



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

10 | 3 | 2017

CASE NO: 80576/2014

(1)	REPORTABLE: ☒ YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
10-March-2017	
DATE	SIGNATURE

In the matter between:

YENDE, FELANI

First Applicant

AMAYENDE ASOGENYANENI ROYAL FAMILY

Second Applicant

and

THE PREMIER: MPUMALANGA PROVINCE

First Respondent

**MEC FOR CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**

Second Respondent

**THE CHAIRPERSON: COMMISSION ON
TRADITIONAL LEADERSHIP DISPUTES AND
CLAIMS: MPUMALANGA PROVINCE**

Third Respondent

THEMBA MICHAEL YENDE

Fourth Respondent

AMAYENDE ASOGENYANENI TRADITIONAL COUNCIL

Fifth Respondent

JUDGMENT

MANAMELA, AJ

Introduction

[1] On 19 July 2012,¹ the first respondent (the Premier) recognised and appointed the fourth respondent (Themba Yende)² as the senior traditional leader of the traditional community known as amaYendeasoGenyaneni (amaYende). This followed a process in terms of the provisions of the Traditional Leadership and Governance Framework Act 41 of 2003 overseen by the third respondent (the Commission) in terms of which amaYende were also recognised as a traditional community.³

[2] The first and second applicants (the applicants), particularly the first applicant (Felani Yende), call for the Premier's decision to be declared unlawful and contrary to adopted customary laws and practices of the Zulu nation, to which amaYende subscribes; reviewed and set aside, and with that the senior traditional leadership be awarded to the Felani Yende, alternatively that the impugned decision be returned to the Commission (constituted by anew and differently) for reconsideration within a prescribed time-frame.⁴

[3] Felani Yende is the son of the late Leornard Mjozi Yende (Leonard Yende and occasionally Leonard) and Thandiwe Maria Mnisi (MmaMnisi). Leonard Yende passed on in 1997, but he is survived by MmaMnisi and most of their children, including Felani Yende. Themba Yende is also the son of Leonard Yende [from a non-matrimonial relationship] with a different mother. MmaHadebe, Themba Yende's mother was never married to Leonard Yende and thus Themba Yende was born out of wedlock. This is effectively the location or origin of

¹ Although the publication in the Government Gazette was only in November 2012, the approval or recognition by the Premier was in July 2012.

² Without implying any disrespect to the parties herein, including those with royal titles or potential royal titles, I refer to the parties herein without the use of titles.

³ See section 11 of the Traditional Leadership and Governance Framework Act 41 of 2003.

⁴ See pars 1-7 of the notice of motion on indexed pp 2-3.

the current dispute. According to Felani Yende, on a correct application of Zulu customs and practices, Themba Yende ought not to have been appointed chief or senior traditional leader of the amaYende, but him.

[4] On the other hand, the respondents in opposition to the relief sought, submit in the main that the process followed in the recognition and appointment of Themba Yende as senior traditional leader was above board. The respondents submit that Felani Yende, the second applicant, as represented by Sibongile Yende, Felani Yende's sister and other family members, were, at all material times, part of the process; associated themselves with the outcome or were indifferent to the outcome. They label the current application an afterthought, possibly motivated by the Felani Yende's realisation of the privileges and financial trappings associated with the status of senior traditional leader.⁵

[5] The application, which is styled a review in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was issued only in November 2014. This was more than two and half years after the impugned decision was taken in 2012.⁶ In the condonation application, incorporated in the review application, the causes or reasons for the delay are essentially stated as being along these lines: the applicants' remote geographical location (ostensibly from the location of this Court); late awareness or knowledge of the existence of the impugned decision; lack of financial resources and limited level of education, on the part of the applicants.⁷ The aforementioned reasons cumulatively gain forceful persuasion, particularly when weighed against a backdrop of consideration of the interests of justice. Therefore, condonation will be granted. I also did not sense forceful objections by

⁵ See par 76 to the founding affidavit on indexed p 23.

⁶ See par 1 above.

⁷ See pars 19 – 40 of the founding affidavit on indexed pp 13 – 16.

counsel for the respondents against the granting of condonation, although this is not necessarily decisive on the issue. The ruling will naturally pave way for a determination of the merits of the matter, after attention is given to other technical or procedural issues, next.

Parties as cited

[6] I consider attention to the issues I discussed next warranted. Although, the second applicant is cited collectively as the royal family, the instrumental person or representative is Sibongile Yende, Felani Yende's sister and therefore Themba Yende's half-sister.⁸ I could not find a resolution or anything confirming her authority. This may become an issue for costs, particularly when considering that the definition of or reference "royal family", may include several other people. But, I will take this no further.

[7] The fifth respondent is a traditional council and ostensibly voluntary association of persons recognised by the Premier as responsible for administering the affairs of the traditional community of amaYende (the Traditional Council), in conjunction with Themba Yende. Also, the standing of the Traditional Council may become an issue on determination of liability for costs.

[8] On the other hand, the notice of motion did not include the Member of the Executive Council responsible for Local Government and Traditional Affairs in Mpumalanga (the MEC), as the second respondent. The notice of motion only reflected four respondents instead of the current five,⁹ but the parties appear to be unanimous as to who the cited parties are in this

⁸ See par 6 of the founding affidavit on indexed p 9.

⁹ See the notice of motion on indexed p 1.

application. Also, the MEC was described or cited as second respondent in the founding affidavit and subsequent documents.

Brief factual background

[9] Further, from what is state above, the brief factual background to this matter is as follows.

[10] AmaYende reside at Iswepe Village, in the Piet Retief environ and district of Mkhondo of the Mpumalanga Province. The applicants and Themba Yende also reside in this area. AmaYende are a component of the Zulu nation under leadership of King Goodwill Zwelethini.¹⁰ They originate from the present-day Vryheid in KwaZulu-Natal Province. Their founder and first-known leader was Ndlengezi, who was one of the commanders under King Shaka of the Zulu nation. AmaYende migrated several times under different chiefs or leaders. Zacharia, who is Leonard's father died before assuming the role of chief. Leonard was employed on a full-time basis, whilst someone else was running the affairs of the community without any supervision. Leonard died in 1997, also without having acted as chief.¹¹

[11] Although, he never became one, Leonard was the last known senior traditional leader of the AmaYende by title. Leonard was also noted as chief, despite the existence of his father's elder son who was born under circumstances similar to those of Themba Yende. Themba Yende is the firstborn son of Leonard. As stated above, his mother is MaHadebe, who was never married to Leonard. Leonard's children with MaMnisi are: Felani Yende; Sibongile, the *de facto* second applicant herein; Ntombikayise and the late Themba.¹²

¹⁰ See par 26 of the supplementary founding affidavit on indexed p 62; par 62.3 of the state respondents' opposing affidavit on indexed p 202.

¹¹ See annexure "FY1" to the founding affidavit on indexed p 33.

¹² See annexure "FY1" to the founding affidavit on indexed p 34.

[12] In 2007, the claims or applications for recognition of amaYende as a traditional community and Themba Yende, as amaYende's senior traditional leader were lodged with the MEC. As indicated above, the claims were finalised when the recognitions were granted by the Premier in 2012.

[13] Dissatisfied with the outcome, the applicants wrote to the Premier outlining the basis of their challenge to the impugned decision,¹³ and during November 2013 they met members of the Commission, but were told that there was nothing the provincial government could do regarding the challenge to the appointment of Themba Yende.¹⁴ Thereafter, the process in terms of PAJA regarding the impugned decision, was initiated¹⁵ and consequently this application was issued in November 2014.

Record of the proceedings (to be reviewed)

General

[14] The record of proceedings to be reviewed comprises the transcription of the video recordings of hearings; minutes of meetings; report of the Commission, incorporating recommendations to the Premier, and notices regarding publication in the decision. However, the applicants somewhat appear to challenge the completeness of the review record and lament "the absence of the full record of the proceedings"¹⁶ and to be undecided about reliance they place on the record filed.¹⁷ But, they evidently chose to enrol the review, despite the machinery

¹³ See par 29 of the founding affidavit indexed p 14; annexures "FY2" and "FY3" to the founding affidavit on indexed pp 41-42.

¹⁴ See par 31 of the founding affidavit indexed p 14; annexure "FY4" to the founding affidavit on indexed p 43.

¹⁵ See par 36 of the founding affidavit indexed p 15; annexure "FY1" to the founding affidavit on indexed p 29-38.

¹⁶ See par 46 of the founding affidavit indexed p 18.

¹⁷ See par 48 of the founding affidavit indexed p 18.

of rule 53 of the Uniform Rules of this Court or the provisions of PAJA to enforce compliance by the respondents.

[15] It is submitted that the following parts of the record have not been furnished by the first, second and third respondents (state respondents) and therefore missing from the review record: written correspondences from the state respondents addressed to Felani Yende and his sisters in response to their letters;¹⁸ minutes of meetings for hearings held November and December 2013, presided over by a certain Mr Simelane or Ms Shongwe, and written, video and/or audio recordings of the proceedings of a hearing or meeting held during 2012 at the Piet Retief town hall.¹⁹ But, I hasten to point out that, it is doubtful that the letters would have, strictly speaking, formed part of review record, as they were sent by the applicants long after impugned decision was made. Actually, the applicants have submitted that there was no response to their letters. The minutes of meetings in 2013 were also after the impugned decision and the Piet Retief meeting material is referred to in the submissions made by the parties herein.²⁰ Therefore, the allegedly missing material, in my view, does not affect the determination of the issues in this matter. Also, the applicants did not pray for anything in this regard, other than that the non-compliance ought to engender a negative view by the Court against the state respondents.

Report of the Commission

[16] The Commission, appointed in terms of section 22(1) of the Traditional Leadership Framework, delivered its report in June 2012 and the Premier approved the report on 19 July 2012.

¹⁸ See annexures "FY2" and "FY3" to the founding affidavit on indexed pp 41-42.

¹⁹ See par 11 of the supplementary founding affidavit on indexed pp 58-59.

²⁰ See par 21 below.

[17] According to its report, the Commission dealt with the claims or applications for recognition, based on section 21(3) of the Traditional Leadership Framework, ostensibly by Themba Yende. It is reported that a comprehensive investigation, research and public hearing to ascertain and verify the claim for leadership by Themba Yende, were conducted.²¹

[18] Further from what is stated above, the Commission reported, among others, the following:

“5.8 CULTURE AND CUSTOMARY LAW OF SUCCESSION AND PRACTICES AMONGST THE YENDE ROYALTY

Yende people are of Zulu origin and observe Zulu traditions and customs. Their ancestors served under Zulu kings and they continue to pay allegiance to King Goodwill Zwelithini.

- The first born son by a traditional leader, irrespective of his mother being married or not becomes an [sic] heir;
- Seniority is not based on the wives or woman in the traditional leader’s life but on the birth of children. First born males become senior.
- However if an inkosi marries before he has children out of wedlock, the first wife become senior.
- ...
- The inner royal family is made up of all royal family members (House of Ogenyaneni) that is all males and females who are descendants of Thunzi. The married wives are excluded.

...

²¹ See annexure “FY1” to the founding affidavit on indexed pp 29-38.

5.9 KEY DECISION-MAKERS ON SUCCESSION WITHIN THE YENDE ROYALTY

The Framework Act ... states that the royal family concerned, must (within a reasonable time after the need arises) identify a person who qualifies in terms of customary law (Section 11(1)(a)).

There are three main houses that are referred to as *amabekankosi* (decision-makers) amongst the Yende of oGenyaneni. These are:

- House of Ndlwembi;
- House of Mdolomba; and
- House of Majalane

The above houses are the only houses that can decide on the leadership succession.

5.10...

5.11 FINDINGS

It is the Committee's findings in the light of all the above facts that:

- The committee has noted the history of the Yende people as per the research work and documents containing historical background.
- Presentation in opposing the application by MJ Yende could not negate the documentary evidence and the oral history presented to the committee.

- The committee finds that the Yende of Ogenyaneni community is scattered around the farms of PietRetief and still pay allegiance to their chieftaincy even though not officially recognized.
- The committee finds that evidence submitted thus far suggest the existence of the senior traditional leadership among the Yende of Ogenyaneni community.
- The committee finds that there exist a traditional community known as the Yende of Ogenyaneni who can be found at Panbult and other surrounding farms in PietRetief.

...

5.13 RECOMMENDATIONS

It is in the light of the above findings of the Committee recommends the following to the Honourable Premier:

- That the Yende Ogenyaneni people be recognized as a traditional community.
- That the identified Michael Themba Yende be recognized as a Senior Traditional Leader of the Yende people.”²²

[underlining added for emphasis]

²² See annexure “FY1” to the founding affidavit on indexed pp 35-37.

Applicants' grounds of review and submissions

[19] It is submitted that Felani Yende became aware that Themba Yende had claimed the chieftainship of their father towards the end of 2011 and the beginning of 2012.²³ Together, with his sisters, Felani Yende says he “took every possible step to bring to the attention of the authorities” that Themba Yende’s claim of chieftainship was not sanctioned by the royal family of amaYende.²⁴ I hasten to point out that, no evidence is proffered in this regard as to precisely what steps were taken. The first step that is specifically stated is only in March 2013, when Felani Yende and his sisters wrote two letters referred to above.²⁵

[20] Felani Yende bemoans the fact that after public hearings were conducted by the Commission during 2012, nothing was communicated in writing to him and his family regarding the Premier’s decision and they only saw Themba Yende assume the position of traditional leadership of the community without evidence of his appointment. It is submitted that Themba Yende’s claim for chieftaincy was lodged without the knowledge of the first applicant’s family or second applicant, which it is submitted is the rightful royal family of the descendants of Leonard Yende.

[21] However, Felani Yende confirms attending a meeting, together with sisters and other family members, at Piet Retief during 2012 arranged by the Commission. He also confirms attending later meetings, whereat the Commission stated that it was looking for information and possibly representations regarding Themba Yende’s claim of chieftaincy.²⁶ Also, the Commission requested information relating to the genealogy; customs regarding chieftaincy

²³ See par 28 of the founding affidavit indexed p 14.

²⁴ See par 28 of the founding affidavit indexed p 14.

²⁵ See par 29 of the founding affidavit indexed p 14; annexures "FY2" and "FY3" to the founding affidavit on indexed pp 41-42.

²⁶ See pars 49-50 of the founding affidavit on indexed pp 18-19.

and succession customs of the AmaYende in order to verify Themba Yende's claim to chieftaincy.²⁷ He says that, to the knowledge of the Commission, they (him and members of his family) declined to support the claim of chieftaincy by Themba Yende.²⁸

[22] The applicants submit that the impugned decision was taken without due and proper consideration of representations made by them and other members of the traditional community regarding the proper application of the Zulu custom.²⁹ This, in my view, put to rest the denial of involvement by the applicants. Further, the applicants say that the Premier was either oblivious as to the correct customary laws and practices applicable to amaYende as Zulus, when he took the impugned decision; had acted in aberration of his duties of due diligence and constitutional obligations to consider the customary laws and practices applicable to the amaYende or allowed himself to be misled as to the correct position. Consequently, the submission goes, the Premier failed to meet the Constitutional minimum standards and statutory thresholds applicable to the appointment and recognition of traditional leaders.

[23] The following paragraphs from the founding affidavit, in my view, summarises the crux of the applicants' case in this matter:

“60. It is trite in the African custom and submit that it cannot be contradicted when I say that, traditional leadership in customary African law is rooted in patrilineage and is genealogically transmitted. A chief is such by birth and by appointment or interest. In spite of interest or lack thereof, a chief remain chief, and in the event of his abdication, which never really took place in our community, the next in line would be entitled to ascend the thrown [sc. throne]. And the next in line.

²⁷ See par 52 of the founding affidavit on indexed p 19.

²⁸ See par 53 of the founding affidavit on indexed p 19.

²⁹ See par 45 of the founding affidavit indexed p 17.

61. As is clear from annexure “FY-6”, the Fourth Respondent, is in the same historical and cultural quagmire as my grand uncle Jakalazi. Despite being the first-born son of my father, he is the son of an *iNtombi* who was never married nor selected as the great wife of my father. My mother Maria Mnisi is the great wife. In this regard, I refer to the confirmation of this position to the affidavit filed by Mnisi Themba Alfred a senior member of the community who was present at lobola of my mother by my father.”³⁰

[24] But, Felani Yende further submits, rather inexplicably in my respectful view, that even if the appointment of Themba Yende was sanctioned by the relevant royal family, it still needs to be reversed as it is based on “incorrect if not incongruent interpretation and application of customary laws” of the amaYende.³¹

Respondents’ case

[25] The state respondents submit that the applicants do not say anything about proper process not been followed, save to state that Felani Yende is the rightful person to be appointed as senior traditional leader because he is the eldest son born of a marriage. They argue that this is not supported by evidence tendered during the hearings to the effect that the eldest son becomes the successor, despite the fact that his mother was not married to the chief, in terms of the customs and practice of the amaYende.

[26] It is submitted that, despite admitting his attendance of the meetings convened by the Commission, the applicants fail to produce evidence of their objection to the claim by Themba Yende or a counterclaim for the position. And that, at these meetings or some of them, evidence

³⁰ See pars 60-61 of the founding affidavit on indexed p 21.

³¹ See par 78 of the founding affidavit on indexed p 26.

on the customary practices of the amaYende as a traditionally community with regard to identification and appointment of senior traditional leaders was presented to the Commission by some of the members of the royal family.

[27] The state respondents submit that in terms of the report of the Commission, the applicants' house does not exclusively constitute the royal family and that, in fact, it is the second house of three houses.³² This appears to be common cause between the parties.

[28] Regarding the timing of the applicants' objection the respondents say the following. The applicants were at all material times aware that Themba Yende has lodged a claim for recognition as the senior traditional leader of amaYende, but yet they did not object or file their claim. The only person who lodged a separate claim, which was later dismissed, is one Mbulali Joseph Yende. At no stage did the applicant object to the process leading up to the appointment of Themba Yende, despite the full knowledge and participation in the process. The respondents further deny that the applicants knew of the appointment of Themba Yende after the intervention of the attorneys of record only in May 2014. They submit that the recognition was publicized in the government gazette, which is the prescribed method for informing all persons affected by the decision, during November 2012. There was also that meeting with the Commission when they were told nothing can be done about the impugned decision.

[29] The respondents further express their dismay regarding the absence of a challenge by the applicants to Themba Yende lodging the claim for the recognition of amaYende as the

³² See par 6 of the first, second and third respondent's opposing affidavit (state respondents' opposing affidavit) on indexed pp 177-178.

traditional community, specifically with regard to his standing or *locus standi* to lodge this claim.³³

[30] Themba Yende, for his own part, submits that he has been considered chief of amaYende as far back as 2002, when the then Regent, named William Yende introduced him to the House of Traditional Leaders of Mpumalanga Province. Felani Yende and his sister Ntombikayise were involved in this decision. I consider it opportune to point out that, these allegations were not specifically dealt with by the applicants, save by way of a blanket denial.³⁴

[31] The respondents effectively submit that the Premier was satisfied that the prescribed processes leading up to the resolution requesting recognition of Themba Yende as the senior traditional leader were complied with in terms of the applicable legal principles.

Applicable legal principles

Legislation

[32] The Constitution of the Republic of South Africa, 1996 (the Constitution) recognises the institution and system of traditional leadership. Section 211 of the Constitution is material in this regard and reads as follows:

“(1) The institution, status and role of traditional leadership, according to customary law, are recognised, 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 amendments to, or repeal of, that legislation or those customs.

(3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

[underlining added for emphasis]

³³ See par 29.1 of the state respondents’ opposing affidavit on indexed pp 189-190.

³⁴ See pars 37-45 of the replying affidavit to fifth respondent’s opposing affidavit on indexed pp 262-263.

[33] But, the most applicable statutory provisions for a determination required in this matter, are significantly located in the Traditional Leadership and Governance Framework Act 41 of 2003 (the Traditional Leadership Framework). It is also common cause that the Premier is empowered in terms of the Traditional Leadership Framework and other legislation to take administrative decisions relating to traditional leadership.

[34] The following definitions from section 1 of the Traditional Leadership Framework will become relevant in the discussions to follow:

“**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;

...

“**senior traditional leader**” means a traditional leader of a specific traditional community who 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;

...

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

[underlining added for emphasis]

[35] Section 11 of the Traditional Leadership Framework provides for recognition of, among others, senior traditional leaders and reads in the material part:

“(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) 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
 - (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.”

[underlining added for emphasis]

[36] The functions of the Commission are explained in section 25(3) of the Traditional Leadership Framework as follows:

“(1) The Commission operates nationally in plenary and provincially in committees and has authority to investigate and make recommendations on any traditional leadership dispute and claim contemplated in subsection (2).

(2) (a) The Commission has authority to investigate and make recommendations on—

(i) a case where there is doubt as to whether a kingship or, principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;

(ii) a case where there is doubt as to whether a principal traditional leadership, senior traditional leadership or headmanship was established in accordance with customary law and customs;

(iii) a traditional leadership position where the title or right of the incumbent is contested;

(iv) claims by communities to be recognised as kingships, queenships, principal traditional communities, traditional communities, or headmanships...

(b) A dispute or claim may be lodged by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information.

(c) The Commission may decide not to consider a dispute or claim on the ground that the person who lodged the dispute or claim has not provided the Commission with relevant or sufficient information or the provisions of section 21 have not been complied with.

(3) (a) When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim.

(b) The Commission must—

(i) ...

(ii) in respect of a principal traditional leadership, senior traditional leadership or headmanship, be guided by the customary law and customs and criteria relevant to the establishment of a principal traditional leadership, senior traditional leadership or headmanship, as the case may be....”

[underlining added for emphasis]

[37] The Traditional Leadership Framework was amended by the Traditional Leadership and Governance Framework Act 23 of 2009 and the amended section 21(3) of the former provides that:

“(3) Where a dispute or claim contemplated in subsection (1) has not been resolved as provided for in this section, the dispute or claim must be referred to the Commission.”

[38] Other than the above-mentioned national legislation, there is also provincial legislation in the form of the Mpumalanga Traditional Leadership and Governance Act 3 of 2005. However, the parties appear to agree that this legislation was not applied when the impugned decision was taken. But, nothing really turns on this for current purposes.

[39] As this is a review in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), it is warranted to quote section 6 thereof of PAJA, which provides for judicial review of administrative action and reads as follows in the material part:

“(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself—

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to—

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so

unreasonable that no reasonable person could have so exercised the power or performed the function; or
(i) the action is otherwise unconstitutional or unlawful.
(3) ...”

[underlining added for emphasis]

[40] It may be opportune to reiterate that, according to the applicants the impugned decision was taken in breach of the Constitution and sections 6(2)(b) and (c) of PAJA. Therefore, the applicants say the administrative action of the Premier was taken, first, without compliance with “mandatory and material procedure or condition prescribed by an empowering” legislation or provision and that “the action was materially influenced by an error of law”.³⁵ But, as it would become clearer in the discussions of the grounds and submissions below, there is no need to compartmentalise the issues herein.³⁶

Case law

[41] I think from our demographics it is an obvious fact that traditional leadership applies to majority of our people living in rural areas.³⁷ Majority of our people still subscribes to customs and traditional practices to regulate or control conduct or the use of power. It is therefore not surprising that our Courts, including at the higher level, have dealt with issues not only regarding traditional leadership or but other traditional or related issues.

³⁵ See section 6(2)(d) of PAJA.

³⁶ See Hoexter C *Administrative Law in South Africa* 2nd ed (Juta Cape Town 2012) at p 254.

³⁷ See the unreported decision (both counsel and I could not find the reported version, if any) *Tinyiko Lwandhlamuni Philla Nwamitwa Shilubana and Ten Others v Sidwell Nwamitwa together with Amici Curiae*, Case CCT 03/07 [2008] ZACC 9, decided on 04 June 2008 (*Nwamitwa*) at par [43] where it is stated: “It is a body of law by which millions of South Africans regulate their lives and must be treated accordingly.”

[42] In the *Nwamitwa*³⁸ decision the following was said which borrowed largely from other decisions:

“[44] As a result, the process of determining the content of a particular customary law norm must be one informed by several factors. First, it will be necessary to consider the traditions of the community concerned. Customary law is a body of rules and norms that has developed over the centuries. An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, in line with the approach set out in *Bhe*.⁴⁸ Equally, as this Court noted in *Richtersveld*, courts embarking on this leg of the enquiry must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it.

[45] It is important to respect the right of communities that observe systems of customary law to develop their law. This is the second factor that courts must consider. The right of communities under section 211(2) includes the right of traditional authorities to amend and repeal their own customs. As has been repeatedly emphasised by this and other courts, customary law is by its nature a constantly evolving system. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development by communities of their own laws to meet the needs of a rapidly changing society must be respected and facilitated.

[46] It follows that the practice of a particular community is relevant when determining the content of a customary law norm. As this court held in *Richtersveld*, the content of customary law must be determined with reference to both the history and the usage of the community concerned. “Living” customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. However, where there is a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.”³⁹

[underlining added for emphasis]

³⁸ See footnote 37 above.

³⁹ See *Nwamitwa* at para [44]-[46] albeit quoted without authorities or footnotes.

[43] The following *dicta* from *Bhe and Others v Magistrate, Khayelitsha*,⁴⁰ referred to in *Nwamitwa*, although dealing with an indirect angle of this matter, is very informative:

“[57] Historically in South Africa, children whose parents were not married at the time they were conceived or born were discriminated against in a range of ways. This was particularly true of children whose family lives were governed by common law. Much of the stigma that attached to extra-marital children was social and religious in origin, rather than legal, but that stigma was deeply harmful. The legal consequences of extra-marital birth at common law flowed from the Dutch principle that 'een wijf maakt geen bastaard', the implications of which were that the extra-marital child was not recognised as having any legal relationship with his or her father, but only with his or her mother. The child therefore took the mother's name, inherited only from his or her mother, and the father of the child had no parental obligations or rights *vis-à-vis* the child. The law and social practice concerning extra-marital children without doubt conferred a stigma upon them, which was harmful and degrading.

[58] It is important, however, in assessing the discrimination and stigma attached to extra-marital birth to distinguish between common law and customary law. As Jones records:

“The African means of dealing with extra-marital birth is essentially accommodative in intent and character; it is oriented towards social inclusivity. The mechanism of maternal-filiation provides an extra-marital child with a father, with a male ritual and social sponsor, with a place in a conjugal unit, and it manufactures for the child a full lineal identity. Very importantly, these attributes are socially visible - they counter what would otherwise be clearly evident deficits in an extramarital child's social make-up - and are preserved and upheld by way of taboo against reference to the child's real paternity or social position. As far as is possible within the bounds of cultural reason, the effect of the African system is therefore to ensure that an extra-marital child's position is *not* compromised by the circumstances of his or her birth.”

[44] The direct point from the *Bhe* decision, also referred to in *Nwamitwa* above, which deserves emphasis is that, where there is a dispute over the customary laws of a community,

⁴⁰ *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic Of South Africa and Another* 2005 (1) SA 580 (CC).

parties should strive to place evidence of the present practice of that community before the Courts and the Courts have a duty to examine the law in the context of the community and to acknowledge developments if they have occurred. However, this being a review, it behoves the applicants to have placed any such evidence before the Commission for consideration when it fulfilled its functions, and not only arise for the first time on review.

[45] It is also worthy of emphasis to state that section 25(3) of the Traditional Leadership Framework requires of the Commission to consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.⁴¹

Other authorities

[46] The applicants cite as authorities, among others, academic textbooks.⁴² They rely on these and other authorities for their submissions, including that in terms of customary law of succession and particularly succession to chieftaincy, the identification of the heir to the throne of chieftaincy is based on the primogeniture rule. In terms of this rule, the heir to the chieftaincy is primarily identified from the principal house (“*indlukulu*”), being the house of the first wife married by the chief referred to as the iNkosikazi, whose first-born son is first in line of succession to his father’s throne. Other sons would inherit following the lineage of seniority.

⁴¹ See *Mamone v Commission on Traditional Leadership Disputes and Claims* 2015 JDR 0015 (CC) at pars [19] – [20].

⁴² Bekker JC and Coertze *Seymour’s Customary Law in Southern Africa* 4th ed (Juta Cape Town 1982); SM Seymour *Bantu Law in South Africa* 3rd ed (Juta); Bennett TW *A Sourcebook of African Customary Law for Southern Africa* 1st ed (Juta Cape Town 1991).

Submissions and legal principles (an analysis)

General

[47] The facts of this matter are very intriguing. But, the facts and consequently the submissions made on behalf of the parties all have to be determined from the enabling or legislative framework. This is the Traditional Leadership and Governance Framework Act 41 of 2003 (the Traditional Leadership Framework). As its title suggests, this legislation provides a framework for determining issues and claims relating to traditional leadership. This is therefore the primary authority or source of reference for anything relating to traditional leadership, including a determination of the issues in this matter. It is therefore, in my view, inconceivable that any of the parties would hold a contrary view.

[48] To start of the discussion, section 1 of the Traditional Leadership and Governance Framework Act defines a “royal family” as “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”. The royal family is the critical player, so to speak in the identification and appointment of traditional leaders.⁴³ In this matter, it is common cause or if it is not, I accepted this to be a proven fact, that the amaYende royal family comprises three houses. This includes, the house of Felani Yende and his sisters. Themba Yende would probably fall into one of these houses, but I don’t have to hold a firm view on this. Therefore, this being an established fact, the applicants are incorrect in asserting that they have the exclusive role of identification and appointment of senior traditional leader of amaYende. This is how I understand their position. The views of other members of the royal family ought to be considered and this include representations made to the Commission. I will return to this issue.

⁴³ See section 11 of the Traditional Leadership Framework.

[49] It is common cause that Themba Yende lodged a claim for traditional leadership of the amaYende and that Felani Yende did not lodge any claim. It is also common cause that a certain Mbulali Yende also lodged a claim, but it was ultimately dismissed. From available evidence, I could not find indication of any objection by the applicants to the appointment of Themba Yende. It is correct that Felani Yende and at least his sisters may have not supported the claim by Themba Yende, but my assessment is that they did not make representations in this regard during the investigations by the Commission. They were aware of the process and were part of it. They only started making representations after the Premier had already published the impugned decision. Yes, I agree with the respondents that the horse has already bolted by this time. The common theme in the case law discussed above is that parties should strive to place evidence of the present practice of that traditional community before the Courts. I have already expressed a view above that the circumstances of this matter this ought to have happened at the Commission before the impugned decision was made.

[50] Regarding the vigorous submission that the Zulu customary law and practices ought to have been applied, I agree with or associate myself with the submissions by the respondents that, the prevailing customary law as practised by the amaYende, as a traditional community, at the relevant time is material. This is actually the law as stated elsewhere herein.⁴⁴ Therefore, a factual enquiry or as stated in section 25(3) of the Traditional Leadership Framework an investigation, is required. In my view the Commission distress its duties satisfactorily in this regard. I do not find any reason to interfere with the impugned decision, including the process followed in its taking.

⁴⁴ See *Mamone v Commission on Traditional Leadership Disputes and Claims* 2015 JDR 0015 (CC) at pars [19] – [20].

[51] Next, I turn to the specific grounds of review of this matter, but obviously there has already been an extensive discussion above, so this ought not to detain me. I make use of some questions as subheadings.

Does the decision recognising the fourth respondent as a senior traditional leader lawful (i.e. did it comply with the provisions of the applicable laws)?

[52] I have already answered this question by concluding that there has been compliance with the applicable laws which requires a consideration and determination of the prevailing customary law and practices of the particular traditional community. I do not consider a wholesale application of what the applicants suggest is the prevailing Zulu customary law to be the starting point, but the provisions of the Traditional Leadership Framework. Once this approach is adopted one would get to what the traditional community considers to be their customary law and practices, even if, as in the case of amaYende may not be what the authorities relied upon by the applicants considered to be Zulu customary law years ago, mostly before the advent of Constitutional democracy.

Whether customary law and practice as espoused by the Zulu nation particularly among AmaYende asoGenyaneni traditional community adhered to by the Commission?

[53] I have just dealt with this above. The applicants rely on *Mamone* to drive this point home. But, I understand *Mamone* to be advancing a different point. In my view, *Mamone* simply repeated the provision in section 25(3) of the Traditional Leadership Framework that, the customary law or customs to be applied has to be what was in practice when the dispute or

claim arose. This is a critical question which simply affirms the status of customary law as dynamic and evolving. The authorities proscribe characterisation of customary law as static, as the applicants submit. Therefore, what was the prevailing practice in 2007 when Themba Felani lodged his claim for chieftaincy is the applicable regimen of customs and practices of the amaYende to be applied. There is no need to go back to time immemorial, so to speak.

Conclusion and Costs

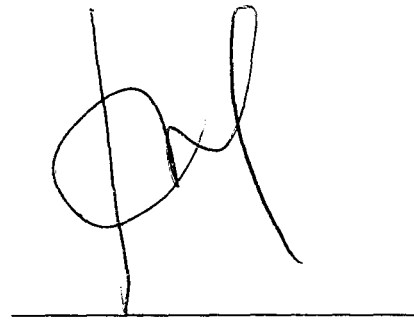
[54] Against the backdrop of what is discussed above, I cannot find anything to sustain the relief sought by the applicants. The application will thus fail.

[55] Counsel for the applicants submitted that, I should consider when dealing with the issue of costs that, the issues raised by the application are of importance and that his clients are not of high literacy levels. But, I am not completely swayed by these. The applicants pursued the matter even when it was clear that the impugned decision cannot be faltered. They attempted to dissociate themselves from what took place in an effort to cast doubt on the work of the Commission and consequently the decision taken by the Premier based on the recommendations by the Commission. This, even if, not *mala fide*, was ill-conceived and ill-advised. The fourth and fifth respondents can proffer the same reasons as the applicants and they ought not to be left out of pocket. But, I can understand that when the applicants initially launched the application, they did not really appreciate the full extent of the reasons and defences of the respondents. However, this ought to have dramatically changed after they received the opposing affidavits. By then the applicants were already enjoying the benefit of legal representation. Therefore, I will make no order as to costs up to the delivery of opposing affidavits by the state respondents, but fourth and fifth respondents will recover their full costs.

Order

[56] In the premises, I make the following order:

- (a) the application is dismissed;
- (b) the first and second applicants are liable, jointly and severally, the one paying the other to be absolved, for costs of the application of the first, second and third respondents from after service of the first, second and third respondents' opposing affidavit; and
- (c) the first and second applicants are liable, jointly and severally, the one paying the other to be absolved, for costs of the application of the fourth and fifth respondents.

A handwritten signature in black ink, consisting of a large, stylized 'K' followed by a vertical line and a small loop, positioned above a horizontal line.

K. La M. Manamela
Acting Judge of the High Court

DATES OF HEARING	:	08 & 09 DECEMBER 2016
DATE OF JUDGMENT	:	10 MARCH 2017

Appearances:

For the First and Second Applicants	:	Adv M Mathaphuna
Instructed by	:	Ndobela Lamola Inc, Pretoria
For the First, Second and Third Respondents	:	Adv MS Mangolele
Instructed by	:	State Attorney, Pretoria
For the Fourth and Fifth Respondents	:	Adv MS Phaswane
Instructed by	:	Mketsu & Associates Inc, Pretoria