

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE HIGH COURT: MTHATHA**

CASE NO: 1842/10

Delivered on : 26 May 2011

In the matter between:

MKHANYISELI DUDUMAYO

1st Applicant

VUYISA DALASILE

2nd Applicant

TSHOMANE TRADITIONAL COUNCIL

3rd Applicant

and

MHLABUNZIMA DALASILE

1st Respondent

MEC FOR LOCAL GOVERNMENT

AND TRADITIONAL AFFAIRS,

EASTERN CAPE

2nd Respondent

THE PREMIER OF THE EASTERN CAPE

3rd Respondent

THE CHAIRPERSON, HOUSE OF

TRADITIONAL LEADERS, EASTERN CAPE

4th Respondent

JUDGMENT

NHLANGULELA J:

[1] This application concerns an administrative review of a decision made by the third respondent, duly assisted by the second respondent, on 08 June 2010 recognizing the first respondent as the Inkosana of ama-Tshomane Tribe and entitled to be the headman of Maphuzi Administrative Area 15A. Further, the applicants seek confirmation of an interdictory relief that the third respondent should not take any further step in effecting its decision; the first respondent should not hold himself out or execute duties as the headman; and that the third respondent should not recognize the first respondent as the Inkosana. Finally, the applicants seek an order that the third respondent recognize the first applicant as the headman of Maphuzi Administrative 15A (Maphuzi 15A).

[2] In my view the central issue for decision of this application is whether the decision taken by the second respondent, acting for the third respondent, complies with the provisions of section 18 of the Eastern Cape Traditional

Leadership and Governance Act, Act No. 4 of 2005 read with the provisions of sections 21, 22 and 25 of the Traditional Leadership and Governance Framework Act, Act No. 41 of 2003. If the decision taken is found not to be in compliance with these legal instruments the entire relief sought by the applicants will be granted. A finding that it does comply will lead to the dismissal of the application.

[3] It will help to set out the provisions of the sections referred to in the preceding paragraph because the decision of virtually all the issues arising from this application swing on the provisions thereof. Section 18 of Act 4 of 2005 reads:

“18

(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;
and

- (b) The Premier must, subject to subsection
(5), by the notice in the Gazette,
recognize the person so identified by
the royal family as an Inkosi or
Inkosana, as the case may be.

- (2) Before a notice recognizing an Inkosi or
Inkosana is published in the Gazette, the
Premier must inform the Provincial House of
Traditional Leaders of such recognition.

- (3) The Premier must, within a period of thirty days after the date of publication of the notice recognizing an Inkosi or Inkosana issue to the person who is identified in terms of paragraph (a)(i), a certificate of recognition.
- (4) Where the Premier has received evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with the provisions of this Act, customary law or custom the Premier-
 - (a) may refer the matter to the 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.
- (5) Where a matter, which has been referred back to the royal family for reconsideration and

resolution in terms of subsection (4)(a), 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.”

[4] The provisions of s 21 of Act No. 41 of 2003 read:

“21(1)(a) Whenever a dispute concerning customary law or customs arises within a traditional community or between traditional communities or other institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community or customary institutions concerned must seek to resolve the dispute internally and in accordance with customs before such dispute or claim may be referred to the Commission.

(b) • • •

- (2)(a) A dispute referred to in subsection (1)(a) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute in accordance with its internal rules and procedures.
- (b) If a provincial house of traditional leaders is unable to resolve a dispute as provided for in paragraph (a), the dispute must be referred to the Premier of the province concerned, who must resolve the dispute after having consulted-
- (i) the parties to the dispute; and
 - (ii) the provincial house of traditional leaders.”

[5] The provisions of section 22 of Act No. 41 of 2003 read:

“(1) There is hereby established, with effect from the date of coming into operation of the Traditional Leadership and Governance Framework Amendment Act, 2009, a

commission known as the Commission on Traditional Leadership Disputes and Claims.

- (2) The Commission must carry out its functions in a manner that is fair, objective and impartial.

[6] The provisions of section 25 of Act No. 41 of 2003 read:

- (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-

• • •

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

(The underlinings are mine for emphasis)

• • •

- (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.
- • •
- (9) Provincial legislation must provide for a mechanism to deal with disputes and claims

related to traditional leadership: Provided that
such a mechanism must not deal with matters
to be dealt with by the Commission.”

(The underlinings are mine for emphasis)

[7] In this matter the respondents are challenging the title or right of the first applicant to succeed his father, Ntilivana, as the Headman. I have taken notice from the papers filed of Court that the disputes raised by the respondents invite an examination of the history of genealogical family tree of Chief Dudumayo Dalasile going back to the falling of the Chief in 1928. Before dealing with that history the identity of the parties before this Court must be ascertained.

[8] The first applicant is Mkhanyiseli Dudumayo, an adult male person of Maphuzi 15A, Mqanduli, Eastern Cape Province. He describes himself as being a biological son of the late Inkosana of Maphuzi 15A, Mr Daliwonga Ntilivana Dudumayo. The second applicant is Vuyisa Dalasile, an adult male Inkosi (Chief) of ama- Tshomane Tribe and a member of the third applicant. The third applicant is Tshomane Traditional Council, Mqanduli, Eastern Cape. This Council is established as such in terms of sections 1 and 6 of Act No. 4 of 2005. It is the administrative organ of ama-Tshomane Tribe.

[9] The first respondent is Mhlabunzima Dalasile, a 77 years old male person of Maphuzi 15A. The second and third respondents are the MEC and Premier, respectively, of the Government of the Eastern Cape Province. The fourth respondent is the Chairperson of the House of Traditional Leaders, Eastern Cape.

[10] I now turn to deal with the history. The background facts are the following:

The people of ama-Tshomane Tribe occupy approximately seven Administrative Areas in the district of Mqanduli, of which Ngcanguba Administrative Area No. 15 (Ngcanguba 15) is one. Chief Dudumayo Dalasile (Dudumayo) reigned in Ngcanguba 15 as both a Chief and Headman until his demise in 1928. He was the head of his family in which the first applicant and first respondent are a part. Dudumayo had six wives. In the great house Gwebindlala and Candulwandle were the first born and second born children respectively. The third son, one Mgudlwa, was born of a right hand house. The customary rule of primogeniture would dictate that the heir and successor (inkosana) to Dudumayo's throne is Gwebindlala.

[11] Gwebindlala, the great son, established his own extended family in which four sons were born. Those were Zwelibanzi, Dalingozi, Ntlokwinendaba and Dabulamanzi who are mentioned chronologically in accordance with the customary arrangement of the houses. Therefore, Zwelibanzi was the son born of the great house. Ntlokwinendaba was the son born of the right hand house. Dalingozi was the son born of the third house. Dabulamanzi was the son born of *iqadi* house which is attached to the great house. Zwelinzima Vuyisa Dalasile, the second applicant, is one of the sons from the great house of Zwelibanzi. Since Vuyisa is not the first born child he is not the great son. The first applicant is the grandson of Dabulamanzi. He is the direct heir and successor to Ntilivana Daliwonga, the son of Dabulamanzi.

[12] Briefly stated the first applicant is the descendant of Gwebindlala in the *iqadi* house.

[13] Mgudlwa died in 1934 without a son.

[14] Candulwandle is also deceased. He is survived by a son, the first respondent. It may also be mentioned that the first respondent is not a customary heir and successor to Dudumayo.

[15] Whilst still living, Dudumayo established Upper Nenga Administrative Area No. 14, from Ngcanguba 15, and allocated headmanship over it to Mgudlwa. Upon his death in 1928 Ngcanguba 15 was again partitioned to produce a portion from it which is called Maphuzi 15A. This was done on the suggestion of the magistrate with the aim of creating the headmanship in Maphuzi 15A in favour of Ntlokwinendaba whose father, Gwebindlala, had predeceased Dudumayo. All the children of Gwebindlala were still young when Dudumayo died. Candulwandle then stepped into the shoes of his brother, Gwebindlala, to act as the Chief of ama-Tshomane and Headman in Ngcanguba 15 including Maphuzi 15A. He did so on behalf of Zwelibanzi and Ntlokwinendaba. Ntlokwinendaba died during the reign of Candulwandle whilst still being a minor. The death of Ntlokwinendaba saw Maphuzi 15A reverting to the great house. In 1930 Zwelibanzi was installed as a Chief of ama-Tshomane Tribe. However, Candulwandle continued to act as Headman in Ngcanguba 15 and Maphuzi 15A. In 1947 Candulwandle lodged a claim for his appointment as the Headman in Maphuzi 15A. His claim did not succeed as the Tribe decided to appoint Dabulamanzi. However, the magistrate of Mqanduli ignored the decision of Tshomane Tribal Authority by appointing Candulwandle as the Headman in Maphuzi 15A. In 1955 Candulwandle retired and the headmanship of Maphuzi 15A was restored to

the *iqadi* house. Dabulamanzi resumed headmanship and reigned until 1971. After Dabulamanzi, the Royal Family appointed Ntilivana as the Headman. Ntilivana reigned as the Headman in Maphuzi 15A until his death in January 2010.

[16] On 24 February 2010 the meeting of the Royal Family identified the first applicant as the Headman of Maphuzi 15A. The second and third applicants approved the decision of the Royal Family. On 22 March 2010 the meeting of the residents of Maphuzi 15A also decided that the first applicant be appointed as the Headman. The two meetings produced written minutes which were forwarded to the third respondent to recognize the appointment of the first applicant and confirm such appointment in accordance with the provisions of s 18 of Act No. 4 of 2005. The appointment is as yet to be confirmed.

[17] The first respondent contested the headmanship of the first applicant on the following grounds:

- a) He is the son of Candulwandle and, thus, he is of royal blood of the great house of Dudumayo;

- b) The first applicant is the child of the *iqadi* house (the third house);
- c) In 1980 he brought a claim for headmanship against Ntilivana which
upon investigations the King of aba-Thembu ruled on 8 October 2007, that he (first respondent) is the person who is entitled to succeed Ntilivana as the headman;
- d) Despite the ruling, he allowed Ntilivana to act as the Headman on his
behalf;
- e) On 05 August 2010 the MEC, acting on behalf of the third respondent, approved his appointment;
- f) On 17 December 2009 the fourth respondent approved his headmanship because in 1948 Zwelibanzi transferred his rights of headmanship over Maphuzi 15A to Candulwandle as a reward for good services rendered while acting as a Chief in Ngcanguba 15 on behalf of Zwelibanzi; and
- g) Dudumayo had allotted Maphuzi 15A to Candulwandle.

[18] The first applicant, duly supported by the second and third applicants, resist the contestation by the first respondent on the following grounds:

- (a) Upon the death of Ntlokwinendaba the headmanship in Maphuzi 15A reverted to the royal family. At the time Zwelibanzi was the headman in Ngcanguba 15;
- (b) On 08 August 1947 Candulwandle claimed headmanship against Zwelibanzi. In a meeting that was held before Mr Wilson, the magistrate of Mqanduli at the time, Candulwandle was recommended for headmanship. Such a recommendation was irregular because the meeting was held in the absence of Zwelibanzi and Candulwandle was legally disqualified from holding a position of a headman by reason that he had a criminal record. As a result the government refused to appoint Candulwandle as the headman of Maphuzi 15A. Zwelibanzi duly lodged a complaint against the recommendation made by Mr Wilson to the Chief Magistrate in Mthatha. However, the appeal before the Chief Magistrate was not finalized; and
- (c) The second and third respondent's decision to give headmanship to the first respondent falls foul to the provisions of Act No. 41 of 2003 in that despite the fact that the claim by the first respondent had been disputed by Ntilivana during his lifetime, the respondents did not refer such dispute to the Commission for a proper investigation and a determination to be made in accordance with customary law.

[19] *Mr Matoti* submitted on behalf of the first respondent that the Premier acted correctly in resolving the dispute in favour of the first respondent as it was enjoined to do so in terms of section 18 (1) of Act No. 4 of 2005; that the headmanship position was vacant because Ntilivana was acting in the post and having no legal rights to be appointed in the post permanently because he was the descendant of the *iqadi* house; and that the applicants had foreseen that the challenge to the recognition of the first respondent would raise a dispute of fact necessitating the dismissal of the application. *Mr Matoti* submitted further that since the dispute concerns the issue of succession under customary law generally, the provisions of s 25(2)(a) of Act No. 41 of 2003 (on the referral of a dispute to the Commission) cannot apply to this case because the referral of the dispute to the King and fourth respondent was sufficient compliance in terms of s 18(1) of Act No. 4 of 2005.

[20] *Mr Matyumza* appeared on behalf of the 2nd, 3rd and 4th respondents. He submitted, aligning himself with the arguments advanced by *Mr Matoti*, that the dispute between the parties concerns the applicability of customary law of succession in the family of Gwebindlala which must have consequences to both the first applicant and the first respondent. He contended that it was

correct of the second and third respondents to decide who between the parties should be recognized as the legitimate headman of Maphuzi 15A. To resolve the dispute the respondents were enjoined to act only in terms of s 21(2)(b) of At No. 41 of 2003 read with s 18(1) of Act No. 4 of 2005 by referring the dispute to the King and fourth respondent to make a recommendation. Since the respondents have utilized the internal rules and procedures at their disposal and resolved the dispute there was no need for the matter to be referred to the Commission in terms of s 25(2(a) of the Act No. 41 of 2003. He submitted further that the *doctrine* of estoppel should be invoked against the applicants because they took part in the investigations which were conducted in 2009 and knew that the King recommended the first respondent for recognition as the headman of Maphuzi 15A.

[21] *Mr Dukada* submitted on behalf of the applicants that two things happened after the demise of Ntilivana. Firstly, the first applicant succeeded Ntilivana as the headman of Maphuzi 15A. Therefore, there was no vacancy that needed to be filled. Secondly, the first respondent contested the position of headmanship which was already held by Ntilivana. He contended that the vacancy did not exist when the respondents took a decision to recognize the first respondent on 08 August 2010 because the Royal Family, acting in terms

of s 18 of Act No. 4 of 2005, had already determined headmanship in accordance with customs applicable to ama-Tshomane Tribe. Once the Royal Family identified the first applicant as the successor to Ntilivana the third respondent was obliged to recognize the first applicant as the headman. He submitted that the second and third respondents were not authorized by the provisions of s 18 of Act No. 4 of 2005 to recognize the first respondent as the headman because, in terms of s 25 of Act No. 41 of 2003, the first respondent's objection constituted a contest against the rights of the *iqadi* house of Ntilivana and the first applicant to the headmanship of Maphuzi 15A. *Mr Dukada* contended that the contestation should have been referred to the Commission and a failure by the third respondent to allow the Commission to decide the dispute in terms of s 25 of Act No. 41 of 2003 would render the impugned decision invalid.

[22] The provisions of Act No. 41 of 2003 and Act No. 4 of 2005, the National and Provincial Statutes respectively, are not in conflict with each other on the question of the machinery that is applicable in the resolution of disputes between the parties. The provisions of the statutes read harmoniously and there is no interpretational problem raised in their applicability in this matter. It is envisaged in s 25(2)(a)(iii) of Act No. 41 of

2003 that a dispute concerning a contestation of traditional leadership position involving the title or right of the incumbent must be investigated and a recommendation be made on such investigations by the Commission which has been established for that purpose in terms of s 22 (1) of Act No. 4 of 2003. The Act is specific in its terms. The provisions of s 18 of Act No. 4 of 2005 and s 21 of Act No. 41 of 2003, which the respondents relied upon for their decision, do not refer in specific terms to disputes which are enumerated in s 25 (2)(a) of Act No. 41 of 2003. Significantly, it is provided in s 18 (4) of Act No. 4 of 2005 that the Premier who has received “evidence or allegation” that the identification of a person for a position of headmanship was not done in accordance with the Act, customary law or custom must refer the matter to the Royal Family for reconsideration and resolution. In this case the dispute has not been referred back to the Royal Family but the third respondent elected to refer the matter to the fourth respondent and the King. It may be inferred from this approach that the third respondent was not satisfied with the decision of the Royal Family. In that case, the third respondent would not have been empowered to deal with the matter at hand any further under the legislative scheme of Act No. 4 of 2005. It comes as no surprise that the provisions of s 25 of Act No. 4 of 2003 provide an appropriate procedure to be adopted by the Premier who is not satisfied with the reasons which influenced the Royal

Family in identifying the headman.

[23] The *proviso* in s 25(9) of Act No. 41 of 2003, the National Statutes, reads that provincial legislation (such as Act No. 4 of 2005) must not deal with matters specifically mentioned in s 25(2) to be dealt with by the Commission, of which the contestation of first applicant's right to headmanship in Maphuzi 15A is one. It is by no means co-incidental that s 18(4) of Act No. 4 of 2005 does not provide for a dispute resolution mechanism of the Commission. In terms of s 25(9) of Act No. 41 of 2003 the Legislature in the Eastern Cape Province had to fashion Act No. 4 of 2005 in such a way that it does not conflict with s 25 (2) of Act No. 41 of 2003.

[24] Therefore, it is my view that the respondents were not empowered by law to resolve the dispute without recourse to the Commission. It is the Commission itself that should decide the dispute. The decision of 08 August 2010 is, therefore, not in compliance with s 25 of Act No. 41 of 2003. It is an unlawful administrative action within the meaning of s 33 of the Constitution read with s 6(2) of the Promotion of Administrative Justice Act No. 3 of 2000.

[25] I now turn to deal with the interdicts sought. It do this against the background that the decision recognizing the first respondent as the headman

is invalid. It must follow that the first respondent may not hold out as the headman or be assisted by the second and third respondents to do so.

[26] The decision whether to grant the interdict that the first applicant be recognized as the headman hinges on the lawfulness or otherwise of the decision by the Royal Family identifying the first applicant as the headman of Maphuzi 15A. It is common cause that the headmanship has been in the hands of the *iqadi* house of Gwebindlala from time immemorial. The Royal Family and ama-Tshomane people have approved of that state of affairs with visible consistency over decades. Based on the customary law principle of primogeniture, the headmanship has inexorably descended from successive generations of the *iqadi* house until the current generation of the first applicant. The Court has not been asked to disturb that state of affairs. On the strength of the maxim: “*omnia praesumuntur rite esse acta*” it must continue to prevail until such time as it has been declared to be unlawful by a court of law. See the case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA), paras [26] and [27] at 242.

[27] Since the location of headmanship in the *iqadi* house of Gwebindlala is valid and the identification of the first applicant complies with the provisions

of s 18 (1)(a) of Act No. 4 of 2005, the third respondent would be obliged to recognize the first applicant as the headman in terms of sections 18(1)(b), 18(2) and 18(3) of the same Act. If the third respondent is not satisfied that the decision of the Royal Family is in accordance with customary law and custom she must request the Commission to decide the dispute as envisaged in s 25 of Act No. 41 of 2003.

[28] On the foregoing, it is my view that the third respondent may be directed to entertain the first applicants' request for his consideration as the Inkosana of Maphuzi 15A.

[29] The dispute of fact argument is irrelevant to the relief sought because the case of the applicants is premised on non-compliance by the respondents with the dispute resolution mechanism which was created by the Legislature in s 25 of Act No. 41 of 2003. The factual disputes arising from the contestation of the position of headmanship should be resolved by the Commission itself.

[30] I do not agree with the respondents that the applicants have not proved the requisites for granting of an interdict. In my view, as demonstrated in this judgment, the applicants have proved that they are entitled to a relief setting

aside the decision of 08 August 2010 to prevent harm that is being caused to the people of ama-Tshomane Tribe in Maphuzi 15A by an unlawful deprivation of a headman. There is no alternative remedy at the disposal of the applicants to correct the decision of the third respondent as well as the consequences thereof.

[31] There is no reason in ordering the second and fourth respondents to pay the costs of the application because they are serving the interest of the first respondent and assisting the third respondent in this application. The third respondent is the only person who is obliged to entertain requests by the Royal Family for the recognition of traditional leaders in terms of the provisions of s 18 of Act No. 4 of 2005. Therefore, both the first and third respondents must pay the costs of this application.

[32] In the result, the following order shall issue:

- (a) That the decision of the 2nd and 3rd respondents to recognise the 1st respondent as Inkosana of Maphuzi Administrative Area 15A, Mqanduli dated 08 June 2010 be and is hereby set aside.**

- (b) That the 2nd and 3rd respondents be and are hereby interdicted and restrained from taking any further step in effecting the decision to recognize the 1st respondent as the Inkosana of Maphuzi Administrative Area 15A, Mqanduli.**
- (c) That the 3rd respondent be and is hereby directed to consider the 1st applicant's request for recognition as Inkosana of Maphuzi Administrative Area 15A, Mqanduli.**
- (d) That the 1st respondent be and is hereby interdicted and restrained from holding himself out or executing any duties as Inkosana of Maphuzi Administrative Area 15A, Mqanduli.**
- (e) That the 1st and 3rd respondents pay the costs of the application jointly and severally, the one paying and the other to be absolved from liability.**

Z. M. NHLANGULELA

JUDGE OF THE HIGH COURT

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Counsel for the 1st respondent : Adv. L. Matoti

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