

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)**

REPORTABLE

CASE NO: 2970/2020

Date heard: 11 February 2021

Date delivered: 23 March 2021

In the matter between:

MAXWELE ROYAL FAMILY

First Applicant

ASIPHE SOLANGA MAXWELE

Second Applicant

and

**THE PREMIER OF THE EASTERN CAPE
PROVINCE**

First Respondent

**MEMBER OF EXECUTIVE COUNCIL
(MEC) FOR COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Second Respondent

BAXOLELE MAXWELE

Third Respondent

SANGONI ROYAL FAMILY

Fourth respondent

JUDGMENT

NOTYESI AJ

Introduction

[1] Pursuant to the invocation of rule 53 of the Uniform Rules of the High Court,¹ the applicants instituted this review application on 3 September 2020, challenging the identification process of the fourth respondent, which culminated in the appointment of the third respondent by the second respondent as acting headman of the Zimbane Administrative area² (“Zimbane”), Mthatha on 12 June 2020.

[2] The Applicants contend that the fourth respondent has no legislative power to identify person(s) for appointment as headman or headwoman in respect of Zimbane, and therefore, cannot identify an acting headman. In their further contentions, the applicants allege that it is the first applicant who has a statutory mandate over the identification of a headman or headwoman in Zimbane. To reinforce their submission, the applicants allege that the first applicant had identified the second applicant in 2008 to succeed his late father, Mzimtsha Maxwele, as a headman, and not the third respondent.

[3] The gravamen of the applicants’ contention is that both the identification and appointment of the third respondent as acting headman of Zimbane is contrary to the material provisions of the Traditional Leadership and Governance Framework

¹ Rule 53 of the Uniform Rules of the High Court Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected- (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and (b) calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to despatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so.

² “**Administrative Area**” means an area of jurisdiction under the authority of headmanship or headwomanship and within the jurisdictional area of a senior traditional leader in accordance with customary law.

Amendment Act³ (the Framework Act) read with the Eastern Cape Traditional Leadership and Governance Act⁴ (the Eastern Cape Act).

[4] In opposing the application, the respondents have challenged applicants' *locus standi* to institute these proceedings. The respondents contend that the first applicant is not a royal family in terms of the Framework Act. They also question the applicants' authority to institute and prosecute these proceedings. To that end, they caused a rule 7 notice to be served upon the applicants and they allege that it has not been complied with and therefore, the applicants are barred from proceeding with the application.

[5] Additional to the objections based on *locus standi*, the respondents raise several dilatory pleas, which include the non-joinder of the Qokolweni Traditional Council, mis-joinder of the fourth respondent, non-compliance with rule 41 of the Uniform Rules, by the applicants, and the defence of *lis pendens*. In relation to the latter defence, the respondents allege that there are pending proceedings similar to the proceedings which had been instituted by the applicants before the Mthatha High Court.

[6] This Court has *mero motu* raised a legal question whether the appointment of the third respondent is compliant with section 140(2) of the Constitution⁵ in view of the fact that the letter of appointment for the third respondent is not countersigned by the Premier (first respondent).

The parties

³ The Traditional Leadership and Governance Framework Act No.41 of 2003 (as amended)

⁴ Eastern Cape and Traditional Leadership and Governance Act 2017, Act No.1 of 2017

⁵ Constitution of the Republic of South Africa, 1996

[7] For the sake of convenience, the first applicant shall be referred to as “*Maxwele Royal Family*”, the second applicant “*Asiphe Maxwele*”, and “*The Premier of the Eastern Cape*”, “*The MEC responsible for Cooperative Governance and Traditional Affairs*”, “*Baxolele Maxwele*”. Maxwele Royal Family is the first applicant. Asiphe Maxwele is the second applicant. The Premier of the Eastern Cape is the first respondent, the MEC responsible for traditional affairs is the second respondent, Baxolele Maxwele is the third respondent and Sangoni Royal Family is the fourth respondent.

The issues

[8] I now turn to deal with the issues falling to be determined in these proceedings. I interpose here to mention that, although the issue in paragraph 8(f) is dispositive of the application, the remaining issues will nevertheless be dealt with to do justice to the submissions made by the parties, respectively. The issues for determination are:

- (a) Whether or not these proceedings are authorised;
- (b) Compliance with Rule 41 of the Uniform Rules;
- (c) The non-joinder of Qokolweni Traditional Council;
- (d) Mis-joinder of the fourth respondent;
- (e) The defence of *lis pendens*;
- (f) Whether or not the applicants have the locus standi to institute these proceedings, if so;
- (g) Whether or not the second applicant was identified as successor by the first applicant in 2008;

- (h) The constitutional validity of the appointment letter for the third respondent;
- (i) Whether or not the applicants are entitled to any relief; and
- (j) The appropriate costs order.

[9] At the hearing of the application, this Court ruled that the matter should be argued in its entirety with each party afforded full argument of his case.

Background facts

[10] Zimbane is made up of approximately 23 localities. It falls under the jurisdiction of Qokolweni Traditional Council. Qokolweni Traditional Council⁶ is a council of a traditional community established under Section 2 of the Framework Act. The senior traditional leader of Qokolweni traditional community is Acting Senior Traditional Leader/Inkosi D.N. Sangoni. The Zimbane headmanship falls under the senior traditional leader/Inkosi Sangoni. The royal family for the traditional community is Sangoni Royal Family (fourth respondent).

[11] Mzimtsha Maxwele was the headman of Zimbane until his untimely death in 2008. Subsequent to his death, his wife, Mrs Nomthandazo Gloria Maxwele was appointed as a regent headwoman, subject to the periodical review of three years by the Premier. She was appointed on 1 May 2008. The period of three years expired on 1 May 2011.

⁶ A council established in terms of section 3 of the Framework Act which must be read together with section 3 of the Eastern Cape Act

[12] The fourth respondent recommended to the second respondent that Mrs Maxwele's appointment as regent be terminated based on the expiry of the appointment. The second respondent did not immediately decide on such a recommendation of the fourth respondent. This was despite the expiry of the term of appointment.

[13] On 26 January 2017, the second respondent issued two separate letters. These letters were addressed to Mrs Maxwele and Acting Inkosi/Senior Traditional Leader D.N. Sangoni. The letters advised of the expiry period for Mrs Maxwele as a regent.

[14] On 18 August 2018, a letter was addressed to Mrs Maxwele by the Head of the Department for Traditional Affairs. The relevant excerpts from the letter read:

- “2. You have been recognized as the regent inkosana/headman of Zimbabwe Administrative Area since May 2008.
3. In terms of the section 26 of the Traditional Leadership and Governance Act No.1 of 2017, the Premier (now MEC as delegated by the Premier) (*sic*) must review your acting capacity once in every three years. Your regency/acting capacity is now long overdue for review.
4. The department has received the royal family resolution reviewing your acting capacity and you are now given an opportunity to make representations in this within fourteen (14) days of receipt of this letter, stating reasons, if any, why your regency must not be reviewed.
5. The MEC will consider your representations and take a decision in this matter and convey same to yourself and the royal family.”

[15] On 8 January 2019, another letter was addressed to Mrs Maxwele by the then MEC responsible for Cooperative Governance and Traditional Affairs, F.D. Xasa and the relevant excerpt read:

- “1. Kindly be advised that the Department requested you to make representations on the 15 August 2018 after receiving royal family resolution reviewing your acting capacity as regent/acting headwoman of Zimbane Administrative Area under Qokolweni Traditional Council.
2. It has to be mentioned that you were given the period of 14 days to respond as to why the decision of the royal family may not be made final and unfortunately no response has been received.
3. Therefore, in the absence of representations received within the specified period of time, the Department is left with no option but to implement the decision of the royal family to terminate your services as regent/acting headwoman of Zimbane Administrative Area under Qokolweni Traditional Council within thirty (30) days from the date of receipt of this correspondent.
4. You are hereby requested to vacate the office as regent/acting headwoman of Zimbane Administrative Area under Qokolweni Traditional Council.”

[16] The review of Mrs Maxwele’s regent position appears to have been triggered by the letters received from the fourth respondent (Sangoni Royal Family).

[17] Eventually, Mrs Maxwele was removed as a regent in 2020. The removal of Mrs Maxwele rendered the position of headmanship in Zimbane vacant. On the occasion of this vacancy, the second respondent requested the identification of the successor by the fourth respondent.

[18] The fourth respondent allegedly after consulting the community of Zimbane, identified the third respondent as a suitable person to act as a Headman of Zimbane. The fourth respondent submitted a resolution on the identification of the third respondent to the second respondent with a request that the third respondent should be appointed as acting headman. The second respondent appointed the third respondent effective from 12 June 2020 as acting headman for Zimbane.

[19] The confirmation of the third respondent's appointment is contained in a letter dated 20 August 2020. The letter is *ex facie* not countersigned by the Premier of the Eastern Cape (first respondent) but only signed by the second respondent.

The facts stated below are in dispute between the parties

[20] That the second applicant was identified by the first applicant to succeed his late father during 2008. That a resolution in this regard was submitted to the first and second respondents.

[21] The parties submitted contrary versions of the custom and tradition on the identification of a headman in Zimbane, it is not clear whether it is hereditary or is by way of elections.

[22] Notwithstanding the existence of the above factual disputes, the parties urge this Court to resolve any factual disputes in terms of the rule articulated in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁷. That is the approach I adopt in dealing with disputed facts.

Legislative Framework

[23] It is apposite to start by setting out the statutory framework within which the issues will be discussed and determined, Section 211 of the Constitution provides for the recognition of traditional leadership as follows:

- “(1) The institution, status and role of traditional leadership, according to customary law are recognized subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendment to or repeal of that legislation or those customs.

⁷ 1984 (3) SA 623 (A) AT 634E-635C; *The Premier of the Eastern Cape & Others v Penrose Ntamo* (149/14) [2015] \AECBHC 14; 2015 (6) SA 400 (ECB); [2015] 4 All SA 107 (ECB) by Plasket J as he then was

Section 212 reads as follows:

- (1) National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities.
- (2) To deal with matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law-
 - (a) national or provincial legislation may provide for the establishment of houses of traditional leaders, and
 - (b) national legislation may establish a council of traditional leader.”

[24] The Framework Amendment Act⁸ is the national legislation. The Eastern Cape Act⁹ is the provincial legislation. The two acts provide for the recognition, functions, and role of traditional leaders. They also provide for the establishment of traditional institutions.

[25] The two acts are complementary. They contain similar definition clauses and in many instances do cross-reference with each other.

[26] Section 8 of the Framework Act deals with traditional leadership positions¹⁰. It only recognises four positions of traditional leadership. The Framework Act also provides for the recognition of traditional communities¹¹. A community may be recognised as a traditional community if it is subject to a system of traditional leadership in terms of that community’s customs and observes a system of customary law. The Premier of the province does the recognition of traditional

⁸ supra

⁹ supra

¹⁰ **Recognition of traditional leadership positions**

The following leadership positions within the institution of traditional leadership are recognised—

- (a) Kingship or queenship;
- (aA) principal traditional leadership;
- (b) senior traditional leadership; and
- (c) headmanship

¹¹ Section 2 of the Framework Act (supra)

communities at provincial level. The Premier may, by notice in the provincial Gazette, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders in the province, the community, and, if applicable, the monarch under whose authority that community fall, recognise a community as a traditional community. Once the Premier has recognised a traditional community, that traditional community must establish a traditional council with no more than 30 members¹². The traditional council has various statutory functions, including administering the affairs of the traditional community in accordance with customs and traditions; facilitating the involvement of the traditional community in the development or amendment of the integrated development plan of a municipality in whose area that community resides; participating in the development of policy, legislation and development programs at the local level; and performing the functions conferred by customary law, customs and statutory law consistent with the constitution¹³.

[27] These proceedings concern the appointment of an acting headman in terms of section 26 of the Eastern Cape Act. Section 14 of the Framework Act also deals with the acting appointment of traditional leaders.

[28] Section 1 of the Framework Act defines the traditional leadership positions and the relevant definitions are:

“traditional leader” means any person who, in terms of customary law of the traditional community concerned, holds a traditional leadership position, and is recognised in terms of this act;

¹² Section 3 of the Framework Act (supra)

¹³ Section 4 of the Framework Act (supra)

“traditional leadership” means the customary institutions or structures, or customary systems or procedures of governance, recognised, utilised or practiced by traditional communities

“headmanship” means the position held by a headman or headwoman.

“headman or headwoman” means a traditional leader, who-

- (a) is under the authority of, or exercise authority within the area of jurisdiction of, a senior traditional leader in accordance with the customary law; and
- (b) is recognized as such in terms of this Act;

“senior traditional leader” means a traditional leader of a specific traditional community who exercises authority over a number of headmen or headwoman in accordance with customary law, or within whose area of jurisdiction a number of headmen or headwomen exercise authority.”

[29] The jurisdiction of a headman is limited to an administrative area and he or she is subject to the authority of the senior traditional leader. It is a senior traditional leader who presides over the traditional community. According to the Framework Act in Section 1¹⁴.

[30] The royal family is the fabric of traditional leadership. It is responsible for the identification of traditional leaders. The royal family must identify the king or queen, principal traditional leader, senior traditional leader and headman or headwoman before the relevant government functionary can appoint them. Both the Framework Act and Eastern Cape Act deal with the recognition of traditional leaders and their removals. The royal family must do the identification¹⁵ in terms of custom and tradition and must identify a suitable person for the position.

Interpretative approach

¹⁴ ‘traditional community’ means a traditional community recognised as such in terms of Section 2; In the Eastern Cape Act, Section 1 ‘traditional community’ means a traditional community recognised as such in terms of section 2 of the Framework Act.

¹⁵ Tshevelana Royal Family v Nditsheni Norman NEtshivulana [2016] ZACC 47; Mphephu v Mphephu-Ramabulana and others (948/17) [2019] ZASCA 58 (12 April 2019)

[31] In *Cool Ideas 1186CC v Hubbard*¹⁶ it was held:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle; namely;

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution”.

Where a word is defined in a statute, the meaning assigned to it by the Legislature must prevail over its ordinary meaning¹⁷. The interpretation of the definition of a royal family is what will determine the question of whether the first applicant is a royal family or not.

[32] The Premier is obliged to consider and implement resolutions received from a royal family unless he invokes the subsections dealing with the allegations of customary contraventions during the identification process. A royal family performs statutory functions. It is a recognised customary institution and is entrenched in the statute.

[33] Before the advent of democracy colonial institutions and successive governments were hell bent on destroying the institution of traditional leadership by a combination of co-opting pliant traditional leaders and harassing resistant ones. The colonial regime almost succeeded in its mission to feed the institution. The present democratic state seeks to preserve and protect the institution of traditional leadership

¹⁶ [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC); *Minister of Co-operative Governance and Traditional Affairs v Sigcau* 2016 (3) All SA 588 at 611

¹⁷ *Minister of Defence and Military Veterans v Thomas* [2015] ZACC 26; 2016 (1) SA 103 (CC); 2015 (10) BCLR 1172 (CC) at para 20; *Tshivhulana Royal Family v Nditsheni Norman Netshivhulana* [2016] ZACC 47 at para 30

as clearly demonstrated by the provisions of section 211 and 212 of the Constitution. The Royal family is now firmly entrenched in the statute.

[34] A royal family serves as a primary source of knowledge on the prevailing customary law and customs on the succession of traditional leadership. These are all legislative functions for a royal family when identifying a suitable person as a traditional leader or acting traditional leader. The royal family is also responsible for the removal of traditional leaders because they must initiate that process before the administrative action of the premier or other relevant government functionary.

[35] There is an obligation to ensure that an entity performing or purporting to perform functions of a royal family, must be a legitimate structure and not a bogus one. The definition of a royal family is important in this regard. The ultimate objective is to ensure that traditional leaders are identified by legitimate royal families, not bogus structures. That is in line with the dignity, importance, and respect for the institution of traditional leadership. In the definition of a royal family, some important other composite words which are separately defined in section 1 are incorporated. This aspect is delved into details when dealing with the *locus standi* of the applicants.

[36] By now, it must be axiomatic that the main legal contest between the parties has narrowed down to a crisp but profound question of whether the first applicant is indeed a royal family as defined in the Act.

[37] However, I must first deal with the procedural objections raised by the respondents, which are dilatory.

Whether or not these proceedings are authorised

[38] The first and second respondents served a notice in terms of Rule 7. The notice states:

“The first and second respondents request the deponent, Ntombekhaya D Maxwele, to provide them with the following documentary proof, within ten (10) days of service hereof:

(a) Copies of the resolutions with minutes and attendance registers, taken by the first applicant, if any, authorising the deponent, Ntombekhaya D Maxwele to depose into a founding affidavit and to institute this application.”

[39] The third respondent made a similar request in his rule 7 notice issued on 14 September 2020 where it is stated:

“The third respondent requires Ntombekhaya D Maxwele to prove that she is authorised to act on behalf of the applicants and to depose to the founding affidavit filed of record.”

[40] The fourth respondent filed no notice but made this allegation in the answering affidavit:

“[Para 19.1] It is trite that when the provisions of Rule 7(1) of the Rules are triggered, as is the case in these proceedings, the matter is adjourned in order to enable the affected party to satisfy the court that he has the authority to act. To date, the applicants have not delivered their anticipated reply to the aforesaid Rule 7 notices. The fourth respondent aligns itself with this point.”

[41] In reply to the aforesaid notices on 18 September 2020, the applicants’ attorneys filed an extract of the first applicant’s meeting held on 26 February 2019, which reads:

“It was resolved that, should need arise, Ntombekhaya D Maxwele, the chairperson, or Mawethu L Maxwele, are authorised to approach courts of this country to enforce this decision and other decisions relating to headmanship of Maxwele Royal Family. They shall keep the royal family informed of any developments in any case they have instituted.”

[42] On 21 September 2020, the first and second respondents delivered their answering affidavit. The third respondent delivered his answering affidavit on 16 September 2020. On 22 September 2020, the matter served in Motion Court where it was further postponed. On 20 October 2020, the applicants delivered their replying affidavit to the affidavits of the first to the third respondents. There is no challenge to the authority of the applicants' attorneys.

[43] Rule 7(1) provides:

“Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

[44] The practical effect of Rule 7 is that when an attorney is instructed to act for a client, the power of attorney given by the client to the attorney is wide enough to include the power to obtain from a suitable person an affidavit necessary to the proceedings in which that attorney is authorised to act. In *Ganes and another v Telecom Namibia Ltd*¹⁸:

“The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. . . It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant.”

¹⁸ *Ganes and another v Telecom Namibia Ltd* (608/2002) [2003] ZASCA 123; 2004 (3) SA 615 (SCA); [2004] 2 All SA 609 (SCA) at 624

[45] In *Eskom v Soweto City Council*¹⁹ :

“If Attorney Bennett has authority to act on respondent's behalf, he may use any witness who in his opinion advances respondent's application. A witness, also when a deponent, may testify even if he has no authority to bring, withdraw or otherwise deal with the application itself. *Barclays National Bank Ltd v Love* 1975 (2) SA 514 (D) at 515C-E and 515F-G.”

[46] Mr Sintwa, counsel for the third respondent correctly conceded that absent the challenge for the authority of attorneys A.S. Zono, Rule 7 cannot stand. The concession was well made.

[47] The fourth respondent did not file a Rule 7 notice and therefore, the submissions by Mr Sishuba were based on notices of other parties. The first and second respondents never challenged the authority of A.S. Zono Attorneys, instead, they were content with the authority of Mrs Maxwele. There is no merit in their submissions. I reject all those submissions concerning rule 7 and authority.

[48] It, follows, that attorneys A.S. Zono has the authority to act on behalf of the applicants, and can use anyone to depose to the affidavits in the application they have instituted.

Compliance with Rule 41 of the Uniform Rules

[49] Rule 41A has recently been introduced in the Uniform Rules of Court. The new Rule requires that every new action or application must be accompanied by a notice, which must be delivered by a plaintiff or applicant with the summons or notice of motion and by a defendant or respondent with a plea or answering affidavit, indicating whether the party agree to or opposes referral to mediation. This rule is about mediation.

¹⁹ *Eskom v Soweto City Council* [1992] 4 All SA 915 (W); 1992 (2) SA 703 (W) at 706A-B

[50] The purpose of Rule 41A is to compel parties to announce their positions at an early stage of proceedings with regard to mediation. The obvious intention is to avoid the taking of risk of adverse court orders at the end of the trial. The parties are not compelled to mediation.

[51] Rule 41A is not a procedural requirement for application proceedings or action proceedings. It is only relevant at the end of the trial in instances where it turns out that the matter ought to have been referred to mediation. None of the parties in these proceedings have expressed a desire for mediation or made any concession on the merits of the application.

[52] Both Mr Sishuba and Mr Mpiti strenuously argued about non-compliance with Rule 41A on the basis that the applicants failed to issue the relevant notices. Rule 41A notices are “without prejudice” and need not be filed with the registrar. This application is properly before this Court. Mr Sintwa did not align himself with the Rule 41A challenge. There is no merit in the submissions of both Mr Sishuba and Mr Mpiti. Therefore, I reject their submissions in this regard.

The non-joinder of Qokolweni Traditional Council

[53] The respondents submitted that there is a non-joinder of Qokolweni Traditional Council.

[54] The first, second, and fourth respondents sought to persuade this Court that the council has an interest in the outcome of the proceedings. However, they had

difficulties in explaining the nature of the council's interest, whether it is a legal interest or interest of convenience, or necessity.

[55] In *Bowring NO v Vrededorp Properties CC and Another*²⁰ it was held:

“Though the Trust may well be right in its analysis of the effect of Vrededorp's claim, the enquiry relating to non-joinder remains one of substance rather than the form of the claim. (See eg *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657.) The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned (see eg *Aquatur (Pty) Ltd v Sacks and Others* 1989 (1) SA 56 (A) at 62A - F; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and Others* 2005 (4) SA 212 (SCA) paras [64] - [66]).”

[56] In *Judicial Service Commission and Another v Cape Bar Council and Another*²¹ Mpati P said:

“It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg *Burger v Rand Water Board* 2007 (1) SA 30 (SCA) para 7; *Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa* 5 ed vol 1 at 239 and the cases there cited).”

[57] What is required in proceedings such as these, is that a party must have a legal interest that may be prejudicially affected in the absence of the party seeking to be joined. See also *Zamukulunga Gogela v Masixole Gebengu in re: Masixole Gebengu v Minister of Safety & Security and Another*²², Schoeman J at [5]

²⁰ 2007 (5) SA 391 at para [21]

²¹ (818/2011) [2012] ZASCA 115; 2012 (11) BCLR 1239 (SCA); [2013] 1 All SA 40 (SCA) at para 12

²² Unreported Eastern Cape Judgment by Schoeman J delivered on 11 December 2005 [Mthatha High Court]

“An applicant for intervention must satisfy the Court that he has a direct and substantial interest in the subject matter of litigation, which could be prejudiced by the judgment of the Court [*Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 167; *Auatur (Pty) Ltd v Sacks and Others* 1989 (1) SA 56 (A) AT 62c]”.

This case dealt with intervening parties but the principle is the same.

[58] The Framework Act deals with the functions of the traditional council and the Eastern Cape Act²³. None of those functions involve the identification and appointment of a headman.

[59] The traditional council has no legal right over the appointment of a headman or his removal. The subject matter in this litigation is the appointment of an acting headman. In terms of section 14 of the Framework Act and section 26 of the Eastern Cape Act, it is the royal family, the Premier, and the Department of Traditional Affairs who are involved. The objection based on non-joinder is non-meritorious and cannot succeed.

Mis-joinder of the fourth respondent

[60] Mr Sishuba submitted that the fourth respondent is not a juristic nor an entity that can be sued in terms of both the legislation and common law. He proceeded to submit that it is an *ad hoc* structure for purposes of identifying a traditional leader. He further submitted that once a royal family performs its functions in respect of identification, it ceases to exist. These submissions must be rejected. A royal family has an interest in the proceedings.

²³ Section 4 of the Framework Act read together with section 8 of the Eastern Cape Legislation Act

[61] It is a statutory body that has legislative functions relating to customary law, which it has performed. A royal family can sue and be sued in terms of Rule 14 of the Uniform Rules²⁴. The purpose of rule 14 is to simplify the method of citation by enabling, *inter alia*, an aggregate of persons to be sued in the name which is descriptive of it.

The defence of *lis pendens*

[62] The respondents submitted that there is pending litigation between the parties, which is substantially similar to the current proceedings before this Court. In view thereof, the respondents raised a defence based on *lis pendens*. This Court was not furnished with the details of the alleged pending proceedings involving the current parties. The applicants also denied the allegations about the aforesaid pending proceedings. This Court had no evidence about any other similar proceedings. It is trite law that in order for *lis pendens* to succeed, these requirements must be met²⁵:

- (i) there must be a pending litigation;
- (ii) between the same parties;
- (iii) it must be based on the same action; and
- (iv) in respect of the same subject matter.

²⁴ DF Scott (EP) (Pty)Ltd v Golden Valley Supermarket (134/2001) [2002] ZASCA 48; [2002] 3 All SA 1 (A); 2002 (6) SA 297 (SCA) at 301H-I; Erasmus Superior Court Practice, second Edition by Van Loggerenberg Volume 2, notes under Rule 14 Service, 2015 D1-149 up to D1-153

²⁵ *George v Minister of Environmental Affairs and Tourism* 2005 (6) SA 297 at para 28. See also *Caesarstone Sdot-Yam v World Marble and Granite* 2000 and othes 2013 (6) SA 499

[63] In the absence of facts, this Court is unable to deal with the factual analysis of those matters. The defence of *lis pendens* is not properly raised and accordingly, is rejected.

Whether or not the applicants have the *locus standi* to institute these proceedings

[64] The respondents dispute that the first applicant is a royal family. Their submission is that the first applicant is not a royal family, and cannot identify the person(s) as headmen or acting headmen. Section 26 of the Eastern Cape Act requires a royal family to identify a suitable person to act as a headman or headwoman. It is time to refer to the wording of section 26:

26 Person acting as king or queen, principal traditional leader, senior traditional leader or headman or headwoman

- (1) The royal family must identify a suitable person in terms of customary law and customs to act as a traditional leader where –
 - (a) a successor to the position of a traditional leader has not been identified by the royal family concerned;
 - (b) the identification of a successor to the position of king or queen, principal traditional leader, senior traditional leader and headman or headwoman is being considered or not yet resolved; and
 - (c) ...
- (2) The Premier must, where the royal family has informed him or her of –
 - (a) the particulars of the person so identified to act as a king or queen, principal traditional leader, senior traditional leader or headman or headwoman; and the reason for identification of that person, by notice in the government provincial gazette, recognise an acting king or queen, principal traditional leader, senior traditional leader or headman or headwoman.
 - (b) ...

[65] Mr Sishuba, counsel for the fourth respondent meticulously submitted that an administrative area does not qualify for any royal family in terms of the above legislation. He contended that headmanship is only in respect of an administrative area and therefore does not qualify to have a royal family. The senior traditional

leader is a leader of the traditional community and he exercises authority over a number of headmen or headwomen in accordance with customary law, or within whose area of jurisdiction a number of headmen or headwomen exercise authority. It is the royal family of a senior traditional leader that deals with the traditional leadership including that of the headman.

[66] I must refer to the definition of a royal family which reads as follows in the Act:

‘royal family’ means the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family.

[67] Flowing from the definition of a royal family, it must be accepted that the requirements for a valid or properly constituted royal family are:

- (i) it must consist of immediate relatives of a ruling family;
- (ii) within a traditional community;
- (iii) who have been identified in terms of custom, and includes, where applicable; and
- (iv) other family members who are close relatives of the ruling family.
- (v) It is the core customary institution or structure.

[68] It is settled by the Act that not all persons of royal lineage qualifies for the royal family. It must consist of those members who are immediate relatives to the ruling family and they must be identified according to custom. The members from other families only qualify to the extent that they are close relatives to the ruling family. The ruling family and proximity to it are what qualifies a person to the royal family.

[69] The parties in these proceedings are not contesting membership or qualification to a royal family, in which event, I would have been required to interpret the meaning of the word “family” in the definition. The family is not an issue. Mr Zono who appeared for the applicants submitted that the first applicant is a royal family. The respondents are disputing that assertion on the basis that Zimbane is an administrative area and thus not even qualified to have a royal family. The central submission being that only a traditional community qualifies to have a royal family.

[70] In terms of the definition, one of the requirements for a royal family is that it must be ruling within a traditional community. A traditional community means a traditional community recognised as such in terms of section 2 of the Framework Act²⁶.

[71] The Eastern Cape Act in its definition of a traditional community it refers to the definition provided by the Framework Act. Section 2 of the Framework Act deals with the recognition of traditional communities²⁷. The first applicant submitted that it is ruling within an administrative area.

²⁶ Section 2 (supra)

²⁷ **Recognition of traditional communities**

(1) A community may be recognised as a traditional community if it—

(a) is subject to a system of traditional leadership in terms of that community’s customs; and
(b) observes a system of customary law.

(2)

(a) The Premier of a province may, by notice in the *Provincial Gazette*, in accordance with provincial legislation and after consultation with the provincial house of traditional leaders in the province, the community concerned, and, if applicable, the king or queen under whose authority that community would fall, recognise a community envisaged in subsection (1) as a traditional community.

(b) Provincial legislation referred to in paragraph (a) must—

(i) provide for a process that will allow for reasonably adequate consultation with the community concerned; and

(ii) prescribe a fixed period within which the Premier of the province concerned must reach a decision regarding the recognition of a community envisaged in subsection (1) as a traditional community.

(3) A traditional community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by—

(a) preventing unfair discrimination;
(b) promoting equality; and

[72] The point is emphasised in the founding affidavit when the deponent makes these allegations:

“The first applicant is Maxwele Royal family which is a core customary institution or structure established in terms of the provincial legislation governing Traditional leadership consisting of immediate relatives of the ruling family and other family members who are close relatives of the ruling family. The first applicant exercises its powers in terms of Act 41 of 2017, which is the provincial legislation and Act 41 of 2003 which is the National Legislation. The first applicant enjoys hegemony over 23 rural communities which constitute Zimbane Administrative Area and it carries on its business at Maxwele Great Place, Khwenxurha Location, Zimbane”

[73] Based on the above assertions, it is self-evident that the first applicant is not ruling within a traditional community and by its own admission, it is ruling within an administrative area. The Eastern Cape Act defines an administrative area below:

“**administrative area**” means an area of jurisdiction under the authority of headmanship or headwomanship and within the jurisdictional area of a senior traditional leader in accordance with customary law.

[74] ‘Headmanship/headwomanship’ means the position held by a headman or a headwoman. ‘Headman/headwoman’ means a traditional leader who-

- (a) is under the authority of, or exercises authority within the area of jurisdiction of, a senior traditional leader in accordance with customary law; and
- (b) is recognized as such in terms of this Act.

[75] In *Bulelwa Ndamase v Vusumzi Ndamase and Others*²⁸ Majiki J held:

(c) seeking to progressively advance gender representation in the succession to traditional leadership positions.

²⁸ An unreported judgment of the Eastern Cape, Mthatha High Court, Case NO. 1961/2010 delivered on 23 April 2015 para 33

“the applicant has not stated how and when her homestead’s royal family was established. She has not stated that its establishment was communicated to the senior royal house, let alone receiving the senior royal house’s blessings.”

These remarks are apposite in this case.

[76] Before an entity can claim to be a royal family all requirements for a valid royal family must be established and an administrative area seeking for a royal family must comply with section 2 of the Framework Act. The first applicant failed to place evidence before Court that it had complied with the provisions of section 2 of the Framework Act. In my view, headmanship does not qualify for the royal family. It is irrelevant that the headmanship is hereditary. A headman is subject to the royal family of the senior traditional leader as the administrative area is not the traditional community. The position only changes once the administrative area has complied with section 2 of the Framework Act. This means that once it has been recognised as a traditional community. The first applicant does not meet the requirements of a valid royal family. It is not ruling within a traditional community.

[77] The legal right of the second applicant was derived from the alleged resolution of the first applicant. The second applicant did not allege to be acting in his own right. His right was derived from the invalid resolutions of a non-existing entity. The second applicant has no *locus standi* too. I conclude that the first applicant is not a royal family and thus has no *locus standi* to institute these proceedings for the relief sought in the Notice of Motion.

Whether or not the second applicant was identified as a successor by the first applicant in 2008.

[78] Whilst I need not address the outstanding issues falling for determination, I do address the shortcomings of the application to demonstrate that it cannot succeed even on merits.

[79] The application is facing insurmountable problems in this review proceeding. The applicants have failed to place before Court their alleged resolution of 2008 in terms of which the first applicant had allegedly identified the second applicant. The existence of the alleged resolution is seriously disputed by the respondents. There is unassailable evidence that Zimbane headmanship is identified by way of public elections. The records of the Chief Magistrate as early as 1949 is uncontested in this regard. The third respondent disputed with evidence the allegations by the applicants that the headmanship of Zimbane is hereditary. He pointed out that the Sangoni royal family is responsible for the identification of the headman/headwoman for Zimbane. This overwhelming evidence has not been controverted by any form of acceptable evidence. In the absence of contrary evidence, I must accept the official records of 1949 and the allegations of the third respondent.

[80] An application is defective if it fails to set out the grounds and the facts and the circumstances upon which the applicant relies. The right to require the record of the proceedings is primarily intended to operate for the benefit of the applicant. The purpose of rule 53 is to provide an aggrieved applicant, who might not necessarily have all the evidence at his disposal, the opportunity to supplement the case in the review application by providing potential evidence in the full record of the review

proceedings. It is the duty of the applicant to select what is relevant from the record to serve as evidence for the review application.

[81] In this case, the applicants launched the application in terms of Rule 53. For inexplicable reasons, they did not pursue the provisions of Rule 53 for the records. The onus was upon the applicants to bring evidence before Court in support of their relief. They failed to do so. In *Saccawu and Others v President, Industrial Tribunal, and Another*²⁹ Melunsky AJA stated:

“an applicant who does not furnish the record to the court runs the risk of not discharging the onus, especially where the allegations upon which it relies are put in issue.... without recourse to the record of proceedings the disputes cannot be resolved on the affidavits. The result is that the appellants’ generalized allegations of bias have not been established”.

[82] The correspondences between the second respondent and the Sangoni Royal Family confirm the allegations of the respondents that it is the Sangoni Royal Family which is responsible to identify the headman for Zimbane. I am persuaded by the submissions of the respondents. It would have been an absurdity that a headman has a royal family outside the senior traditional leader or at least outside the traditional community or without the knowledge of senior traditional leader or permission from the royal family of the senior traditional leader.

Conclusion

[83] The conclusions on the two issues above render it unnecessary to deal with the constitutional issue that the Court has raised. The lack of *locus standi* of the applicants on its own brings the application to an end and it must fail. The applicants

²⁹ 2001 (2) SA 277 (SCA) at 282 d

are not entitled to any relief. It follows therefore that the appointment of the third respondent is not validly challenged.

Costs

[84] The general rule is that costs should follow the results. I have not been persuaded differently. The respondents submitted that the deponent to the founding affidavit should pay the costs in her personal capacity. She purported to represent a non-existent customary structure. The submission is sound and I agree.

Order

[85] In the result the following order shall issue:

1. The application is dismissed;
2. The deponent to the founding affidavit, Ntombekaya D Maxwele, jointly and severally with the second applicant are ordered to pay costs of the application on a party and party scale.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT

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