



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 255/22

In the matter between:

**CHIEF AVHATENDI RATSHIBVUMO
RAMBUDA**

First Applicant

NDWAMBI DONALD RAMBUDA

Second Applicant

RAMBUDA TRADITIONAL COUNCIL

Third Applicant

RAMBUDA ROYAL FAMILY

Fourth Applicant

and

TSHIBVUMO ROYAL FAMILY

First Respondent

MBULAHENI LUCAS MAVHUNGU

Second Respondent

PREMIER OF LIMPOPO PROVINCE

Third Respondent

**MEMBER OF THE EXECUTIVE COUNCIL FOR
COOPERATIVE GOVERNANCE, HUMAN
SETTLEMENTS AND TRADITIONAL
AFFAIRS**

Fourth Respondent

Neutral citation: *Chief Avhatendi Ratshibvumo Rambuda and Others v Tshibvumo Royal Family and Others* [2024] ZACC 15

Coram: Maya DCJ, Chaskalson AJ, Dodson AJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ and Tshiqi J.

Judgment: Mathopo J (unanimous)

Heard on: 30 November 2023

Decided on: 17 July 2024

Summary: Limpopo Traditional Leadership and Institutions Act 6 of 2005 — interpretation of section 12(2) — authority to identify a new headman or headwoman — Premier obliged to act in accordance with section 12(2) — referral to provincial house of traditional leaders and relevant local house of traditional leaders

ORDER

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

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal succeeds to the extent only that paragraph 32.2 of the High Court's order is set aside and replaced with the following order:
“32.2 The matter is remitted to the Premier of the Limpopo Province with the following directions:
 - (a) the Premier must refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations in terms of section 12(2)(a) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005; and
 - (b) in all the further decision-making in the matter the provisions of section 2(1) of the Traditional and Khoi-San Leadership Act 3 of 2019 must be taken into account.”
4. There is no order as to costs.

JUDGMENT

MATHOPO J (Maya DCJ, Chaskalson AJ, Dodson AJ, Kollapen J, Mhlantla J, Rogers J, Schippers AJ and Tshiqi J concurring)

Introduction

[1] This case concerns a dispute regarding the appointment of a headman of the Tshibvumo Village in accordance with the Vhavenda custom. The issues emanate from an application for leave to appeal against the judgment and order of the High Court of South Africa, Limpopo Division, Thohoyandou (High Court). The High Court reviewed and set aside the decision of the Premier of the Limpopo Province (Premier), in terms of which Mr Ndwambi Donald Rambuda (Mr Rambuda) was recognised as headman of the Tshibvumo Village. That court held that the Premier failed to exhaust “an internal remedy” in terms of section 12(2) of the Limpopo Traditional Leadership and Institutions Act¹ (Limpopo Traditional Leadership Act). It remitted the matter to the Premier.

[2] The applicants contend that Mr Rambuda is the legitimate headman identified by the Rambuda Royal Family. In turn, the respondents assert that Mr Mbulaheni Lucas Mavhungu (Mr Mavhungu), son of the former and now deceased headwoman, Ms Nthambeleni Tshibvumo Singo (Ms Singo), is the correct person and was so identified by the Tshibvumo Royal Family.

[3] The central enquiry in this case is whether the Rambuda Royal Family or the Tshibvumo Royal Family is entitled to identify the headman. Related to this enquiry is whether the High Court was correct in its finding that there were two royal families.

¹ 6 of 2005.

This case also raises the proper interpretation of section 12(2) of the Limpopo Traditional Leadership Act.

Parties

[4] The first applicant is Chief Avhatendi Ratshibvumo Rambuda (Chief Avhatendi), the senior traditional leader of the Rambuda Traditional Community. The second applicant is Mr Rambuda, the elder brother of Chief Avhatendi. The third applicant is the Rambuda Traditional Council. The fourth applicant is the Rambuda Royal Family.

[5] The first respondent is the Tshibvumo Royal Family. The second respondent is Mr Mavhungu, son of the former headwoman, Ms Singo. The third respondent is the Premier, Limpopo (Premier) and the fourth respondent is the Member of the Executive Council for Cooperative Governance, Human Settlements and Traditional Affairs, Limpopo (MEC). The third and fourth respondents did not participate in these proceedings.

Background facts

[6] Tshibvumo Village is a settlement in the Vhembe District, Limpopo. The village has been under the traditional leadership of the Rambuda Royal Family for the past several decades. Ms Singo was appointed as the headwoman of the Tshibvumo Village from 1982 until her death on 24 December 2014.² After her death, there was a vacancy for a headman/headwoman in Tshibvumo Village.

[7] Subsequently, two successors were purportedly identified. Mr Rambuda was identified by the Rambuda Royal Family and Mr Mavhungu by the Tshibvumo Royal Family. The Rambuda Royal Family is that of the senior traditional leader, while the Tshibvumo Royal Family is purported to be that of the headmanship/headwomanship.

² *Tshibvumo Royal Family v Rambuda* [2020] ZALMPHC 9 (*Tshibvumo Royal Family*) at para 1.

These “royal families” are in dispute but are both under the governance of the Rambuda Traditional Council.

[8] When the Tshibvumo Royal Family selected Mr Mavhungu as successor, the resolution was communicated to the Rambuda Traditional Council on 19 February 2016.³ Chief Avhatendi refused to acknowledge the identification made by the Tshibvumo Royal Family and instead made an application to the Premier for the recognition of Mr Rambuda as the former headwoman’s successor, giving rise to a dispute between the two families.

Legal framework

[9] Before dealing with this matter, it is important to outline the relevant statutory definitions. Sections 12(1) and (2) of the Limpopo Traditional Leadership Act provide:

- “(1) Whenever a position of a senior traditional leader, headman or head woman is to be filled—
- (a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to the customary law of the traditional community concerned—
 - (i) identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and
 - (ii) through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of the specific person.
 - (b) the Premier must, subject to subsection (2)—
 - (i) by notice in the *Gazette* recognise the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, headman or headwoman, as the case may be;

³ Id at para 2.

- (ii) issue a certificate of recognition to the person so recognised;
and
 - (iii) inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional leader, headman or headwoman.
- (2) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the Premier—
 - (a) may refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations; or
 - (b) may refuse to issue a certificate of recognition; and
 - (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.”

[10] Section 1 of the Limpopo Traditional Leadership Act defines a “royal family” 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 family members who are close relatives of the ruling family.”

[11] Section 1 of the Limpopo Traditional Leadership Act defines a “senior traditional leader” as—

“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.”

[12] Section 1 of the Limpopo Traditional Leadership Act defines a “headman” or “headwoman” as—

“a traditional leader who—

- (a) is under the authority of, or exercises authority within the area of jurisdiction of, a senior traditional leader in accordance with customary law; and
- (b) is recognised as such in terms of this Act.”

Litigation history

High Court (first urgent application)

[13] Following Chief Avhatendi’s identification of Mr Rambuda as headman, the Tshibvumo Royal Family instituted an urgent application in the High Court on 20 March 2016, seeking an order in the following terms:⁴

- (a) A declaration that the Tshibvumo Royal Family be vested with the power to identify a successor to the deceased headwoman.
- (b) The Premier be interdicted from considering the application for the recognition of Mr Rambuda as headman of Tshibvumo Village under the Rambuda Traditional Council.
- (c) The Premier be directed to “return” the application of Mr Rambuda for his recognition as headman of Tshibvumo Village.
- (d) The Rambuda Traditional Council be directed to submit the application of the Tshibvumo Royal Family for the recognition of Mr Mavhungu as the person identified for the position of headman by the Tshibvumo Royal Family.

[14] At the hearing of the urgent application on 24 March 2016, the parties reached a settlement agreement which was made an order of court. The terms of the settlement agreement were that the application of the Tshibvumo Royal Family was to be referred to the Premier. In the event that the Premier had by then already decided to recognise Mr Rambuda as the headman, the Tshibvumo Royal Family would be granted leave to supplement their papers to review the Premier’s decision.⁵

⁴ Id at para 3.

⁵ Id at para 4.

[15] Upon receipt of the court order, the Premier responded in writing that Mr Rambuda had not yet been recognised as headman and confirmed that the process had been stopped as per the court order dated 24 March 2016.⁶

[16] More than two years later, in May 2018, the Tshibvumo Royal Family received a letter from the MEC stating that the Premier had recognised Mr Rambuda as the headman of Tshibvumo Village with effect from 9 March 2018.⁷

High Court (second urgent application)

[17] Aggrieved by the Premier's decision, the Tshibvumo Royal Family brought a second urgent application seeking an order to interdict the Premier's decision to recognise Mr Rambuda as headman and that his salary and allowances be stopped, pending finalisation of the review application. The application was opposed by the Rambuda Royal Family. The parties again reached a settlement agreement. It was agreed that the installation ceremony of Mr Rambuda as headman would not proceed, pending the review application. The settlement agreement was made an order of court.⁸

High Court (review application)

[18] The Tshibvumo Royal Family instituted the review application on the basis that they have the requisite authority to identify the person for the role of headman. In their application, they sought an order in the following terms:⁹

- (a) To review and set aside the Premier's decision to recognise Mr Rambuda as headman.
- (b) Declaring that Mr Mavhungu be recognised as headman of the Tshibvumo Village.

⁶ Id at para 5.

⁷ Id at para 6.

⁸ Id at paras 7-8.

⁹ Id at para 9.

- (c) That the Premier issue a certificate of recognition to Mr Mavhungu as headman and notify the Provincial House of Traditional Leaders.
- (d) That a salary and allowances be paid to Mr Mavhungu as headman of the Tshibvumo Village.

[19] The applicants disputed that the Tshibvumo Royal Family had the power to identify the headman in the Tshibvumo Village. They contended that the Tshibvumo Royal Family was self-created and formed with the intention of undermining the Rambuda Royal Family in the Tshibvumo Village.

[20] The Premier did not participate in the review proceedings. An explanatory memorandum prepared and submitted to him by the MEC was filed as part of the review record in terms of rule 53 of the Uniform Rules. It contains a recommendation by the MEC that Mr Rambuda be recognised as headman. In sum, the memorandum sets out a brief history of the matter and the reasons underpinning the MEC's recommendation.

[21] The memorandum, *inter alia*, states that the first person to rule the Tshibvumo Village as headwoman was Ms Mboneni Rambuda in 1946. She was given authority to rule by her late elder brother, Chief Ratshibvumo Rambuda, who was ruler of the Rambuda Traditional Community. She ruled until she passed away in 1978.¹⁰ After her death, the Rambuda Royal Family identified Ms Singo for the position of headwoman. She ruled until she passed on in 2014. Given this history, it was deduced that the Tshibvumo headmanship arose from the Rambuda Royal Family.

[22] The memorandum further explains that Mr Rambuda is the first-born son of the late Chief Azwihangwisi, who was Chief Avhatendi's predecessor. The applicants took the decision to have a male as headman because males bear future successors. The Rambuda Royal Family held a meeting on 19 December 2017 and identified Mr Rambuda as headman of the Tshibvumo Village. The identification of Mr Rambuda

¹⁰ Id at para 12.

as headman occurred as a result of and “in terms of the notice of withdrawal of [the] application dated and signed at Thohoyandou on the 24th day of August 2016” and the affidavit by Mr Ntakadzeni Nthengwe (the son of Ms Mboneni Rambuda). In that affidavit, Mr Ntakadzeni Nthengwe stated that he and his siblings never contested the position of headman as the role is not hereditary and they do not form part of the Rambuda Royal Family. Mr Ntakadzeni Nthengwe said that the children of the late Ms Singo do not qualify to take the position of headman.

[23] The respondents filed a supplementary affidavit in the review proceedings, explaining that a traditional practice has developed over the years within the Rambuda Traditional Community for a headwoman to be succeeded by her children. The recognition of Mr Rambuda was, therefore, in contravention of the court order dated 24 March 2016. The respondents asserted that the Premier was misled into believing that the notice of withdrawal related to the merits, when in fact it concerned the question of costs. Further, the Premier failed to follow the legislative prescripts set out in section 12 of the Limpopo Traditional Leadership Act.

[24] In response to the supplementary affidavit, the applicants asserted that the position of headwoman of the Tshibvumo Village was not hereditary, and further that according to Vhavenda custom, after the death of a headman or headwoman, it is the Rambuda Royal Family that determines who should fill the position.¹¹

[25] The High Court found that the Limpopo Traditional Leadership Act was silent as to which royal family – that of the senior traditional leader or of the headman – has the authority to identify a successor to the headman or headwoman. It reasoned that the Limpopo Traditional Leadership Act does not establish a hierarchy or distinction in terms of which family plays a lesser role.

¹¹ Id at para 18.

[26] The High Court then referred to section 21 of the Traditional Leadership and Governance Framework Act¹² (Framework Act), which prescribes the procedures to resolve disputes concerning customary law or custom. It emphasised that exhausting all remedies provided for by the statute is a prerequisite before approaching the courts. The High Court held that the Premier was obliged to act in accordance with section 12(2)(a), or (b) and (c) of the Limpopo Traditional Leadership Act because there was, as contemplated by that subsection, “evidence . . . that the identification of a person . . . was not done in accordance with customary law, customs or processes”. It further held that the MEC had provided misleading information to the Premier by incorrectly stating that the respondents had withdrawn their application. It concluded that the Premier failed to act in accordance with section 12(2) of the Limpopo Traditional Leadership Act and reviewed and set aside his decision to recognise Mr Rambuda as headman with effect from 9 March 2018, in terms of section 6(2)(b) of the Promotion of Administrative Justice Act¹³ (PAJA). The High Court referred the matter back to the Premier to be dealt with in accordance with the remedies provided for in the Limpopo Traditional Leadership Act.

[27] The applicants applied to the High Court for leave to appeal, which was dismissed. A further application for leave to appeal to the Supreme Court of Appeal suffered a similar fate.

In this Court

Applicants’ submissions

[28] The applicants contend that the identification of Mr Rambuda was in accordance with section 12(1)(a)(i) of the Limpopo Traditional Leadership Act because the Rambuda Royal Family is the family under whose authority the Tshibvumo Village was governed by Ms Singo. The applicants say that the Rambuda Royal Family is the sole

¹² 41 of 2003.

¹³ 3 of 2000.

customary structure empowered to designate a person for the role of traditional leader in the Tshibvumo Village.

[29] The applicants submit that the High Court erred in its finding that there are two royal families. The applicants argue that the Rambuda Royal Family is the sole family that has ruled over the Tshibvumo Village for many generations because, as the family of the senior traditional leader, it is empowered to nominate a headman or headwoman for the Tshibvumo Village. They contend that the High Court was wrong to hold that the family of the headman also has the power to appoint a successor.

[30] The applicants also assert that the Rambuda Royal Family meets the standard and definition of a “royal family” as contemplated in section 1 of the Limpopo Traditional Leadership Act and has a well-established system of law with its own values and norms.

[31] The applicants take issue with the fact that, without properly following custom, Mr Mavhungu conducted himself as headman of the Tshibvumo Village and established the Tshibvumo Royal Council, an entity which did not exist during the reign of the deceased headwoman, Ms Singo.

Respondents’ submissions

[32] The respondents advance four grounds in support of the High Court’s decision. Firstly, they contend that once Mr Mavhungu and Mr Rambuda were identified as competing successors to the deceased headwoman, a dispute existed which obliged the Premier to act in terms of section 12(2)(a), or (b) and (c) of the Limpopo Traditional Leadership Act. The Premier’s failure to act in accordance with these prescripts render the decision reviewable.

[33] Secondly, the respondents submit that the purpose of section 12(1) of the Limpopo Traditional Leadership Act is to provide for a process of identifying a successor to the senior traditional leadership throne. In the case of a headman or

headwoman, the use of the words “the royal family concerned” signifies that, to fill the position of a senior traditional leader, the royal family of that senior traditional leader should identify the successor, but that if the position to be filled is that of a headman or headwoman, then it is the royal family of that headman or headwoman that should identify the successor. The respondents assert that the Rambuda Royal Family is, therefore, responsible for the identification of a senior traditional leader and not the headman.

[34] Thirdly, the respondents state that the memorandum prepared by the MEC, which the Premier relied upon for his decision, was based on alleged erroneous information. The Premier was misled and this renders his decision reviewable.

[35] Lastly, the respondents argued that Chief Avhatendi’s attempts to impose the strict rule of primogeniture by excluding Mr Mavhungu from succeeding his mother is untenable. In support of their argument, they contend that it behoves this Court to develop the customary law to conform to the changing needs of the community within the context of its values and norms, as ordained in the Constitution.

Issues

[36] The issues in this application are:

- (a) Does this Court have jurisdiction? Is it in the interests of justice for leave to appeal to be granted? Should the late filing of the application be condoned?
- (b) If so, which royal family has the power to identify the person to fill the position of headman or headwoman?
- (c) Was the High Court’s finding that there are two royal families correct?
- (d) Was the High Court correct to review and set aside the Premier’s decision to recognise Mr Rambuda as headman of the Tshibvumo Village?
- (e) Should the High Court have remitted the matter to the Premier?

Jurisdiction and leave to appeal

[37] At the heart of this application is the identification of the rightful headman or headwoman for the Tshibvumo Village by the relevant royal family and consequent recognition by the Premier. The question is whether it is the Rambuda or Tshibvumo Royal Family that has a right to nominate the successor to the late headwoman. The community of the Tshibvumo Village have been without a headman or headwoman since the passing of Ms Singo in 2014. This determination requires a proper analysis and interpretation of what constitutes a royal family in terms of the Limpopo Traditional Leadership Act. More importantly, a determination ought to be made as to whether the provisions of section 12(2) of the Limpopo Traditional Leadership Act were triggered or not. A judgment of this Court is beneficial to guide the interpretation of the dispute resolution mechanisms contained in the Limpopo Traditional Leadership Act.¹⁴

[38] These issues engage our Court's jurisdiction because the matter raises a constitutional issue relating to the recognition of traditional leaders in terms of the Framework Act, now replaced by the Traditional and Khoi-San Leadership Act (TKLA),¹⁵ that was passed to give effect to section 211 of the Constitution.¹⁶ In *Sigcau*,¹⁷ this Court reiterated that the institution of traditional leadership and the determination of who should hold positions of traditional leadership have important constitutional dimensions.

¹⁴ *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* [2014] ZACC 36; 2015 (3) BCLR 268 (CC) at para 38.

¹⁵ 3 of 2019.

¹⁶ Section 211 provides:

“(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.”

¹⁷ *Sigcau v President of the Republic of South Africa* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC) (*Sigcau*) at para 15.

[39] As pointed out in *Dengetenge Holdings*:

“This Court grants leave to appeal if it is in the interests of justice to do so. The factors that it normally takes into account include the importance of the issues raised by the matter, the prospects of success and the public interest.”¹⁸

For reasons that will become clear, it is in the interest of justice that leave to appeal be granted as the appeal has reasonable prospects of success. This is a constitutional matter which implicates the institution of traditional leadership¹⁹ and engages our jurisdiction because it concerns the review of the exercise of public power. This matter also requires final determination and certainty regarding traditional leadership disputes.

Condonation

[40] The application for leave to appeal in this Court was filed on 17 August 2022. This is 75 days from the date that leave to appeal had been dismissed by the Supreme Court of Appeal as opposed to the 15 days prescribed by the Rules of this Court. The applicants state that the reason for the delay was that they only obtained the Supreme Court of Appeal’s order dismissing their application for leave to appeal from their correspondent attorney a month after it was made. The applicants further mention that the attorneys struggled to get hold of the applicants for another month. The respondents oppose the application for condonation on the grounds that there is no reasonable explanation for the delay.

[41] When considering an application for condonation, this Court has to consider whether it is in the interests of justice to grant condonation. It is a value judgement

¹⁸ *Dengetenge Holdings (Pty) Limited v Southern Sphere Mining and Development Company Ltd* [2013] ZACC 48; 2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC) at para 52.

¹⁹ See *Sigcau* above n 17 at para 15:

“From the discussion of the constitutional and legal framework it is apparent that the institution of traditional leadership and the determination of who should hold positions of traditional leadership have important constitutional dimensions. Resolution of this festering dispute troubling the amaMpondo needs to be constitutionally clarified. It is in the interests of justice to do so.”

based on the facts of the case and the adequacy of the explanation for the delay.²⁰ In *Grootboom*,²¹ this Court found that the concept of the interests of justice is flexible and that the following must be regarded when considering whether to grant condonation, amongst others:²² (a) the nature of the relief sought; (b) the extent and cause of the delay; (c) the effect of the delay on the administration of justice and other litigants; (d) the reasonableness of the explanation for the delay; (e) the importance of the issue to be raised in the intended appeal; and (f) the prospects of success.

[42] I agree with the respondents that the delay is excessive and the reasons provided are unsatisfactory. The Court has on numerous occasions expressed its displeasure at late applications with inadequate explanations.²³ Such a practice cannot be countenanced. However, in view of the attitude I take of the matter, particularly the finding of the High Court which requires reconsideration by this Court, I am of the view that condonation should be granted.

Analysis

[43] A dispute exists between the parties as to who fulfils the attributes of a royal family. The definition of a royal family in the context of this litigation cannot be easily determined without a proper interpretative exercise.²⁴ It requires careful consideration of the scheme of the Act in light of section 33 of the Constitution and the general principles of interpretation as applied by this Court in *Cool Ideas*.²⁵ Chapter 12 of the Constitution recognises the status and role of traditional leadership in accordance with customary law. Section 211(3) provides that the “courts must apply customary law

²⁰ *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (1) BCLR 65 (CC); 2014 (2) SA 68 (CC) (*Grootboom*) at para 35.

²¹ *Id* at para 22. Also see *Brummer v Gorfil Brothers Investments (Pty) Limited* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3 and *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (*Van Wyk*) at para 20.

²² *Grootboom* *ibid*.

²³ See further *eThekweni Municipality v Ingonyama Trust* [2013] ZACC 7; 2014 (3) SA 240 (CC); 2013 (5) BCLR 497 (CC) at paras 26-7; *Van Wyk* above n 21 at para 33 and *Grootboom* above n 20 at paras 33-5.

²⁴ See *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

²⁵ *Id* at para 28.

when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law”. Section 212 of the Constitution provides for the enactment of national legislation to provide for a role for traditional leaders as an institution at local government level for matters affecting local communities. This includes headmen or headwomen who regularly interface with members of the local community. It is thus essential that their role and function be properly explored.

[44] In this case, the legislation at issue and which deals directly with the institution of headmen or headwomen are the Limpopo Traditional Leadership Act, the now repealed Framework Act, and the TKLA. Before considering the role of a headman or headwoman, the first inquiry is to determine the role or position of a senior traditional leader. Section 1 of the Limpopo Traditional Leadership Act locates a headman or headwoman as being under the authority of, or exercising authority within the area of jurisdiction of, a senior traditional leader in accordance with customary law.

[45] It is common cause that Chief Avhatendi is the senior traditional leader of the Rambuda Royal Family. What is in issue is the extent of his jurisdiction and whether he can exercise authority or control over the purported Tshibvumo Royal Family. The Tshibvumo Royal Family identified Mr Mavhungu for the position of headman and submitted the nomination to the Rambuda Traditional Council, which refused to acknowledge the said nomination. Chief Avhatendi disputed the nomination of Mr Mavhungu on the basis that the children of the deceased headwoman were, by virtue of being born from the Mavhungu family in Thengwe, not from the Rambuda Royal Family and could therefore not be appointed as the headman.

[46] The Rambuda family is the “core customary institution . . . consisting of immediate relatives of the ruling family within a traditional community” under the leadership of a senior traditional leader, Chief Avhatendi. They have ruled over the Tshibvumo Village for many generations and meet the statutory definition of a royal family as set out in section 1 of the Limpopo Traditional Leadership Act.

[47] The respondents' position is different. They fall under the Rambuda Traditional Council and do not have a statutorily recognised royal family or traditional council that conducts administrative functions or duties like the Rambuda Royal Family and Traditional Council. A royal family must align with a traditional community headed by a senior traditional leader and not with a headwomanship or headmanship, headed by a headwoman or headman. Although in terms of the legislation the Rambuda Royal Family was the rightful authority to identify the successor to the deceased headwoman, the Tshibvumo Royal Family persisted with their argument that they were entitled to identify a headman for the Tshibvumo Village.

[48] The finding by the High Court that “the royal family of the senior traditional leader will be responsible for the identification of a successor to a senior traditional leader, whilst that of the headman or headwoman will be responsible for the identification of the successor to the headman or headwoman” contradicts its earlier finding which held that:

“the LTL[I]A does not make a distinction between the Royal Family of a Senior Traditional Leader and that of a headman or headwoman. If it was the intention of the legislature of the LTL[I]A that the Royal Family of the headman or headwoman plays a lesser role, it would have clearly stated [so] and also limited the role which it was supposed to perform”.²⁶

These were issues which the Premier ought to have referred to the provincial and local houses to investigate in terms of section 12(2)(a)(i) of the Act.

[49] As a matter of law, the authority to identify a new headman or headwoman rests exclusively with the Rambuda Royal Family. This conclusion is buttressed by several points. Section 12(1) of the Limpopo Traditional Leadership Act provides that the identification for a headman position shall be done by the royal family and in terms of customary law of the traditional community concerned. It follows clearly from the

²⁶ See *Tshibvumo Royal Family* above n 2 at para 24.

definition of a royal family in section 1 of the Limpopo Traditional Leadership Act, namely, “the ruling family within a traditional community,” not “a ruling family within a traditional community” that there can only be one royal family per traditional community. In sections 3 and 4 of the Limpopo Traditional Leadership Act, traditional community means a community recognised as such and living in the area falling under the jurisdiction of a traditional council. Since Tshibvumo Settlement falls within the area under the jurisdiction of the Rambuda Traditional Council, the traditional community contemplated by sections 3 and 4 of the Limpopo Traditional Leadership Act is not the Tshibvumo community, but the broader community residing within the entire area of jurisdiction of the Rambuda Traditional Council.

[50] It is for this reason that the Rambuda Royal Family, being the royal family of this broader traditional community, is empowered to nominate the new headman or headwoman. The Limpopo Traditional Leadership Act vests no powers in a body that describes themselves as a royal family of the Tshibvumo community, because there is no Tshibvumo traditional council that has been recognised under section 3 and 4 of the Act and so the “Tshibvumo community” has no status under the Limpopo Traditional Leadership Act. It is, therefore, clear as a matter of law that only the Rambuda Royal Family is empowered to recommend the appointment of a new headman or headwoman, and this finding does not require further consultation with the provincial and local houses of traditional leaders.

[51] Section 12(1) of the Limpopo Traditional Leadership Act sets out the process for the recognition of a senior traditional leader, headman or headwoman. It requires the royal family concerned to identify a person who qualifies for the position with due regard to customary law and the traditional community concerned. Section 12(2), in turn, provides the dispute resolution process where there is evidence or an allegation that the identification or recognition of a senior traditional leader, headman or headwoman was not done in accordance with section 12(1).

[52] In light of the above, the question to be asked is whether the High Court was correct in its finding that the nature of the dispute between the parties required that all prescribed remedies, as provided for in the Limpopo Traditional Leadership Act, be exhausted before any external dispute mechanisms may be engaged. The applicants take issue with the review and setting aside of the Premier's decision and ultimate remittal of the matter to the Premier and contend that the High Court ought to have endorsed the decision of the Premier despite its defects. This argument ignores the fact that a dispute exists with regards to the historical placement of the headwoman or headman of the Tshibvumo Village. This gives rise to evidence and an allegation as contemplated in section 12(2) of the Limpopo Traditional Leadership Act. This is an issue which requires investigation by the Provincial and Local House of Traditional Leaders, which has the necessary expertise in traditional affairs.

[53] It is necessary to emphasise that the provisions of section 12(2) of the Limpopo Traditional Leadership Act ought to be read in conjunction with section 12(1)(b) which places the Premier as the ultimate decision-maker in the recognition of the person identified by the royal family as a senior traditional leader, headman or headwoman, as the case may be. In such instances, the Premier would then be obliged to act in accordance with section 12(1)(b) and recognise the person so identified or, in the event of an allegation or evidence that such identification was not in line with customary law, customs or processes, exercise his or her discretion in conformity with the provisions of section 12(2)(a) or (b) either to refer the matter to the provincial and local houses of traditional leaders or to refuse recognition. However, the discretion afforded to the Premier within the provisions of section 12(2) is not absolute and is subject to an obligatory provision in subsection (c) which compels the Premier, in the event of an allegation or evidence of non-compliance with customary law, customs or processes, to refer the matter back to the royal family for consideration and resolution where the certificate of recognition has been refused.²⁷

²⁷ Section 12(2)(c) of the Limpopo Traditional Leadership Act.

[54] It is important to bear in mind that the Premier should not slavishly follow the prescripts set out in section 12(2). He must satisfy himself that there is evidence or an allegation, that is not frivolously advanced, of non-compliance with customary law in the identification of a person before referring the dispute to the relevant bodies in terms of the Limpopo Traditional Leadership Act. This is because in some instances frivolous allegations may be made challenging the nomination. The Premier still retains a discretion in such cases. In a similar vein, the Court in *Mtungwa*,²⁸ when interpreting the provision of section 19(4) of the KwaZulu-Natal Traditional Leadership and Governance Act,²⁹ which is similar to section 12(2) of the Limpopo Traditional Leadership Act, held that the Premier has a discretion by virtue of the use of the word “may” in the section. The Court expressed itself as follows—

“From the wording of section 19(4) of the Act, the first respondent [the Premier of KwaZulu-Natal] has a discretion as to whether to issue a certificate of recognition. He is, however, only obliged to refer the matter back to the umndeni wenkosi where he has exercised his discretion and decided not to issue a certificate of recognition. The wording of the subsection makes that plain.”³⁰

Conclusion

[55] It is clear that the Premier did not exercise his discretion under section 12(2) in a lawful manner. The Premier simply recognised Mr Rambuda on the basis of misinformation in the form of a memorandum received from the MEC which incorrectly interpreted a notice of withdrawal of the application by the respondents. He did not apply his mind to the matter but acted on the strength of the erroneous facts in the memorandum which rendered his decision reviewable. In terms of the court order dated 24 March 2016, the Premier was mandated to carefully consider the respondents’ representations before making any decision. As aptly recognised by the High Court, an examination of the respondents’ representations would have alerted the Premier to the

²⁸ *Mtungwa v Premier of KwaZulu-Natal* [2022] ZAKZPHC 74 (*Mtungwa*).

²⁹ 5 of 2005.

³⁰ *Mtungwa* above n 28 at para 36.

existence of a dispute regarding the rightful successor. The High Court held that the Premier was obliged to act in accordance with section 12(2) of the Limpopo Traditional Leadership Act. However, he failed to fulfil this obligation.

[56] In my view, the relevant facts were before the Premier. A simple inquiry with the respondents would have revealed that the information provided in the memorandum was not entirely correct. The Premier should have followed the procedures set out in section 12(2) and satisfied himself that proper process was followed in terms of customary law for the nomination of the headman. The review and ultimate setting aside of the decision of the Premier in the High Court ought to have been premised on section 6(2)(e)(iii) of PAJA because “irrelevant considerations were taken into account or relevant considerations were not considered”. This Court should, therefore, endorse the finding of the High Court in so far as it relates to the Premier’s failure to follow a mandatory process in terms of section 12(2).

[57] Of particular significance is that, despite the allegation that the identification was not done in accordance with customary law, the Premier omitted to exercise his discretion in terms of either section 12(2)(a) or (b). He neither referred the matter to the Provincial House of Traditional Leaders and the relevant local house of traditional leaders for their recommendations, nor did he refuse to issue a certificate of recognition and refer the matter back to the Royal Family.

[58] It is perhaps apposite to comment on another misdirection of the High Court that the procedure in section 12(2) of the Limpopo Traditional Leadership Act provides for “internal remedies” to be exhausted before approaching the court, unless exceptional circumstances prove otherwise in the context of section 7(2) of PAJA. The latter section provides that “no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted”.

In *Mamogale*,³¹ Mogoeng JP, in the context of section 21 of the Framework Act said the following—

“A truly internal dispute is, in the context of this case, capable of being resolved by the Royal Family through customary laws, customs and processes. On the contrary, a Premier, who has already pronounced himself or herself on a matter, cannot be summoned to a meeting of the Royal Family or of the tribe for the purpose of attempting to find any internal solution envisaged by section 21(1)(a). Accordingly, once the Premier takes a decision, the dispute loses every semblance of being internal. It follows that section 7(2) of PAJA does not apply to this case.

After the Premier decided on the dispute, it was open to the Applicant to bring this application to this Court which clearly has the jurisdiction to entertain it.”³²

[59] In *Tshivhulana Royal Family*,³³ this Court considered section 21 of the Framework Act. The relevant portions of section 21 of the Framework Act provide—

“(1)(a) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary 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 institution concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.

. . .

(2)(a) A dispute or claim referred to in subsection (1) 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 or claim in accordance with its internal rules and procedures.”

³¹ *Mamogale v Premier, North-West Province* [2006] ZANWHC 63.

³² *Id* at paras 19-20.

³³ *Tshivhulana Royal Family v Netshivhulana* [2016] ZACC 47; 2017 (6) BCLR 800 (CC).

[60] On application of these principles, this Court held that neither the Framework Act nor the Limpopo Traditional Leadership Act prescribe an internal appeal or review procedure in terms of which the Premier may review his or her own decision.³⁴ As a result, there was no internal remedy that the Tshivhulana Royal Family had to exhaust first.³⁵ By parity of reasoning, this Court's interpretation of the provisions of section 21 of the Framework Act, as replaced by the TKLA, applies with equal force to the provisions of section 12(2) of the Limpopo Traditional Leadership Act.

[61] There remains for consideration an issue relating to Chief Avhatendi's attempt to impose strict rules of male primogeniture. This issue arises against the backdrop of Chief Avhatendi's contention that Mr Mavhungu cannot succeed the deceased headwoman because he is not Rambuda by blood. In light of the inherent complexities and nuanced nature of this matter, a comprehensive and prudent determination cannot be achieved without due consideration and integration of living customary law. As explained above, section 12(2) of the Limpopo Traditional Leadership Act sets out the avenues available to the Premier in the event of evidence or an allegation that the identification of a headman does not align with customary law, customs or processes. This is an issue that must also be referred to the Premier and the Provincial and Local House of Traditional Leaders in light of the provisions of section 39(2) of the Constitution and the provisions of section 2(1) of the TKLA.³⁶ This is in order to avoid senior traditional leaders imposing their views on the living customary law of the community.

³⁴ Id at para 47.

³⁵ Id at para 48.

³⁶ Section 2(1) of the TKLA reads:

- “(1) A kingship or queenship, principal traditional community, traditional community, headmanship, headwomanship and Khoi-San community must transform and adapt customary law and customs relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by—
- (a) preventing unfair discrimination;
 - (b) promoting equality; and
 - (c) seeking to progressively advance gender representation in the succession to traditional and Khoi-San leadership positions.”

[62] I conclude that before any decision is taken to recognise the headman or headwoman of the Tshibvumo Village, the dispute should be remitted to the Premier to act in accordance with the provisions of section 12(2)(a) of the Limpopo Traditional Leadership Act. The Premier must then refer the matter to the Provincial and Local House of Traditional Leaders, as well as the relevant local house of traditional leaders for their recommendations. As the party who recognised the person nominated, it is prudent that the Premier not be involved in the internal mechanism of the dispute. He cannot be a party to and a resolver of the dispute at the same time. Hence the direction to act in terms of section 12(2)(a) upon remittal.

[63] The upshot is that the High Court was correct in upholding the first and second respondents' review application, notwithstanding that the reasoning in its judgment was flawed in certain respects. However, insofar as the High Court's order remits the matter to the Premier "to be dealt within in accordance with the remedies available to him in terms of the LTL[I]A", it is not specific as to how the Premier should deal with the matter. This Court has found that the Premier ought to have acted, and must act, in terms of section 12(2)(a) of the Limpopo Traditional Leadership Act. Directions upon remittal are also necessary to address the gender discrimination that manifested itself in the decision-making of the first, second and fourth applicants. This constitutes just and equitable relief in terms of section 8(1) read with section 8(1)(c)(i) of PAJA. The appeal should therefore be upheld only to the extent necessary to address the problems in the remittal order.

Costs

[64] It is trite that the award of costs is a matter within the discretion of the Court. The applicants are granted the protection established in *Biowatch*,³⁷ as the matter concerned a vindication of their constitutional rights contained in Chapter 12 of the Constitution. Therefore, I make no order as to costs.

³⁷ *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

Order

[65] In the result, I make the following order:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal succeeds to the extent only that paragraph 32.2 of the High Court's order is set aside and replaced with the following:
 "32.2 The matter is remitted to the Premier of the Limpopo Province with the following directions:
 - (a) the Premier must refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations in terms of section 12(2)(a) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005; and
 - (b) in all the further decision-making in the matter the provisions of section 2(1) of the Traditional and Khoi-San Leadership Act 3 of 2019 must be taken into account."
4. There is no order as to costs.

For the Applicants:

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