

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

Case Number: A72/2023

1.	REPORTABLE: YES / NO
2.	OF INTEREST TO OTHER JUDGES: YES/ NO
3.	REVISED.
24 February 2025	
DATE	SIGNATURE

In the matter between:

NGOMANE-LUGEDLANE INNER ROYAL FAMILY

Appellant

and

THE PREMIER OF MPUMALANGA

First Respondent

**MPUMALANGA DEPARTMENT OF
CO-OPERATIVE GEVERNANCE AND
TRADITIONAL AFFIARS**

Second Respondent

SIZWE MKHULU NGOMANE

Third Respondent

This judgment will be handed y circulation to the parties and by publication on SAFLII. The judgment shall be deemed to have been handed down on 24 February 2025 at 10:00.

JUDGMENT

Roelofse AJ:

INTRODUCTION

[1] The appellant appeals an order by this court dated 21 July 2023 (Mashile J sitting, hereinafter referred to as “the court *a quo*”), dismissing its application for an order compelling specific performance by the first respondent in terms of her obligations as set out in section 20 of the Mpumalanga Traditional Leadership and Governance Act 3 of 2015 (“the Act”); compelling the first respondent to withdraw the certificate of recognition of the third respondent as Inkhosi; to publish a notice in the provincial Gazette with particulars of the removed Inkhosi; and to inform the appellant, the third respondent and the Provincial House of Traditional Leaders of the removal of the third respondent as Inkhosi.

[2] The appellant purports¹ to be the Ngomane-Lugedane Inner Royal Family (“the royal family”). The royal family was established and is recognised in terms of the Mpumalanga Traditional Leadership and Governance Act 3 of 2005 (“the Act”). The first respondent is the Premier of Mpumalanga Province (“the Premier”). The second respondent is the Mpumalanga Department of Cooperative Governance and Traditional Affairs (“COGTA”). The third respondent is the present Chief (“the Chief”) of the Ngomane-Lugedane Traditional Community (“the community”).

[3] The appellant seeks the removal of the Chief. The purpose of the application

¹ I refer to the appellant as the “purported” Ngomane - Lugedane Inner Royal Family because, in his confirmatory affidavit, the Chief denies that the Ngomane - Lugedane Inner Royal Family is before court. The Chief alleges that the persons that took the purported resolution does not constitute the Ngomane - Lugedane Inner Royal Family.

was for the Premier to act in accordance with her powers in terms of section 20 of the Act².

[4] The Premier opposed the application. COGTA did not oppose the application. Although not opposing the application, the Chief filed a confirmatory affidavit wherein the appellant's allegations were challenged. In its replying affidavit, the appellant did not deal with the disputes or evidence raised by the Chief in his confirmatory affidavit. Although the appellant's failure to deal with the allegations made by the Chief in his confirmatory affidavit is not decisive in this appeal, it will demonstrate why the appellant's interpretation of the provisions of section 20³ of the Act and more particularly, the powers of the Premier, is wrong.

FACTUAL BACKGROUND

[5] The appellant took a purported resolution on 3 December 2020 ("the resolution") in terms of which the purported members of the royal family are alleged to have resolved to remove the third respondent as Chief, head and representative of the community; remove him as chairperson of the community's tribal Council; disallowing him to represent the community in any forum or institution and that the third respondent's certificate of Chieftaincy and the recognition by the government through the Department of Cooperative Governance and Traditional Affairs ("COGTA) be revoked "entirely."

[6] The appellant's reasons for the removal of the chief are recorded in the resolution. The Chief allegedly, with total disregard of the Lugedlane-Nkomane royal family, destroys the very being of the Ngomane tribe by chasing away its

² See paragraph 13 below where the provision of the relevant section of the Act is set out.

³ Fn 2 *ibid*.

ancestors; fails to execute traditional duties and is also allegedly involved in criminality.

[7] Pursuant to the purported resolution, the appellant informed the Premier and COGTA about the resolution.⁴ When the Premier did not act upon the purported resolution, the appellant demanded that the Premier act in terms of section 20(3) of the Act.⁵

[8] On 21 May 2021, the Chief Director: Traditional Institutional Management sent a memorandum⁶ to the Acting Head: Cooperative Governance and Traditional Affairs dealing with the removal of the Chief. The purpose of the memorandum was: *“To provide a report on the interventions made by the Department in the above-mentioned matter.....”*, the matter being the removal of the Chief.⁷

[9] In the memorandum, amongst others, it is recorded that COGTA has made intervention relating to the correspondence over the Chief’s alleged conduct of the affairs of the Chieftaincy, including harassment of the members and a dysfunctional working relationship between him and the inner royal family. The memorandum also refers to the correspondence received from the appellant’s attorneys. The Chief Director sets out the failures of interventions and meetings to resolve the impasse between the parties. In the memorandum it is alleged that the inner royal family admitted the existence of family disputes and lack the of cooperation among the members of the family. In the memorandum it is also recorded that it was agreed that all affected parties attend a joint meeting to be conducted with everyone

⁴ On 28 January 2021 and 20 January 2021 respectively.

⁵ Fn 2 *ibid*.

⁶ Annexure “RM1”.

⁷ The appellant does not deny the memorandum or its content.

involved in the dispute to find a solution. Furthermore, it is recorded in the memorandum that the family was unable to resolve the issues amongst themselves. The memorandum states that the department's position is that the allegations against the Chief are false.

[10] What is furthermore clear from the memorandum is that the dispute concerns various factions within the royal family.

[11] In paragraph 3.13 of the memorandum, the director records as follows:

“It was clarified that the recognition certificate of the current incumbent is still valid and the senior traditional leader together with the royal family must interact and engage the communities to dispel those false rumours and misinformation being spread around the communities and to take a stand, by reporting criminal elements other than the laissez faire approach they have adopted. The family were satisfied with most of the responses provided by the department and undertook to engage collectively in smooth running of the chieftaincy.”

[12] It is against this backdrop that the Premier states in paragraph 15 of the answering affidavit as follows:

“To this very extent, I submit that before taking any steps as envisaged in Section 20(3) of the Act, I need to be convinced that it is in the interest of the Traditional Community that the grounds raised are justifiable for me to invoke my powers in terms of the Act. I must further indicate that the issues relating to the removal of the Third Respondent as Inkhosi was dealt with by the second respondent thereafter, the second respondent recorded its findings in the report.”

THE PROVISIONS OF THE ACT

[13] The relevant provisions of the Act regarding the removal of an Inkhosi are as follows:

“20. Withdrawal of removal of Inkhosi

- (1) An inkhosi may be removed from office on the grounds of -
 - (a) conviction of an offence which carries a sentence of imprisonment of more than 12 months without the option of a fine;
 - (b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that inkhosi to function as such;
 - (c) wrongful appointment or recognition; or
 - (d) a transgression of a customary rule or principle that warrants removal.
- (2) Whenever any of the grounds referred to in subsection (1)(a), (b) and (d) come to the attention of the inner royal family and the inner royal family decides to remove an inkhosi, the inner royal family concerned must, within a reasonable time and through the relevant customary structure -
 - (a) inform the Premier of the particulars of the inkhosi to be removed; and
 - (b) furnish reasons for such removal.
- (3) Upon receipt of the particulars of the inkhosi to be removed and the reasons for such removal as contemplated in subsection (2), the Premier must-
 - (a) withdraw the certificate of recognition of such an inkhosi;
 - (b) publish a notice in the Provincial Gazette with particulars of the removed inkhosi, and
 - (c) inform the inner royal family concerned, the removed

inkhosi and the Provincial House of Traditional Leaders of such removal.

- (4) Where an inkhosi is removed from office, a successor identified in line with customs may, subject to the provisions of this Act, assume the position, role and responsibilities of such inkhosi.”

[14] This appeal largely concerns the provisions of Section 20(3) of the Act. Other peripheral issues include the alleged transgression by the Chief of a customary rule or principle that warrants removal and the existence of factual disputes in this regard.

THE APPELLANT’S INTERPRETATION OF SECTION 20(3) OF THE ACT

[15] It is the appellant’s view that Section 20(3) of the Act does not afford the Premier any discretion. Therefore, as soon as the Premier is notified about a decision to remove an Inkhosi, the Premier must remove the Chief. The appellant alleged that “....*the reasons for the removal of the Third Respondent from office of Inkhosi has been properly set out and is same in line with the prerequisites of the Act*”⁸ and “.... *But that, despite being obliged in terms of the Act and to act accordingly, the first respondent has failed and all [sic]refused to perform its duties in terms of section 20 of the Act.*”⁹The appellant argued in the court *a quo* that the wording of section 20 of the Act and section 10B of Act 51 of 2003 is couched in peremptory terms. Therefore, these provisions deprive the Premier of any discretion following the receipt of a decision to remove an Inkhosi. The thrust of the appellant’s argument in this court was the same.

THE PREMIER’S VIEW OF SECTION 20(3) THE ACT

[16] The Premier’s view is that in acting in terms of Section 20(3) of the Act, the Premier needs to be convinced that it would be in the interest of the Traditional

⁸ Para. 11 of the Founding Affidavit at p. 13.

⁹ Para. 18 of the Founding Affidavit at p. 15.

Community that the grounds for the removal of an Inkhosi are justifiable and would be in the interest of Traditional Community. The Premier says that the Premier will not at the mere request and upon allegations made by certain members of a Traditional Community, withdraw a certificate of recognition or remove an incumbent Inkhosi. The Premier's view is therefore that the Premier retains a discretion to act in terms of Section 20(3) of the Act.

FINDINGS OF THE COURT A QUO

[17] The court *a quo* identified three issues to be considered, being: whether the Premier has a discretion to remove an Inkhosi or not; whether the Chief violated the provisions of section 20(1)(a), (b) and (d) of the Act; and whether there are disputes of fact.

Does the Premier have a discretion?

[18] In interpreting the provisions of section 20(4) of the Act, the court *a quo* considered the purpose of the Act and found that the purpose of the Act is to provide for the recognition and withdrawal of the recognition of traditional communities, the establishment of their governing structures and the appointment and removal of functionaries within those governing structures. In addition, the court *a quo* also considered the provisions of sections 20(1) to 20(4) of the Act. The court *a quo* considered the discretion that is afforded to the Premier in Section 19(4)(a) to (c) of the Act where the Premier has a discretion to refer a decision by a Traditional Community to appoint an Inkhosi to the Provincial House of Traditional Leaders or refuse to recognize the person identified and refer matter back to the inner royal family for reconsideration.

[19] The court *a quo* found:

“The duty of assessing whether or not the assumption of the role of the removed Inkhosi from office accords with the customs and the provisions of the Act rests squarely with the Premier. The purpose of the recognition is to ensure that traditional communities, their governing structures and functions operate within the confines of the Constitution to which the Republic of South Africa subjects.”¹⁰

Did the Chief violate the provisions of Section 20(1)((a), (b) or (d) of the Act?

[20] The court *a quo* found that the only ground upon which the appellant could rely upon was the ground in section 20(3)(d) of the Act which provides that the Chief must have transgressed a customary rule or principle that warrants removal. In this regard the court *a quo* found that the onus of showing the existence of the customary rule or principle and that the Chief has transgressed it rested that upon the appellant. The court *a quo* found that the appellant had not shown the existence of the customary rule, that it was transgressed and that the transgression warrants the removal of the Chief.

Dispute of fact?

[21] In the court *a quo*, the Premier argued that upon the facts and evidence in the papers, the appellant has failed to discharge its onus of proving that the Chief has transgressed or violated a customary rule of the community. To that end, so the Premier says, there is a material dispute of fact. In this court’s view, this is a point well taken. The appellant sought a final order which may only be granted in motion proceedings if the facts averred in the applicant’s affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The Chief’s confirmatory affidavit seriously contests the evidence presented by the appellant especially with regards to his alleged transgression of

¹⁰ Para. 24 of the judgment.

supposed customary rules. As part of the premier's version, this evidence cannot be overlooked. Yet it is not necessary to decide the appeal on this basis for reasons that will appear later in this judgment.

[22] The court *a quo* found that inasmuch as the Premier has referred to disputes of fact which are incapable of resolution on the papers, once the court has found that the Premier has a discretion, whether or not there are disputes of fact becomes irrelevant. The court *a quo* did however find that having regard to the confirmatory affidavits, no transgression of the customary rule or principle was established.

THE GROUNDS OF APPEAL

[23] Summarised, the appellant raises ten grounds of appeal. The appellant's grounds of appeal are as follows: (a) the court *a quo* failed to attribute the ordinary meaning to the word "must" in section 20(3), being a peremptory provision of the Act; (b) the court *a quo* erred in attributing a further obligation beyond what is required in section 20(3); (c) the appellant has furnished sufficient reasons for the removal of the Chief and that is all that was required; (d) the appellant failed to show (and the court *a quo* failed to consider why) the Premier would be in a better position or more suitable to evaluate the custom or tradition and the observance thereof rather than to simply act on the peremptory provisions of section 20(3); (e) the Premier only had to be satisfied that the appellant has taken certain preliminary steps in seeking the removal of the Chief; (f) the court *a quo* erred in equating the word "must" in section 20 with the word "may"; (g) the court *a quo* erred in finding that the duty of assessing whether or not the Inkhosi must be removed lies with the Premier; (h) the court *a quo* erred in ignoring that the Chief did not challenge the decision or the application; (i) the court *a quo* erred in finding that the Chief did not

transgress the grounds listed in section 20(3)((a) to (d); (j) the court *a quo* erred in awarding costs to the respondents.

ANALYSIS

Grounds of appeal: (a), (b), (e), (f) and (g)

[24] The appellant's challenge of the powers of the Premier in terms of Section 20(3) of the Act is unfounded. It can never be said that it is expected of the Premier to be aware of every customary rule or principle. For that purpose, COGTA is part of the process. The Premier has established that in this matter, the disputes were referred to COGTA. As a matter of fact, the appellant itself wrote to COGTA and also forwarded its resolution to it. The report clearly shows COGTA's involvement and its efforts to resolve the dispute. The appellant relies upon *Minister of Environmental Affairs and Tourism and Others v Pepper Bay Fishing (Pty) Ltd*¹¹ for its submission that the word "must" in Section 20(3) of the Act shows that those provisions are peremptory and therefore, the Premier had no choice but to remove the Chief from office. *Pepper Bay* lays down a proviso. The proviso is that circumstances may mitigate against a peremptory interpretation. What those circumstances are will inevitable differ from case to case or else *Pepper Bay* would have listed those circumstances. In *Cool Ideas 1186 CC v Hubbard and Another*¹², the following was held:

¹¹ 2004(1) SA 308 (SCA), para. 32.

¹² *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), referred to in argument by the appellant.

“[28] A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).” (Endnotes omitted).

[25] The appellant’s insistence on the literal meaning of the word “must” in Section 20(3) of the Act ignores the riders mentioned in *Cool Ideas*.¹³ To attribute only a literal meaning to the word “must” in Section 20(3) of the Act would offend the purpose of the Act which includes, amongst other things, the upholding of the principle of democratic governance and the promotion of unity. In addition, since the Act does not provide for a procedure for an Inkhosi to be heard before a decision in terms of Section 20(3) is taken, same will not only offend the purpose and object of the Act but also would be unconstitutional. Such a literal interpretation would be at odds with the Constitutional preservation of the provisions of section 20(3). In our view, the court *a quo* correctly found that the context of section 20(3) of the Act mitigates against a peremptory meaning of the section in that the Premier is afforded no discretion.

Grounds of appeal: (c) and (d)

[26] The reasons the applicant furnished for the removal of the chief are set out in the resolution. These reasons are challenged in the Chief’s confirmatory affidavit.

¹³ Para, 24 *ibid*.

This court agrees with the court *a quo* that once it is found that the Premier retains a discretion, the disputes that are raised on the papers are of no moment. The memorandum is telling. The disputes were clearly considered by COGTA who disagreed that the Chief must be removed from office.

Ground of appeal: (h)

[27] Although the Chief did not oppose the application, the Chief filed a confirmatory affidavit wherein he challenged the applicant's standing, the resolution and the allegations against him. These issues were therefore properly in dispute.

Ground of appeal: (j)

[28] As the appellant's challenge to the costs order that was made by the court *a quo*, this court is not prepared to interfere because in that regard there was no misdirection committed by the court *a quo*.

[29] In the premises, the appeal must fail. The following order is proposed:

- (a) The appeal is dismissed.
- (b) The appellant is ordered to pay the respondent's costs including the costs consequent upon the costs of the employment of counsel to be taxed on Scale B.




Roelofse AJ

Acting Judge of the High Court

I agree and it is so ordered




Mphahlele JP

I agree.




Ratshibvumo DJP

DATE OF HEARING: 23 August 2024

DATE OF JUDGMENT: 24 February 2025

APPEARANCES:

For the Appellant: Mr H Fourie on instructions of De Waal and Skosana Inc.

For the First Respondent: Mr TH Mathebula on instructions of TH Mathebula Incorporated