



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 373/22

In the matter between:

MPHEPHU-RAMABULANA ROYAL FAMILY

Applicant

and

THE PREMIER LIMPOPO PROVINCE

First Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
CO-OPERATIVE GOVERNANCE, HUMAN
SETTLEMENTS AND TRADITIONAL
AFFAIRS**

Second Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Third Respondent

TONI PETER MPHEPHU-RAMABULANA

Fourth Respondent

MASINDI CLEMENTINE MPHEPHU

Fifth Respondent

Neutral citation: *Mphephu-Ramabulana Royal Family v Premier of the Limpopo Province and Others* [2024] ZACC 12

Coram: Zondo CJ, Bilchitz AJ, Chaskalson AJ, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J

Judgment: Theron J (unanimous)

Heard on: 22 February 2024

Decided on: 21 June 2024

Summary: Traditional and Khoi-San Leadership Act 3 of 2019 — section 13(1) — recognition of traditional leader — failure to make a decision

Direct leave to appeal — no reason to bypass lower courts — not in the interests of justice — refused

Relief sought — remittal to the High Court — High Court dealt with merits — *functus officio* — incompetent relief sought — bound by pleadings

ORDER

On appeal from the High Court of South Africa, Limpopo Division, Thohoyandou:

1. The application for leave to appeal directly to this Court is refused.
2. There is no order as to costs in this Court.

JUDGMENT

THERON J (Zondo CJ, Bilchitz AJ, Chaskalson AJ, Majiedt J, Mathopo J, Mhlantla J and Tshiqi J concurring):

Introduction

[1] This matter concerns the appointment of an acting King of the Vhavenda. Section 13(1) of the Traditional and Khoi-San Leadership Act¹ provides for the

¹ 3 of 2019. Section 13(1) reads:

“13. Recognition of acting traditional and Khoi-San leaders—

identification of an acting King where the successor to the position of King or Queen has not been identified. This application follows upon protracted litigation between the parties about the appointment of a King or Queen of the Vhavenda.

Parties

[2] The applicant is the Mphephu-Ramabulana Royal Family (Royal Family), a customary institution within the Mphephu-Ramabulana Traditional Community established in terms of the Limpopo Traditional Leadership and Institutions Act.² The first respondent is the Premier of the Limpopo Province (Premier). The second

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- (1) Within 90 days of becoming aware of any of the instances mentioned in subparagraphs (i), (ii) and (iii)—
- (a) a royal family must identify a suitable person to act as a king, queen, principal traditional leader, senior traditional leader, headman or headwoman, after taking into account whether any of the grounds referred to in section 9(1) or 16(11)(h) or 16(14) apply to such person; or
 - (b) a royal family or Khoi-San council, as the case may be, must identify a suitable person to act as a senior Khoi-San leader or branch head, as the case may be, after taking into account whether any of the grounds referred to in section 11(1) or 16(14) apply to such a person,

where—

- (i) a successor—
 - (aa) to the hereditary position of a king, queen, principal traditional leader, senior traditional leader, headman, headwoman or senior Khoi-San leader has not been identified by the royal family concerned in terms of section 8 or 10, as the case may be; or
 - (bb) to the position of senior Khoi-San leader or branch head has not been elected by the Khoi-San council as contemplated in section 10(1)(b);
- (ii) the identification of a successor to the position of a king, queen, principal traditional leader, senior traditional leader, headman, headwoman, senior Khoi-San leader or branch head is being dealt with in terms of section 8(4) or 10(7), as the case may be; or
- (iii) a king, queen, principal traditional leader, senior traditional leader, headman, headwoman, senior Khoi-San leader or branch head, as the case may be, is unable to perform his or her functions under circumstances other than those provided for in section 14 for—
 - (aa) the treatment of illness for a period of more than three months;
 - (bb) study purposes for a period of more than three months; or
 - (cc) any other lawful purpose.”

² 6 of 2005.

respondent is the Member of the Executive Council: Cooperative Governance, Human Settlements and Traditional Affairs, Limpopo (MEC). The third respondent is the Minister of Cooperative Governance and Traditional Affairs (Minister). The fourth respondent is Mr Toni Peter Mphephu-Ramabulana (Mr Mphephu-Ramabulana) who has been identified by the Royal Family as the King of the Vhavenda. The fifth respondent is Ms Masindi Clementine Mphephu (Ms Mphephu), who is contesting the position of the Vhavenda Kingship/Queenship.

Background litigation

[3] On 14 August 2010, the Royal Family identified Mr Mphephu-Ramabulana as the King of the Vhavenda.³ On 21 September 2012, the President of the Republic of South Africa (President) recognised Mr Mphephu-Ramabulana as the King of the Vhavenda.⁴

[4] In December 2012, Ms Mphephu instituted review proceedings in the High Court (2012 review proceedings), to have the identification and recognition of Mr Mphephu-Ramabulana as the King of the Vhavenda, reviewed and set aside. The High Court, per Legodi J, dismissed the application.

[5] On appeal, the Supreme Court of Appeal concluded that the decisions by the Royal Family and the President, respectively, to identify and recognise Mr Mphephu-Ramabulana, the fourth respondent, as the King of the Vhavenda were unlawful, unconstitutional and invalid and fell to be set aside.⁵ The following paragraph from the Supreme Court of Appeal's judgment is key to this matter:

“In light of these findings, the decision by the [President] to recognise the first respondent as King of Vhavenda, is reviewed and set aside and the appeal must

³ This takes place in terms of section 13 of the Traditional and Khoi-San Leadership Act cited in n 1 above.

⁴ Traditional Leadership and Governance Framework Act (41/2003): Recognition of Mr Toni Peter Mphephu (Ramabulana) as a King of Vhavenda Community, GNR 766 GG 35705, 21 September 2012.

⁵ *Mphephu v Mphephu-Ramabulana* [2019] ZASCA 58; 2019 JDR 0753 (SCA) (*Mphephu SCA*).

succeed. However, it would obviously be premature to consider a just and equitable remedy before the entire review is finalised. The outstanding issues and points *in limine* [preliminary matter] referred to the High Court for evidence and adjudication have a direct bearing on any future identification and recognition of a person, even in an acting capacity, as King or Queen of Vhavenda. Thus, any attempt to appoint anyone to the Throne at this stage of the proceedings, would require a prior resolution of the very same issues pending adjudication in the High Court. It would be in the interest of all the parties to have these matters resolved before the next process of identifying and recognising a leader in terms of section 9 of the [Traditional Leadership and Governance] Framework Act commences. Consequently, the effect of the review and setting aside of the first respondent's recognition as King of Vhavenda and the withdrawal of his recognition certificate as King will have to be stayed, pending the completion of the proceedings, including any appeal process that might arise therefrom.”⁶

[6] The Supreme Court of Appeal ordered that the matter be remitted to the High Court for adjudication of the outstanding issues before another Judge. The Supreme Court of Appeal also ordered that the withdrawal of the certificate of recognition of Mr Mphephu-Ramabulana as King of Vhavenda be stayed, pending the final determination of the proceedings. The order of the Supreme Court of Appeal reads:

- “1. The appeal is upheld with no order as to costs.
2. The matter is referred back to the Limpopo Division of the High Court, Thohoyandou for further adjudication on the merits before another Judge.
3. The order of the High Court is set aside and replaced with the following:
 - ‘(a) It is declared that the decision of the eighth respondent of 14 August 2010 to identify the first respondent as a suitable person to be appointed as the King of the Vhavenda Traditional Community is unlawful, unconstitutional and invalid and is reviewed and set aside.
 - (b) It is declared that the decision of the second respondent dated 14 September 2012 to recognise the first respondent as the

⁶ Id at para 43.

King of the Vhavenda Traditional Community published in Traditional Leadership and Governance Framework Act [41/2003]: Recognition of Mr Toni Peter Mphephu (Ramabulana) as King of Vhavenda Community, GNR 766 GG 35705, 21 September 2012 is unlawful, unconstitutional and invalid and is reviewed and set aside.

- (c) It declared that the decisions of the eighth respondent to identify, and that of the second respondent to recognise the first respondent as King of Vhavenda are based on a criteria that promotes gender discrimination, and are reviewed and set aside in that the discrimination impedes compliance with the provisions of section 2A(4)(c) of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009, to progressively advance gender representation in the succession to the position of King or Queen of Vhavenda.
- (d) The second and the fourth respondents are directed to refer the following issues of customary laws and custom to the fifth and sixth respondents respectively for opinion and advice to be submitted to the High Court:
 - (i) What measures are in place or have to be in place for the adaptation and transformation of the principle of primogeniture by the traditional communities, within the context of section 2A(4)(c) of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009;
 - (ii) Whether a child born before the parent is recognised as a traditional leader, qualifies to be the successor of the parent to that position of traditional leadership; and
 - (iii) Whether in the Vhavenda custom, the *Ndumi* qualifies to be identified and recognised as a successor to a position of traditional leadership.
- (e) The costs shall be costs in the cause.
- (f) The withdrawal of the certificate of recognition of the first respondent as King of Vhavenda, shall be stayed pending the final determination of the proceedings.”

[7] Mr Mphephu-Ramabulana and the Royal Family appealed to this Court against the decision of the Supreme Court of Appeal. Ms Mphephu conditionally cross-appealed against the stay order (paragraph 3(f) of the order of the Supreme Court of Appeal).⁷ This Court, in *Mphephu-Ramabulana*⁸ (*Mphephu 1*), dismissed the main application and upheld the cross-appeal. This Court set aside the stay order on the basis that it would not be just and equitable to suspend the order of invalidity after a finding that the identification and recognition decisions were unlawful and invalid. This Court held that a stay, in these circumstances, did not vindicate the rule of law or the fifth respondent's right to administrative justice.⁹ The order of this Court reads:

- “1. Condonation is refused in the main application.
2. The main application is dismissed.
3. Condonation is granted in the application for leave to cross-appeal.
4. Leave to cross-appeal is granted.
5. The cross-appeal is upheld to the extent set out in paragraphs 6 to 8 below.
6. Paragraph 1 of the order of the Supreme Court of Appeal is set aside and replaced with the order that:
‘The appeal is upheld, and the second respondent is ordered to pay the costs of the applicant.’
7. Paragraph 3(e) of the order of the Supreme Court of Appeal is set aside and replaced with the order that:
‘The second respondent is ordered to pay the costs of the applicants.’
8. Paragraph 3(f) of the order of the Supreme Court of Appeal is set aside.
9. The second respondent is ordered to pay the costs of the first respondent in this Court.”

⁷ Paragraph 3(f) of the Supreme Court of Appeal's order states: “The withdrawal of the certificate of recognition of the first respondent as King of Vhavenda, shall be stayed pending the final determination of the proceedings”.

⁸ *Mphephu-Ramabulana v Mphephu* [2021] ZACC 43; 2022 (1) BCLR 20 (CC); 2021 JDR 2796 (CC) (*Mphephu 1*).

⁹ *Id* at para 75.

Current litigation

[8] On 17 February 2022, the MEC and the Minister informed the Royal Family that they would implement the Constitutional Court’s decision in *Mphephu 1*. That involved no longer recognising Mr Mphephu-Ramabulana as King and withdrawing his benefits. On 1 March 2022, the Royal Family convened a meeting where Mr Mavhungu David Mphephu was recognised as the acting King.

[9] On 1 April 2022, the Royal Family requested that the Premier recognise Mr Mavhungu David Mphephu as the acting King. Almost eight months passed, but the Premier failed to recognise an acting King. On 29 November 2022, the Royal Family approached the High Court on a “semi-urgent” basis, to review the Premier’s failure to recognise Mr Mavhungu David Mphephu as acting King of Vhavenda. It sought an order declaring the failure to take a decision as unconstitutional, unlawful and invalid and that it be replaced with a decision recognising Mr Mavhungu David Mphephu as the acting King.

[10] In the High Court, the Premier, the MEC and the Minister collectively opposed the application. They raised five points *in limine*, namely “non-joinder, disputes of fact, urgency, *locus standi* [standing], lack of exhaustion of internal remedies and, order of substitution of first respondents”.¹⁰

[11] The High Court dealt with two *in limine* points in deciding the application before it. First, whether the application was indeed urgent and second, whether the application was premature in light of the Supreme Court of Appeal’s direction that an acting King/Queen could not be appointed until the review application before the High Court was finalised.

¹⁰ *Mphephu-Ramabulana Royal Family v Premier Limpopo Province* [2022] ZALMPHTC 11 (*Mphephu HC*) at para 11.

[12] The High Court first dealt with urgency in terms of rule 6(12) of the Uniform Rules of Court.¹¹ The High Court held that the matter was not urgent as the test for urgency was not met.¹² The High Court found that there was no adequate explanation, nor proper circumstances placed before it, to justify the matter being heard on an urgent basis. It thus held that the matter ought to “be struck off the roll”.¹³

[13] Despite this finding, the High Court proceeded to deal with the merits of the matter. It held that the application to appoint an acting King was premature as the Supreme Court of Appeal had found that an acting King could not be identified until the review application before the High Court under case number 773/2012 had been finalised. It thus dismissed the application.

In this Court

[14] The Royal Family applies for leave to appeal directly to this Court against the High Court’s judgment and order. Alongside its application for leave to appeal to this Court, the Royal Family conditionally applied for leave to appeal to the Full Court of the Limpopo Division in the event that this Court did not grant it leave to appeal.

Issues

[15] The issues arising in this matter are:

¹¹ Rule 6(12) of the Uniform Rules of Court reads:

- “(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.
- (b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.
- (c) A person against whom an order was granted in such person’s absence in an urgent application may by notice set down the matter for reconsideration of the order.”

¹² The test is whether, if the matter were to follow its normal course as laid down by the rules, an applicant will be afforded substantial redress.

¹³ *Mphephu HC* above n 10 at para 18.

- (a) Does this matter engage this Court's jurisdiction, and should leave to appeal directly to this Court be granted?
- (b) Is the appointment of an acting King premature?
- (c) Did the Premier fail to recognise Mr Mavhungu David Mphephu as the acting King?
- (d) If so, what is the appropriate remedy?

Jurisdiction

[16] This Court's constitutional jurisdiction is engaged as the matter concerns the review of the exercise of a public power.¹⁴ In addition, this Court has held that the institution of traditional leadership and the determination of who should hold positions of traditional leadership raise constitutional issues.¹⁵

Leave to appeal directly

[17] The next question is whether leave to appeal directly to this Court should be granted. This question is linked to the interests of justice.

[18] In *Union Refugee Women*¹⁶ and *Freedom of Religion South Africa*,¹⁷ this Court laid down the principles governing leave to appeal directly to this Court. The factors relevant to deciding whether leave to appeal directly should be granted include: whether only constitutional issues are involved; the importance of the constitutional issues raised; the urgency, if any, of having a final determination of the matter; whether coming directly to this Court will save time and costs; the prospects of success; and any disadvantage as a result of bypassing the lower courts. As stated, ultimately, the question is whether it is in the interests of justice to hear a direct appeal.

¹⁴ *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 20.

¹⁵ *Sigcau v President of the Republic of South Africa* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC) at para 15.

¹⁶ *Union Refugee Women v Director, Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) (*Union Refugee Women*) at para 21.

¹⁷ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 (11) BCLR 1321 (CC) (*Freedom of Religion South Africa*) at para 27.

[19] In *Democratic Party*¹⁸ this Court said the following about direct appeals:

“In deciding what is in the interests of justice, each case has to be considered in the light of its own facts. A factor will always be that direct appeals deny to this Court the advantage of having before it judgments of the Supreme Court of Appeal on the matters in issue. Where there are both constitutional issues and other issues in the appeal, it will seldom be in the interests of justice that the appeal be brought directly to this Court. But where the only issues on appeal are constitutional issues the position is different. Relevant factors to be considered in such cases will, on one hand, be the importance of the constitutional issues, the saving in time and costs that might result if a direct appeal is allowed, the urgency, if any, in having a final determination of the matters in issue and the prospects of success, and, on the other hand, the disadvantages to the management of the Court’s roll and to the ultimate decision of the case if the Supreme Court of Appeal is bypassed.”

[20] The applicant submits that direct leave should be granted for the following reasons: (i) the application bears reasonable prospects of success; (ii) it is the Supreme Court of Appeal’s order being challenged, thus making bypassing it necessary; (iii) the matter concerns constitutional issues; (iv) there is a vacuum in traditional leadership which must be promptly resolved; and (v) the matter involves an infringement of the applicant’s rights to fair administrative action and to practice their culture. The applicant contends that the Supreme Court of Appeal has already pronounced on the matter and it cannot be approached to consider its own judgment.

[21] None of these reasons justify us bypassing the lower courts in this case. The contention that the Supreme Court of Appeal has already made a pronouncement and can therefore not be approached in respect of its own order, is unfounded. The Supreme Court of Appeal has not pronounced on whether the Premier unjustifiably failed to make a decision, in particular, whether he failed to recognise Mr Mavhungu David Mphephu as acting King.

¹⁸ *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* [1998] ZACC 9; 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) (*Democratic Party*) at para 32.

[22] The unarticulated concern of the applicant is that the Supreme Court of Appeal ordered a stay in *Mphephu 1*, that the High Court justified its decision with reference to the stay order of the Supreme Court of Appeal and that the Supreme Court of Appeal cannot be expected now to reverse the logic of its stay judgment in *Mphephu 1*. This concern ignores the fact that this Court, in its judgment in *Mphephu 1*, overturned the stay and explained why it was inappropriate. Consequently, if the Supreme Court of Appeal now has to consider the present appeal, it will do so in the light of this Court's judgment in *Mphephu 1* and will know that its earlier reasoning in relation to the stay has been rejected.

[23] The Royal Family has advanced no reason why the Supreme Court of Appeal and the Full Court should be bypassed and deprive this Court of the benefit of judgments of those courts.¹⁹

[24] The relief sought by the Royal Family is also incompetent. As mentioned, despite the conclusion by the High Court that the matter was not urgent, it rather curiously dealt with the merits of the application. It found that the matter was premature and dismissed the application.

[25] In its notice of motion, the Royal Family seeks that leave to appeal be granted against the order of the High Court, that the appeal be upheld with costs and that the order of the High Court be set aside and replaced with an order, inter alia, that:

- “a. The order of the High Court of Limpopo Local Division Thohoyandou is set aside;
- b. The matter is remitted back to the High Court for determination of the remaining points *in limine* and merits of the application.”

¹⁹ See *Economic Freedom Fighters v Gordhan; Public Protector v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) at paras 68-75.

[26] This relief was sought on the basis that the High Court had not dealt with the merits of the matter and had struck the matter from the roll for lack of urgency. This is not so. While stating that the applicant had not made a case out for urgency and the matter ought to be struck from the roll, the High Court nevertheless dealt with the merits of the application, albeit, in very brief terms. It is abundantly clear from the order that the High Court *dismissed* the application.

[27] In these circumstances, the relief sought by the applicant, namely, remittal to the High Court to determine the merits of the application, is not competent. That Court is *functus officio* (its authority over the matter is over). The general rule is that once a court has pronounced a final judgment or order, it has no authority to correct, alter or supplement it.²⁰

[28] Further, the applicant, in its heads of arguments asks that the order of the High Court be set aside and replaced with an order directing the first respondent to recognise Mr Mphephu as the acting King. It is trite that parties are bound by their pleadings. Pleadings are there to “delineate the issues to enable the other party to know what case has to be met. It is impermissible to plead one particular issue and to then seek to pursue another at the trial”.²¹

[29] This Court in *Molusi*²² explained:

“The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (*mero motu*), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed. In *Slabbert*, the Supreme Court of Appeal held:

²⁰ *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306F.

²¹ *Minister of Agriculture and Land Affairs v De Klerk* [2013] ZASCA 142; 2014 (1) SA 212 (SCA) at para 39.

²² *Molusi v Voges N.O.* [2016] ZACC 6; 2016 (3) SA 370 (CC); 2016 (7) BCLR 839 (CC) (*Molusi*).

‘A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.’”²³

[30] A remedy directing the first respondent to take a decision was impermissibly raised for the first time in the applicant’s written submissions. This is prejudicial to the respondents. Therefore, that relief is not properly before this Court.

[31] For these reasons, it is not in the interests of justice for this Court to grant leave to appeal directly to it.

[32] However, this is not the end of the road for the applicant. In its founding affidavit, the applicant states that, together with its application for leave to appeal directly to this Court, it conditionally applied to the High Court for leave to appeal. Plainly, the applicant can still pursue its application for leave to appeal in the High Court.

[33] I emphasise that this matter should be resolved promptly and must be taken seriously by all parties involved. The lacuna that has existed in the leadership of the Vhavenda community since February 2022 is deeply troubling and requires speedy resolution.

Costs

[34] The ordinary rule is that costs follow the result. Having regard to the circumstances of this matter, I am of the view that it is appropriate not to make a costs order.

²³ Id at para 28.

Order

[35] For these reasons, the following order is made:

1. The application for leave to appeal directly to this Court is refused.
2. There is no order as to costs in this Court.

For the Applicant:

S Ravele instructed by S.O Ravele
Attorneys

For the First and Second Respondents:

MS Mphahlele SC and ZS Mothupi
instructed by State Attorney,
Thohoyandou

For the Fifth Respondent:

J Roux SC and LF Taljard instructed by
Hammann Moosa Attorneys