

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

CASE NO. : 1961/2010

Heard on: 4 December 2014

Date delivered: 23 April 2015

In the matter between:

BULELWA NDAMASE

Applicant

And

VUSUMZI NDAMASE

First Respondent

NDAMASE NDAMASE

Second Respondent

PREMIER, EASTERN CAPE PROVINCE

Third Respondent

**MEC FOR LOCAL GOVERNMENT AND
TRADITIONAL AFFAIRS**

Fourth Respondent

JUDGMENT

MAJIKI J:

[1] This is an application by the applicant for an order in the following terms, in the main;

- 1. Declaring the resolution taken by the second respondent nominating the 1st respondent as the Headman (Inkosana) of Zinkumbini Administrative Area, Libode, invalid, unlawful, unconstitutional and of no force and effect.*

2. *Restraining and/or interdicting the first respondent from passing himself off as the Headman (Inkosana) of Zinkumbini Administrative Area, Libode.*
3. *Restraining and/or interdicting the third and the fourth respondents from giving effect to the resolution referred to in paragraph 1 above.*
4. *Directing the third and the fourth respondents to consider the resolution of the Ndamase royal family dated 13 April 2009, nominating the applicant as the Headman (Inkosana) of Zinkumbini Traditional Community.*
5. *Costs of the application to be paid by second, third and fourth respondents, jointly and severally, the one paying the others to be absolved, further, order for costs in the same terms to be paid by the first respondent only in the event of him opposing the application.*

[2] The application is opposed by all four respondents. The main affidavit on behalf of the third respondent is deposed to by Sidumo Mateta as a person dealing with matters of this nature within the department of local government and traditional affairs. (“the department”). The fourth respondent delegated his powers in terms of section 34 of Traditional Leadership and Governance Act No. 4 2005 (Traditional Leadership Act) to the third respondent.

Factual background

[3] It is common cause that the applicant’s grandfather, Dlukulwana was nominated by King Victor Poto (referred to as Chief in a copy of the minutes attached by the applicant and the second respondent) to succeed one Pesi who was dismissed for reason of having a criminal conviction.

[4] The said minutes are a record of a meeting held on 26 July 1951 presided to by the magistrate at the kraal of Nini Mbali, who had been acting after Pesi's dismissal.

[5] The magistrate recorded that King Poto had authority to nominate a headman, and his nomination would be submitted to the government, and if it was approved, the magistrate would call a further meeting to instal the nominee. The second respondent is in the direct line of descendancy and successors of kings of West Pondoland, King Poto's great-grandson.

[6] Ndlukulwana was the headman of Zinkumbini administrative area until his demise in 1969.

[7] Ndlukulwana died leaving four sons of which the applicant's father is the third born son.

[8] The applicant's father became a headman of the area in 2006. The parties hold different views as to the nature of that particular appointment and the nature of other appointments that were made for the said position between 1969 and 2006. That is, with regard to whether the applicant's appointment if it was permanent, it was hereditary; whether the previous ones were also permanent and how the process of filling of the position left vacant by the applicant's father at the time of his death on 17 April 2008 should have unfolded.

[9] The second respondent nominated the first respondent to fill the position of the applicant's father. According to the second respondent, he had authority to do so as the administrative area in question is one of the areas in respect of which the king of Nyandeni has always nominated a headman for. This is in accordance with long standing Pondo tradition, custom and practice of the king of Western Pondoland.

[10] The applicant avers that she was nominated by her royal family which her father constituted. After his father's confirmation as the traditional leader, he constituted his new traditional community and his royal family separate, independent, distinct and quite apart from the king's royal family.

[11] Contrary to what the applicant avers, the third and fourth respondents state that they did not just process the recognition of the first respondent's appointment. According to the fourth respondent upon receipt of 2 differing recommendations for appointment they referred the matter to provincial house of traditional leaders, they did not issue a certificate of recognition and referred the matter back to the head of the royal family, the second respondent.

[12] The applicant avers that she addressed numerous letters to officials within the department and to the house of the traditional leaders, challenging what she said were second respondent's actions and insisting that she be recognised.

[13] After referring the matter back to the head of the royal family, the second respondent, the fourth respondent sent a letter, in response to the applicant's enquiry, to the applicant advising that they will process the recognition of first respondent.

[14] The fourth respondent has raised two points, *in limine*. The first point relates to the non-joinder of Thanduxolo Mbangwa. Mbangwa was, according to the applicant, appointed to act on her behalf, whilst she is not available to assume her duties in terms of her appointment. The second point is that the minutes attached refer to chieftaincy that does not exist in Zinkumbini. The applicant therefore has no *locus standi* to bring the application that relates to Zinkumbini headmanship.

[15] Furthermore, the third respondent aver that the applicant is a non-resident, within the area.

[16] Furthermore, it is denied on behalf of the fourth respondent that permanent headmanship implies hereditary headmanship.

[17] In my view, the issue of the appointment of Mbangwa is not before the court in this application. That issue would be secondary after the determination of the alleged main appointment, that of the applicant.

[18] According to the third respondent, the applicant's father was nominated by the mother of the second respondent who was a regent king at the time. The applicant's father did not inherit as the eldest son of Dlukulwana. The applicant says her aunt told her that her father's eldest brothers were not interested in taking over the headmanship.

[19] The issue for determination is; what is the process of determining the person to be recommended to the third and fourth respondents as the incumbent to be recognised and appointed as the headman of Zinkumbini administrative area. Furthermore, whether the appointment of the first respondent is in accordance with the correct procedure or not.

[20] According to the first and second respondent those appointments were only made by the reigning kings. The applicant's father was appointed by the regent, the mother of the second respondent.

[21] From the applicant's papers it does not seem that she has placed a different manner of procedure in terms of which the headman of Zinkumbini was appointed up to 2006, whether in an acting or full capacity.

[22] In my view, there is no basis upon which the applicant has been able to dispute what is said to have been a long practice and tradition in Western Pondoland. The second respondent has put forward examples in history of such appointments, dating back from 1951 in respect of Zinkumbini area. On 26 July 1951 King Victor Poto nominated Dlukulwana Zisebenzele Ndamase who was appointed as permanent headman of Zinkumbini. This in my view supports the fact that there were other permanent appointments for the headmanship of Zinkumbini area before. Those did not have the effect of creating a new hereditary process in the appointments of the successor/s of the past headman.

[23] Furthermore, the second respondent attached copies of official letters from the magistrate confirming appointments of localities whose nominations were always made by the king.

24 February 1930 - Permanent chief (King) Victor Poto nominated Mbizo Gadi for Nyandeni Location 2 . “ the above location is one of those of which the Paramount Chief is allowed by the government to nominate the headman.”

25 January 1928 Mhlanganiso, Libode “the residents were not called upon to nominate a successor to the late headman as, according to the records in this office, this is one of the locations in which the chief has a right to nominate successor.”

21 September 1926 Chief Poto (King) submitted the name of Nqwiliso as headman of Marhubeni, “Marhubeni is one of the locations in which chief has a right of nomination.”

[24] According to Bennett’s customary law in South Africa, at page 1 customary law derives from social practices that the community concerned

accepts as obligatory. He goes on to state that, nearly all customary laws in their original form, at least, are unwritten. Although the legitimacy of custom depends on its age, customary law is always up to date, because, ancient though it may seem, no custom is ever older than the memory of the oldest living person.

The preamble of the traditional leadership Act reads :

- *WHEREAS the National Government has, in the White Paper on Traditional Leadership and Governance, set out the norms and standards for transformation in line with constitutional imperatives and restoration of the integrity and legitimacy of the institution of traditional leadership in accordance with custom and customary practices;*
- *AND WHEREAS the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003) was enacted to set norms and standards for traditional leadership and governance throughout the Republic of South Africa.*
- *AND WHEREAS there is need for the Government of the Province of the Eastern Cape to enact Provincial legislation within the framework of the Traditional Leadership and Governance Framework Act, 2003 to provide for matters which are peculiar to the Province;*

[25] In the matter between ***Penrose Ntamo and Others v The Premier of the Eastern Cape and Others case number 169/2014***, Nhlangulela ADJP analysed the application of custom in relation to the Constitution and traditional leadership Act. He referred to section 3(1) of the traditional leadership Act, “the state must respect, protect and promote the institution of traditional leadership in accordance with the dictates of democracy in South Africa”. The decision by the royal family to identify a headman outside an election process

and without involving members of the community (which was the existing customary practice) was set aside. He referred to Umdeni (clan) of *Amantungwa and Others v MEC for Housing and Traditional Affairs, kwa-Zulu Natal and Another (2011)(2) AllSA 548 SCA* and *paragraph 21* and stated that the Supreme Court of Appeal “confirms that a court must determine the custom of the community before it, in order to determine whether a headman has been lawfully appointed.

[26] Section 18 of the Act provides :

“(1) Whenever the position of an iNkosi or iNkosana is to be filled—

(a) the royal family concerned must subject to such conditions and procedure as prescribed, within sixty days after the position becomes vacant, 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 6 (3) apply to that person; and

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

[27] The applicant’s basis for the criticism of the conduct of the second respondent is that, she belongs to a separate, independent royal family, her father’s appointment was understood by those present to be of a permanent nature and hereditary, amongst others. The resolution created a legitimate expectation that, it (headmanship) would upon her father’s death devolve upon his family (as it was the case with her grandfather).

[28] The customary practice as indicated by evidence advanced on behalf of the respondents proves to the contrary. The facts evidenced by the records from the magistrate, from very early on, reflect that the practice was that the king had locations in which he had a right to nominate a successor to the headman, including Zinkumbini location. Pesi Ndamase also deposed to an affidavit confirming appointments by the kings in iilali zika Kumkani and that Zinkumbini headmanship is not hereditary. This to me seems to be sufficient proof of the existence of this custom. The applicant disputes this by relying on what she says she was told by her aunt. She also named chiefs like, Inkosi Gwadiso, none of whom have deposed to a confirmatory affidavit. Moreover, his father's elder brothers were never appointed by the king, to be headmen, there is no evidence to support that they abdicated as the applicant alleges.

[29] In my view, there is no conflict between this customary practice and the legislation enacted in the form of the traditional leadership Act. This is clear from the preamble and section 18, of the said Act. If for any reason there would be any such inconsistency, which finding I would have a difficulty in finding support for in the circumstances of this case, section 211(3) of the Constitution of the Republic of South Africa Act 200 of 1983 ("the Constitution") provides: the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law. One of the qualifications in doing so, according to Bennett's customary law in South Africa at page 43, is that customary law must be deemed repealed to the extent that it is inconsistent with legislation.

[30] If the custom may for any reason be found not to be applicable, or any need may arise to change the practice to enable the process to be more inclusive and in line with the provisions of section 18 of the traditional leadership Act, it would still be the royal family, which the applicant refers to as the greater Nyandeni royal family, presided over by the second respondent, that would have power to identify the person to assume the headmanship of

eZinkumbini. It is not the case of the applicant that there is a reason to change or augment the customary practice in any case. She just contends that it is her family that has the power to appoint a headman and it appointed her.

[31] The applicant seems to rely on the fact that she averred that her father (after 2006), after his appointment constituted a new traditional community and established his own royal family distinct and independent from the senior royal family (grater Nyandeni royal family presided over by the king). She avers that that royal family appointed and recommended her as the person to succeed her father. She cannot be excluded purely on the basis that she is a woman and is married.

[32] The royal family in the Act is defined as, 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 members who are close relatives of the ruling family.

[33] The applicant has not stated how and when her homestead's royal family was established. She has not stated that its establishment was communicated to the senior royal house, let alone receiving the senior royal house's blessings. Despite her averment about this establishment, she in her papers also states that the headmanship in question, is an extension of the greater Nyandeni royal family presided over by the king.

[34] A traditional community refers to one that has been recognised in terms of section 5 of the Act.

“(1) The premier may, subject to the provisions of section (2), recognise a community as a traditional community if it –

(a) Is subject to a system of traditional leadership in terms of that community's customs and

(b) Observes a system of customary law.

“(2)(a) The Premier must, by notice in a local newspaper with wide circulation in the province or area of the province concerned, or by such other form of communication as determined by him or her, and after consultation with the Provincial House of Traditional leaders, the community concerned and the Ikumkani under whose authority that community falls, publish his or her intention to recognise a community envisages in subsection (1) as a traditional community.

(b) The Premier must, in the notice contemplated in subsection (1), invite interested parties to submit their comments to him or her within such period as prescribed.

(c) The Premier must, consider the comments submitted to him or her in terms of paragraph (b) and take a decision regarding the recognition of the traditional community.

(d) The Premier may, subject to the provisions of this Act and the Framework Act, after consideration of the comments referred to in paragraph(c), by notice in the Gazette, recognise a community as a traditional community.”

Nowhere in the applicant's papers does it appear that this is how her father ensured that the traditional community she referred to, was constituted.

[35] Furthermore, the applicant has not shown that her alleged appointment which constituted a deviation from the long practice, in respect of previous Zinkumbini appointments, amongst others, those done by the kings, was informed by a necessity to change a tradition or custom. She has only averred that the prerogative cannot take precedence over the right of the royal family to nominate a successor.

[36] With regard to the headmanship being hereditary, she only attached a letter from the housing local government and traditional affairs office of Libode on 13 February 2006, which only confirms her father's assumption of duty as a permanent headman. The said letter does not state how the said appointment was done. The respondents stated that it was done by the regent king, the second respondent's mother. It is not the first appointment to be referred to as permanent, there were many before, as indicated in annexed letters of appointment. Such never bore a connotation of automatic inheritance. The king would still make subsequent appointments after termination of the one that referred to the permanent headman.

[37] Finally, the applicant does not meet the requirement for appointment as provided for in the traditional leadership Act. She is a non-resident within the jurisdiction of the traditional council. According to her she resides at W109, Palmgate, 11 Centenary Boulevard, Umhlanga Ridge, Durban. The resolution nominating the applicant would not be in accordance with the provisions of the traditional leadership Act. Section 18 (1)(i) of the traditional leadership Act provides that the person to be recognised as inkosi or inkosana must amongst others, be of the person identified 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 6(3) apply to that person. Section 6(3)(e) provides that a member of the traditional council shall be a person who is ordinarily resident within the jurisdiction of the traditional council. The applicant correctly averred that a traditional council is constituted by iilali

under a senior traditional leader. The iilali in turn are administrative areas headed by headman. Nowhere does section 6(3)(c) make reference to a domicile of choice and origin.

[38] There is a big issue made by all the parties about the fact that the applicant is a married woman. I do not deem it necessary to pronounce on this issue under the circumstances. The applicant would not validly be capable of appointment even if she was of the other gender in the circumstances of this case.

[39] The dispute about the purpose and the resolutions of the meeting of the 13 April 2009 also is also not material in the circumstances. Whether the meeting was to nominate an heir and administrator to the estate of the applicant's father as averred by Lungile her brother, or the applicant's appointment as a traditional leader as applicant avers, does not take the applicant's case any further.

[40] With regard to the filing of the replying affidavit, I hereby condone its late filing. The applicant in the explanatory affidavit had already tendered costs occasioned by the postponement due to her not filing the replying affidavit timeously.

[41] The applicant's appointment at her home on 13 April 2009 was one of an heir to the chieftaincy. This could have well been just an error in terminology. I am not inclined to view the error about terminology in the same light as averred on behalf of the third and fourth respondents, that it affects the applicant's *locus standi* to bring this application. However, any appointment of the applicant is contrary to the provisions of traditional leadership Act. It is so in many respects as indicated above. Therefore any purported appointment of the applicant at her home on 13 April 2009 would have been flawed.

[42] Consequently, the application stands to be dismissed

In the result,

The application is dismissed with costs.

B MAJIKI

JUDGE OF THE HIGH COURT

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