



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 282/22

In the matter between:

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA

First Applicant

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS

Second Applicant

COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS

Third Applicant

CHAIRPERSON OF THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS

Fourth Applicant

and

WEZIZWE FEZIWE SIGCAU

First Respondent

LOMBEKISO MAKHOSATSINI SIGCAU

Second Respondent

NOBANDLA SIGCAU

Third Respondent

ZIYANDA SIGCAU

Fourth Respondent

PREMIER, EASTERN CAPE PROVINCE

Fifth Respondent

NATIONAL HOUSE OF TRADITIONAL LEADERS

Sixth Respondent

EASTERN CAPE HOUSE OF TRADITIONAL LEADERS

Seventh Respondent

IKUMKANI YAMAMPONDO ASENYANDENI

Eighth Respondent

Neutral citation: *President of the Republic of South Africa v Sigcau and Others* [2024] ZACC 21

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

Judgments: Tshiqi J (unanimous)

Heard on: 28 November 2023

Decided on: 3 October 2024

Summary: Admin law — Commission committed no error of law or fact — No basis to review the Commission’s findings — Customary law — Commission sufficiently resolved the dispute by considering customary law, genealogy and the views of *amaMpondo* — rightful successor was never determined customarily but statutorily and in terms of colonial and apartheid laws.

ORDER

On appeal from the Supreme Court of Appeal of South Africa (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:
 - “(1) The appeal is dismissed
 - (2) There is no order as to costs.”
4. There is no order as to costs in this Court.

JUDGMENT

TSHIQI J (Chaskalson AJ, Dodson AJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J and Schippers AJ concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order of the Supreme Court of Appeal. The matter concerns the historical determination of the rightful King of *amaMpondo* community. I will often refer to the parties who share the common name Sigcau and other parties frequently mentioned, using their first names. I do so for the sake of brevity, convenience and clarity and do not intend to disrespect any of them.

Background

[2] The discernible history of *amaMpondo*, which has been the basis of at least three commissions,¹ can be traced back to *uKumkani* (King) Faku's reign over *amaMpondo* which was from 1824 – 1867. Faku's Great Place (and thus the then homestead of *amaMpondo* people) was at Qaukeni. After fending off iNkosi uShaka's (King Shaka) attacks, *uKumkani* Faku left Qaukeni to establish a second Great Place for the *amaMpondo* people near to the west of the Mzimvubu river. After establishing the second Great Place, *uKumkani* Faku returned to Qaukeni, leaving his eldest son Ndamase to rule there. This effectively separated *amaMpondo* into two: *amaMpondo aseQaukeni* (Eastern Pondoland) and *amaMpondo aseNyandeni* (Western Pondoland).

¹ The three commissions being: the 1938 Commission which recommended the appointment of Botha followed by the 2006 Commission which determined the position of the paramountcies of the *amaMpondo* and lastly the 2010 Commission which appointed Zanozuko. The sequence of these events follows in the text.

[3] In Qaukeni, *uKumkani* Faku was succeeded by his son Mqikela, who in turn was succeeded by his son Sigcau. Sigcau was succeeded by his son Marhelane who, when he died in 1921, was succeeded by his son Mandlonke. There was no known challenge to *uKumkani* Mandlonke's kingship and that of his predecessors. Mandlonke was however still a minor at the time, and his uncle, Mswakeli, acted in his position between 1921 and 1935. During this period, the Black Administration Act² (initially called the Native Administration Act) was enacted. It was on the basis of that Act that the kings and queens of African communities were referred to as Paramount Chiefs.

[4] In 1937 *uKumkani* Mandlonke died without leaving any male issue, in or out of wedlock. As there was no identified male issue, his brothers had to be considered for kingship. A dispute arose between two of his half-brothers, the late Botha and the late Nelson Sigcau who were both Marhelane's sons, but were born of different mothers. Nelson was a son of *iQadi* (a King's wife who plays a supportive role to one of the King's houses to which she is attached.) and Botha was the son of a Right-Hand Wife. In 1938, Botha solicited the intervention of the Governor-General, who was responsible for the administration of the Black Administration Act, to investigate and determine who was to succeed Mandlonke between Botha and Nelson. The 1938 Commission was subsequently established and it recommended that Botha be appointed as Paramount Chief. Botha was then installed by the Governor-General as Paramount Chief of Eastern Pondoland. It is common cause that the dispute was statutorily settled in terms of the Black Administration Act and not customarily, when Botha was recognised as the "Paramount Chief" of the Eastern Pondoland by the then Governor-General.

[5] Such recognition is reflected in minute 956 dated 9 May 1958 by the office of the Governor-General which states in relevant part:

“[The] Ministers accordingly have the honour to recommend that His Excellency may be pleased in terms of subsection (7) of section two of the Native Administration Act,

² 38 of 1927 (Black Administration Act).

1927 (Act No. 38 of 1927), as amended, and section one hundred and two of Proclamation No. 180 of 31 August 1956, to authorise—

1. Botha Sigcau to assume the title of Paramount Chief of Eastern Pondoland, comprising the districts of Bizana, Flagstaff, Lusikisiki and Tabankulu; and
2. Victor Poto to assume the title of Paramount Chief of Western Pondoland, comprising the districts of Libode, Ngqeleni and Port St Johns.”

[6] In *Sigcau* the Appellate Division, in determining a dispute between Nelson and Botha as to who was the rightful heir to the property of the Great House after the death of *uKumkani* Mandlonke, noted that the Governor-General had appointed Botha as the Paramount Chief. In its analysis, the Court dealt with what happened after *uKumkani* Mandlonke’s death as follows:

“[T]ribal meetings were held but no agreement could be arrived at because there was a genuine dispute as to the right of succession in an unprecedented situation. It is unnecessary to go into the details of what happened thereafter save that two tribal meetings were held at which the majority favoured the claim of Nelson. Thereafter the Government appointed a commission to enquire into the matter of the Chieftainship and, acting on the recommendation of the commission, appointed Botha Paramount Chief in terms of section 23 of Act 38 of 1927. But the appointment did not determine the question of succession to the property of the Great House.”³

The Court reasoned further:

“The Government in making an appointment is not bound to appoint the man who would be chief according to Native Custom, and it could not be seriously suggested that a custom has grown up since 1927 of giving the property of the man who would be Chief by Native Custom to the Chief appointed by the Government if they were not one and the same person.”⁴

³ Id at 74.

⁴ Id at 75.

[7] It is thus clear that Botha was recognised as traditional leader, not in terms of custom or the views of the majority in the community, but in terms of the Native Administration Act. Author Govan Mbeki writes that the people at that time felt that Botha had enlisted the assistance of the apartheid authorities who, after setting up a commission, concluded that Botha should succeed.⁵ According to Govan Mbeki, this enraged the community and they, amongst others, demanded the removal of Botha.⁶ This was not placed in dispute at the Commission, the proceedings of which are at issue in the present litigation.⁷ In any event, Botha was not appointed as a King of *amaMpondo*, but as a Paramount Chief, which was the office created statutorily to replace customary kingship. As will be explored later, *amaMpondo* had another string to their bow: they decided to rely on *ukungena* custom (a traditional custom wherein a widow becomes the wife of her brother in law) to produce an heir for Mandlonke's house. More about that later.

[8] Botha passed away in 1978. After his death, a special meeting of the Qaukeni Regional Authority was held on 10 December 1978. The minutes of the meeting reflect that the meeting was held before Botha's funeral service and its purpose was to consider his successor. At that meeting Nelson, seconded by Mak Sigcau, moved for the recommendation of Mpondombini Sigcau, the eldest son of Botha, as the successor to his late father.

[9] The dispute over kingship did not end. It re-emerged, this time between Botha's son, Mpondombini, and Zwelidumile Sigcau, the son of his brother Nelson. This discontent resulted in the intervention of the then Transkei Government under the leadership of Kaizer Daliwonga Matanzima who issued an instruction that *amaMpondo* should vote on the issue. The majority voted in favour of Mpondombini. He was subsequently appointed as the Paramount Chief, which meant that he succeeded his

⁵ Mbeki *The Peasant's Revolt* (1964, South Africa) at 116.

⁶ Id.

⁷ See n 1 above.

father, Botha. Following this, Zwelidumile launched a court challenge, but he passed away in 1984 before the matter reached finality.

[10] In September 2004, the Traditional Leadership and Governance Framework Act⁸ (Traditional Leadership Act) came into operation. Where relevant I shall refer to the Traditional Leadership Act as it read prior to coming into force on 25 January 2010 of the Traditional Leadership and Governance Framework Amendment Act⁹ as the “unamended Act”. I shall use the expression “amended Act” for the Traditional Leadership Act as it read as from 25 January 2010. With effect from 1 April 2021, the Traditional Framework Act was repealed by the Traditional and Khoi-San Leadership Act.¹⁰

[11] In terms of the unamended Act, the Commission on Traditional Leadership Disputes and Claims (Commission) was established. The members of the Commission were appointed by the then President of the Republic of South Africa in terms of section 23(1) of the unamended Act. It is not in dispute that the members of the Commission were appointed because of their expertise in customary law and traditional leadership. Regarding *amaMpondo*, the Commission’s first task, relevant to this matter was to investigate and make determinations in relation to *amaMpondo aseNyandeni* and *amaMpondo aseQaukeni* paramountcies. In particular, in respect of this first task, the Commission complied with its duty in terms of section 28(7) and exercised its powers in terms of section 25(2)(a)(i) of the unamended Act. Section 28(7) provided:

“The Commission must, in terms of section 25(2), investigate the position of paramountcies and paramount chiefs that had been established and recognised, and which were still in existence and recognised, before the commencement of this Act, before the Commission commences with any other investigation in terms of that section.”

⁸ 41 of 2003.

⁹ 23 of 2010.

¹⁰ 3 of 2019.

[12] Section 25(2)(a)(i) of the unamended Act stated that the Commission had authority to investigate, either on request or of its own accord, amongst others and relevant to this case:

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

[13] The Commission concluded that the kingship of *amaMpondo* exists, that Mqikela retained the kingship of *amaMpondo* as a whole and that in terms of customary law and the Framework Act, the Nyandeni paramountcy was not a kingship. This determination, which concluded that there was only one kingship/queenship, united *amaMpondo aseQaukeni* and *amaMpondo aseNyandeni*. The method and procedure of that investigation, the narrative and the findings of that report were never legally challenged and remain extant.

[14] In 2006, during Mpondombini’s reign, Zwelidumile’s son, Zanozuko, who was born in 1974, lodged a claim with the Commission contesting the incumbency of the envisaged kingship/queenship. This was opposed by Mpondombini. The Commission’s mandate to investigate this claim was sourced in section 28(8) read with section 25(2)(2)(ii) of the unamended Act. Section 28(8) of the unamended Act provided as follows:

- “(a) Where, pursuant to an investigation conducted in terms of subsection (7), the Commission has decided that a paramountcy qualifies to be recognised as a kingship or queenship, such a paramountcy is deemed to be recognised as a kingship or queenship in terms of section 3A.
- (b) The incumbent paramount chiefs, in respect of the kingships and queenships contemplated in paragraph (a), who were recognised before the commencement of this Act, are deemed to be kings or queens, subject to investigation and recommendation of the Commission in terms of section 25(2).”

[15] Section 25(2)(a)(ii) of the unamended Act stated that the Commission had authority to investigate “a traditional leadership position where the title or right of the incumbent is contested.”

[16] The manner in which the Commission dealt with the dispute is set out in the answering affidavit of the then Acting Chairperson of the Commission, filed at the High Court during the review proceedings in this matter. The then Acting Chairperson said that the investigation included conducting research, interviews and consultations with the elders of both groups. Further, he stated that the Commission applied the following procedure in dealing with the dispute on incumbency: that upon receipt of the claim from Zanozuko, it referred it to Mpondombini for his comment, which he provided. Thereafter, the Commission referred Mpondombini’s response to Zanozuko and then summoned the parties to a public hearing regarding the claim and the opposition thereto. Each party was invited to present oral and documentary evidence and could summon any number of witnesses. All the witnesses were subjected to cross-examination by the opposing party and questions from the panel of the Commission’s experts. In reaching its conclusion the Commission further relied on section 25(3)(a) of the unamended Act which provided:

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

[17] Although the Acting Chairperson of the Commission does not elaborate on this, it is clear from its determination that it also considered the 1978 court challenge relevant to the present dispute, the report emanating from the 1938 Commission and several authors such as Govan Mbeki and Victor Poto. Regarding the court challenge the Commission said:

“Botha ruled as Paramount Chief of *amaMpondo aseQaukeni* until his death in 1978. Nelson's biological son Zwelidumile Sigcau again raised the issue of succession to the throne. In 1978 Zwelidumile instituted an action against the Respondent over

ubuKumkani of *amaMpondo aseQaukeni* in the Supreme Court of the former Transkei. The basis of Zwelidumile's claim was that he was the sociological first born son of Mandlonke and therefore the heir to the throne according to custom. Unfortunately, Zwelidumile passed away in 1984, before the matter could be finalised. In 1983 Magingqi lodged an application in the former Supreme Court of Transkei against the Respondent wherein she unsuccessfully sought to return to Mzindlovu. Prior to the public hearings before this Commission, the Claimant had approached the office of the Registrar of the High Court, Mthatha, for more information in the matter. However, the court file concerning this application could not be located.”

[18] The Acting Chairperson of the Commission said the following regarding its determination and findings:

“44.2 The Commission then considered the issues to be determined, and they are:

- (a) When Mandlonke died without a successor, who was to succeed him in terms of the customary law and customs of *amaMpondo*?
- (b) Was Magingqi the great wife of Mandlonke?
- (c) Was the appointment of Botha according to the customary law and customs of *amaMpondo*?
- (d) Did Nelson and Magingqi enter into a union of *ukungena*?
- (e) Is the claimant [Zanozuko] the rightful heir to the throne of *amaMpondo*?

44.3 The Commission then went on to analyse the issues, and in doing so took cognisance of the following:

44.3.1 The traditional leader:

- (i) should not have lost his position through indigenous political processes;
- (ii) in considering the dispute the Commission must consider and apply customary law and customs as they were when the dispute arose; and
- (iii) the Commission has authority to investigate disputes dating from September 1927 unless the claimant provides good grounds for the Commission to go beyond this date.”

[19] The Commission subsequently made its finding in January 2010, informing the President that Zanozuko is entitled to be heir to the throne of *amaMpondo*. It was while

Mpondombini was in hospital in August 2010 that he learnt that a public announcement to this effect had been made.

Litigation history

[20] In November 2010, Mpondombini instituted the current review proceedings. In order to avoid confusion, it bears mentioning that, in those earlier proceedings, Mpondombini was unsuccessful in the High Court and the Supreme Court of Appeal but succeeded in this Court. This Court did not determine the merits. The review proceedings proceeded in this fashion: Mpondombini's review application was heard in the High Court and on 19 March 2012, De Klerk AJ dismissed it and refused leave to appeal. The application suffered a similar fate at the Supreme Court of Appeal. However, he was granted leave to appeal by the Constitutional Court. He subsequently died in March 2013, before the Constitutional Court delivered its judgment on 13 June 2013.

[21] In a judgment that came to be known as *Sigcau I*,¹¹ the Constitutional Court set aside the judgment and orders of De Klerk AJ on a procedural ground of review, and ruled that the recognition of Zanozuko was invalid because the then President of the country had relied on the provisions of the amended Traditional Leadership Framework Act instead of the unamended version. As stated, the Court left the consideration of the merits of the review application open for re-adjudication.

[22] The Commission and the Presidency's understanding of the judgment was that all that was needed was for the former President to issue another notice of recognition in compliance with the provisions of the unamended Act in recognising Zanozuko again. This led to the second application, which was brought by the Minister of Cooperative Governance to seek a proper interpretation of the order in *Sigcau I*. The application came before Murphy J in the High Court, Gauteng Division, Pretoria. The High Court judgment was delivered on 20 November

¹¹ *Sigcau v President of the Republic of South Africa* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC) (*Sigcau I*).

2015, in which Murphy J agreed with the Minister's interpretation of the Constitutional Court order in *Sigcau I* to the effect that all that the decision entailed was that the President should publish the requisite notice of Zanozuko's recognition in the Government Gazette and issue a certificate of recognition in favour of Zanozuko under the unamended Act.

[23] The second respondent in this matter, Lombekiso Makhosatsini Sigcau, Mpondombini's widow, and her daughter, Wezizwe Feziwe Sigcau, the first respondent in this matter, disagreed with this view. This was after Mpondombini's death in 2013. With leave of the High Court granted on 3 June 2016, they launched an appeal to the Supreme Court of Appeal which delivered its judgment on 7 June 2017, dismissing the appeal. Lombekiso then approached this Court which delivered its judgment on 11 September 2018 in *Sigcau II*.¹²

[24] This Court upheld the Supreme Court of Appeal and High Court orders. It held that on a proper construction of *Sigcau I*, and in light of the decision of the Commission which held him not to be entitled to be King, Mpondombini's deemed recognition as *iKumkani* ceased upon the issuing of the decision of the Commission. Accordingly, it was not necessary to remove him as *iKumkani* as provided for in section 10. The President did not, on the facts of this case, have to either initiate, or wait for, the removal of Mpondombini as *iKumkani* as part of the steps taken to ensure the "immediate implementation" of the Commission's decision. The President was authorised to recognise Zanozuko in terms of the unamended Act. Again, this Court left "alive" the question of the merits of the review application.

[25] Following this, on 5 October 2018, Wezizwe and Lombekiso applied for substitution as applicants in the review application, due to the death of Mpondombini. The substitution order was granted by consent in the High Court. In the same year on 30 November 2018, the President of the Republic of South Africa published a

¹² *Sigcau v Minister of Cooperative Governance and Traditional Affairs* [2018] ZACC 28; 2018 (12) BCLR 1525 (CC) (*Sigcau II*).

Presidential Minute recognising Zanozuko as *iKumkani* of *amaMpondo*. On 10 December 2018, the mother and daughter requested the High Court, Gauteng Division, Pretoria to place the review application on the roll for the adjudication of the merits.

The High Court review application on the merits of the succession to kingship

[26] The review application canvassed the following issues:

- (a) Whether the applicants must seek condonation for any delay in prosecuting this review application and if so, whether condonation should be granted.
- (b) Whether the evidence of an expert, Dr Claassens should be admitted.
- (c) Whether the impugned decisions should be reviewed on any of the following grounds:
 - (i) that the Commission, in investigating and deciding the above disputes, failed to correctly fulfil its statutory role in ascertaining the relevant provisions of *amaMpondo* customary law; and
 - (ii) that the Commission erred in concluding that Nelson and not Botha was the rightful successor to Mandlonke in terms of the customary law of *amaMpondo*.
- (d) Whether Zwelidumile, and later Zanozuko, had a legitimate claim to the throne through the custom of *ukungena*, including the questions whether:
 - (i) *ukungena* was practised by royalty in *amaMpondo* custom;
 - (ii) Magingqi was a Great Wife in the royal house; and
 - (iii) an *ukungena* union in fact occurred between Nelson and Magingqi.
- (e) Whether the Commission had a duty to consider the views of *amaMpondo* on whether Zanozuko Sigcau ought to be appointed and, if so, whether this duty was satisfied.
- (f) If the review is successful, what the remedy should be.

[27] In determining the question of condonation, the Court concluded that, in spite of the failure by the applicants to prosecute the review application without delay and

failure to apply for condonation, which ordinarily would be fatal to their case, any prejudice suffered by the respondents as a result of the delay was outweighed by the need to bring this matter to finality. The Court reasoned that it was essential that after *Sigcau I* and *Sigcau II*, the litigation between the parties regarding this dispute should be adjudicated to finality. It further held that it was in the interests of both parties not to have another round of appeals solely on the issue of delay.

[28] Regarding Dr Claassens' evidence, the High Court admitted such evidence. The contention was that the Commission, in arriving at its decision, failed to consult *amaMpondo*. This submission by the applicants was predicated on the opinion of Dr Claassens that customary law is not static, that it evolves and that popularity is one of the relevant factors in determining traditional leadership succession in customary law.

[29] The High Court considered the contention of the respondents that by interviewing the members of the *amaMpondo* community during the first investigation to determine the existence of kingship/queenship, and thereafter conducting public hearings where oral evidence was presented during the second investigation on incumbency, the Commission's approach was properly consultative.

[30] In deciding this issue the High Court said—

“The notion of ‘consulting the public’ for the traditional leadership succession in this case was certainly fraught with inconsistencies and obvious practical difficulties. Firstly, during the hearing before the Commission in 2009, Mpondombini contended that the Commission should consider his popularity with the ‘Chiefs’ (senior traditional leaders). In support of that contention he submitted the Chiefs' confirmatory affidavits. As it will appear later in this judgment, that popularity was not an event as at the time the dispute arose, which would require consideration in terms of section 25(3)(a) of the old Act.

Similarly, the applicants in *Sigcau II* relied on the notion that the Commission had to consult the royal family in terms of section 9 of the old Act, before taking the impugned

decision. The Constitutional Court in the main judgment of *Sigcau II* rejected the applicants' argument that the decision of the Commission taken in terms of section 25(2)(b)(ii) of the old Act had to be referred to the royal family in terms of section 9 of the same Act. The Court found that on a proper reading of the Act, that form of consultation with the royal family would be inconsistent with the purpose of section 25 of the old Act.

In this Court, the applicants now rely on the notion of public consultation as the living law. In the first instance, this Court could not find any evidence of the sources and content of customary law rules on public consultation for the determination of traditional leadership succession in the customary laws and custom of *amaMpondo*. Further, there was no evidence presented to this Court as to what form that consultation would take, in terms of customary law. In particular, and as observed by Froneman J in the dissenting judgment in *Sigcau II*, in instances where the royal family, alternatively the entire *amaMpondo* nation evidence prevalence of division or factionalism in regard to views on the choice of leadership, it seems that eventually traditional leadership may have to be determined through a democratic process of casting of votes.”

[31] The High Court then held that neither counsel nor Dr Claassens, in her opinion to the Court, attempted to demonstrate, with reference to this case, how the living law should have been applied by the Commission to resolve the dispute, against the customary rules of leadership succession as the Commission found them.

[32] It continued and held—

“It seems to me that the Commission was thus enjoined by section 25(3)(a) to go back in time, to the events of 1937 to 1939, to unravel what appeared from the evidence submitted by both parties and their witnesses, to be the root of the dispute, namely, the events relating to the leadership contestation between Nelson and Botha. The living law applicable was therefore that of the period from 1937, after Mandlonke's death to 1939 when the then apartheid government installed Botha as *uKumkani*. The living law during the period between 2008 to 2009, when the Commission heard evidence leading to the impugned decision, would not have assisted the Commission to resolve the dispute within the prescribed terms of section 25(3)(a).”

[33] The High Court then referred to the living law at the time of the dispute and held:

“The Commission’s 2010 report records that in regard to the question of popularity, Nelson was more popular and acceptable to the community than Botha. Mbeki in his publication wrote:

‘The then Nationalist government moved to invade the area with its new policies, and from the very start it went wrong, making the serious mistake of choosing as the arch-champion of Bantu Authorities Chief Botha Sigcau, a man already discredited in the eyes of his people. As far back as 1939, when the choice had had to be made of a successor to the Paramount Chief of East Pondoland the government of the day had picked on Chief Botha in preference to his half-brother Nelson, who had been regarded by many as the rightful heir. The use of Chief Botha by the Nationalists to introduce Bantu Authorities in the face of popular opposition to his chieftainship, was bound to provoke widespread resentment.’

Having regard to Mbeki’s views expressed above, had the apartheid government then, consulted the public in resolving the dispute between Nelson and Botha in compliance with the popularity factor as the living law, it seems Botha would not have been appointed *uKumkani*. Consequently, Mpondombini would not have been entitled to succeed him either. However, the popularity factor as advocated by the applicants to be considered post 2008, is not the basis on which the Commission took the impugned decision.”

The Court then concluded on this score that:

“The Commission was constrained by section 25(3)(a) of the old Act to consider the events as they were at the time the dispute arose. In that regard, the content of the evidence presented by both parties and their witnesses pointed to the events as they were when the dispute started in 1937. The Commission’s decision was thus informed by that evidence, which came from some witnesses who lived during that period; witnessed and experienced the events as they unfolded then and lived long enough to narrate them in 2009. It seems to me that the Commission’s public hearings and the evidence obtained therein between 2008 and 2009, were a form of public consultation within the notion of the living law on the customary law and custom of *amaMpondo* relevant to this case.”

[34] It further held that there was no evidence placed before the Commission that, in spite of section 25(3), the Commission had to consult the people of *amaMpondo*. It highlighted that the witnesses had testified about the events that occurred from 1937 to 1939. It also held that apart from making the allegation that the Commission failed to consult the people of *amaMpondo*, the applicants in the High Court “could not point to the customary rules of succession as to how and with whom, in view of the provisions of section 25(3), the Commission should have conducted the consultation”.

[35] The High Court also applied its mind to the question whether the Commission, in investigating and deciding the above disputes, correctly fulfilled its statutory role in ascertaining the content of the relevant provisions of *amaMpondo* customary law. The High Court held that the Commission applied the customary law and custom of the traditional leadership succession of *amaMpondo* which dictates that the son of the Right-Hand Wife does not succeed the king. In arriving at this conclusion, the High Court rejected the evidence of *uKumkani* Victor Poto whom it concluded had given different versions about the custom on two different occasions. The Court dealt with this in this fashion:

“Mpondombini testified before the Commission with reference to the statement by *uKumkani* Poto that a son of the Right-Hand Wife succeeds ahead of any son of *iQadi*. Poto was an author who, when presenting evidence before the courts in the 1940s in regard to the dispute between Botha and Nelson, recanted the view he expressed in his book published in 1927, prior to the eruption of the dispute between Botha and Nelson. In his book, Poto wrote that sometimes the chief dies without an issue. Under those circumstances the men choose a Great Wife from the king’s wives. The son of that chosen great wife is then installed as the chief. The successor is never chosen from the Right-Hand House. Sometimes the chief dies without a great wife, the men choose a successor.

Poto recanted this statement when he was called to assist in resolving the dispute. He changed his view in favour of Botha that a son from the Right-Hand House can succeed. Of importance to note, when in 1944 Poto was recanting what he wrote back in 1927, he had ascended the position of *uKumkani of amaMpondo of Nyandeni* as the son of a

Right-Hand Wife. He was thus conflicted and had a vested interest in asserting this view. The Commission accepted the view Poto had expressed in the book because he expressed such view in 1927, at the time he was free of influence and vested interests.”

[36] The High Court then dealt with the question whether the Commission erred in concluding that Nelson, and not Botha, was the rightful successor to Mandlonke in terms of the customary law of *amaMpondo*. The High Court held that the evidence showed that had it not been for the intervention of the Government of the time, and having regard to the living customary law at the time of the dispute, Nelson, who was more popular than his brother Botha, would have ascended the throne.

[37] Then the Court considered whether Zwelidumile in any event had a legitimate claim to the throne through the custom of *ukungena*. The High Court dealt with this issue by asking different interrelated questions. It first asked itself whether *ukungena* was practised by royalty in *amaMpondo* custom. In order to answer this question, it referred to Mpondombini’s affidavit submitted to the Commission during the hearing, where he stated “if a deceased Paramount Chief is succeeded by two brothers, and leaves no issue of his own, then *ukungena* union can only be entered into between the widow and the elder of the two such brothers.” The Court then said further about Mpondombini’s affidavit:

“Mpondombini went on to state in the affidavit that his father Botha being older than Nelson was the first to be requested to enter into the *ukungena* union with Magingqi and he refused. The point being made is that Mpondombini’s affidavit corroborated the finding by the Commission that the *ukungena* custom was indeed practised by the royalty of *amaMpondo*.”

[38] In this regard the High Court concluded that Mpondombini himself had confirmed that *ukungena* was part of the *amaMpondo* custom at the time.

[39] Next, the High Court determined whether Magingqi was a Great Wife in the royal house. The High Court held that the Commission found, on the basis of the

evidence placed by witnesses before it, that at the time Nelson performed the custom of *ukungena*, Magingqi was still the occupant of the Great House at Mzindlovu. The elders intended that the *ukungena* union be held with the occupant of the Great House, who at that time was Magingqi and not Mandlonke's other wife, Mampofane. The High Court found it significant that Poto himself at that time had warned that any *ukungena* union with Magingqi would spell trouble in future. He (Poto) had not referred to Mampofane. The High Court also referred to the conclusions of the Commission:

“The Commission therefore concluded, mainly from the direct and indirect evidence of the witnesses that Magingqi was the Great Wife, who had resided with Mandlonke at the Great House before the latter's death. The evidence also supports the allegation that she continued to stay there after the death of Mandlonke, until she was pressured to leave the Great House, hence her application to the Supreme Court of Transkei in 1983 in an attempt to return to the Great House.”

[40] The High Court asked whether an *ukungena* union had in fact occurred between Nelson and Magingqi. It also accepted that this union had in fact occurred and that from this union Zwelidumile was Zanozuko's biological father, but was regarded as Mandlonke's son sociologically by virtue of the *ukungena* system.

[41] The High Court held that, for the above reasons, it was unable to find any evidence that the decision of the Commission was either irrational, unlawful, unreasonable or procedurally unfair and that it should be set aside.

Supreme Court of Appeal

[42] Aggrieved by the decision of the High Court, Wezizwe and Lombekiso approached the Supreme Court of Appeal. The Supreme Court of Appeal listed the grounds of review as being that the Commission:

- (a) misunderstood the nature of customary law;
- (b) failed to consider the import of the appointment of Mpondombini in *Sigcau I* in 1979;
- (c) failed to consider the views of the *amaMpondo* in 2008; and

- (d) incorrectly determined that Botha was not the legitimate successor in 1938.

[43] Before the Supreme Court of Appeal, the two appellants in that Court argued that the Commission made an error of law in that, in its process, it made use of rigid rules of genealogical succession. It failed to investigate and apply the relevant customary law at the time of the dispute. They further submitted that in 1939, Botha rather than Nelson, was the candidate preferred by the community and that the Commission ignored this factor. It was also submitted that the report by the Commission reveals that it centred its inquiry on genealogy as the absolute requirement for leadership positions and paid no regard to the question of public participation in the determination of a king or queen. Furthermore, it was contended that the Commission also failed to consider that *amaMpondo* preferred Mpondombini to Zwelidumile in 1979, failed to consider the fitness of Zanozuko to govern and had no regard for community participation in its 2010 report.

[44] The two appellants in that Court also contended that the Commission adopted an adversarial, trial-like fact-finding process and did not, on its own, investigate the issues before it. It confined its task to the consideration of the evidence and arguments presented to it by the rival claimants to the throne.

[45] The respondents in the Supreme Court of Appeal argued that the Commission heard extensive evidence from Mpondombini's witnesses. They retorted that the Commission had no duty to "patch-up" the evidence provided by Mpondombini. Having heard evidence from Zanozuko (the claimant) and members of the community called by Mpondombini, the Commission could rely on the expertise of its own members in assessing, understanding and contextualising the evidence, as the members of the Commission were customary law experts themselves.

[46] The Supreme Court of Appeal held that the Commission misunderstood its function in the 2010 process, in confining itself to the evidence led by Mpondombini

and Zanozuko and the witnesses who testified at the hearing. It also ignored relevant evidence on how *amaMpondo* had chosen their leaders at various times in the past. In line with the submission on behalf of Mpondombini in that Court, on the evidence before the Commission *amaMpondo* customary law incorporated indigenous political processes where the public or community participated in choosing between eligible candidates, based on both the strength of their familial claim and their ability to lead. The Supreme Court of Appeal reasoned further that the Commission's findings belied its claim that it took all relevant factors into account because considerations of public participation and acceptability or fitness for office were ignored.

[47] The Supreme Court of Appeal continued:

“A clear example of the Commission's misconception of relevant principles was its view that the 1938 Commission was wrong in considering the character flaws of a potential successor. The Commission remarked that such consideration was ‘not in line with customary law and customs of *amaMpondo*’. Clearly, the Commission erred in this regard . . .

It is undoubtedly so that the Commission's 2010 hearing was adversarial. All that it did was to listen to the competing claims of Mpondombini and Zanozuko. It merely decided on the basis of that evidence. When the hearing took place, certainly the *amaMpondo* customary law and customs had evolved. It was incumbent on the Commission to investigate these factors by calling more members of the royal family, an *imbizo*, or experts, or all of them, to widen the base from which the salient principles of the living customary law of *amaMpondo* on traditional leadership could be determined.”

[48] It referred to this Court's judgment in *Shilubana*:¹³

“[T]he practice of a particular community is relevant when determining the content of a customary-law norm. As this Court held in *Richtersveld*, the content of customary law must be determined with reference to both the history and the usage of the community concerned. ‘Living’ customary law is not always easy to establish and it

¹³ *Shilubana v Nwamitwa* [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC); (*Shilubana*) at para 46.

may sometimes not be possible to determine a new position with clarity. Where there is, however, a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.”

[49] The Supreme Court of Appeal then compared the process followed by the Commission in 2008 with the one followed in 2010 and said:

“Curiously, as explained in its 2008 report, the methodology used by the Commission in discharging its function of investigating both paramountcies of *amaMpondo*¹⁴ comprised two stage hearings. During both stages it held public hearings in which selected members of the royal houses and others appointed by them testified under oath. Those members also referred the members of the Commission to supplementary research material. Thereafter, the commissioners asked questions. Interested parties were afforded the opportunity to challenge the versions provided by the members of the royal houses. Members of the public were permitted to pose questions to the presenters and to make comments. As already explained, and in stark contrast with this procedure, in its investigative function during 2009 and 2010, the Commission confined itself to the evidence tendered by the claimants to the throne. In my view, the process in which the Commission engaged during 2009 to 2010, which was essentially receiving such evidence as the parties chose to tender, was not proper. An investigation as envisaged in section 25(2) of the Framework Act entailed the Commission listening to tendered evidence, initiating active searches for further evidence, and inviting input from relevant persons other than the contenders to the throne.”

[50] Regarding the appointment of Mpondombini in 1979, the Supreme Court of Appeal held that neither the Commission nor the High Court considered the relevance of the evidence to the effect that Mpondombini’s ascendance to the throne was not confined to kinship with his predecessor but was based on a choice made by the community in an election which was held at the instance of the then Transkei Government, who referred the matter to a vote.

¹⁴ That is, *amaMpondo aseQaukeni* and *amaMpondo aseNyandeni*.

[51] The Supreme Court of Appeal held that the Commission failed to apply the correct customary law at the time of the dispute. It held that the Commission was incorrect in confining itself to the evidence led by both disputants to the throne and in failing to incorporate community participation.

[52] The Supreme Court of Appeal held that the Commission and the High Court erred in finding that Botha could never succeed his father because he is the son of the Right-Hand House. The Supreme Court of Appeal determined that it was possible for Botha to ascend the throne and that Right-Hand House ascensions were not unheard of in *amaMpondo* custom.

[53] The Court held that it was important that Mpondombini's succession to the throne had been supported by other traditional leaders of the *amaMpondo* nation (who had served under Botha), including Nelson. The evidence before the Commission was that Mpondombini was supported by 25(twenty-five) senior traditional leaders compared to the 3(three) who supported Zanozuko. The Supreme Court of Appeal found it important that even though Mpondombini was opposed to the idea of holding an election, the *amaMpondo* heeded the call and voted in his favour. However, the Supreme Court of Appeal acknowledged that the election was facilitated by the Government of the Transkei homeland.

[54] The Supreme Court of Appeal upheld the appeal and set aside the order of the High Court. It further set aside the Commission's 2010 determination, as well as the President's report and notice on the appointment of Zanozuko as King.

In this Court

Applicants' submissions

[55] The applicants argue that the statutory powers given to the Commission must be understood against the background of the following interlinked principles: (a) the Commission's actions are administrative action, and can only be reviewed in

accordance with section 6(2) of the Promotion of Administrative Justice Act¹⁵ (PAJA), and that the review basis envisaged in section 6(2) has not been shown; (b) that deference ought to be shown to the determinations of the Commission, bearing in mind its expertise regarding traditional leadership and the content and application of customary law for a particular community; and (c) that the Commission was tasked with determining the applicable customary law and customs of *amaMpondo* as they were when the events occurred which gave rise to the dispute or claim.

[56] The applicants argue further that there was no basis for the conclusion by the Supreme Court of Appeal that the Commission was bound to hold a process akin to an *imbizo* (gathering to share knowledge) to resolve the matter. The applicants submit that the Commission did take the community's views and the living customary law of *amaMpondo* into consideration when it determined the matter.

[57] The applicants argue further that Mpondombini was allowed a full opportunity to be heard before the Commission. He raised no serious attack on the fairness of the process at the time. Therefore, it is not open to the respondents to raise an issue regarding the process followed, long after its completion, when they were happy with it at the time and raised no objection until the investigation was finalised.

Respondents' submissions

[58] The respondents' contentions are that the Commission failed in its duty to investigate and apply the customary law at the time relevant to the dispute. To support their argument, they submit that by applying a strict genealogical approach, the Commission failed to identify the customs governing *amaMpondo* and also the central role of community preference and fitness to govern in choosing between viable candidates.

¹⁵ 3 of 2000.

[59] The further criticism is directed at the method of the investigation and the process followed by the Commission. The respondents argue that the Commission adopted an adversarial court-like process and did not engage in public consultations with the *amaMpondo* community. They argue that as a result, it ignored evidence relating to Mpondombini's support in 2008, and failed to consider whether *amaMpondo* supported the appointment of Zanozuko and if he was fit to govern. Finally, the respondents argue that in crafting the remedy, the Supreme Court of Appeal exercised discretion in a true sense, something this Court will only interfere with if it is at odds with the law.

Issues

[60] These are the issues before us:

- (a) Does the matter engage the jurisdiction of this Court? If it does, is it in the interests of justice for this Court to grant leave and determine the matter?;
- (b) The review test applicable to the findings of the Commission. Did the High Court and the Supreme Court of Appeal apply the correct review test?;
- (c) The mandate of the Commission;
- (d) Whether the Commission was obliged to follow the living law of the *amaMpondo*, for what period, and what this entails;
- (e) The method adopted by the Commission in its investigation;
- (f) The concept of deference to the findings of the Commission;
- (g) Whether the factual findings of the Commission can be re-determined; and
- (h) The remedy.

Jurisdiction and leave to appeal

[61] Section 211 of the Constitution provides that the institution, status and role of traditional leadership are recognised in accordance with the Constitution. Customary law must be recognised as “an integral part of our law” and “an independent source of

norms within the legal system.”¹⁶ Furthermore, this matter raises issues of great importance on traditional leadership and the issues go beyond the parties before the Court. The community of *amaMpondo* have been at a crossroads regarding the rightful heir to the throne since 1937 with numerous litigation challenges brought before the courts since then. Therefore, our jurisdiction is engaged and it is in the interests of justice that leave to appeal be granted.

Review test

[62] The respondents sought to review and set aside the decision of the President, in terms of PAJA. Section 6 in relevant parts reads:

- “(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.
- (2) A court or tribunal has the power to judicially review an administrative action if—
 - ...
 - (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - ...
 - (d) the action was materially influenced by an error of law;
 - (e) the action was taken—
 - ...
 - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - (f) the action itself—
 - ...
 - (ii) is not rationally connected to—
 - ...
 - (cc) the information before the administrator; or
 - (dd) the reasons given for it by the administrator.”

¹⁶ *Alexkor Ltd v Richtersveld Community* [2003] ZACC 18; 2003 (12) BCLR 1301 (CC); 2004 (5) SA 460 (CC) at para 51.

[63] The applicants argue that the Supreme Court of Appeal made significant findings regarding the Commission's factual determinations related to customary law principles of succession and traditional leadership. They argue that the Supreme Court of Appeal, in doing so, was incorrect in two respects. Firstly, it deviated from its precedent that dictates deference to decisions or findings of a commission, especially one that is an expert body, such as the one in this matter. Secondly, the applicants further contend that, by re-determining these findings of the Commission, the Supreme Court of Appeal conflated the nature of a review and an appeal.

[64] The respondents submit that this matter should be considered using a standard that considers acceptability, fitness to govern and popularity. They argue that the Commission committed errors of law in that it did not conduct an all-encompassing investigation into the living customary law of *amaMpondo*. The respondents also contend that the Commission adopted an adversarial, trial-like fact-finding process and did not, on its own, investigate the issues before it. It confined its task to the consideration of the evidence and arguments presented to it by both claimants to the throne. As a result, so argue the respondents, the Commission committed errors of fact on who was the rightful heir of *amaMpondo*.

[65] In this Court, counsel for the respondents submitted that the basis of review in this matter is mixed and encompasses both error of law and fact. Counsel for the respondents elaborated and argued that the alleged failure to apply the living customary law of *amaMpondo* was an error of law but that this resulted in a factual error. He raised the same argument regarding what he referred to as an adversarial approach adopted by the Commission. It seems, in my view, that the review is based on section 6(2)(e)(iii) and (f)(ii)(cc) and (dd) of PAJA.

Mandate of the Commission

[66] In order to contextualise the grounds of review, I set out the mandate of the Commission and its powers. Section 212(1) of the Constitution provides that “[n]ational legislation may provide for a role for traditional leadership as an institution

at local level on matters affecting local communities”. Pursuant to this provision in the Constitution, the Framework Act was passed in 2003. The Framework Act was amended in 2009 with effect from 25 January 2010.

[67] The amended Act was repealed by the TKLA. The TKLA was found to be unconstitutional by this Court in May 2023 in that “Parliament had failed to comply with its constitutional obligation to facilitate public involvement before passing the TKLA”.¹⁷ The order of constitutional invalidity was suspended for 24 months to allow Parliament to cure the defect in the TKLA. The unamended Act is, however, the relevant statute in the resolution of this traditional leadership dispute as it was the applicable legislation at the time of the decision-making subject to review in these proceedings.

[68] Section 22(1) of the unamended Framework Act provided for the establishment of the Commission. In terms of section 25(2) of the Framework Act, the Commission had the authority to investigate, either on request or on its own accord, any of the matters listed in section 25(2)(i) to (vi). Section 25(3)(a) of the Framework Act provided that when considering a dispute or claim, the Commission: “must consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim”. Section 25(3)(b)(i) provided that the Commission must, in respect of a kingship, be guided by “the criteria set out in section 9(1)(b)¹⁸ and such other customary norms and criteria relevant to the establishment of a kingship”.

¹⁷ *Mogale v Speaker of the National Assembly* [2023] ZACC 14; 2023 (6) SA 58 (CC); 2023 (9) BCLR 1099 (CC).

¹⁸ Section 9(1)(b) stated:

- “(1) Whenever the position of a king or queen is to be filled, the following process must be followed:
- ...
- (b) the President must, subject to subsection (3), recognise a person so identified in terms of paragraph (a)(i) as a king or a queen [that is, identified by the relevant royal family], taking into account—

[69] Section 9(1)(a)¹⁹ provided for what had to be considered before someone is recognised as a king or queen. The Commission had powers to investigate and decide disputes of various kinds resulting from historical aberrations of customary law and customary law institutions under colonial and apartheid laws dating back to 1 September 1927 (when the Native Administration Act took effect), or earlier if good grounds existed. The mandate of the Commission was that it had to restore the integrity of the institution of traditional leadership and right the wrongs of the past by resolving traditional leadership disputes dating from as far back as 1 September 1927.

-
- (i) the need to establish uniformity in the Republic in respect of the status afforded to a king or queen;
 - (ii) whether a recognised kingship exists—
 - (aa) that comprises the areas of jurisdiction of a substantial number of senior traditional leaders that fall under the authority of such king or queen;
 - (bb) in terms of which the king or queen is regarded and recognised in terms of customary law and customs as a traditional leader of higher status than the senior traditional leaders referred to in subparagraph (aa); and
 - (cc) where the king or queen has a customary structure to represent the traditional councils and senior traditional leaders that fall under the authority of the king or queen; and
 - (iii) the functions that will be performed by the king, or queen.”

¹⁹ Section 9(1)(a) stated:

- “(1) Whenever the position of a king or a queen is to be filled, the following process must be followed:
 - (a) The royal family must, within a reasonable time after the need arises for the position of a king or a queen to be filled, and with due regard to applicable customary law—
 - (i) identify a person who qualifies in terms of customary law to assume the position of a king or a queen, as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person; and
 - (ii) through the relevant customary structure—
 - (aa) inform the President, the Premier of the province concerned and the Minister, of the particulars of the person so identified to fill the position of a king or a queen;
 - (bb) provide the President with the reasons for the identification of that person as a king or a queen; and
 - (cc) give written confirmation to the President that the Premier of the province concerned and the Minister have been informed accordingly.”

[70] Importantly, the Commission, in terms of section 25(3)(a) of the Framework Act, had to consider and apply customary law and customs of the relevant traditional community as they were when events occurred that gave rise to the dispute or claim.

[71] As to the time frame envisaged in section 25(3)(a) of the Framework Act, the respondents argued that the installation of Botha as a Paramount Chief in 1938 and Mpondombini's installation in 1979, after his nomination, are both relevant in determining the relevant period. They argue that the Commission failed to consider the events in 1979 when Mpondombini did not inherit automatically but on the basis of Nelson's nomination at the meeting convened after Botha's death. According to the respondents, these two events illustrated that Botha was a preferred candidate by *amaMpondo* in 1938 and that his son Mpondombini was also a preferred candidate by virtue of the nomination in 1979.

[72] We know that the kingship was a bone of contention from the date of Mandlonke's death. For a while, the then Government and later the Transkei Government intervened and utilised colonial powers and processes in order to appoint Botha as a Paramount Chief of *amaMpondo*, and not as a king in terms of the living customary law of *amaMpondo*. From that period there was no resolution of the *amaMpondo* kingship through their customs because we know that the then Government did not resolve the dispute through reliance on customary law. It did so in terms of the Native Administration Act.

[73] The meeting that took place after Botha's death was not to nominate an *amaMpondo* king as stated. It was to replace Botha as a Paramount Chief. The nominated candidate would be submitted to the Transkeian authorities. The meeting held on 10 December 1978, where Mpondombini was nominated, was that of a regional authority. It was not a customary body. It was a body recognised at that stage in terms

of the Transkei Constitution²⁰ and the Transkei Authorities Act.²¹ A regional authority was provided for in sections 1 and 2(1)(a) of that Act. Anyway, the President of Transkei in terms of section 66 of the Transkei Constitution had the power to grant or withhold confirmation of appointment as Paramount Chief. Nelson was a chief at the time. He probably realised that the ultimate decision to appoint a Paramount Chief was that of the President and that there was no point in nominating a candidate not favoured by the Transkeian authorities at the time.

[74] Voting processes under the Transkei Bantustan authorities after Botha's death cannot be assumed to have reflected the will of *amaMpondo*. The rightful successor to *uKumkani* Mandlonke was never determined customarily and that dispute pertaining to the kingship was not resolved according to custom. Therefore, the events that occurred and that gave rise to the dispute or claim occurred way back in 1937 when *uKumkani* Mandlonke died without leaving an heir to the throne.

[75] The Commission could not ignore the history and the fact that the event giving rise to the dispute or claim was Mandlonke's death in 1937. Of course, Nelson ultimately relented during Botha's reign as a Paramount Chief but Botha was never *iKumkani* of *amaMpondo*. His son Mpondombini, as well, succeeded him as a Paramount Chief, not as *iKumkani yamaMpondo* (the King of *amaMpondo*). It is common cause that Botha and Nelson died years before a dispute arose before the Commission. The dispute that served before the Commission was between the rival claimants Mpondombini born in 1942 and Zanozuko born in 1974.

[76] Mpondombini and Zanozuko contested the matter before the Commission as a continuation of Zwelidumile's claim as an heir from *ukungena* between Magingqi and Nelson. Zanozuko made it clear before the Commission that the house of Mandlonke to which he claimed to belong was revived by Nelson through *ukungena*. Because there

²⁰ 47 of 1963.

²¹ 4 of 1965.

was no *iKumkani yama Mpondo* appointed in terms of the customary law of *amaMpondo* after Mandlonke's reign, the Commission had to trace the kingship from the date when the dispute to succeed Mandlonke started. It had to do so even though the dispute had cascaded to the extent that the grandchildren or subsequent generations continue to contest the kingship. It is a fact, and I emphasise, that their contestation dates back to when the dispute occurred after the event of the death of Mandlonke without leaving a male issue.

[77] The first criticism is that the Commission committed an error of law in that it failed to consider the living customary law of *amaMpondo*. The second criticism is that it adopted an adversarial court-like hearing and did not embark on public participation involving consultation of *amaMpondo*. Therefore, we must first consider what living customary law is and then deal with whether it was considered. Thereafter we must consider whether the criticism aimed at the process adopted by the Commission in its investigation was flawed.

Did the Commission adopt the living customary law of amaMpondo?

What is living customary law?

[78] In understanding customary law, an important distinction needs to be drawn between codified customary law and living customary law.²² Customary law is mostly unwritten, with no dedicated body of persons tasked with making rules or with the authority to define its norms. This body of law covers all matters regulating personal and family life, and only certain aspects of customary law have been codified, for example the recognition of customary marriages, and parts of the law of succession, especially that dealing with the abolition of the principle of primogeniture. Often, this codification emanates, in effect, from court judgments on disputes lodged with the courts pertaining to traditional leadership and custom.²³

²² Moore and Himonga "Living Customary Law and Families in South Africa" in Hall, Richter, Mokomane and Lake (eds) *Child Gauge* (Children's Institute, Cape Town, Child Gauge) 2018 at p 61.

²³ Id at page 62.

[79] The Recognition of Customary Marriages Act²⁴ defines customary law as the customs and usages traditionally observed among the indigenous African people of South Africa and forming part of our culture. Section 211 protects those institutions that are unique to customary law. Specifically, section 211(3) of the Constitution enjoins the application of customary law by the courts, where this law is applicable, “subject to the Constitution and any legislation that specifically deals with customary law.” It follows from this that, in the constitutional era, customary law must be interpreted by the courts in a manner that is compatible with the Constitution.

[80] Many South Africans subscribe to and live according to customary law. Sections 30 and 31 of the Constitution provide for the right to cultural diversity. The recognition and application of customary law rests on the right to culture of the particular community. Customary law in South Africa is tied to ethnicity, therefore the law regulating the lives of people will differ across communities, ethnicities and provinces.

[81] Living customary law exists in the system of living norms that regulate everyday lives of people who live according to customary law. In *Pilane*²⁵ this Court confirmed the notion of living customary law as follows: “[t]he true nature of customary law is as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs.”²⁶ The system of living customary law is thus dynamic, evolving and context-specific as it adapts to changes in the beliefs and circumstances of the people it applies to. This is highlighted in *Shilubana*.²⁷ The Court rejected the contention that custom should be “certain” and

²⁴ 120 of 1998.

²⁵ *Pilane v Pilane* [2013] ZACC 3; 2013 JDR 0295 (CC); 2013 (4) BCLR 431(CC).

²⁶ *Id* at para 34.

²⁷ *Shilubana* above n 14.

“uniformly observed for a long period of time”.²⁸ The Court instead held that change is intrinsic to customary law, and as such, customary law must be permitted to develop.²⁹

Did the Commission consider the living customary law then?

[82] The respondents rely on the evidence adduced by Dr Claassens that the living customary law of *amaMpondo* requires acceptability and a popular assessment of the candidates’ fitness to govern and that the courts need to take into account these specific factors beyond purely genealogical rules. Therefore, they submit that the customary law of *amaMpondo* considers three primary elements for ascension to the throne: genealogy, fitness to govern and popular opinion. Their criticism is that the Commission based its findings purely on genealogy. The applicants do not dispute that the three elements of customary law needed to be considered, but argue that they were all considered by the Commission.

[83] It is undisputed that in taking into account the three primary elements, the Commission also had to consider customary law as it was prior to the interference of colonialism and the implementation of the Black Administration Act and be able to separate practices enforced through statutory colonial laws, from practices observed by the community as their customary practices and law.

[84] It is helpful in this judgment to deal at length with the evidence considered by the Commission regarding the living customary law of *amaMpondo* and how the Commission dealt with it. The purpose of this exercise is not necessarily to determine the correctness of the findings of the Commission, but to deal with the criticism that the Commission made its findings based solely on genealogy and did not consider other factors such as fitness to govern and popularity, when it made its findings.

²⁸ Id at paras 52-4.

²⁹ Id at paras 54-5.

The evidence relating to the living customary law and the Commission's approach to it

[85] In his answering affidavit filed in the High Court, the Acting Chairperson of the Commission repeatedly states that its findings were based on the customary law of *amaMpondo* as it was when the events occurred that gave rise to the dispute or claim. This is in compliance with section 25(3)(a) of the Framework Act. There is no evidence to suggest that the customary law of *amaMpondo* had remained rigid from time immemorial and that at the time of the events it had not adapted. A clear example is the custom relating to the succession to the throne. Evidence led at the Commission suggested that the custom to the effect that the eldest son of a king should not succeed the throne was adapted because of the fear that if such a son were to succeed his father, he would compete for Chieftaincy with his father, and this would lead to fragmentation of the tribe.

[86] Furthermore, the Commission considered several customs practised by *amaMpondo* at the time. These customs also emerged from the testimony of the witnesses of both parties. These were *ukungena* and *isifingo*³⁰. The Commission had regard to the right of succession customarily between the Great House, Right-Hand House and *iQadi*. It had regard to the undisputed fact that before the intervention of the then Governor-General, Nelson was regarded as more popular than Botha. Evidence about popularity could only have been established through listening to the *amaMpondo* who knew the events at the time and possibly through research.

[87] We also know that before Botha was appointed, there was a succession battle between him and Nelson. As stated, *amaMpondo* favoured Nelson. He was therefore the popular brother, having regard to popularity as envisaged in the living customary law. Through the intervention of the then Governor, Botha was appointed. The 1938 Commission was established by the then Government and it was this Commission's recommendation that Botha be appointed as Paramount Chief. Botha

³⁰ The witnesses at the Commission had a different understanding of what *isifingo* entailed in practice. But what was not in dispute was that it was a ceremony performed to signify *ukungena* union between the two families.

was then installed by the Governor-General as Paramount Chief of Eastern Pondoland. It is fair to say, as the Commission reasoned, that were it not for the intervention of the then Government, Nelson would have been appointed and succession would have followed his lineage, subject to other elements of living customary law.

[88] It is not disputed, however, that traditional rulers were recognised and appointed by the colonial government and their positions were no longer determined in accordance with indigenous laws and procedures.³¹ It is also common cause that the dispute was statutorily settled in terms of the Black Administration Act and not customarily, when Botha was recognised as “Paramount Chief” of Eastern Pondoland by the then Governor-General.

[89] It is not disputed that after Botha’s death, Mpondombini, as Botha’s son, was recommended. Amongst the people who recommended him was Nelson. What is not clear from the evidence is what led Nelson to overlook his son, Zwelidumile (Zanozuko’s father), and to recommend Mpondombini instead. Perhaps the Commission could have investigated this behaviour by Nelson. But we do not know if anyone knew the answer to this question. At that stage Nelson had long passed on. The Acting Chairperson of the Commission in his answering affidavit in the High Court dealt with this issue in the following manner:

“It is therefore misleading for the applicant to claim that he was ‘appointed King of *amaMpondo*, on 10 December [1978].’ Nowhere does the extract of the meeting of 10 December 1978 say or indicate that the applicant was appointed as the ‘King of *amaMpondo*’. It simply and in very clear terms, states that the applicant succeeded his late father since he was the eldest son. Furthermore, nowhere does the resolution say that the applicant's succession to the paramountcies was done or effected in accordance, with Pondo customs or customary law. It is also noteworthy that only (19) nineteen chiefs and councillors were present, and more than (20) twenty chiefs were absent from the said meeting. The legitimacy and validity of the decision was therefore questionable. It is therefore misleading to say that the appointment was made

³¹ Id at page 210.

by ‘unanimous decision of *amaMpondo*’, when more than half those entitled to be present were indeed absent from the meeting. It would also appear that the meeting was convened as a ‘special meeting’, and was called at short notice ‘just before the funeral service of the late Botha Sigcau’. In any event it is also manifestly the case if one reads the minute of the meeting that the purpose of the meeting was ‘to obtain the authority’s resolution on the matter’. If this was indeed the case, it is quite clear that the purpose of the meeting was not to decide the issue of the succession of the late Chief Botha Sigcau in accordance with Pondo customs or customary law, but rather ‘to obtain the authority’s resolution of the matter’. As we know the authority was established under the discredited apartheid system. In the first place, Botha Sigcau was appointed in terms of section 23 of the Black Administration Act, 1927 in any event.”

[90] I endorse the reasoning of the Commission in this regard. Botha was not appointed in terms of the living customary law of *amaMpondo*. He was in fact statutorily made a Paramount Chief of *amaMpondo* and not *iKumkani*. His son Mpondombini was also recommended to take over statutorily as a Paramount Chief. The meeting took place before a Magistrate. The entire cabinet of the Transkei homeland was present at his installation.

[91] It should not be overlooked that Botha had been in power for several decades. Nelson had lost the challenges to the throne. But it cannot be that his decision to recommend Mpondombini cuts through the powers of the Commission to rectify the wrongs of the past. It is just another relevant factor. It is also not insignificant that at the time of his death, Botha had also been President of the then Transkei, a so-called independent State according to apartheid laws, and had been at the helm for two years, having been imposed by the then government. If the Commission had found itself bound by these practices, it would not have fulfilled its mandate to right the wrongs of the past and restore dignity to customary law.

[92] We know that shortly after Mpondombini’s appointment, Nelson’s son Zwelidumile challenged Mpondombini’s paramountcy. He did not consider himself bound by the recommendation made after Botha’s death. This discontent resulted in the intervention of the then Transkei Government under the leadership of

Kaizer Matanzima who then issued an instruction that *amaMpondo* should vote on the issue. Mpondombini was subsequently appointed as the Paramount Chief which meant that he succeeded his father, Botha as a Paramount Chief, and not as *iKumkani*, as already alluded to. Following this, Zwelidumile launched his court challenge in 1978.

[93] What is noteworthy is that the voting process initiated by Kaizer Matanzima was not in accordance with *amaMpondo* custom and tradition. Mpondombini himself launched a court challenge on this very basis, but he lost it. Mpondombini's appointment as Paramount Chief was therefore not made in accordance with *amaMpondo* living custom and tradition but was, like his father, as a result of the intervention of the then Government. The Framework Act was established in order to deal with these interventions by past Governments to correct the erosion of customary law and tradition. There are scanty details on the turn-out, the freeness or the fairness of the election and there is no evidence suggesting that tradition and custom were considered when the voting took place.

[94] Zanozuko's version about his claim to kingship included the contention that Nelson performed *ukungena* with Magingqi, one of the late Mandlonke's wives. Before it answered this question, however, the Commission first determined whether the appointment of Botha was according to custom. According to Zanozuko, the appointment of Botha had been irregular and was not in line with the customary law and customs of *amaMpondo* in that, at the time, the Government was not obliged to follow the customs of *amaMpondo* in appointing a Paramount Chief, and did not do so. The Commission found that Botha, as the son of the Right-Hand House, could not succeed. In his claim form Zanozuko stated that Botha was the son of the Right-Hand House and was not allowed to succeed. He also alleged that according to the living custom, where *iKumkani* dies without an issue in the Great House, the heir was identified from the sons of *amaQadi* to the Great House or if this fails, any *iQadi* was given preference over the Right-Hand House.

[95] Zanozuko argued that after Botha was irregularly installed, *amaMpondo* decided to revive Marhelane's Great House through *ukungena*. Zanozuko's claim is based on the proposition that Zwelidumile was the direct heir to Mandlonke sociologically because of the *ukungena* relationship between Nelson and Magingqi, his biological parents.

[96] The respondents, on the other hand, argued that in appointing Botha the Government had been guided by the custom of *amaMpondo* and the recommendations of the 1938 Commission. They argued that the custom applicable was that if there is no son in the Great House and no Great Wife to nominate a successor, then the first-born son of the Right-Hand House would succeed over the son of *iQadi* to the Right-Hand House.

[97] In resolving the question as to whether the son of *iQadi* or the Right-Hand House could succeed, the Commission referred to the following recommendations of the 1938 Commission:

- “(a) The custom to be followed is that of the commoners, which is that the first woman married is the great wife and the second woman to be married is the right-hand house. On failure of the male issue, in the Great House the son of the right-hand house succeeds to the Great House;
- (b) As regards the relative merits of the two Claimants there is a consensus of opinion that Botha bears a better character than Nelson [because] he is more mature in years and has a good reputation for straight dealings among both Europeans and natives and is progressive. Under his charge, the Pondos will have a better chance of developing. Nelson on the other hand, is a weakling under the sway of hangers on at the great place. It seems to us very probable that the backing he has received from those in contact with the great place is inspired by the wish of the men in question to retain the power in their own hands, which they have undoubtedly wielded since the death of Mswakeli.”

[98] Regarding the 1938 recommendation that Botha was more suitable and the criticism of Nelson, the Commission found that the 1938 Commission placed more

emphasis on the perceived character flaws of Nelson as opposed to custom. This, it found, was not in line with customary law and customs of *amaMpondo*. In that regard, the Commission's affidavit stated:

“The dispute between Nelson and Botha should be viewed in its proper context and in relation to the prevailing political climate at the time:

- (i) There was great resistance to the policies of the colonial government. It therefore suited the colonialists to place people such as Botha, who were pliable and easy to manipulate, in positions of authority. Armed with the Native Administration Act, the Government was able to impose its will and frustrate *amaMpondo*. Against determined *amaMpondo* opposition, the government installed Botha as paramount chief of *amaMpondo*.
- (ii) The disaffection of *amaMpondo* with the installation of Botha over Nelson is said to be part of the reasons for what was known as the ‘The Pondo Revolt’ in 1960.
- (iii) During this time, it is alleged that Botha was forced to flee and sought refuge from the colonialists. They secured his return, and he advocated the introduction of the Bantu Authorities Act.”

[99] The Commission then concluded that in view of the above, the appointment of Botha was irregular and not in line with the customary law and customs of *amaMpondo*. In reaching that conclusion, the Commission had regard to the popularity of the two brothers and furnished reasons why Nelson was a preferred candidate by *amaMpondo*, and the consequences of the Government's intervention in appointing Botha as a Paramount Chief.

[100] As to fitness to lead, the 1938 Commission had rejected Nelson because of *amaMpondo*'s affinity to him. In this regard the 1938 Commission had characterised him as a weakling under the sway of hangers-on at the Great Place. It said that it was probable that the backing he had received from those in contact with the Great Place was inspired by the wish of the men in question to retain the power in their own hands. It characterised Botha as having a good reputation for straight dealings among “both Europeans and natives and [was] progressive.”

[101] However, if one had regard to the fact that in the two meetings held after Mandlonke's death, Nelson was favoured by the majority, then the question for the Commission was who had to determine the suitability of the two brothers to lead and what criterion was more consistent with living customary law of *amaMpondo*. Why was Nelson criticised and labelled a weakling, yet the very same *amaMpondo* preferred him, such that they revolted after Botha was appointed as Paramount Chief by the colonial government? It is improbable that the majority of *amaMpondo* would choose someone not fit to govern simply because some of them wanted to retain power in their own hands.

[102] The Commission then determined whether Nelson and Magingqi entered into a union of *ukungena*. This question was very important because prior to *ukungena*, the customary succession would have probably required that Gwebinkumbi, who was Nelson's heir, be considered after Nelson. However, none of the parties to the Commission pursued this route seriously as the dispute was about a successor to Mandlonke. *Ukungena* was adopted because the intention was to raise a seed for Mandlonke. The product from *ukungena* became the sociological son of Mandlonke, whilst Gwebinkumbi was an heir to Nelson rather than Mandlonke. The Commission's affidavit summarised Zanozuko's version thus:

- “(i) In an attempt to wrestle the kingship from Botha, *amaMpondo* resorted to the custom of *ukungena*. Nelson was approached to *ngena* Magingqi, the great wife of Mandlonke. To this end, Nelson was taken out of school and he subsequently performed all the rituals attendant to the custom of *ukungena*, that is, *isifingo* and *ukuhlamba izitya*.
- (ii) The objective of this exercise was for Nelson to raise seed and thus revive the house of Mandlonke.
- (iii) [T]he decision that Nelson should *ngena* Magingqi was not unusual in that historically, the sons of *ukungena* ascended the throne of *amaMpondo*. He [Zanozuko] cited the following examples:
 - (aa) during the reign of Cabe, Gangatha *ngena* 'd Qiya's wife;
 - (bb) one chief Zondwayo, *ngena* the wife of Nonkonyana; and

(cc) recently, the Respondent installed Siyoyo, a son born of *ukungena*.”

[103] The Commission noted that Zanozuko’s witnesses Magqwarhu Sigcau and Pawuli Ncoyeni corroborated his version. It also noted that Magqwarhu, the third wife of Nelson married in 1949, confirmed that Nelson *ngena’d* Magingqi in that she witnessed the performance of *isifingo* by Nelson at the home of Magingqi. According to Zanozuko’s witnesses, Magingqi was not regarded as the wife of Nelson but *iqabane*, (a term used for a woman in an *ukungena* union). His witnesses also stated that Magingqi resided at her marital home and only left as a result of death threats from Botha; that Nelson’s Great Place was at Khimbili; and that Magingqi never lived at Khimbili with Nelson. To the contrary, Nelson visited Magingqi at her marital home. When Nelson died, Magingqi did not participate in the mourning rituals with Nelson’s wives. The Commission also considered the evidence of Pawuli Ncoyeni, the uncle and neighbour to Magingqi, who stated that Nelson *ngena’d* Magingqi and that he was present during the ritual of *isifingo*, where Nelson presented a white horse to Magingqi’s family and that, after the marriage to Mandlonke, Magingqi did not live at her home.

[104] The Commission considered the evidence of Mpondombini and his witnesses, who denied that Magingqi and Nelson entered into the union of *ukungena*. According to Mpondombini, the possibility of such a union was never mooted. His version was that after the death of Mandlonke, Magingqi and Nelson fell in love, Magingqi then returned to her maiden home and married Nelson who delivered six head of cattle and a white horse as *lobola* (dowry) to the home of Magingqi. She lived with Nelson at Khimbili. Mpondombini stated that the supporters of Nelson could not have proposed *ukungena* because according to the custom of *amaMpondo*, children born of *ukungena* union do not succeed at the level of *ubuKumkani*(kingship). This, according to him, would clearly have been an exercise in futility and in any event, the union between Nelson and Magingqi could not have been *ukungena* because none of the rituals of *ukungena* were performed in that (a) Magingqi left the marital home; (b) Nelson paid *lobola* and married Magingqi; (c) the *isifingo* ritual was not performed at the marital

home of the deceased husband; and (d) the children born of the union between Nelson and Magingqi were regarded as those of Nelson and not Mandlonke.

[105] Mpondombini's witnesses, Sylvia Noyolo Madikizela, Mlungu Gideon Sigcau and Mercy Nonceba Jam-Jam, also denied that there was *ukungena* between Nelson and Magingqi. Noyolo Madikizela, who was a midwife at Holy Cross Hospital, Eastern Cape, at the time of the birth of Zwelidumile, stated that she believed that Nelson and Magingqi were husband and wife because at their first meeting, Nelson had introduced himself as such. She had heard rumours that Nelson was supposed to *ngena* Magingqi in order to give birth to *iKumkani* of *amaMpondo* but to everyone's surprise, he paid *lobola* and married her. It was unusual for *lobola* to be paid twice for the same woman.

[106] Another witness, Mercy Nonceba Jam-Jam, who lived at Mzindlovu during the reign of Mandlonke, stated that Magingqi was the first wife of Mandlonke. After the death of Mandlonke, it was rumoured that Nelson had *ngena'd* Magingqi and that Magingqi left the marital home and she later heard that Magingqi and Nelson had married. Therefore, there could not be *ukungena* between Magingqi and Nelson. She understood *isifingo* to constitute one beast. Six cattle and a horse, paid by Nelson, would be tantamount to *lobola*.

[107] Another witness for Mpondombini was Mlungu Sigcau, the son of Marhelane. He also confirmed that Magingqi was the first wife of Mandlonke. He stated that Nelson never *ngena'd* Magingqi because he took Magingqi from her marital home and took her to her maiden home where he married her and settled at Khimbili with her. He said that he never heard of *ukungena* between Nelson and Magingqi but he knows that Poto had warned that neither Botha nor Nelson should *ngena* Magingqi as this would result in a never-ending dispute.

[108] Another witness, Malangana Ndunge, testified generally about the custom of *ukungena*. He stated that the purpose of *ukungena* was to revive the bloodline of the

deceased. Therefore, it was important that a man who *ngena*'s the widow does not dilute the said bloodline. The restriction of *ukungena* at the level of kingship was in order to prevent the dilution of the bloodline. The widow was not restricted as to who might *ngena* her. There was therefore a danger of the bloodline being diluted. He denied that Gangatha *ngena* 'd Qiya's wife because the former was still alive.

[109] Gwebizilwana Sigcau also testified and denied that the union between Magingqi and Nelson constituted *ukungena* because they fell in love and she left the marital home and they had children. He denied that children born of *ukungena* are permitted to ascend the throne and, like Ndunge, he stated that Gangatha did not *ngena* Qiya's wife.

[110] In determining whether Nelson and Magingqi were engaged in a union of *ukungena*, the Commission stated that it would have to first determine where Magingqi resided before and after the death of Mandlonke. In this regard the Commission considered both versions and took into account the version of the Zanozuko that Magingqi always resided at Mzindlovu during the lifetime of Mandlonke; that she never left the marital home; that Magingqi left Mzindlovu for Khubeni at the instance of Botha; and that as a result of death threats from Botha, she had to leave Khubeni for Matshona. The Commission highlighted that Zanozuko's evidence in this regard was corroborated by Magqwarhu Sigcau, Nelson's third wife.

[111] The Commission also dealt with Mpondombini's version and highlighted that initially the version put by his counsel during Zanozuko's case was that Magingqi never lived at Mzindlovu but was allocated a house at Khubeni; that however, during Mpondombini's case, the version changed: that Mercy Nonceba Jam-Jam testified that both Magingqi and Mampofana lived at Mzindlovu during the lifetime of Mandlonke.

[112] The Commission also referred to the evidence of Mlungu Gideon Sigcau who stated that after Botha had been installed, Botha took Magingqi to Khubeni. It also referred to Mpondombini's testimony to the effect that, upon marriage, Magingqi was informed that she would be allocated a house at Khubeni. She later moved to Khubeni

and visited Mandlonke at Mzindlovu. After the death of Mandlonke, Magingqi left Khubeni at night, taking with her all her belongings including the livestock.

[113] The Commission also referred to Mpondombini's version to the effect that *ukungena* is only valid if the widow does not leave the marital home. It referred to his argument that Magingqi's departure from the marital home supported their contention that *ukungena* union did not exist between Nelson and Magingqi.

[114] After analysing the evidence, the Commission found that the probabilities were that Magingqi lived at Mzindlovu during the lifetime of Mandlonke and moved to Khubeni after his death. It reasoned that her departure from the marital home pointed to one who was fleeing. In support of this reasoning it referred to Mpondombini's own version, that Magingqi left at night with all her belongings including the livestock. It highlighted that Magqwarhu also stated that Magingqi fled from Khubeni at night. This, according to the Commission, was an indication that her departure from the marital home was involuntary.

[115] The Commission then considered what the ritual of *isifingo* entails and whether in the case of Nelson and Magingqi the ritual was performed. It seems from the evidence that *isifingo* has to be carried out in order for *ukungena* to be complete. The Commission referred to the evidence of Zanozuko that *isifingo* was a ritual through which the man chosen by the family to *ngena* the widow was introduced to her maiden family. It further referred to his evidence that Nelson delivered six head of cattle and a white horse to Magingqi's maiden home as *isifingo*.

[116] It highlighted that the following witnesses also supported his version: Magqwarhu Sigcau, who stated that *isifingo* was the ritual of delivering a beast to the widow's maiden home by *ukungena* and introducing the widow's consort and that she was present when this ritual was performed at Magingqi's home in kwaGingqi. It also referred to her evidence to the effect that after *isifingo*, a ritual called *ukuhlamba izitya* (literally translated: to wash dishes) is usually performed at the widow's marital

home. The Commission highlighted that she had no knowledge whether this was done at the marital home of Magingqi.

[117] The Commission dealt with the evidence of Pawuli Ncoyeni who stated that *isifingo* was the presentation of a white horse to the maiden home of the widow's family and the introduction of the *ukungena* consort to the family of the widow. It also referred to his evidence that he was present when this ritual was performed at Magingqi's home.

[118] The Commission considered the evidence of Mpondombini to the effect that the ritual of *isifingo* was performed when a beast was slaughtered. The man introduced himself to the marital home of the widow and the man was counselled to take care of the widow. It dealt with his witnesses in this regard and took into account the evidence of Malangana Ndunge, Mpondombini's fourth witness who stated that according to custom, there was no need for *isifingo*, that was, the introduction of the suitor to the maiden home of the widow, because the widow belonged to her marital home. *Ukuhlamba izitya* was a ritual performed at the marital home of the widow. Mercy Nonceba Jam-Jam stated that one beast and one horse would amount to *isifingo* and that anything more would amount to *lobola*. Gwebizilwana Sigcau stated that *isifingo* was defined as the introduction of the suitor into the marital home of the widow. Traditional beer was brewed and a beast was slaughtered.

[119] After considering the evidence of both parties on this aspect, the Commission's findings were that from the evidence it was not clear what *isifingo* entailed but that it was evident that *isifingo* likely constituted some form of introduction between the consort and the maiden home of the widow; that it was probable that the consort had to introduce himself to the maiden home of the widow; and that it would also be logical for members of the marital family to publicly announce the union and counsel the consort.

[120] The Commission found that, in the case of Nelson and Magingqi, it was common cause that Nelson delivered six beasts and a white horse to the maiden home of

Magingqi. It also found that it was highly improbable that Nelson would have paid *lobola* for his brother's wife, in that according to custom *lobola* was not paid twice for the same woman from the same family. The purpose of *lobola* was to establish and maintain the relationship between the two families. *Lobola* was redeemable because if the woman "misbehaved" she was returned to her maiden home. It found that Nelson was merely introducing himself to the maiden home of Magingqi and that, therefore, the six beasts and horse delivered to the maiden home of Magingqi constituted *isifingo* and not *lobola*.

[121] Having made a finding on *isifingo*, the Commission examined the broader issue of *ukungena*. It noted as common cause the fact that *amaMpondo* were not satisfied with the installation of Botha by the Government. According to Zanozuko, this led to the decision that Nelson should *ngena* Magingqi. It acknowledged that the question whether Nelson performed *ukungena* with Magingqi was disputed by Mpondombini. It found that from the evidence, it was clear that *ukungena* was mooted. In this regard, it found that Magqwarhu Sigcau and Pawuli Ncoyeni supported Zanozuko's version. It found that even though Mpondombini denied that *ukungena* occurred, his witnesses did not. Sylvia Madikizela heard rumours that Nelson was supposed to *ngena* Magingqi. Mlungu Sigcau was aware of the warning against *ukungena* by Poto.

[122] The Commission also found that it was common cause that Ntombiyokwenzani, the first child from the relationship between Nelson and Magingqi, was born whilst Magingqi was at her marital home. Nelson always maintained that Zwelidumile, the second child of this relationship, was the son of Mandlonke. This is consistent with Zwelidumile being the sociological child of Mandlonke. The Commission stated that the evidence of Gwebizilwane supported this to the effect that, when Nelson engaged in *ukubusa* (to request permission for allocation of land) for Zwelidumile, he referred to him as the son of Mandlonke. The Commission also accepted evidence to the effect that Magingqi did not participate in the mourning rituals upon the death of Nelson, which was consistent with a relationship based on *ukungena*. It found that it was highly probable that indeed Ntombiyokwenzani, which literally means "what do we do with

this girl” or “of what use is this girl” was so named due to the fact that *amaMpondo* were disappointed when a boy was not born, that is, a male successor to Mandlonke.

[123] The Commission stated that in view of the fact that *amaMpondo* were frustrated, that custom was not followed when Botha was appointed as Paramount Chief and this was supported by the colonialists, the custom of *ukungena* seemed to the community to be the necessary and the reasonable solution. It then concluded that in the circumstances there was *ukungena* between Nelson and Magingqi and that the objective was to raise a seed to revive the house of Mandlonke.

[124] In considering the evidence of *ukungena* in detail, the Commission was not strictly determining a line of descent traced continuously from an ancestor, genealogy in the strict sense. Mandlonke, the ancestor, had passed on without leaving a male issue. The Commission did not limit its focus to who, of the two brothers, could succeed genealogically but considered whether a custom that could be resorted to, in order to raise a seed, was practised by *amaMpondo* royalty and whether it in fact occurred. In essence, the Commission was looking at *ukungena* as a living customary law practice that *amaMpondo* resorted to in the 1940s in order to prevent Botha, an appointee of the colonial authorities, to ascend the throne as their *iKumkani* over their preferred leader, Nelson.

[125] The next issue the Commission determined was whether according to the custom of *amaMpondo*, a son born of an *ukungena* union could ascend the throne. It referred to Zanozuko’s version that *ukungena* was widely practised at the level of *ubuKumkani* and the example of Qiya and Gangatha which Zanozuko cited in support of this version to the effect that Qiya was the son of Cabe, a former king of *amaMpondo*. After a succession dispute, Qiya was banished and his wife was *ngena’d* by his younger brother, Gangatha.

[126] The Commission also referred to the evidence of Mpondombini who conceded that *ukungena* was practised amongst *amaMpondo* but denied that it was practised at

the level of *ubuKumkani*. Mpondombini went further to state that a son born of *ukungena* never succeeded to the throne of *amaMpondo*. He further denied that the union between Qiya's wife and Gangatha was *ukungena* because at the time of the union Qiya was still alive. According to him, Bala, who was born of the union between Qiya's wife and Gangatha, was regarded as the son of Gangatha and accordingly succeeded him as king.

[127] In this regard the Commission found that *ukungena* was indeed practised at the level of *ubuKumkani*. It stated that the warning by Poto that neither Nelson nor Botha should *ngena* Magingqi was not on the basis that *ukungena* between Magingqi and the sons of Marhelane (Nelson and Botha) would be contrary to custom, but rather that the children born of the union would have a legitimate claim to the kingship of *amaMpondo*. The Commission stated that since it accepted that the above warning by Poto supported Zanozuko's contention that *ukungena* did take place at the level of *ubuKumkani*, it did not deem it necessary to make a finding on the veracity or otherwise of the example of Qiya and Gangatha cited by Zanozuko. It found that according to the customary law and customs of *amaMpondo*, a son born of an *ukungena* union could ascend the throne.

Analysis of the Commission's reasoning

[128] There is no basis to interfere with the finding of the Commission regarding the nature of the relationship between Nelson and Magingqi. Even Mpondombini's witnesses, Mrs Madikizela and Magqwarhu Sigcau and Pawuli Ncoyeni, supported Zanozuko's version that *ukungena* was mooted, even though their recollection of what occurred differed in several respects. Mrs Madikizela heard rumours that Nelson was supposed to *ngena* Magingqi. Mlungu Sigcau was aware of the warning against *ukungena* by Poto. Mrs Madikizela testified that people were expecting Nelson to *ngena* Magingqi so she could give birth to the future king, but that instead of performing *ukungena*, he married her. However, the Commission had to deal with this evidence in the context of undisputed evidence that a brother would not customarily pay *lobola* and marry his late brother's wife, let alone cohabit with her at his late brother's home, and

that *lobola* would not have been paid twice for the same woman by the deceased's family, hence its finding that the union was *ukungena* and not a marriage.

[129] Mercy Nonceba Jam-Jam, who was also Mpondombini's witness, said that she heard rumours of *ukungena* between Nelson and Magingqi, whilst she was at her marital home in eKhubeni but had not witnessed it. The Commission also took into account the evidence of whether Magingqi mourned for Nelson according to custom. One of Mandlonke's wives testified that she did not do so as she was still regarded as Mandlonke's wife and this had to be compared with the evidence of the younger brother to Magingqi, who testified that as a family they only recognised Mandlonke as Magingqi's husband and that Nelson introduced himself to them as the person who had practised *ukungena* with Magingqi. Furthermore, the evidence by these witnesses shows that the custom of *ukungena*, and the practice of *isifingo* to solidify the relationship, was part of the living customary law at the time and the Commission accepted it as such.

[130] The above evidence also shows that the Commission dealt with the living customs of *amaMpondo* at length and did not solely resolve the dispute by following the genealogical system. It considered the fact that the claim by Zanozuko was based on the fact that he was a descendant of the custom of *ukungena* and the cultural practice of *isifingo* performed by his grandparents.

[131] The function of the Commission was to deal with disputes over kingships that arose because of the distortions of customary law in the apartheid and colonial periods. So, the focus of the Commission had to be on the time of those distortions, not on the present or the "prospective" provisions of the Act and whether they have recognition mechanisms that will provide for living customary law to be used to resolve kingship disputes going forward.

[132] Chapter 6 of the Act was essentially a transitional mechanism that provided for the Commission to ensure that the basis on which disputes should be adjudicated was a

basis that should, as far as possible, be re-determined so as to undo colonial and apartheid distortions of customary law in the historical appointment of kings. That is why the Commission was given jurisdiction over disputes dating back to 1927. So, the statutory mandate of the Commission required a primary focus on the time at which the apartheid and colonial distortions took place, not on the popularity of competing candidates today or at some stage between the original distortion and today.

[133] According to Dr Claassens, one of the factors that are relevant and have come to form part of living customary law in the traditional community in question is the popularity of the traditional leader. The respondents relied on this alleged component of living customary law and submitted that the appointment of *iKumkani* should not be dictated only by genealogy but should also be influenced by popularity. This was considered by the Commission. The Commission concluded that the evidence established that Nelson was more popular amongst *amaMpondo* than Botha. Otherwise, why did the *amaMpondo* revolt take place if *amaMpondo* were not signifying their discontent with the leader chosen by the colonial government? Why did *amaMpondo* resort to *ukungena* between Nelson and Magingqi in order to produce an heir? It was in an attempt to avoid having Botha imposed on them as *iKumkani*. Zwelidumile was eventually born after the *ukungena* union between Nelson and Magingqi and he was Mandlonke's sociological son. After the first attempt, a girl named Ntombiyokwenzani was born. The name itself suggests that *amaMpondo* were disappointed after her birth because their objective had not been met. In its findings, the Commission mentions that a series of meetings were held after Mandlonke's death. Poto was invited and in one of the meetings, he chose Botha, but the majority favoured Nelson. The Appellate Division in *Sigcau*, had earlier accepted that because there was a genuine dispute as to the right of succession in an unprecedented situation, two tribal meetings were held at which the majority favoured the claim of Nelson.³²

³² *Sigcau* above n 3.

[134] The respondents submit that Mpondombini was more popular because he was nominated by a majority at the meeting held after Botha's death. In this regard they rely on evidence of the votes in favour of Mpondombini at that meeting but ignore the political context in which those votes took place. This process was, as stated, not in accordance with the living customary law of *amaMpondo*. There is also no basis to conclude that *amaMpondo* paramountcy elections held under the watchful eye of Kaizer Matanzima represented the will of *amaMpondo*.

[135] In finding that Botha was not the rightful heir, the Commission also had regard to a custom it found *amaMpondo* had adopted from *amaXhosa*. The Commission accepted that according to the tradition, the sons of the Right-Hand Houses never succeeded and that Nelson, born of *iQadi* (Mamtshibeni) and the only surviving son of *iQadi*, was entitled to succeed. It rejected Poto's evidence that Botha, of the Right-Hand House could succeed. It rejected his evidence on the basis that he was reneging on the contrary earlier opinion expressed in his book. It found the two versions mutually exclusive.

[136] The mandate of the Commission was to deal with disputes over royal succession that arose because of the distortions of customary law in the apartheid and colonial periods. So, the focus of the Commission had to be on the time of those distortions, not on the present – the “prospective” provisions of the Act have recognition mechanisms that will provide for living customary law to be used to resolve royal succession disputes going forward

[137] The evidence above shows that the Commission dealt with the living customs of *amaMpondo* at length and resolved the dispute not by following the genealogical system strictly, but by considering the fact that Zanozuko's claim was not based on genealogy by itself but on the fact that he was a descendant of the custom of *ukungena* and the cultural practice of *isifingo* performed by his grandparents. He was also the descendant of the candidate who had been identified by the majority of the community in question at two meetings as more popular and having the better claim to kingship.

[138] The contention by Mpondombini that the living customary law of *amaMpondo* was not considered is not supported by the careful manner in which the Commission evaluated the evidence of the parties and the manner in which it arrived at its conclusion. This then brings me to the next criticism and ground on which the Commission's findings are challenged.

The method adopted and the process followed during the investigations

[139] The criticism directed at the method of the investigations and the process followed is that the Commission adopted a court-like process and that it should have adopted a pro-active inquisitorial role rather than leave it to the parties to decide what evidence was to be brought before it. The Acting Chairperson of the Commission responded to this criticism in his answering affidavit and outlined that the mandate of the Commission was to conduct an investigation. He said:

“Insofar as the applicant alleges or contends that the Commission acted *ultra vires* its powers to investigate in that it conducted itself as a court of law, I point out that I stated at the outset of the hearings on 28 January 2008 (Bundle 1, page 4), the following:

‘Lest we misunderstand how the Commission ought to operate and operates let us bear in mind that the concept that underpins our mandate is investigative. And investigate means search into matter, seek information about matter. Thus whilst we subscribe to the principle of fairness and we are keen to comply with procedures of the legal courts, the very nature of our mandate makes it incumbent on us to *explore all possible avenues to access the information we seek*. Consequently, *we do entertain information based on hearsay and over-and-above the hearings we also conduct our own research*. Evidently, a final decision in any matter is based on a wide-encompassing investigation.’”

The Acting Chairperson continued and said:

“When the hearings commenced on 31 March 2008, I again reiterated the following:

‘The decisions of the Commission are final, but they can be challenged through the court of law. In terms of section 22(2) the Commission must carry out its functions in a manner that is fair, objective and impartial. I would also like to point out that the inquiry is set down for this week, it's only a tool to gather evidence. *Hereafter the Commission would still have to conduct its own research. Decided cases will also form part of the Commission's research activity.*’”

[140] There is no criticism that the process followed was unfair. There is also no evidence that the Commission did not conduct its own research as it undertook to do. In fact, there is no evidence suggesting that what the Acting Chairperson says they did, did not happen. It is very important to keep in mind that there was no prescribed method of conducting the investigation. There is also no evidence criticising the expertise of the members of the Commission. In fact, we know that its 2008 recommendation about whether the kingship resided with *amaMpondo aseQaukeni* or *aseNyandeni* was accepted. Of course during the earlier investigation, the members of the Commission consulted the community widely. Nothing suggests that some of that earlier evidence, to the extent relevant, was ignored in the second phase.

[141] It is also curious to note that none of the respondents' predecessors challenged the process at the time of the investigation. They participated fully. The method and procedure followed by the Commission in conducting the investigation was in terms of its mandate and beyond reproach. There is no basis to find that a mandatory and material procedure or condition prescribed by the Framework Act was not complied with. It cannot be said either that relevant considerations were not considered. It also appears from the findings of the Commission that it considered evidence emanating from community meetings that were called during the first phase.

[142] The Commission had a difficult task of sifting through hearsay evidence and evidence based on a faint recollection of the witnesses about what really occurred after the death of Mandlonke and somehow connect the dots about the prevailing custom at

the time and compare this against the witnesses' recollections of what had happened factually.

[143] The quotation below encapsulates how the Commission had to deal with conflicting evidence during the hearing:

“This is the problem of history. We cannot know that which we were not there to see and hear and experience for ourselves. We must rely upon the words of others. Those who were there in the olden days, they told stories to the children so that the children would know, so that the children could tell stories to their children. And so on, and so on. But now we come upon the problem of conflicting stories. Kojo Nyarko says that when the warriors came to his village their coats were red, but Kwame Adu says that they were blue. Whose story do we believe, then?

We believe the one who has power. He is the one who gets to write the story. So when you study history, you must ask yourself, whose story am I missing? Whose voice was suppressed so that this voice could come forth? Once you have figured that out, you must find that story too. From there you get a clearer, yet still imperfect, picture.”³³

[144] The Commission had to ask itself what story it was missing and find that story too. It heard evidence from the community members, members of the royal family and the contenders for the kingship position. The Commission also conducted its own research in line with the evidence and made findings which took this into account. In the first investigations, it had expanded its investigations and consulted the community widely before it recognised a single *amaMpondo* kingship, under the lineage of a common ancestor, Mqikela. This information was still at its disposal. It is not said what other information regarding the living law of *amaMpondo* was ignored by it, simply because it did not adopt the same process it adopted during the first phase.

[145] Secondly, it found that Zanozuko was the rightful successor to the throne of *amaMpondo* and that Mpondombini's ascendancy to the status of Paramount Chief had been irregular. It is this determination that lies at the heart of the current matter. There

³³ Gyasi *Homegoing* (Penguin Random House, United Kingdom 2017) at 206.

is therefore no basis to review the findings of the Commission on this ground. It was not successfully argued that relevant considerations were ignored or that there was a material error of law in this regard.

Should there be deference to the findings of the Commission, specifically on findings of fact?

[146] When one considers this review application, it is helpful to set out how the courts approach the decisions of administrative bodies in review applications. In *Bapedi*,³⁴ this Court acknowledged that our right to just administrative action and PAJA, the legislation enacted to give effect to that right, require rigorous scrutiny of the decisions of administrative bodies. But the Court cautioned that neither asks courts to substitute their opinions for those of administrative bodies. It also highlighted that it is not required that a decision of an administrative body be perfect or, in the court's estimation, the best decision on the facts. This Court reasoned that this is particularly so for rationality review under PAJA. It referred to Hoexter:

“[A] crucial feature of [rationality review under PAJA] is that it demands merely a rational connection – not perfect or ideal rationality. In a different context Davis J has described a rational connection test of this sort as relatively deferential because it calls for rationality and justification rather than the substitution of the Court's opinion for that of the tribunal on the basis that it finds the decision . . . substantively incorrect”.³⁵

[147] This Court continued and held that a level of deference is necessary in a case where matters fall within the special expertise of a particular decision-making body.³⁶ The Court referred to *Bato Star*³⁷ and highlighted that there this Court said that we should treat the decisions of administrative bodies with “appropriate respect” and give

³⁴ *Bapedi Marota Mamone v Commission of Traditional Leadership Disputes and Claims* [2014] ZACC 36; 2015 (3) BCLR 268 (CC) (*Bapedi*).

³⁵ *Id* at para 78.

³⁶ *Id* at para 79.

³⁷ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490; 2004 (7) BCLR 687 (CC).

due weight to findings of fact. More importantly this Court highlighted that the Commission, which was also tasked to investigate the *Vhavhenda* kingship dispute in *Bapedi*, is a specialist body constituted of experts who are knowledgeable regarding customs and the institution of traditional leadership. The Court continued:

“As this Court held in *Nxumalo*, it is appropriate to treat its decisions with some deference. When considering a claim, the Commission is required by section 25(3)(a) of the Framework Act to ‘consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred that gave rise to the dispute or claim.’ Notably, this provision tasks the Commission not only with applying the relevant customary law to the case before it, but also with determining what that law was at the relevant time. This latter question depends primarily on historical and social facts, which the Commission must establish through evidence led before it and its own investigation.”

[148] Professor Hoexter states that like any other law, customary law answers to the Constitution.³⁸ She further remarks that, as with any unwritten source, “an administrator who relies on customary law may have a difficulty in establishing the existence and extent of his powers”.³⁹

[149] What the Commission was tasked to do in terms of its mandate in *Bapedi* is no different from what the Commission had to do in this matter. It also comprised of practising jurists, academics, and linguists who were knowledgeable experts in matters relating to the institution of traditional leadership, history, customary law, and traditional affairs. The Commission was also assisted by researchers.⁴⁰

³⁸ Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta & Co) at 49.

³⁹ Id at 49-50.

[150] It is helpful to also consider what the Supreme Court of Appeal said in *Logbro Properties CC*,⁴¹ in describing “deference” in this context as—

“a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.”⁴²

[151] In *South Durban Community Environmental Alliance*⁴³ the Supreme Court of Appeal said:

“In sum, a court may interfere where a functionary exercises a competence to decide facts but in doing so fails to get the facts right in rendering a decision, provided the facts are material, were established, and meet a threshold of objective verifiability. That is to say, an error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts.”

⁴¹ *Logbro Properties CC v Bedderson N.O.* 2003 (2) SA 460 (SCA) (*Logbro Properties CC*) at 471A-D at paras 21-2; Hoexter, “The Future of Judicial Review in South African Administrative Law” (2000) 117 *SALJ* 484 at 501-502.

⁴² *Logbro Properties CC* id at para 21. The quotation came from the Hoexter article at 501-2, where the author in turn cited Cockrell ““Can you Paradigm?” Another Perspective on the Public Law / Private Law Divide” 1993 *Acta Juridica* at 227.

⁴³ *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government* [2020] ZASCA 39; 2020 (4) SA 453 (SCA); 2020 (7) BCLR 789 (SCA) para 23 (as said in *Airports Company South Africa v Tswelokgotso Trading Enterprises* [2018] ZAGPJHC 476; 2019 (1) SA 204 (GJ); [2019] JOL 41030 (GJ) at para 12); *Dumani v Nair* [2012] ZASCA 196; 2013 (2) SA 274 (SCA); [2013] 2 All SA 125 (SCA); and *Pepcor Retirement Fund v Financial Services Board* [2003] ZASCA 56; 2003 (6) SA 38 (SCA); [2003] 3 All SA 21 (SCA).

[152] In this matter, the applicants allege that the Supreme Court of Appeal entered into the fray and made findings that the Commission's factual determinations were indeed incorrect and essentially morphed the review proceedings into an appeal or at the very least into a review based on an error of fact.

[153] One of the functions of the Commission was to take into account and apply both customary law and the customs of the relevant traditional community as they existed at the time when the events giving rise to the dispute or claim occurred (as stipulated in section 25(3)(a)). In dealing with the submissions from the disputants, the Commission examined in detail, the customary genealogical rules regarding traditional leadership, and to a certain extent, popularity. It also considered the impact of a commission established by the colonial Government in the Transkei (1938 Commission), which made some determinations regarding the character of Nelson as a potential *iKumkani*. The Commission found that such determinations from the 1938 Commission were not in line with custom. Therefore, although the Commission did not deal to any specific extent with fitness to govern, it is safe to assume that fitness to govern is reflected in popularity, and the Commission was correct in its refusal to place reliance on an assessment of fitness to govern by white colonial administrators whose preference was for pliant traditional leaders.

[154] Furthermore, the Commission went on to set the contextual scene at that time, outlining how the Native Administration Act and colonial Government sought to frustrate the *amaMpondo* people and impose traditional leaders who were more pliant and willing to fall in line with the Government's objectives. The Commission found that Botha was such a leader, hence his imposition as a Paramount Chief of the *amaMpondo*. The Commission also considered its own research and was guided by the expertise of its panel members.

[155] The process and approach adopted was in line with the statutory purpose and mandate of the Commission. The Commission also matched the evidence with the

socio-political context at the time of contestation between Nelson and Botha whilst still considering the preceding accepted customary practices, leading to its conclusions. It also referred to legal proceedings between the contending parties at the time, and the minutes of meetings held to discuss various issues concerning paramount chieftainship as well as kingship.

[156] It is not clear why the Supreme Court of Appeal rejected the findings of the Commission that firstly, Botha, as the son of the Right-Hand House, could never succeed as *iKumkani* and, secondly, that *amaMpondo* resorted to *ukungena* to raise a seed for Mandlonke's house. The Supreme Court of Appeal failed to show how these findings were out of kilter with the evidence presented to the Commission and the Commission's own research. This failure was primarily due to a lack of acknowledgment that the Commission was an expert body in its own right like another administrative body.⁴⁴ It overlooked the fact that the Commission comprehensively engaged in the collection and evaluation of evidence from various sources and conducted its own research.

[157] Another error by the Supreme Court of Appeal was that it ventured beyond the proper scope of its judicial review powers by suggesting that the Commission should have considered a broader scope of evidence to obtain a more comprehensive view of living customary law of *amaMpondo*. It second-guessed the assertion of the Acting Chairperson, who in his affidavit states that the living customary law of *amaMpondo* at the time was considered and how the Commission's report and evidence are replete with evidence of what occurred at the relevant time.

[158] To suggest that the Commission should have held an *imbizo* (a public gathering of the community usually convened at the behest of a traditional leader) goes against the assertion by the Acting Chairperson who states that during the first phase, that process was embarked upon and that during the second phase, the Commission relied

⁴⁴ See by way of analogy, *Bato Star* above n 40 at para 48.

on all the evidence at the second hearings and supplemented this with evidence already at its own disposal and further research. This begs the following questions: was an *imbizo* of *amaMpondo* the only method to be adopted by the Commission and did it have to do it every time it was tasked to conduct an investigation? Additionally, was there a method prescribed for gathering evidence during the investigation? The answer is no. This was a matter to be determined by the Commission based on its expertise.

[159] Khampepe J in *Bapedi* emphasised that, even if arguments concerning the factual correctness of findings are persuasive, that is not the focus of a review. Even differing in the interpretation of the facts to the Commission does not, especially given the respect owed to its findings in this context, entitle a court to set aside the Commission's decision. There is no cogent analysis in the Supreme Court of Appeal judgment that is illustrative of any incongruity or discordance, between the evidence placed before the Commission and gathered through its research, and its resulting findings. Therefore, the Supreme Court of Appeal had no grounds to re-determine the factual findings of the Commission.

Conclusion

[160] The mandate of the Commission was to determine the dispute in terms of section 25(3)(a) of the unamended Framework Act. In this regard it had to consider and apply customary law and customs of the relevant traditional community as they were when events occurred that gave rise to the dispute or claim. We know that the rightful successor to *uKumkani* Mandlonke was never determined customarily and that the dispute regarding kingship in terms of customary law was not resolved. Therefore, the events that occurred that gave rise to the dispute or claim occurred way back in 1937 when *uKumkani* Mandlonke died without leaving an heir to the throne.

[161] As illustrated above, the Commission carefully analysed the evidence relating to the customary law practised by *amaMpondo* at the time and how it was applied in order to try and resolve the dispute regarding the successor to the kingship after Mandlonke died without leaving an heir. Its findings were based on that analysis. Therefore, apart

from genealogy, the Commission analysed how *amaMpondo* resorted to *ukungena* and *isifingo* in order to raise seed in Mandlonke's house. It concluded that Zanozuko was a descendant of those customs.

[162] It also analysed the evidence of events showing that Nelson was more popular than Botha and how he lost the claim to kingship through colonial intervention. The Commission is very careful in its report to emphasise and highlight that Botha was actually a Paramount Chief and not a king of *amaMpondo* because the colonialists distorted the *amaMpondo* history and their titles. When Mpondombini succeeded his father, he did so as a Paramount Chief and not as a king of *amaMpondo*. In fact, the headnote of the meeting where he was nominated by Nelson and others states that the meeting was convened to forward names to the Governor. The purpose of the meeting therefore was not to correct what happened in 1938 and the appointment of Botha as a Paramount Chief. It was to nominate and send Botha's successor as Paramount Chief to the colonial authorities.

[163] The appointment of Botha, was something that certainly called for intervention and reconsideration by the Commission pursuant to its mandate, because it was patently impacted by the colonial authorities and ignored the very criterion of popular support for which the respondents contend as part of living customary law.

[164] Furthermore, Mpondombini's nomination was a decision taken in the regional authority, a body that has its origins in the Bantu Authorities Act,⁴⁵ and it was subject to scrutiny and confirmation by Kaizer Matanzima under section 66 of the Transkei Constitution, which may have influenced Nelson's conduct. I also do not think a once-off election called by Kaizer Matanzima as a statutory functionary of an apartheid imposed homeland system is enough of a basis for concluding that elections have become part of *amaMpondo* living customary law.

⁴⁵ 68 of 1951.

[165] Regarding the process followed by the Commission, there is no complaint that it was unfair. No objections were raised at the time until it was finalised. There was no prescribed procedure with which the Commission was required to comply in conducting the investigation. There is also no evidence that the Commission considered irrelevant factors or did not consider factors it had to consider. There is no justification for second-guessing the assertion by the Acting Chairperson that some of the research collected during the first phase was used, as well as the expertise of the panel members and their own research. In fact, it appears through their reference to the Appellate Division and Govan Mbeki and Poto's books that they did not confine themselves to the evidence of the witnesses.

[166] This was a review, not an appeal. A review is different from an appeal. As stated above with reference to *Bapedi*, even a difference in the interpretation of the facts placed before the Commission, does not entitle a court to set aside the Commission's decision. So long as the Commission's decision is rational and does not suffer from a review ground set out in section 6(2) of PAJA, a court may not intervene.⁴⁶ Having said that, I do not find a basis to find that the Commission committed an error in law or in fact. There is thus no basis to review the findings of the Commission.

Remedy

[167] The respondents submit that, in addition to the review and setting aside of the Commission's decision, the matter must be referred to the Royal Family for determination. As illustrated above, I have found no basis to review the findings of the Commission. The application for review has no merit.

[168] The parties approached the courts because they were struggling to resolve the dispute amongst themselves. There have been decades of uncertainty for *amaMpondo* as to who should be the true heir to the throne.⁴⁷ In my view, therefore, even from a

⁴⁶ *Bapedi* above n 55 at para 92.

⁴⁷ *Shilubana* above n 14 at para 43.

practical point of view, it is impossible to determine who the “royal family” is without first determining which line of descent, that of Nelson or that of Botha, produces the true heir.

[169] This Court in *Zuma* held:

“Like all things in life, like the best of times and the worst of times, litigation must, at some point, come to an end. The Constitutional Court, as the highest court in the Republic, is constitutionally enjoined to act as the final arbiter in litigation. This role must not be misunderstood, mischaracterised, nor taken lightly, for the principles of legal certainty and finality of judgments are the oxygen without which the rule of law languishes, suffocates and perishes.”⁴⁸

[170] This case requires an effective remedy, which in this case is an order replacing the decision of the Supreme Court of Appeal with one dismissing the appeal against the judgment and order of the High Court.⁴⁹ Mpondombini and Zanozuko have passed away. But, in November 2018 the President recognised Zanozuko as King and this was duly promulgated in the *Government Gazette*. Zanozuko died after his recognition. Although his successor will have to be identified, this will be done against the background that Zanozuko was so recognised as the King. The order of this Court therefore leaves in place such recognition.

Costs

[171] The Supreme Court of Appeal ordered the applicants to pay the respondents costs. This was in light of the fact that the Supreme Court of Appeal had reversed the High Court’s decision. It is common cause that the award of costs is a matter within the discretion of the Court. Therefore, I make no order as to costs.

⁴⁸ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* [2021] ZACC 28; 2021 JDR 2069 (CC); 2021 (11) BCLR 1263 (CC) at para 1.

⁴⁹ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) at para 89.

Order

[172] I therefore make the following order:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:
 - “(i) The appeal is dismissed.
 - (ii) There is no order as to costs.”
4. There is no order as to costs in this Court.

For the Applicants:

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