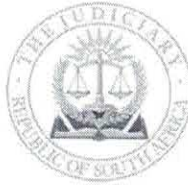


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Signature]</i>	
Date <i>15/11/2019</i>	

CASE NO: 2505/2017

In the matter between:

MABULANI JULIUS MALULEKE**APPLICANT**

and

HLANEKI TRADITIONAL COUNCIL**FIRST RESPONDENT****HLANEKI ROYAL HOUSE****SECOND RESPONDENT****MAM HLANEKI****THIRD RESPONDENT****THE MEC: CO-OPERATIVE GOVERNANCE****FOURTH RESPONDENT****HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS****THE PREMIER: LIMPOPO PROVINCIAL GOVERNMENT****FIFTH RESPONDENT**

JUDGMENT

MAKGOBA JP

- [1] This is a review application in which the Applicant seeks the review and setting aside of the decision by the Fifth Respondent ("the Premier") to recognise the third Respondent as the senior traditional leader of the Hlaneki Traditional Community and the successor to his late father, Hosi Jackson Chabane Maluleke Hlaneki who passed away on 20 November 2015.
- [2] The previous recognised Hosi of the Hlaneki Community, Hosi Jackson Chabane Maluleke Hlaneki ("Hosi Jackson") reigned from 1979 to November 2015 when he passed away. The Hlaneki Royal Family (Second Respondent) identified and appointed the late Hosi's eldest son, the Third Respondent, as successor to the late Hosi Jackson in accordance with the customs of the Hlaneki Traditional Community. The Premier duly recognised the Third Respondent as senior traditional leader with effect from 13 April 2016. It is this decision, and not the decision of the Hlaneki Royal Family to appoint the Third Respondent taken on 7 December 2015, that the Applicant seeks to have reviewed and set aside.

- [3] At the hearing of this review application on 5 November 2019, and upon hearing the submissions by Counsel for all the parties, I pronounced an order dismissing the review application with costs and indicated that my written judgment would follow in due course. I proceed to give reasons for the order.
- [4] The Hlaneki Royal Family (Second Respondent) duly constituted, met on 7 December 2015, identified and appointed the Third Respondent as the successor to the late Hosi Jackson and conveyed this decision to the Fourth and Fifth Respondents. The Fourth Respondent ("the MEC") approved the decision on 12 February 2016 and the Premier recognised the Third Respondent with effect from 13 April 2016 as senior traditional leader in terms of section 12(1)(b) of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005 ("the Limpopo Traditional Leadership Act"). The Third Respondent was so informed by the Premier on 21 April 2016.
- [5] On 22 January 2017, some 9 months later, in a letter dated 22 January 2017 and received by the Premier's office on 31 January 2017 the Applicant raised an objection to the appointment of "*the acting chief of Hlaneki tribal authority*". The basis for the complaint is not disclosed in the letter, but reference was made to two documents dated 24 March 2016 and 10 April 2016 (being annexures MJM1 and MJM2 to the founding affidavit) which were not attached to the said letter to the Premier dated 22 January 2017. The

documents (annexures MJM1 and MJM2) relied upon by the Applicant raised a complaint that not all members of the “royal council” who were eligible to sit as members of the royal council were present at the meeting of the royal family when the decision was taken on 7 December 2015 to appoint the Third Respondent as Hosi.

- [6] I need to point out at this early stage of the judgment that the aforesaid complaint raised in the documents dated 24 March 2016 and 10 April 2016 is not the complaint raised by the Applicant in the present review application. In this application the Applicant alleges that the royal family which took the decision on 7 December 2015, is the wrong royal family and that it could not have taken the decision.
- [7] According to the Applicant a mistake was made in 1924 when at the passing away of the senior traditional leader at the time, the successor was appointed from the second house and not the first house and that through all the successive appointments for traditional leaders since then, including the appointment of the late Hosi Jackson on 01 June 1979, these appointments remained in the wrong house and that he, the Applicant, is the real successor and that his family is the royal family.

[8] The Respondents raised *inter alia* the following defences which are all fatal to the application:

8.1. By the time that the Applicant raised his dispute, which is not even the dispute on which he relies in the review application, the Premier had already taken his decision and was *functus officio*.

8.2. The Applicant did not take the decision of the royal family (Second Respondent), of which he was aware by March 2016, on review. He only takes the Premier's decision to recognise the Third Respondent on review. This decision was already taken on 13 April 2016 and the application is well out of time.

8.3. To the extent that the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) is applicable to the decision of the Premier under review, the failure by the Applicant to institute the proceedings for judicial review without unreasonable delay and not later than 180 days after the date on which the Applicant became aware of the action and reasons for it, or may reasonably have been expected to have become aware of the action and the reasons, is fatal to this application.

In the alternative and to the extent that the common law is applicable to the review application, the failure by the Applicant to institute these proceedings within a reasonable time, is similarly fatal to the application.

- 8.4. The relief sought by the Applicant that the recognition by the Premier in terms of section 12(1)(b) of the Limpopo Traditional Leadership Act be reviewed and set aside will have no practical effect because the recognition by the Premier is a confirmation of the decision of the Royal Family. To review and set aside the recognition by the Premier to appoint a senior traditional leader does not automatically result in the setting aside of the decision of the Royal Family. The decision of the Royal Family is not the subject of this review application.
- 8.5. The Traditional Leadership and Governance Framework Act 41 of 2003, ("the Framework Act") when it was promulgated in 2004, established a Commission specifically to deal with historical disputes such as this. When the term of this Commission expired, a second Commission was established by the Framework Act which was specifically authorised to hear such disputes if those disputes could not be settled internally. The Applicant failed to raise such dispute with either of the two Commissions, which were specialised bodies created to determine such disputes and cannot do so now on review. The Applicant was obliged to follow the procedure laid down in terms of section 21 of the Framework Act.

[9] The Commission on Traditional Leadership Disputes and Claims was specifically established in terms of the Framework Act to investigate and decide on the historical leadership disputes and claims, either on request by an affected party or its own accord. The Applicant has failed to raise the dispute that he now relies on in the review application, when he should have done so when the Commission was still in existence and which was created specifically to investigate such claims and disputes¹.

[10] The applicable provisions of the Framework Act and the Limpopo Traditional Leadership Act as well as the merits of this review application should be determined against the facts of this case as well as the genealogy of the Hlaneki Traditional Community. The appointment and recognition of a senior traditional leader is regulated by section 11 of the Framework Act and its equivalent, section 12 of the Limpopo Traditional Leadership Act.

[11] Section 12 of the Limpopo Traditional Leadership Act reads as follows:

“12 Recognition of senior traditional leader, headman or headwoman

(1) Whenever a position of a senior traditional leader, headman or headwoman is to be filled –

¹ See *Mamone v Commission on Traditional Leadership Disputes and Claims* 2012 (JDR 1755 GP) by Makgoba J, which was confirmed on appeal by both the SCA, see [2004] 3 All SA 1 (SCA) and by the Constitutional Court in *Bapedi Marota Mamone v Commission on Traditional Leadership Dispute and Claims & Others* 2015 (3) BCLR 268 (CC).

(a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to the customary law of the traditional community concerned –

- (i) identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and*
- (ii) through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of the specific person.*

(b) The Premier must, subject to subsection (2) –

- (i) By notice in the Gazette – recognise the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, head or headwoman, as the case may be;*
- (ii) Issue a certificate of recognition to the person so recognised; and*
- (iii) Inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional leader.*

(2) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not in accordance with customary law, customs or processes, the Premier –

- (a) May refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations; 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.*
- (3) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (2) has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law”.*

[12] As laid down in this Court recently in the matter of **Mulamula & Others v Premier of the Province of Limpopo & Others**, a judgment of 6 September 2019² the Premier is obliged to (“must”) recognise the person so identified and effect the appointment by notice in the provincial gazette, by issuing a certificate of recognition and by informing the relevant house of traditional leaders of the recognition.

² As yet unreported but available on SAFLII and reported as *Mulamula & Others v The Premier of the Province of Limpopo & Others* (5948/2018)2019 [ZALMPPHC 44] (6 September 2019) and on Juta’s daily reports as 2019 JDR 1942 (LP).

The only qualification placed on the Premier to recognise the person identified, is when there is evidence that the identification was not done in accordance with customary law, in which event the Premier may either refer the matter to the house of traditional leaders, or refuse to issue the certificate and refer the matter back to the Royal Family for reconsideration.

[13] In the present case the aforementioned qualifications or circumstances did not arise either before the Premier recognised the Third Respondent, or at the time the Applicant allegedly raised his “dispute” with the Premier in January 2017.

[14] The following facts relating to the genealogy of the Hlaneki royal family and the circumstances relating to the appointment of the Third Respondent as the senior traditional leader are common cause or not seriously disputed.

14.1. An ancestor of both the Applicant and the Third Respondent, Hosi Matshema (Macema) Jan Hlaneki ruled the Hlaneki Tribe until he passed away on 28 March 1916. At the meeting of the then Royal Family convened by the Native Commissioner, Pietersburg, and also attended by a number of senior headmen of the community, the late Hosi Matshema Jan Hlaneki’s son, Tshabane (Chabane) Hlaneki was appointed as his successor and duly recognised as such by the authorities in 1917. Hosi Tshabane passed away in 1928 and was

succeeded by his eldest son from his first wife, Mkhachani (Mkhatshane) William Hlaneki who was appointed on 6 August 1928 and reigned as Hosi until he passed away in 1946.

- 14.2. The late Hosi Mkhachani William Hlaneki's eldest son, Jackson Chabane Maluleke Hlaneki (the Third Respondent's father) was still a minor at the time and one of his uncles George Hlaneki Maluleke was appointed as Regent, acting in his stead from 1946 until he passed away in 1978.
- 14.3. It is further common cause that Hosi Jackson Chabane Maluleke Hlaneki was thereafter duly appointed on 1 June 1979 as Hosi of the Hlaneki tribe (as it was then known).
- 14.4. Hosi Jackson Hlaneki passed away on 20 November 2015. It is further common cause that the Third Respondent is the eldest son of the late Hosi and entitled in terms of the customs of the Hlaneki tribe to succeed his father.
- 14.5. It is further common cause that on 7 December 2015 the Hlaneki Royal Family at a meeting identified and appointed the Third Respondent as successor to the late Hosi Jackson, that this appointment was confirmed at a further meeting of the Royal Family held with representatives of the Fourth Respondent on 9 February 2016 and that the Premier, after receiving confirmation of the appointment and the

recommendation from the MEC (Fourth Respondent) recognised the Third Respondent as Hosi on 13 April 2016.

14.6. It is further common cause that the Premier has complied with the provisions of section 12(1)(b) of the Limpopo Traditional Leadership Act by recognising the Third Respondent as senior traditional leader by notice in the Gazette, that he has issued a certificate of recognition of the Third Respondent and informed the provincial house of traditional leaders and the local house of traditional leaders of his recognition.

[15] The Applicant's case on review seems to be that in 1924, when Chabane Hlaneki Maluleke, who is the grandfather of the late Hosi Jackson and the great grandfather of the Third Respondent was appointed as Hosi, a mistake was committed in that Chabane Hlaneki Maluleke was from a junior house and that one Hlatlani Hlaneki, who was allegedly born of the late Hosi's first wife, should have been appointed. According to the Applicant he was born from what he says was historically the first house and that the Premier should have recognised him as a senior traditional leader and not the Third Respondent.

These facts are disputed by the First to Third Respondents. Therefore, in law the various disputes of fact in the present matter should be decided on the Respondents' version³.

³ See *Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-636C; *Ludidi v Ludidi and Others* [2018] 4 All SA 1 (SCA) par 18.

The objective facts, as supported by the Fourth and Fifth Respondents' explanatory affidavit also show that there is no merit in any of the grounds upon which the Applicant seeks to review and set aside the Premier's decision.

- [16] What the Applicant in reality attempts to do, is to seek the review and setting aside of a decision that was taken (on his own version of facts) in 1924 when, according to him the position of Hosi of the Hlaneki traditional community was allocated to the wrong house and remained in the wrong house in the subsequent appointments in the long line of successive Hosi who were appointed since then. I agree with the First to Third Respondents' Counsel's submission that this is legally untenable, both under common law (which was applicable throughout the whole period) and under administrative law under the Constitution which is now the supreme law of the country.

There is no basis to do so almost a century after the fact, particularly not when the Applicant had remedies available to him during this period and left the appointment of successors unchallenged.

- [17] In my view the Applicant's *bona fides* in instituting these review proceedings and his credibility as a witness are brought into question. This is the first time that the Applicant raises this so-called dispute. The Applicant is about 86 years old and has lived through Vuhosi (chieftaincy) appointed according to

Hlaneki customs and traditions all his life, yet he failed to raise any dispute until now. He had many opportunities to do so. He could have recently in 1979 reviewed the appointment of the Third Respondent's father, Hosi Jackson. Moreover from about 1996 there were various Commissions in the Limpopo Province on traditional leadership, namely the "Ralushai Commission" established in 1996, the "Nhlapo Commission" of 2004 and the "Kgatla Commission" of 2015. The Applicant did not raise this alleged dispute at any of these occasions and / or commissions and should not be allowed to do so now.

- [18] Counsel for the Applicant argued that the Applicant did raise a dispute against the identification and / or the appointment of the Third Respondent as a senior traditional leader. Counsel argued further that such a dispute was raised before the Premier could recognise the appointment of the Third Respondent. In this regard Counsel relied on the correspondence dated 24 March 2016 and 10 April 2016 (Annexures MJM1 and MJM2 to the founding affidavit).

In my view the aforesaid correspondence do not disclose any dispute that the Premier could give any attention to, even if he had not by then already issued the Certificate of Recognition. The heading of the correspondence states that the objection is to the appointment of *"the Acting Chief of Hlaneki Tribal Authority"*. The truth is that no acting chief was being appointed. Therefore this correspondence had nothing to do with the appointment of the Third

Respondent who was being recognised as a senior traditional leader of the Hlaneki Traditional Community.

- [19] For what it may be worth, I set out the contents of one of the letters. Paragraph 1 of the letter reads as follows:

"I, MJ Maluleke, a full member of the legitimate Hlaneki Tribal Council wish to raise an objection to the appointment of an Acting Chief of Hlaneki Tribal Authority who was appointed by an illegitimate Hlaneki Tribal Council without having properly constituted a legitimate Hlaneki Tribal Council, for reasons unknown to me and other legitimate Hlaneki Tribal Council members."

- [20] Whatever complaint is contained in the aforesaid letter is without merit. The Applicant is not and was never a member of the Hlaneki Tribal Council. It is the Royal Family that took the decision to identify the Third Respondent as successor to the late Hosi Jackson and not an "illegitimate Hlaneki Tribal Council" as alleged. The Hlaneki "Tribal Authority" does not have authority to take such decision and it is common cause that the Royal Family took this decision and not the Tribal Authority or Council.

The complaint in this letter therefore had no basis in either the Framework Act or the Limpopo Traditional Act and is not a complaint that would have obliged the Premier to exercise his discretion in terms of section 12(2) of the Limpopo Traditional Leadership Act to refer the dispute to either the house of traditional

leaders, back to the Royal Family, or on which he could have refused to issue a certificate of recognition, which by then he had already issued.

[21] In the result the Applicant has failed to show that he has lodged any timeous and valid complaint against the decision of the Royal Family to identify the Third Respondent as successor to the late Hosi Jackson Hlaneki or that he has placed evidence or an allegation before the Premier or the Fourth Respondent (the MEC) that the identification of the Third Respondent was not done in accordance with customary law, customs and processes as contemplated in section 12(2) of the Limpopo Traditional Leadership Act.

[22] The Royal Family (the Second Respondent in this case) plays a very significant role in the determination of who the rightful person is to fill a position of traditional leadership. Only recognised Royal Family members are entitled to participate in the process⁴.

The term “royal family” is defined as follows in section 1 of both the Framework Act and the Limpopo Traditional Leadership Act:

““royal family” means the core customary institution or structure consisting of the 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.”

⁴ Lurhani v The Premier of Eastern Cape Province Government 2018 JDR 0629 (ECM) PAR 13-15; and Makaula v Zulu Royal Family of Ncapai Kamadzikane Kazulu 2016 JDR 0794 (ECM) par 56

- [23] The Royal Family as contemplated in section 12(1) of the Limpopo Traditional Leadership Act and section 11(1) of the Framework Act is the immediate and core family of the late Hosi Jackson Hlaneki. The Applicant is not a member of the Royal Family. The family of the person the Applicant claims should have been appointed as Hosi in 1924 and who, according to the Applicant is the "legitimate Royal Family" are not members of the Royal Family as defined in the Framework Act and the Limpopo Traditional Leadership Act. This in my view, is fatal to the Applicant's case.
- [24] The late Hosi Jackson Hlaneki was a duly recognised and appointed Hosi from the year 1979 until his death in 2015. In terms of section 28(1) of the Framework Act a traditional leader who was appointed in terms of the applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of the Framework Act is deemed to have been recognised as such in terms of section 9 or 11 of the Framework Act. The Third Respondent was therefore duly identified and recognised as the rightful successor to the late Hosi Jackson.
- [25] The Applicant who presently challenges the appointment of the Third Respondent could and should have lodged a claim or dispute with either of the aforementioned Commissions when they were in existence had he

disputed the late Hosi Jackson Hlaneki's appointment as Hosi on the basis that it was not in accordance with customary law. No such dispute was declared by him and the Commission therefore made no decision on the late Hosi Jackson's recognition as Hosi. Accordingly, Hosi Jackson was deemed to have been recognised as a traditional leader in terms of the Framework Act and duly succeeded by his son, the Third Respondent.

The Applicant admits in his replying affidavit that he never challenged the whole line of succession and that no one else challenged this during the past century. This is also fatal to the Applicant's review application.

- [26] The administrative decision taken in 1979 when the late Hosi Jackson Hlaneki was appointed and thereafter recognised as Hosi, had the result that his core family was and remains the Royal Family of the Hlaneki as defined in the Framework Act and the Limpopo Traditional Leadership Act. The Applicant never took that decision on review and cannot do so now 40 years later.

As was pointed out by Makgoba J (as he then was) in **Netshimbupfe v Mulaudzi & Others 2015 JDR 2344 (GP)** in paragraph 6 of the judgment:

"is trite that until an administrative decision 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."

See: Oudekraal Estates (Pty) Ltd v City of Cape Town & Others 2004 (6) SA 222(SCA).

The decision in the Oudekraal Estate case was confirmed by the Constitutional Court in Camps Bay Rate Payers' & Residents' Association and Another v Harrison and Another 2011 (4) SA 42 (CC0 at [62] where it was held:

"Administrative decisions are often built on the supposition that previous decisions were validly taken and, unless that previous decision is challenged and set aside by a competent Court, its substantive validity is accepted as a fact."

- [27] The effect of this is that the unchallenged appointment of Hosi Jackson Chabane Hlaneki in 1979, and that of his predecessors after the alleged dispute arose according to the Applicant in 1924, is that the core family of the late Hosi Jackson Chabane Hlaneki is the Royal Family of the Hlaneki traditional community, as defined in the Framework Act and the Limpopo Traditional Leadership Act.

That Royal Family is the only Royal Family that could have identified a successor to the late Hosi Jackson Hlaneki. It indeed took such decision on 7 December 2015 to identify the Third Respondent as successor, which decision the Premier in the absence of contrary evidence of an allegation as contemplated in section 12(2) of the Limpopo Traditional Leadership Act was obliged to accept. The Applicant's family has no standing and has not been recognised under the Framework and Limpopo Acts. See in this regard the

judgment by MG Phatudi AJ (as he then was) in **Sepadi v Premier of Limpopo Provincial Government 2015 JDR 2262 (GP) / [2015] ZAGPPHC 1097 (13 October 2015)** at paras [13] – [18].

If these principles are applied to the Applicant's family, they cannot claim to be the "Royal Family" of the Hlaneki who should have taken the decision as to who the successor to the late Hosi should be. The late Hosi Jackson Hlaneki's family members are and remain the *"immediate relatives of the ruling family within a traditional community"* as contemplated in the definition of "Royal Family".

- [28] Since the appointment of Hosi Jackson Hlaneki in 1979 was never disputed, his family is the Royal Family and not the unnamed "royal family" that the Applicant says should have taken the decision. As pointed out in an appeal in this division in **Netshimbupfe & Another v Mulaudzi [2017] ZALMPPHC 3 (3 March 2017)** at paragraph 17⁵ that there *"cannot be two different customary structures or entities in existence at the same time within that community that was the Royal Family"*.

⁵ This was an unsuccessful appeal against the judgment of Makgoba J (as he then was) in *Netshimbupfe & Another v Mulaudzi* 2015 JDR 2344 (GP) by Muller J with whom MG Phatudi J and Kganyago J agreed.

[29] I come to a conclusion that in the circumstances of this case the Premier was obliged to accept the decision of the Royal Family taken on 7 December 2015 and to recognise the Third Respondent as Hosi. There is no merit in the Applicant's review application and it should fail.

[30] The Application is accordingly dismissed with costs including the costs consequent upon the employment of Senior Counsel.



**E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

Heard on	: 5 November 2019
Order pronounced on	: 5 November 2019
Judgment delivered on	: 15 November 2019
For the Applicant	: Adv A C Diamond
Instructed by	: Diamond Inc
For the 1st, 2nd & 3rd Respondents	: Adv Havenga SC
Instructed by	: M P Koekmoer Attorney
For the 4th & 5th Respondents	: Adv S S Green
Instructed by	: State Attorney