namely –
- 3.3.1 first, that issue was no longer before Court by agreement between the attorneys of the appellants and first and second respondents; and
- 3.3.2 secondly, s 9(1)(a) of the Framework Act has given the power to identify the person to fill the position of a king or queen to a Royal Family and there are processes that must be followed which ultimately lead to the recognition of the person so identified.
- 3.4 it had thus been common cause that the processes in ss 9 and/or 25 of the Framework Act regarding such identification and recognition had not yet been exhausted by the third appellant and the second respondent;
- 3.5 the parties had accordingly agreed, and it was accepted by the court *a quo*, that the parties so agreed in *Matiwane 2*, that the s

9(1)(a) process be first followed, as discussed in paragraph 3.3.1 above;

- 3.6 the decision in *Matiwane 2* therefore related only to the issue of the existence or otherwise and restoration of the kingship of AmaMpondomise;
- 3.7 the decisions of both the Nhlapo and Tolo Commissions had been set aside by the Court in *Matiwane 1* and *Matiwane 2*;
- 3.8 the record in respect of such commissions was accordingly also not placed before the court *a quo* for purposes of the adjudication of the issues before it;
- 3.9 on 18 May 2019 and 31 May 2019 each of the Royal Families passed a resolution identifying the second respondent and the second appellant respectively for recognition by the third respondent;
- 3.10 on 2 August 2019 the third respondent, with the advice of the fourth respondent, made the decision refusing to accept either of the identified incumbents as he was not satisfied that same were done in accordance with custom and customary law of AmaMpondomise. He then referred the matter back to the two Royal Families for reconsideration and identification of one common heir for him to recognise;
- 3.11 the two Royal Families have not yet complied with the decision of the third respondent and its legal consequences; and
- 3.12 the first and second respondents had failed and/or refused to co-operate with the appellants regarding compliance with the process in the third respondent's decision and had prematurely approached the court *a quo* without first setting aside such decision on review to

the extent that they are not satisfied with it, as required in terms of the *Oudekraal* principle (see *Oudekraal Estate (Pty) Ltd v City of Cape Town* 001 (6) SA 222 (SCA)).

4. Equally, and in the same breath, the court *a quo* erred and/or misdirected itself in holding in paragraph [46] of the judgment that “(T)his case is distinguishable from *Mphephu*” (see *Mphephu Ramabulana v Ramabulana* [2019] 2 All Sa 51 (SCA)).
5. Accordingly, the court *a quo* erred and/or misdirected itself in not having found in its judgment that the prior jurisdictional facts or processes in terms of s 9(1)(a), particularly the “processes that must be following which ultimately lead to the recognition of the person [to be] identified [as king or queen]”, had not yet been met or satisfied and consequently that it would be premature at this stage for the Court to assume jurisdiction and pronounce on the issue as to who qualifies to be identified and recognised as king or queen of the AmaMpondomise.
6. The court *a quo* had therefore acted *ultra vires* the provisions of subsection 9(1)(a) to 9(4) and/or 25 of the Framework Act in making its finding and arriving at its decision and order of 14 January 2020 and accordingly fundamentally misdirected itself.
7. Moreover, the court *a quo* failed to properly construe and appreciate the purpose and the legal consequences of the decision of the third respondent and the issue arising from it, resulting in the court *a quo* also failing to appreciate the applicability of the *Oudekraal* principle on the facts of this case.
8. The court *a quo* therefore wrongly found in paragraphs [14] to [43] onwards of its judgment, that the decision which required to be first set aside by “a competent court” is that of King Ngcwina and that such a step had to be done by the appellants. This is particularly so in that on the facts, it is the decision of the third respondent of 2 August 2019 that

was relevant for purposes of deciding whether the process in s 9(1)(a) of the Framework Act had been complied with by the first respondent and which, in terms of the said *Oudekraal* principle, had to be first caused to be set aside by such respondent before it could approach the Court if it was aggrieved by having to comply with same.

9. In the circumstances, the court *a quo* erred and/or misdirected itself in finding in paragraph [48] of its judgment that the second respondent “*was properly identified, particularly in view of all the foregoing. . . .*” as he was in fact not properly identified in view of the foregoing.
10. Thus, the court *a quo* also further erred and/or misdirected itself in suggesting and/or finding in paragraphs [61], [70] and [71] onwards of its judgment, that the first respondent was entitled to ignore the decision of the third respondent of 2 August 2019 and instead approach the Court for relief, and that the appellants are required to only subsequently approach the Commission in terms of s 10 of the Framework Act and move for the removal of the first respondent. That is particularly so *inter alia* in that the correct position, both in fact and in law, is that the third appellant and the second respondent are obliged to act in accordance with the decision of the third respondent to enable him (the third respondent) to make his decision in terms of s 9(4), failing which the process prescribed as set out in ss 21 and 25(1) and (2)(a)(iii) and (ix), 25(3)(a) and (b)(i) of the Framework Act has to be followed.
11. The court *a quo* erred and/or misdirected itself in not finding that the first and second respondents’ application was without merit, particularly in that during the hearing on 7 November 2019 counsel for such respondents expressly conceded on record that the respondents’ claim in the application was not based on custom and customary law. That is particularly so in that the empowering provisions, being the Framework Act, read also with the decision of the third respondent of 2 August 2019, expressly requires in ss 9(1), 2(4), 21 and 25 thereof that the determination of the issue as to who is to be identified and nominated for

the provision of king or queen “*must consider and apply customary law and the customs of the [AmaMpondomise] traditional community as they applied when the events occurred that gave rise to the dispute or claim [in respect of a kingship or queenship], guided by the criteria set out in sections 2A1 and 9(1)*”.

12. Accordingly, the court *a quo* ought to have found on the basis of the foregoing that the first and second respondents failed to allege and prove a right or clear right for them to succeed in the interdictory relief they sought in the application before the Court.
13. Also, having regard to the foregoing, the court *a quo* erred and/or misdirected itself in finding in paragraphs [68] to [74] of its judgment that the first and second respondents would have no alternative remedy if they are not granted the interdict they sought. That is especially so when also having regard to the relevant common cause facts and evidence in the papers which served before the court *a quo*.
14. In the event, the court *a quo* also erred and/or misdirected itself in not finding that the application by the first respondents was also flawed and not warranting to be dealt with as one of urgency, as was contended by the appellants, and then that it should be struck off the Urgent Roll, or dismissed, particularly when regard is had to the common cause facts and the fact that the respondents had patently and virtually failed to make any allegations as required by Uniform Rules 12(a) and (b) that they should “*set forth explicitly the circumstances which they aver render the matter urgent and the reasons why they claim that they could not be afforded substantial redress at the hearing in due course*”.
15. The court *a quo* should therefore have found that the first and second respondents’ application was inherently fatally irregular and not

warranting to be entertained or granted by the Court as a basic and established principle.²

16. Flowing from the foregoing, the approach and decision made by the court *a quo* in paragraph [74] of its judgment regarding the issue of costs, which it granted against the appellants, is inconsistent with the approach and law regarding “*the issue of costs, including the principle as held in the decision in Biowatch Trust v Registrar Genetic Resources and Others*”³ which should have been followed by the court *a quo*. This is particularly so in that this is a matter in which the appellants are seeking to vindicate their constitutional rights in terms of sections 211 and 212 of the Constitution of the Republic of South Africa Act,⁴ which was also manifested in terms of the agreement between the parties and decision of the third respondent referred to in the preceding paragraphs.
17. Accordingly, the court *a quo* had failed to properly and judicially exercise its discretion on the issue of costs and had misdirected itself”. (Footnotes omitted).

C. Background facts:

[5] The history of AmaMpondomise is not in dispute apart from the issue of the disinheritance of Dosini. It has been captured well in the judgment by the court *a quo*. I shall not traverse it in detail for that reason. The kingship of AmaMpondomise dates back to the time of king Ngcwina in the 13th century. He had two sons, Dosini and Cira. Dosini was from the Great House and thus the eldest son, who in terms of custom, was supposed to succeed him. However, for reasons which are in dispute, king Ngcwina decided to disinherit him and handed over the reigns to Cira who ascended to the throne and ruled the AmaMpondomise. The kingship flowed from

² *Makhuvha v Lukoto Bus Service (Pty) Ltd* 1987 (3) SA 376 (V) at 3881-389D; *Cekeshe v Premier, Eastern Cape* 1998 (4) SA 935 (TK) at 498 F.

³ 2006 (9) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para [40] *et seq.*

⁴ No 108 of 1996, as amended.

the house of king Cira until king Mhlontlo in 1904. Brooks J amply covers this period in *Matiwane v President of the Republic of South Africa and Others* (“*Matiwane 2*”)⁵.

[6] Brooks J set aside the findings of the Tolo Commission and declared that AmaMpondomise did have kingship, and ruled “that their kingship is hereby restored”. Similarly, Griffiths J in *Matiwane v President of the Republic of South Africa* (“*Matiwane 1*”)⁶ set aside the findings of the Nhlapho Commission which found that AmaMpondomise never had kingship. This therefore makes the point clear that king Mhlontlo was the king who was deposed in 1904. Any suggestion to the contrary would be against the findings of Brooks J and, by implication, the finding that AmaMpondomise had kingship until it was taken away in 1904.

[7] The finding of Brooks J further fortifies the fact that Dosini and his descendants never ascended to the throne and thus never ruled AmaMpondomise as kings since Dosini’s disinheritance by his father king Ngciwa. It is not disputed in the papers that the second respondent is the great-granddaughter of Dosini.

[8] After the restoration of the kingship of AmaMpondomise, the first respondent submitted the name of the second respondent to the third respondent as per the resolution of the first respondent for his recognition as the king in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act). The appellants did likewise. The first appellant submitted to the third respondent a resolution of the third appellant, which recommended the appointment of the second appellant. On receipt of both recommendations, the third respondent penned a letter to both the third appellant and the first respondent refusing to recognise either of them as either King or Queen because of the dispute. The letter addressed to the first respondent reads as follows:

‘2. The President has taken into account the judgment in the case of *Matiwane v President of the Republic of South Africa and Others* (2047/2018) [2019] ZAECHC 23; [2019] 3 All SA 209 (ECM) (16 May 2019).

⁵ 2019 (3) SA 209 (ECM).

⁶ 2014 JDR 0363 (ECM).

3. As you are aware, the Presidency and the Ministry of Cooperative Governance and Traditional Affairs (CoGTA) have accepted the judgment.
4. The effect of the judgment was to recognise the AmaMpondomise kingship.
5. The Presidency has since received two letters: One letter dated 04 June 2019 was from Mkata Attorneys representing the Dosini Royal Family and the other letter being yours representing the Phahlo Royal Family.
6. The Dosini Royal Family has nominated Ms Ntombenkonzo Maseti whilst the Phahlo Royal Family has nominated Mr Luzuko Matiwane to be recognised and appointed by the President as the rightful heir to the AmaMpondomise throne.
7. Both letters state that they are representing the AmaMpondomise Royal Family and that the nominations were the decision of the Royal Council and they have attached documents in this regard.
8. The letter from the Attorney of the Dosini Royal Family acknowledges that there is a dispute within AmaMpondomise Royal Family as to who is the rightful incumbent and requests the President to appoint a Commission to conduct an investigation to determine the rightful heir to ascend the throne in terms of AmaMpondomise customs and tradition of Mpondomise nation.
9. In view of the above, it is evident that the Royal Family cannot reach a unanimous decision in choosing one common incumbent to ascend the throne.
10. At the hearing of the matter, Mr Luzuko Matiwane (the applicant) abandoned the relief initially sought, declaring him to be the King of the AmaMpondomise. This in turn triggers the provisions of section 3A and 9 of the Act which deals with the establishment and recognition of kingship and queenship councils and the recognition of kings and queens respectively.
11. In this regard:
 - 11.1 Section 3A(1) of the Act provides:

“(1) Once the President has recognised a kingship or queenship, that kingship or queenship must, within one year of the recognition, establish a kingship or queenship council”.

11.2 Section 9 provides in relevant part:

“9 Recognition of kings and queens

(1) Whenever the position of a king or a queen is to be filled, the following process must be followed:

(a) The royal family must within a reasonable time after the need arises for the position of a king or a queen to be filled, and with due regard to applicable customary law-

(i) identify a person who qualifies in terms of customary law to assume the position of a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10 (1) (a), (b) and (d) apply to that person; and

(ii) through the relevant customary structure

(aa) inform the President, the Premier of the province concerned and the Minister, of the particulars of the person so identified to fill the position of a king or a queen;

(bb) provide the President and the Minister with reasons for the identification of that person as king or queen;

(cc) give written confirmation to the President that the Premier of the province concerned and the Minister have been informed accordingly; and

(b) The President must, on the recommendation of the Minister and subject to subsection (3), recognise a person so identified in terms of paragraph (a) (i) as king or queen, taking into account-

- (i) *the need to establish uniformity in the Republic in respect of the status afforded to a king or a queen;*
 - (ii) *whether a kingship or queenship has been recognised in terms of section 2A; and*
 - (iii) *the functions that will be performed by the king or queen.*
- (2) *The recognition of a person as a king or a queen in terms of subsection (1) (b) must be done by way of-*
 - (a) *a notice in the Gazette recognising the person identified as king or queen; and*
 - (b) *the issuing of a certificate of recognition to the identified person.*
- (3) *Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in terms of customary law, customs or processes, the President on the recommendation of the Minister-*
 - (a) *may refer the matter to the National House of Traditional Leaders for its recommendation; or*
 - (b) *may refuse to issue a certificate of recognition; and*
 - (c) *must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.*
- (4) *Where the matter that has been referred back to the royal family for recognition and resolution in terms of subsection (3) has been reconsidered and resolved, the President on the recommendation of the Minister must recognise the person identified by the royal family if the President is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law”.*

12. The President has been advised by the Minister of Cooperative Governance and Traditional Affairs that Government does not have the legal authority to

be involved in any of the royal family processes of nominating an heir. Only the Royal Family through the customary structure has the authority to identify a person who qualifies in terms of customary law to assume the position of a king or a queen. Once the royal family has finalised its processes of choosing the rightful heir, it then notifies the government to facilitate all the required administrative processes of recognising and appointing the Kingship and the King respectively.

13. The President has therefore decided to refer the matter back to the Royal Family for reconsideration and resolution. The two families are requested to resolve the matter internally and nominate one common heir for the President to recognise as the King of AmaMpondomise.’

D. The issues:

[9] In summary the issues are:

- 9.1 whether urgency was established in the court *a quo*;
- 9.2 whether the respondents established the jurisdictional facts to sustain the requirements of a final interdict;
- 9.3 whether the court *a quo* was correct in not ordering that the resolution of the dispute between the parties should be in terms of the Traditional Leadership and Governance Framework Act;⁷ and
- 9.4 the costs.

E. Urgency:

- [10] The application was launched on 17 September 2019. The Notice of Motion indicates that the application was to be made, on a semi-urgency basis, on 5 November 2019 at 10h00. It provided that notice to oppose should be filed no later than 25 September 2019 and the answering affidavit no later than 10 October 2019. The respondents in paragraph 124 of the founding affidavit deal with why the matter was semi-urgent. Amongst others, they aver that the

⁷ No. 41 of 2003 in terms of sections 9, 21 and 25 thereof.

issue to be determined is of public interest and deals with steps taken to resolve the matter from the date of judgment restoring the kingship to when the third respondent penned Annexure “C”. Such steps have not been disputed by the appellants in their answering affidavit. All that is contended by the appellants is:

- (a) the fact that the certificate of urgency has not been served on them;
- (b) that the “Applicant refused and scoffed at every request by me and my Royal Family, to remedy the claim or dispute as per the President’s request, they failed to respond thereto”; and
- (c) states that she has asked her attorneys to apply for the non-compliance with the rules in terms of rules 30 and 30A.

[11] The court *a quo* on this issue correctly found that “(i)t was open to the respondents to institute Rule 30 proceedings to deal with that non-compliance”. The court *a quo* reasoned as follows:

“Furthermore, it is not clear how the shortened time frames with which the respondents elected to comply without challenging them affected them in their preparations in the final analysis. No prejudice was pointed out and I cannot see any. This application was launched on 17 September 2019 and heard on 5 November 2019. I simply cannot see how that period would have been insufficient for proper preparations and filing to be made”.

[12] It should be noted that the issue of lack of urgency cannot be clouded by the fact that the respondents were ready to proceed with the matter on 6 November 2019. Put differently, they complied with the truncated time periods and were ready to argue the matter. The court can nevertheless still make a determination as to whether the matter was urgent in the first place. I agree with similar sentiments stated by Kroon J in *Caledon Street Restaurant CC v D’Aviera*⁸ when he said:

⁸ [1998] JOL 1832 (SE).

“It is to be emphasised that the fact that, in the result, and after a postponement of the matter, the papers are complete by a particular date and the matter is in that sense ripe for hearing, must not cloud the issue whether the Applicant’s modification of the rules on the grounds of urgency was unacceptable”.

[13] The court *a quo* exercised a discretion in terms of rule 6(12)(a) which stipulates that, in urgent applications, the court or a judge “may dispense with the forms and service provided for in the rules and may dispose of such matter at such time and place and in such a manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it seems meet”. The court *a quo* exercised its discretion and heard the matter. There are no reasonable grounds for this court to interfere with its exercise of the discretion vested in it.

F. Interdict:

[14] In *Setlogelo v Setlogelo*⁹ the court found that the requisites for the right to claim an interdict are known to be a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other remedy.

Clear right

[15] The issue before the court *a quo* was not about whether king Ngcwina was correct when he disinherited Dosini as the rightful heir to the throne. That issue remains live, until successfully challenged by the respondents. The issue, as I can see from the papers, remains unresolved until it is pertinently challenged in the rightful way. As things stand, the descendants of king Cira reigned since 1300 until 1904 when they were unlawfully stripped of kingship by the colonialists, according to Brooks J. The second respondent is the direct descendant of king Mhlontlo who was deposed and therefore, on the face of that, the respondents had a clear right to bring the application. It is on that basis that the court *a quo* found that a clear right had been established. I find no misdirection in this regard.

⁹ 1914 AD 221 at 221.

Harm and injury reasonable apprehended

[16] The harm that is reasonably apprehended was established and the court *a quo* correctly found so. The papers reveal that the first and second respondents had applied to the third respondent for the recognition of the second respondent as the king. There was a ceremony that was being prepared for his installation as the king. The respondents had a reasonable apprehension that the installation would be disrupted. The court *a quo* went further to find that:

“The harm is not only that of the Applicants but that of AmaMpondomise as a whole. These papers make it clear even on the basis of the respondents own submissions that the absence of a leader to lead the nation of AmaMpondomise is a harm that must be brought to an end as it is a continuing harm”.

[17] Furthermore, the appellants had written to the third respondent also seeking the appointment of the second appellant as queen. That could also be regarded as an injury, which, objectively viewed, could be realised.

Absence of another remedy

[18] The respondents, in the court *a quo*, sought declaratory relief. The provisions of the Framework Act do not provide for that remedy. I shall deal below with the provisions of the Framework Act. The issue of the disinheritance of Dosini was foreshadowed in the Tolo Commission before Brooks J and the parties, as alluded to, agreed that it should be withdrawn before him. Brooks J did not decide the issue and it remains unresolved. It is apparent from the papers that numerous attempts were made either by the appellants and/or the respondents to resolve the issue of the disinheritance of Dosini *but to no avail*. Section 21(1)(a) of the Superior Courts Act (10 of 2013) grants courts jurisdiction over all persons residing or being in and in relation “to *all causes and all offences* triable” within its area of jurisdiction. There was no other conceivable remedy available to the respondents other than a declarator from the court *a quo*.

G. Should the court *a quo* have deferred the issue to the two families in terms of the letter of the third respondent:

[19] The applicant before Brooks J was Luzuko Matiwane. He is the second respondent before us. The issue before Brooks J was a claim for the official recognition and reinstatement of the kingship of AmaMpondomise.¹⁰ The first and second appellants were later joined by the court before Brooks J as the fifth and sixth respondents on the understanding that that court would not determine or make an order declaring the second respondent before us as king of the AmaMpondomise. Brooks J reasoned as follows in paragraph 4:

“However, the parties and their legal representations very properly and maturely applied their minds to the issue and agreed that the Applicant would withdraw his opposition to the joinder application and would seek no relief declaring him to be the King of AmaMpondomise”.

Brooks J thereafter made an order declaring that AmaMpondomise did have a kingship and reinstated it.

[20] As alluded to, pursuant to the order, the appellants and the first and second respondents, acting in terms of the Frameworks Act, independently approached the third respondent for recognition as king and queen respectively. Faced with that situation, the third respondent declined to appoint any of them and penned the letter dated 2 August 2019 referred to above, which is the subject of this appeal. There are two divergent interpretations given to the letter by the parties based on paragraphs 8 and 9 thereof. For the sake of clarity I shall refer to these paragraphs which read:

‘8. The letter from the Attorney of the Dosini Royal Family acknowledges that there is a dispute within the AmaMpondomise Royal Family as to who is the rightful incumbent and requests the President to appoint a Commission to

¹⁰ Paragraph 1 of Matiwane 2.

conduct an investigation to determine the rightful heir to ascend the throne in terms of AmaMpondomise customs and tradition of Mpondomise nation.

9. In view of the above, it is evident that the Royal Family cannot reach unanimous decision in choosing one common incumbent to ascend the throne’.

[21] It was clear to the third respondent that the dispute between the parties was alive and could not be resolved by them. There was no unanimity as to who should be king or queen. The third respondent had received the two letters, one from the respondents dated 12 June 2019 and the other from the appellants dated 4 June 2019 both claiming to be royal families representing the AmaMpondomise nation. I do not understand the contention therefore, that the royal family is not unanimous regarding the dispute. There were two royal families purporting to represent AmaMpondomise. Be that as it may, the third respondent refers to sections 3A and 9 of the Framework Act and then decides as follows:

‘The President has been advised by the Minister of Cooperative Governance and Traditional Affairs that Government does not have legal authority to be involved in any of the royal family processes of nominating an heir. Only the royal family through the customary structure has the authority to identify a person who qualifies in terms of customary law to assume the position of a king or queen. Once the royal family has finalised its process of choosing the rightful heir, it then notifies Government to facilitate all the required administrative processes of recognising and appointing the kingship and the king respectively’.

[22] What is meant by this paragraph is clear and needs no interpretation. Obviously, the third respondent would not appoint a person if there is a dispute about who should be appointed. Royal Family by its very nature is a customary structure. Section 1 of the Framework Act defines Royal Family as “the core customary institution or structure consisting of immediate relatives of the royal family within the traditional community, who have been identified in terms of custom, and includes where applicable, other family members who are close relations of the ruling family”.

[23] It is clear from the facts of this matter that there are two “royal families” who both claim to be legitimate. They have both independently of the other, followed the customary processes which are alluded to in paragraph 12 of the letter. The consequence of these processes led to the appointment of the second appellant as the queen and the second respondent as the king. Both parties purported to have been acting in terms of the AmaMpondomise customary practices. I do not therefore understand the reasoning of the third respondent when it relegated the issue again to the “royal family”. The third respondent knew that there were two royal families, and was also alive to the dispute about who is the “king” or “queen”. This is so because paragraph 2 of the letter says that “(t)he President has taken into account the judgment in the case of *Matiwane v President of the Republic of South Africa and Others*. The paragraph referred to acknowledges that the issue was about the recognition of AmaMpondomise kingship. It therefore means that the third respondent was also aware of the dispute about who should be the king or queen referred to in paragraph 4 of that judgment.

[24] Paragraph 4 of the letter is confusing, especially in that the third respondent was aware of the dispute based on the two letters that he received from two royal families representing the same nation, and what is said in ‘Matiwane 2’ in this regard. It is also confusing because it refers the matter back to a “royal family” and at the same time says “the two families” must resolve the issue internally. The remittal of the matter in terms of section 9 of the Framework Act would not resolve the dispute.

[25] Mr *Mathapuma*, counsel for the appellants, argued that the court *a quo* erred in finding that “the parties did go to the Commissions previously and (t)here is no internal remedy, in my view, provided for in the Framework Act that the applicant was, in the circumstances to exercise first before coming to this court”. Placing reliance on *Sigcau and Another v Minister of Co-operative Governance and Traditional Affairs*¹¹ he argued that sections 9 and 25 of the Framework Act, provide such a remedy. He argued that the letter from the third respondent referred the matter back to the third appellant and the first respondent for consideration and

¹¹ 2018 (12) BCLR 1525 (CC) at paras (27) and [30].

identification of one common heir for him to recognise. Therefore, the two royal families have not met and thus the decision of the third respondent and its consequences have not been complied with. I have dealt with the letter of the third respondent above and need not repeat my views about it. Relying on the principle enunciated in *Oudekraal Estate (Pty) Ltd v City of Cape Town*¹², the appellants argue that the decision of the third respondent has not been reviewed and set aside and therefore it is still binding. In sum, the appellants submit that the court *a quo* acted *ultra vires* the provisions of section 9(1)(a) and (4) and/or 25 of the Framework Act. Failure to comply with the decision of the third respondent means that the process prescribed in sections 21 and 25(1) and 2(a)(iii) and (ix), 25(3)(a) and (b)(i) of the Framework Act had to be followed, so argue the appellants.

[26] Section 9(1)(a) of the Framework Act reads as follows:

‘(1) Whenever the position of a king or a queen is to be filled, the following process must be followed:

(a) The royal family must, within a reasonable time after the need arises for the position of a king or a queen to be filled, and with due regard to applicable customary law:

(i) identify a person who qualifies in terms of customary law to assume the position of a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person; and

(ii) through the relevant customary structure:

(aa) inform the President, the Premier of the province concerned and the Minister, of the particulars of the person so identified to fill the position of a king or a queen;

(bb) provide the President with the reasons for the identification of that person as a king or a queen; and

(cc) give written confirmation to the President that the Premier of the province concerned and the Minister have been informed accordingly’.

¹² 2004 (6) SA 222 (SCA) para [26].

[27] The provisions of section 9(2) are not applicable as they cater for the process of recognition by the third respondent. Section 9(3) provides that:

- ‘3. Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the President-
- (a) may refer the matter to the National House of Traditional Leaders for its recommendation and resolution;
 - (b) may refuse to issue a certificate of recognition; and
 - (c) must refer the matter back to the royal family for resolution where the certificate of recognition has been refused’.

The third respondent has not acted in terms of subsection 3(a). Instead he referred the matter back to the royal family in circumstances where it was clear that there can be no resolution by them. Sections 9(4) and (5) are not relevant for purposes hereof.

[28] The facts of *Sigcau*¹³ are different from the present. However, the relevant portion relied upon by the appellants is where the court deals with the provisions of section 9(1) of the Framework Act. Zondo ACJ said the following in paragraphs 31, 49 and 50.

‘[31] Furthermore, section 9(1) applies to a case where the position of a king or a queen is to be filled and nobody has been identified by a lawful authority as the person entitled to be king or queen. In this case the Commission has decided who is entitled to be the king or queen and, as long as it is accepted that the Commission had power to make that decision, the section 9(1) process for the identification of a person to be the king or queen is not applicable. In these circumstances the process in section 9(1) has no application in a case where the President is required to ensure an “immediate implementation” of the decision of the Commission.

. . .

¹³ *Ibid* footnote 11.

[49] In any event, the section 9 process includes an internal dispute resolution process within the royal family as can be seen from the provisions of section 9(3) and (4). That internal dispute resolution process seems to fall within section 21(1)(a). Section 21(1)(a) reads:

“Whenever a dispute concerning customary law or customs arises within a traditional community or between traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute internally and in accordance with customs”.

[50] That means that, if there is a dispute within the royal family as to who is entitled in terms of customary law to be king or queen and there are different names, the royal family must try and resolve that dispute. However, section 21(b) provides that “[w]here a dispute envisaged in paragraph (a) relates to a case that must be investigated by the Commission in terms of section 25(2), the disputes must be referred to the Commission, and paragraph (a) does not apply”. Therefore, the scheme of the unamended Act is that disputes that fall under section 25(2) are dealt with by the Commission and not “internally” as contemplated in section 21(1)(a) and as would happen if the whole of the section 9 process were to be applied in this matter. Section 9(3) and (4) would entail that the royal family resolves the dispute internally if the President refers it back to the royal family for reconsideration¹⁴.

[29] Section 21(1)(a) referred to in *Sigcau* falls under chapter 6 of the Framework Act. The heading of the chapter reads:

DISPUTE AND CLAIM RESOLUTION AND COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS

¹⁴ *Ibid* 31, 49 and 50.

The heading to section 21 is *dispute and claim resolution*. Section 21 is silent as to who should refer the matter to the Commission. However, section 25(2)(a) provides that:

“The Commission has authority to investigate and make recommendations...”

In the context of this matter, either the appellants or the respondents had the right to act in terms of the provisions of section 21 of the Framework Act which, in a nutshell, provides for the resolution by the royal family internally, failing which, to approach the provincial house of traditional leaders, then the Premier and only thereafter the Commission. It was not the responsibility of the third respondent to take the matter up with the relevant structures. The recommendation of the third respondent in terms of the letter is rendered superfluous by the fact that the dispute between the parties has not been resolved amongst them. It will not assist to bring the parties together with a view that they should resolve the dispute. The respondents allege that they are not even related to the appellants to an extent that the two families may intermarry. The dispute between the third appellant and the first respondent dates back for centuries. But what cuts across this like a golden thread is the fact that Dosini was disinherited many years ago. That dispute still lingers on. It has not been resolved by the Commission, or by Brooks J and Griffiths J.

[30] The letter of the third respondent is silent about referring the matter in terms of section 21. Neither of the parties has acted in terms of that section either. Section 25(2)(b) states that any dispute or claim may be lodged with the Commission by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information. The appellants also did not follow this process.

[31] The disinheritance has not been challenged and therefore it remains extant. It is not before this court either. I say so, because before the court *a quo* was an application for a declaratory order and an interdict based on the fact that the third appellant has never been a royal family and did not rule from 1300. Furthermore, that the respondents are the direct descendants of the family that ruled as kings of the AmaMpondomise, with the last deposed king being king Mhlontlo.

[32] The first respondent is constituted by the direct descendants of Mhlontlo whose kingship was restored. I say so because when the kingship of AmaMpondomise was taken away in 1904, the family that was ruling as kings was that of the descendants of Cira from 1300. At that time, the reigning king was Mhlontlo.

[33] The appellants in annexure G56 to the founding affidavit (the Dosini Royal Family Resolution) do not accurately deal with the issue which Brooks J's judgment dealt with. It is somewhat of a distortion. Brooks J pertinently found that the person or the reigning king at the time of the disposition of kingship, as dealt with before, was king Mhlontlo. Therefore, annexure G56 cannot be a reflection of what had been found by Brooks J. In context annexure G56 says the following:

- '5. The Mpondomise's further note that when Ntose died, his great son and heir Ngcwina succeeded in terms of custom.
6. Further notes that, Ngcwina violated the Mpondomise customary law of succession when he disinherited or deprived his great son and heir Dosine of the Kingship of AmaMpondomise in favour of his son Cira from the sixth House.
7. Emphasised that the kingship of AmaMpondomise ended on that date". (Emphasis added).

This is not what Brooks J found in his judgment. He found that the last king to be deposed was king Mhlontlo in 1904.

[34] The assertion by the appellants that the restoration of kingship started from the period of the disinheritance of Dosini; cannot be correct in the light of the above references.

[35] The respondents in prayers 1 and 2 of the notice of motion sought declaratory orders in respect of the resolution taken by the appellants identifying the second respondent as the queen. It was within the rights of the respondents in terms of section 21 of the Superior Courts Act to do so. The letter of the third respondent cannot be seen as a bar to that effect. A court has a discretion whether to issue a declaratory order and will not do so while the effect would be to decide abstract, academic or hypothetical questions unrelated to any interest in a right which

produces no concrete or tangible result beyond the bare declaration¹⁵. The learned authors, relying on *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*¹⁶, state that once the applicant has satisfied the court that it is interested in an “existing, future or contingent right or obligation”, the court is obliged by the subsection to exercise its discretion. This, they find, does not mean that the court is bound to grant a declaratory, but that it has to consider and decide whether it should refuse or grant the order, following an examination of all the relevant factors.

[36] In the application in the court *a quo*, the respondents did not seek an order that challenged the decision of the third respondent taken in terms of the letter. The respondents did not seek, in the court *a quo*, the resolution of whether Dosini was deposed in terms of custom or not, nor did it seek a resolution of who the rightful king is. All the respondents sought was that the appellants’ resolution should be declared to be unlawful *ab initio* and that the appellants should refrain from declaring the third appellant as a royal family of AmaMpondomise, as well as the interdictory relief.

[37] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁷ Howie P *et* Nugent JA said the following:

“For those reasons it is clear, in our view, that the Administrator’s permission was unlawful and invalid at the outset. . . . Until the Administrator’s approval (and thus also has the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside”.

¹⁵ Herbstein and Van Winsen – The Civil Practise of the High Court of South Africa, fifth edition, Vol 1 by Cilliers Loots and Nel at page 60.

¹⁶ (237/2004) [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) at para 17.

¹⁷ (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (28 May 2004) para 26.

[38] I am bound by the above principle. The order granted by the court *a quo* has the effect of setting aside the decision taken by the third respondent that the matter should take the route provided for in terms of section 9(1) of the Framework Act. Furthermore, I do not read what was said by Zondo ACJ in *Sigcau* to mean (especially in that the facts are not similar) that the respondents, in the circumstances of this case, were precluded from seeking declaratory and interdictory relief but instead should have followed the internal remedies provided for in the Framework Act, as contended for by the appellants. I say so based on the longstanding dispute between the parties as to who should be the king or queen. The parties have failed to resolve this ongoing dispute which, as reflected above, the third respondent alludes to in its letter. It would serve no purpose to refer the matter back to it to pursue the procedure reflected in section 9 of the Framework Act.

[39] The other issue which needs to be dealt with is that of costs. It is trite that the issue of costs is in the discretion of the court that resolved a dispute between parties. That discretion should not be readily interfered with by a court of appeal unless the discretion was not exercised judicially, or has been exercised based on a wrong appreciation of the facts or wrong principles of the law. The State in this matter was not an active party. It was merely cited because the third respondent is the party that has to make the recognition. The *lis* was between the appellants and the first and second respondents. The Biowatch principle¹⁸ does not find application in this matter.

[40] Consequently, I make the following order.

The appeal is dismissed with costs.

M MAKAULA
Judge of the High Court

¹⁸ The principle enunciated in *Biowatch, Trust v Registrar Genetic Resources (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC)*.

Stretch J: I agree.

IT STRETCH
Judge of the High Court

Bloem J: I agree.

GH BLOEM
Judge of the High Court

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