

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

Delivered: 3/3/17

(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO THE JUDGES: YES/ NO
(3)	REVISED.

[Signature]
1/3/17

APPEAL CASE NO: HCA02/2016

In the matter between:

NETSHIMBUPFE FUNZANI ERNEST

:FIRST APPELLANT

MEMBERS OF NETSHIMBUPFE ROYAL FAMILY

:SECOND APPELLANT

And

MUALUDI VHANGANI CATHCART

:FIRST RESPONDENT

CHAIRPERSON OF THE HOUSE OF THE TRADITIONAL LEADERS

:SECOND RESPONDENT

MEC OF COGHSTA LIMPOPO PROVINCE

:THIRD RESPONDENT

THE PREMIER OF LIMPOPO PROVINCE

:FOURTH RESPONDENT

NETSHIMBUPFE MULATEDZI

:FIFTH RESPONDENT

APPEAL JUDGEMENT

MULLER J:

[1] The erstwhile Council of National Unity for the Republic of Venda,¹ established the Mushasha Commission in 1990 in terms of the provisions of the Commission Act, Act 8 of 1947.² The commission was tasked to inquire into the vhoi affairs in the then Republic of Venda.³

[2] The upshot of the commission of inquiry was that the appointment of the incumbent khosi Tshisevhe Edward Netshimbupfe⁴ was set aside from 30 September 1991. In his stead khosi Munyadziwa Netshimbupfe⁵ was appointed as traditional leader of the Tshimbupfe community. Khosi Munyadziwa reigned until his death in 2013. The first appellant is the eldest son of khosi Tshisevhe and the fifth respondent is the eldest son of khosi Munyadziwa. The fifth respondent was identified at a meeting of a royal council as the successor to the deceased khosi. Simultaneously, the first appellant was also identified as the successor to the deceased khosi by a royal family. Both names were forwarded to the premier of the Limpopo province for recognition.

[3] The main relief originally claimed was that condonation be granted for the late filing of the application and that the decision of the chairman of the Council of National Unity of the government of Venda to appoint a commission of inquiry be reviewed and set aside as being invalid and in contravention of the provisions of section 4 of the Vhoi Administration Act, 14 of 1986 of the Republic of Venda. Although couched as substantive relief the appellants also claimed for an order that the decision of the commission be set aside on the basis that it acted *ultra vires* the aforementioned Act.

[4]. However, on 16 April 2015 the appellants abandoned the main relief originally claimed in the notice of motion.⁶ The appellants nevertheless persisted with the alternative claim that the decision taken on 25 July 2014 by the Tshimbupfe royal

¹ Under the chairmanship of brigadier-general Ramushwana.

² In terms of proclamation 10 of 1990 published in Government Gazette of the Republic of the Venda Vol 18 No 71 dated 18 May 1990.

³ Proclamation 10 of 1990.

⁴ Hereinafter referred to as khosi Tshisevhe.

⁵ Hereinafter referred to as khosi Munyadziwa

⁶ In terms of an amended notice of motion.

council in terms whereof the fifth respondent was identified as the successor to the throne of the Tshimbupfe traditional leadership be reviewed and set aside. And, in the alternative, they also seek a *declarator* that the identification of the fifth respondent by the said royal council is *ultra vires* and inconsistent with the provisions of the Traditional Leadership and Governance Framework Act.⁷ Finally, the appellants seek an order that the first appellant be declared the rightful and lawful successor to the vacant traditional leadership position.

[5] The appellants, in view of the amendment to the relief claimed in the amended notice of motion, accept by necessary implication that the commission of inquiry was lawfully established by the previous government. They also accept the lawfulness of the appointment of khosi Munyadziwa. It must be emphasised that khosi Munyadziwa is not the successor of the dethroned khosi Tshisevhe. A successor to khosi Munyadziwa has to be appointed in terms of the customs of the Tshimbupfe traditional community.

[6] The appellants, on appeal argued, on the one hand, that the identification of the fifth respondent as the successor to the late khosi was not done in accordance with the prevailing custom of the Tshimbupfe community, and, on the other, that the royal council who identified the fifth respondent as khosi was a defunct structure which was created by the repealed Vhosi Administration Act of the Republic of Venda who had no authority in law to make a valid identification.

[7] Makgoba J (as he then was) dismissed the application with costs. He came to the conclusion that the first appellant is not entitled to succeed him. He found, in essence, that the fifth respondent who is the eldest son of the late khosi was properly and correctly identified in terms of the customs of the tribe by the royal family.⁸

[8] He also dismissed a subsequent application for leave to appeal with costs. This appeal is with leave granted by the Supreme Court Appeal.

[9] The Framework Act gives effect to section 211 and 212 of the Constitution. It was passed to recognise traditional communities and to provide a statutory framework

⁷ Act 41 of 2003 (Hereinafter the Framework Act).

⁸ "Only a male child birthed by a great wife qualifies to be an heir to the headman. In order to qualify as a "dzekiso" wife, a woman must have been married whilst a virgin, must be royalty and the bride wealth, that married her should have come from the father of the headman" See *Tshivulana Royal Family v Neshivhulana* (CCT48/16) [2016] ZACC47 (14 December 2016) p3 (fn 3).

within which traditional leadership is identified and recognized by both national as well as the provincial authorities of the provinces where the traditional communities are situated.⁹

[10] Section 11 of the Framework Act states:

“Recognition of senior traditional leaders, headmen or headwomen

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

(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 applicable customary law -

(i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 12(1)(a), (b) and (d) apply to that person; and

(ii) through the relevant customary structure, inform the Premier of the province concerned of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and

(b) the Premier concerned must, subject to subsection (3), recognise the person so identified by the royal family in accordance with provincial legislation as senior traditional leader, headman or headwoman, as the case may be.

(2) (a) The provincial legislation referred to in subsection (1)(b) must at least provide for -

(i) a notice in the *Provincial Gazette* recognising the person identified as senior traditional leader, headman or headwoman in terms of subsection (1);

(ii) a certificate of recognition to be issued to the identified person; and

(iii) the relevant provincial house of traditional leaders to be informed of the recognition of a senior traditional leader, headman or headwoman.

(b) Provincial legislation may also provide for -

(i) the election or appointment of a headman or headwoman in terms of customary law and customs; and

(ii) consultation by the Premier with the traditional council concerned where the position of a senior traditional leader, headman or headwoman is to be filled.

(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 Premier -

(a) may refer the matter to the relevant provincial house of traditional leaders for its recommendation; or

(b) may refuse to issue a certificate of recognition; and

⁹ See *Sigcau v President of the Republic of South Africa* 2013 (9) BCLR 1091 (CC) at para 4.

(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 which has been referred back to the royal family for reconsideration and resolution in terms of subsection (3) 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."

[11]The Limpopo Traditional Leadership and Institutions Act¹⁰ was enacted by the province of Limpopo as envisaged by the Constitution and the Framework Act and deals, in similar terms in Chapter 4, with the identification of traditional leaders by traditional communities and the recognition of such traditional leaders by the premier of the province.¹¹

¹⁰ Act 6 of 2005 came into force 1 April 2006. (Hereinafter the Limpopo Act.)

¹¹ "12 **Recognition of senior traditional leader, headman or headwoman**

(1) Whenever a position of a senior traditional leader, headman or head woman is to be filled-

(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, headman 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, headman or headwoman.

(2) 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 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] Both Acts define “the royal family” to mean:

“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.”

And a “customary institution or structure” is defined in terms of both Acts as:

“those institutions or structures established in terms of customary law.”

[13] It is clear from a plain reading of both Acts that the royal family is a statutorily entrenched institution or structure recognized by custom and that customary law applies to the process to be adopted and followed for the identification of the successor of a khosi. The court must, therefore, direct its attention to the customs and traditions of the Tshimbupfe community in terms whereof a successor of a khosi is identified.

[14] In *Alexkor Ltd & another v The Richtersveld Community & others*¹² the Constitutional Court described indigenous law as a: „[S]ystem of law that was known to the community, practised and passed on from generation to generation. It is a system of law that has its own values and norms. Throughout its history it has evolved and developed to meet the changing needs of the community . . .”

[15] The procedure followed by the royal family to identify a successor has to be in accordance with the prevailing custom of the Tshimbupfe community on the date the successor is identified and must, in addition, also accord with the relevant provisions of the Limpopo Act.¹³

[16] The appellants contend that the royal family consists of the children of the late khosi Tshivhase. The respondents denied this contention and assert that the royal

¹² 2004 (5) SA 460 (CC) par 53 and 57.

¹³ A decision by the royal family to recognize a traditional leader under section 12(1)(a) is reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). “PAJA defines administrative action as a decision or failure to take a decision that adversely affects the rights of any person, which has a direct, external legal effect. This includes “action that has the capacity to affect legal rights” per Mogoeng CJ in *Viking Pony Africa Pumps t/a Tricon Africa v Hidro-Tech Systems (Pty) Ltd* 2011 (1) SA 327 (CC) at par 37. See also *Nesengani and Others v Chairperson of the Davhana Royal Council and Others* (204/2008) [2016] ZALPPTHHC (19 September 2016) par 57. Also *Mphephu and Another v Mphephu-Ramabulana and Others*; Limpopo High Court (Case no 773/2012) (30 January 2017) par 77.

family consists of the children of the reigning khosi Munyadziwa. It is argued by the respondents that the royal council and the royal family are the same institution and that a reference to royal council is a reference to the royal family. What is clear is that there is a fundamental difference between the parties who the royal family is and who the members of the royal family are. The difference of opinion has its roots, so it appears, at the removal of khosi Tshisevhe by the Venda Government.

[17] There cannot be two different customary structures or entities in existence at the same time within that community that was the royal family. Because of the view I take of the case, it is unnecessary to decide whether there is a difference between the royal council and the royal family or whether the royal family consists of the family and children of the late khosi Tshisevhe or khosi Munyadziwa. I refrain, therefore, from making any decision in this regard.

[18] Two successors have been identified, the names of which have been submitted to the premier of the Limpopo province for recognition by him, in accordance with the Limpopo Act. The conundrum is twofold. One, the two successors were identified at meetings of different royal families and on different occasions. Two, only one successor may be identified and subsequently recognised by the premier.¹⁴ It is the task of the royal family to identify a single person who is qualified in terms of customary law to assume the position in question and must notify the premier through the relevant customary structure of the particulars of the specific person so identified.¹⁵ Section 12 as a whole envisaged a single person to be identified by the royal family, and that the person that has been identified, be recognized by the premier of the province as the traditional leader.

[19] It is common cause between the parties that in terms of the custom of the Tshimbupfe community a successor must be identified by the khadzi¹⁶ and the ndumi.¹⁷ They are members of the royal family. They play an important role in the identification of a successor. It is, *inter alia*, their duty to be present at a specially

¹⁴ Section 12(1)(b)(i).

¹⁵ Section 12(1)(a)(i).

¹⁶ The khadzi is a sister of the khosi. The khadzi and the ndumi must jointly agree who the successor is. The khadzi is also entrusted with ceremonial duties.

¹⁷ The ndumi is the younger brother of the khosi. See *Nesengani and Others v Chairperson of the Davhana Royal Council and Others supra* at par 4.3-4.6.

convened meeting of the royal family to identify a successor of a khosi that has passed on, even where it is obvious who the successor is. The identification of the successor by the khadzi and the ndumi is an indispensable part of the identification process to be valid. Neither the khadzi nor the ndumi attended the meeting where the fifth respondent was identified as the successor to the deceased khosi. However, they were present at a meeting where the first applicant was identified as successor.

[20] The submission made on behalf of the respondents was that they were invited to the meeting but they have deliberately elected not to attend with the result that a successor was identified by the meeting in their absence.

[21] Both legal representatives were invited by the court to suggest what the position in customary law would be if a khadzi or ndumi declined to attend a meeting where they are obliged to perform their respective duties in accordance with custom. They were unable to recall that it has ever happened before and were unsure if provision for such an eventuality in the custom of the community exists.

[22] Of course, custom may be proved by a party who is relying on a particular custom, if the rules of the custom are not readily ascertainable with sufficient certainty so that judicial notice may be taken thereof.¹⁸ *In casu*, the parties are in agreement that it is the custom that the khadzi and ndumi must be present at a meeting of the royal family convened to identify a successor to a traditional leader. That being the custom, the identification of the fifth respondent at a meeting of the royal family without the khadzi and ndumi being present and without their identification of the fifth respondent for whatever reason, is not in accordance with the custom of the community.

[23] The respondents are unable to rely on an existing customary rule that empowered the royal family to identify a successor in the absence of the khadzi and ndumi where they have elected not to participate in such a meeting. It is, therefore, not open to this court to conjure up an alternative procedure if there is none in terms of customary law. Nor can their absence simply be condoned.

[24] Makgoba J erred, with respect, in finding that the identification of the fifth respondent was regular and that it must follow that he will succeed his late father

¹⁸ Section 1 of the Law of Evidence Amendment Act, Act 45 of 1988. Also *Maisela v Kgolane* NO 2000 (2) SA 370 (T) at 376H.

because he is in any event the eldest son of the deceased khosi, born from a dzekizo wife. That may well be true, but is not the question the learned judge was called upon to decide. This case does not deal with succession. It deals with the legality of the identification of a successor to the late khosi by the royal family. The learned judge also did not consider the effect of the provisions of section 12(2) of the Limpopo Act.

[25] The names of the two identified successors that have been identified have been forwarded to the premier, who has not yet recognised anyone in terms of the Limpopo Act.¹⁹ Section 12(2) of the Limpopo Act clothed the premier with a discretion in instances where there is evidence or an allegation that the identification of a person was not done in accordance with customary law to:- (a) refer the matter to the provincial house of traditional leaders and the local house of traditional leaders for their recommendation; or (b) he/she may refuse to issue a certificate of recognition; and (c) must refer the matter back to the royal family for reconsideration and resolution where a certificate of recognition has been refused. If a matter has been referred back to the royal family for reconsideration and resolution and if the dispute has been resolved, the premier must recognize the person identified, if the premier is satisfied that the matter has been resolved in accordance with customary law.²⁰

[26] Section 12(2) of the Limpopo Act provides a mechanism whereby any dispute as to the eligibility of a person identified may be resolved internally. The dispute between the parties can best be addressed by the premier who is the designated person in terms of the legislation to take the appropriate steps to resolve the dispute internally before he/she is called upon to recognize the identified person as a traditional leader. Provision is made for institutions that are best suited to deal with the current dispute. They are endowed with an intimate knowledge of the customs of the Tshimbuphe community to bring about a resolution of the dispute once and for all. It is in the interest of the members of the relevant community to have clarity who their traditional leader is, and it is in the interests of justice to have stability within the larger community.

¹⁹ Section 12(b)(i)-(iii). A person is recognized by the premier if the premier is satisfied that the identification of the person by the royal family was done in accordance with custom. The premier must then recognize the person by notice published in the gazette and the premier must at the same time issue a certificate of recognition to that person and inform the provincial house of traditional leaders of the recognition.

²⁰ Section 12(3).

[27] The premier acknowledged receipt of a letter the contents of which is not attached to the papers relating to the chieftainship. I accept that the premier was made aware of the existing dispute. In any event, the mere fact that two persons were identified is evidence that the identification of these persons is not in accordance with customary law or custom and not in accordance with the precepts of the section 12. Until such time that the premier has made a decision, the dispute remains an internal matter for which an internal remedy is available.²¹ In my view the internal remedy provided for must first be exhausted before this court may be approached for relief.

[28] The Constitutional Court recently held that the internal remedies provided for in section 21 of the Framework Act do not apply to disputes between the premier and traditional communities.²² The dispute in the present case has not yet reached that stage. The premier has not made a decision yet to recognize any of the persons identified or to invoke any of the provisions of section 12(2) of the Limpopo Act. However, a considerable period of time has lapsed since the dispute was brought to the attention of the premier.²³ There cannot be any doubt that the premier is duty bound to make a decision and that it is in the interests of the community that it is done without any further delay.

[29] In the result, the appeal must fail, albeit for different reasons set out herein. There is also no reason why costs should not follow the result.

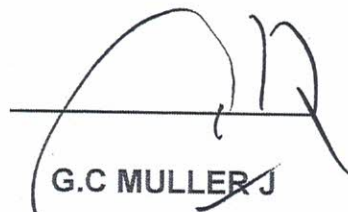
ORDER

1. The appeal is dismissed with costs.

²¹ *Koyabe and Others v Minister for Home Affairs and Others* 2010 (4) SA 327 (CC) at par 34-40. *Nichol and Another v Registrar of Pension Funds and Others* 2008 (1) SA 383 (SCA) at par 15-18.

²² *Tshivhulana Royal Family v Netshihulana supra*.

²³ A decision should be made within a reasonable time.



G.C MULLER J

JUDGE OF THE HIGH COURT: LIMPOPO DIVISION POLOKWANE

I agree



M.G PHATUDI J

JUDGE OF THE HIGH COURT: LIMPOPO DIVISION POLOKWANE

I agree



M.F KGANYAGO J

JUDGE OF THE HIGH COURT: LIMPOPO DIVISION POLOKWANE