



THE SUPREME COURT OF APPEAL REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

SCA CASE NOS:147/2024;
148/2024; 217/2024 and 250/2024

HIGH COURT CASE NO: 38670/2022

In the matter between:

THE PRESIDENT OF THE

REPUBLIC OF SOUTH AFRICA

FIRST APPELLANT

PRINCE MISUZULU

KA-ZWELITHINI ZULU

SECOND APPELLANT

THE MINISTER, COOPERATIVE

GOVERNANCE AND TRADITIONAL AFFAIRS

THIRD APPELLANT

and

PRINCE MBONISI BHEKITHEMBA KA BHEKUZULU

And 27 Others

FIRST RESPONDENT

PRINCE SIMAKADE KA-ZWELITHINI ZULU

SECOND RESPONDENT

PRINCE MANGOSUTHU BUTHELEZI

THIRD RESPONDENT

PREMIER: KWAZULU-NATAL PROVINCE

FOURTH RESPONDENT

NATIONAL HOUSE OF

TRADITIONAL LEADERS

FIFTH RESPONDENT

KWAZULU-NATAL HOUSE OF

TRADITIONAL LEADERS

SIXTH RESPONDENT

MEMBERS OF THE ZULU ROYAL FAMILY

IDENTIFIED IN ANNEXURE “A”

SEVENTH RESPONDENT

AND

HIGH COURT CASE NO:

19891/22

In the matter between:

PRESIDENT OF THE REPUBLIC

OF SOUTH AFRICA

FIRST APPELLANT

PRINCE MISUZULU KA ZWELITHINI

ZULU

SECOND APPELLANT

THE MINISTER, COOPERATIVE

GOVERNANCE AND TRADITIONAL AFFAIRS

THIRD APPELLANT

and

PRINCE MBONISI BHEKITHEMBA KA BHEKUZULU

and 27 Others

FIRST RESPONDENT

PRINCE SIMAKADE KA-ZWELITHINI ZULU

SECOND RESPONDENT

PRINCE MANGOSUTHU BUTHELEZI	THIRD RESPONDENT
PREMIER OF KWAZULU-NATAL PROVINCE	FOURTH RESPONDENT
PRINCESS THEMBI NDLOVU	FIFTH RESPONDENT
PRINCE THULANI ZULU	SIXTH RESPONDENT
QUEEN MAYVIS ZUNGU	SEVENTH RESPONDENT
QUEEN BUHLE MATHE	EIGHTH RESPONDENT
QUEEN THANDEKILE JANE NDLOVU	NINTH RESPONDENT
QUEEN NOMPUMELELO MCHIZA	TENTH RESPONDENT
QUEEN ZOLA ZELUSIWE MAFU	ELEVENTH RESPONDENT
QUEEN SIBONGILE WINIFRED ZULU	TWELFTH RESPONDENT
MEMBERS OF THE ROYAL FAMILY AS LISTED IN ANNEXURE "A"	THIRTEENTH RESPONDENT

Neutral citation: *The President of the Republic of South Africa and Others v Prince Mbonisi and Others* (147/2024; 148/2024; 217/2024 and 250/2024) [2025] ZASCA 143 (06 October 2025)

Coram: Zondi DP and Nicholls JA and Saldulker, Phatshoane and Molitsoane AJJA

Heard: 28 and 29 May 2025

Delivered: 06 October 2025

Summary: Traditional leadership dispute – whether the identification of the King-Elect by the Zulu Royal House was in accordance with the Zulu customary law and customs – whether the President of the Republic of South Africa's recognition decision complied with the provisions of s 8 of the Traditional and Khoi-San Leadership Act 3 of 2019 – whether the *res judicata* principles were correctly applied to the identification issue – remittal order by the high court was incompetent.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Davis J sitting as court of first instance):

- 1 The first and second appellants' appeal is upheld.
- 2 The order of the high court is set aside and replaced with the following:
 - '(a) The first applicant's application under case number 19891/2022 is dismissed;
 - (b) The first applicant is ordered to pay the second respondent's costs including the costs of two counsel where so employed;
 - (c) The applicant's application under case number 38670/2022 is dismissed;
 - (d) The applicant is ordered to pay the second respondent's costs including the costs of two counsel where so employed.'
- 3 The first and second respondents are ordered to pay the second appellant's costs including costs of two counsel.
- 4 The first and second respondents' cross-appeals are dismissed with costs, such costs to include costs of two counsel.

JUDGMENT

Zondi DP (Nicholls JA and Saldulker, Phatshoane and Molitsoane AJJA concurring):

Introduction

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Pretoria, per Davis J (the high court), relating to two applications in which a decision taken by the Zulu Royal House on 14 May 2021, to identify the second appellant, Prince Misuzulu ka Zwelithini Zulu (Prince Misuzulu) as the King of the Zulu Nation (identification decision) and the decision taken by the first appellant, the President of the Republic of South Africa (the President) on 16 March 2022 to recognise him as such (the recognition decision), were challenged. The President and

the Minister of Cooperative Governance and Traditional Affairs (the Minister) shall be collectively referred to as the first appellant.

[2] One application was brought by the first respondent, Prince Mbonisi Bhekithemba ka Bhekuzulu (Prince Mbonisi) under case number 19891/2022 and the other by the second respondent, Prince Simakade ka Zwelithini Zulu (Prince Simakade) under case number 38670/2022. The President, the Minister, Prince Misuzulu, Prince Mangosuthu Buthelezi (Prince Buthelezi), Premier of the KwaZulu-Natal Province (the Premier), and the members of the Zulu Royal Family were cited as respondents in both applications.

[3] The Zulu Royal Family's identification decision and the President's recognition decision were taken in terms of s 8 of the Traditional and Khoi-San Leadership Act 3 of 2019 (the Leadership Act). Both Prince Mbonisi, together with some of the members of the Zulu Royal Family and Prince Simakade had sought the review and setting aside of the identification and recognition decisions. In short, Davis J refused to review and set aside the identification decision holding that he had no powers to revisit it as it was rendered *res judicata* by the judgment of Madondo AJP in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the Pietermaritzburg High Court). However, he granted an order declaring the recognition decision unlawful and set it aside. He remitted the recognition of the King of the Zulu Nation to the President and directed him to act in terms of ss 8 (4) and (5) of the Leadership Act ie to appoint an investigative committee¹(remittal order).

¹ Section 8(4) and (5) of the Traditional and Khoi-San Leadership Act 3 of 2019 (the Leadership Act) provides as follows:

'(4) Where there is evidence or an allegation that the identification of a person as a king or queen, principal traditional leader or senior traditional leader, or the identification or election of a person as a headman or headwoman, was not done in terms of customary law and customs, the President or the relevant Premier, as the case may be-

(a) must cause an investigation to be conducted by an investigative committee designated by the President or Premier, as the case may be, which committee must, in the case of a committee designated by the President, include at least one member of the National House and in the case of a committee designated by a Premier, include at least one member of the relevant provincial house, to provide a report on whether the identification or election of the relevant person was done in accordance with customary law and customs and if not, which person should be so identified or whether a new election should be held; and

(b) must, where the findings of the investigative committee indicate that the identification or election of the person referred to in subsections (1) and (2) was not done in terms of customary law and customs, refer the report contemplated in paragraph (a) to the royal family or relevant traditional council in the case of an elected headman or headwoman, for its comments.

[4] The appeal and the cross-appeal are before this Court with leave of the high court. Prince Mbonisi and Prince Simakade are cross-appealing against the remittal order of the high court. These will be dealt with more fully later in the judgment.

The facts

[5] What gave rise to the dispute over the kingship of the Zulu Nation is the following. King Zwelithini Ka Bhekuzulu (King Zwelithini/ His late Majesty) had been a King of the Zulu Nation since 1968 until his death on 12 March 2021. In his last will and testament, he had nominated one of his wives, the late Queen Mantfombi Dlamini-Zulu (the late Queen) as his successor. The Royal Family met on 24 March 2021 to appoint the late Queen as the regent and Prince Buthelezi, the Traditional Prime Minister of the Zulu Nation, publicly announced her as such. The Queen passed away on 29 April 2021 before she could be officially recognised as the regent.

[6] Before her death, the Queen at the meeting of the Royal Family held on 30 March 2021, proposed and nominated Prince Misuzulu, her first-born biological son, as the successor to the throne in terms of the Zulu customary law and customs. This nomination, it would seem, was pursuant to her will in which she had similarly nominated him as the king.

[7] Aggrieved by these developments, on 28 April 2021, Queen Sibongile Winnifred Zulu, one of His late Majesty's wives, brought an application in the Pietermaritzburg High Court under case number 2751/2021-P for an order, among others, declaring that she was married in community of property to His late Majesty and interdicting the sixth to the fourteenth respondents in those proceedings from declaring, endorsing, proclaiming or appointing Queen Mantfombi or any of the respondent queens as regent or successor to the throne as *Isilo samaZulu*, ie King of the Zulu Nation, pending the final determination of her application.

(5) The President or the relevant Premier, as the case may be, may, after having considered the report of the investigative committee as well as the comments of the royal family, subject to subsection (3) recognise a person as king or queen, principal traditional leader, senior traditional leader, headman or headwoman, as the case may be.'

[8] Simultaneously, Princess Ntandoyenkosi and Princess Ntombizosuthu Zulu-Duma brought an application in the same court under case number 2752/2021P for an order, inter alia, interdicting the nominated executor from giving effect to the will of His late Majesty pending the determination of its validity. The Zulu Royal Family was cited as the sixth respondent in those proceedings and Prince Simakade's name was on the list of the members of the Zulu Royal Family who were cited as the respondents. The two applications were consolidated and heard together by Madondo AJP.

[9] In the meantime, before the hearing of the two applications, on 5 May 2021, the Zulu Royal Family, at a meeting summoned by Princess Thembi Ndlovu (Princess Thembi), His late Majesty's sister, identified Prince Simakade as Isilo. He was nominated by Prince Vulindlela ka Bhekuzulu (Prince Vulindlela). Prince Buthelezi took strong exception to Princess Thembi's action and on 7 May 2021, at the memorial service for the late Queen, he announced that the late Queen had nominated Prince Misuzulu as Isilo and that the succession debate was closed. According to Prince Simakade, when he became aware of the rumours that he was in contention for the throne, he wrote an open statement, on 11 May 2021, which he asked Prince Buthelezi to read out on his behalf at a meeting to be arranged. The statement is in isiZulu and reads thus:

'Mangibingelele ku Mntwana wakwa Phindangene

Mageba

Bengicela ukuba Umntwana angifundele lesi statimende esivulelekile njengoba ngisibhalile.

Ngizwa Mageba ukuba igama lami seliya thinteka ekubeni mina Simakade, Jackson Zulu ngifuna isikhundla sobukhosi. Ngijabulile uma ngibona umntwana ku mabona kude ezisholo ngokwakhe ukuthi angikaze ngisho nakuye ukuthi ngiyasifuna lesisi khundla, nami ngiyakufakazela lokho.

Ngingaqiniseka ukuba angikaze ngisho kumuntu ukuthi ngiyasifuna lesisikhundla.

Ngizwa Mageba ukuthi kukhona ubu homuhomu obukhombisa ukuthi hleze kukhona abangifisela lesisikhundla futhi ayikho into engingayenza ngemizwa yabanye abantu.

Mangicacise ukuthi ubabekazi wami umntwana wakwa Ndlovu benaye umntwana wase Khwezi, bake basiqwashisa sizingane ze Nkosi ukuthi uma Isilo noma iNdunkulu iphakamisa igama lomunye wethu kufanele avume loyo oyobe ekhonjiwe. Ngakhoke nami ukuba

ngangiphakanyisiwe ngangizosamukela leso siphakamiso, futhi babesixwayisile ukuba uma kuphakamiswa omunye wethu asibokwamukela futhi simeseke loyo oyobe ekhonjiwe.

Njengengane ehloniphayo nengicabanga ukuthi izithobile ngiyaqiniseka ukuthi angeke ngiweqe amagama abantu abadala njengoba besengichazile gezeluleko ezingaphezulu.

Ngiyamucela umntwana ukuba nxa esefunda lesisitatimende njengoba sinjalo asale esengicelela nezintatheli ukuba zingalokhu zingifonela ngaloludaba ngoba akukho okunye engingakusho ukudlula lokhu esengikushilo,

Mangithokoze Mageba, Imina uMzukulw wakho,

Umntwana Simakade Zulu

[Signature and date]²

[10] On 14 May 2021, the Zulu Royal Family and heads of various Houses of the Zulu Royal Family held a meeting at Kwakhangelamankengane Royal Palace to identify the king. This meeting was called and chaired by Prince Buthelezi. According to the attendance register, the meeting was attended by about 140 members from various Houses of the Zulu Royal Family. Prince Mbonisi, Princess Thembi and Prince of Bhanganoma sent their apologies for not making it to the meeting. Prince Buthelezi introduced Prince Misuzulu as the new incoming King to the entire Royal Family. He once again nominated Prince Misuzulu as the nominee to be the King of the Zulu Nation. The minutes of the meeting reveal that the entire audience accepted and

² 'Greetings to the Prince of Kwa Phindangene

I request the Prince to read this open statement on my behalf as it is.

I am aware, Mageba, that my name is mentioned in some narrative that I,

Simakade Jackson Zulu, have ambitions of ascending to the throne. I was thrilled when I saw the prince stating on television that I have never told him that I covet this position, and I confirm what he said.

I can confirm that I have not told anyone that I covet this position.

I am aware, Mageba, that there are rumours suggesting that there may be people who wish that I should take this position. I cannot do anything about other people's feelings.

I want to state that my aunt, the princess who is married to the Ndlovu family, and the prince of the Khwezi house, have advised us, as the king's children, that if the king or the queen chooses one of us, the one who is nominated should accept the nomination. Therefore, I would have accepted the nomination had I been selected, and they had also advised that we should accept and support whosoever is nominated.

As a respectful child and a humble person, I confirm that I will not disobey the words of our elders, as I have stated in relation to the abovementioned pieces of advice.

I request the prince, as reads this statement in its unaltered state, to also ask the journalists to desist from calling me about this matter because here is no further information I can give in addition to what I have already stated.

Thank you, Mageba. It is me, your grandnephew.

Prince Simakade Zulu' (This is a version as translated by Soror Language Services, p 2826)

agreed with the appointment of Prince Misuzulu to the throne. At the request of Prince Buthelezi, Prince Thulani read out Prince Simakade's statement dated 11 May 2021 which Prince Simakade had specifically asked Prince Buthelezi to read out on his behalf.

[11] On 23 May 2021 a second meeting, the purpose of which was to confirm the identification of Prince Simakade as Isilo was held by a faction of the members of the Zulu Royal Family led by Princess Thembi. Prince Vulindlela moved for his nomination, and it was supported by those who were in attendance. On 28 May 2021, Princess Thembi addressed a letter to the President alleging a dispute in the identification process and requesting his intervention. The President did not respond to this letter.

[12] On 3 June 2021, Princess Thembi addressed another letter to the President, which purported to be a dispute letter. In it, she alleged that the nomination and appointment of the late Queen contravened the Zulu customary law of hereditary succession, in terms of which the throne passes down through a direct line of descendant from an ancestor. She contended that the lineage is genealogical in nature and that being the case, the late Queen could not be nominated, appointed or recognised as next in line. She stated further that Prince Simakade qualified to be nominated as the rightful heir to the throne of the Zulu Nation through the custom of ukufakwa esiswini.³

[13] Princess Thembi disputed that Prince Misuzulu was correctly identified or nominated by the Zulu Royal Family. She contended that the meeting of 7 May 2021 did not constitute the meeting of the Zulu Royal Family as defined by both the national and provincial legislation, and further, that the meeting of 14 May 2021 was called under a false pretense. It was not called for the purpose of identification of the King.

[14] In turn, on 16 June 2021, Strauss Daly Attorneys on behalf of Prince Misuzulu, addressed a letter to the President calling for his recognition as the King. Subsequently, on 23 July 2023, another letter, was written by Prince Misuzulu himself

³ The term 'ukufakwa esiswini' directly translates to 'being put in the stomach'. It is a Zulu custom of adoption or affiliation, where a child is deemed to be the child of the (great) wife for the purposes of succession.

to the President, in which he urged the President to intervene in his recognition as the King of the Zulu Nation.

[15] On 5 August 2021, the Premier wrote a letter to the Minister expressing concern that the Zulu Royal Family was divided on a final decision as to who should be the successor to His late Majesty. The Premier informed the Minister that the Provincial Executive Council had appointed three experts in mediation to assist the parties in resolving the dispute. To address the Premier's concern, the President requested the Minister to intervene in the matter and to work closely with the KwaZulu-Natal provincial government. Pursuant to the President's request, the Minister appointed an ad hoc mediation panel (the mediation panel) to assist her to resolve the kingship dispute.

[16] The main responsibility of the mediation panel was to undertake the necessary consultation to bring all the parties in the Zulu Royal Family together to reach an agreement on who should be recognised as the king, in terms of the Zulu customary law and customs. It was mandated to, among others, meet with the members of the Zulu Royal Family and 'to mediate the dispute taking into account the Zulu culture and the legal aspects'. It was required to compile and submit a report to the Minister within one month of its establishment.

[17] Whilst the outcome of the mediation panel was awaited, on 5 September 2021, a meeting of the Zulu Royal Family called by Princess Thembi was held at Thokazi Royal Lodge, to further consult the outstanding Houses of the Zulu Royal Family on the succession. This meeting was attended by 47 members of the Zulu Royal Family including Prince Mbonisi and was chaired by Prince Mxolisi ka Bhekuzulu, the half-brother to His late Majesty. The nomination of Prince Simakade as the next Isilo of the Zulu Nation was endorsed. Surprisingly, in his papers Prince Mbonisi denied that Prince Simakade was ever nominated by the Zulu Royal Family as the next king of the Zulu Nation.

[18] On 29 September 2021, a meeting of all Houses of the Zulu Royal Family, called by Prince Buthelezi, was convened at the Legislative Assembly Chambers in Ulundi, to discuss matters affecting the Zulu Nation and the Monarchy. All the Houses of the

Zulu Royal Family resolved to recognise Prince Misuzulu as the King of the Zulu Nation and pledged their loyalty to him. They declared that they would abide by the wishes of His late Majesty, as expressed in his will, and also that of the late Queen. The Houses of the Royal Family expressly rejected the resolution taken at the meeting called by Princess Thembi endorsing the nomination of Prince Simakade as the King.

[19] On 19 November 2021, Prince Mbonisi, His late Majesty's half-brother, brought an application in the Pietermaritzburg High Court under case number 10879/2021P, in which he sought, amongst others, an order, that pending the final determination of the applications under case numbers 2751/2021P and 2752/2021P, Prince Misuzulu and Prince Buthelezi be interdicted and restrained from preparing and organising the coronation of Prince Misuzulu as Isilo sama-Zulu, which he believed was scheduled for 3 December 2021, and further that pending the final determination of the application concerned, the President should be interdicted and restrained from recognising or undertaking any steps which may reasonably be construed as recognising Prince Misuzulu as Isilo sama-Zulu. I must point out that Prince Mbonisi had erroneously assumed that the coronation of King Misuzulu was scheduled to take place on 3 December 2021. By the time his application was heard by Madondo AJP on 12 January 2022, the coronation had not taken place. It only occurred in August 2022. The application for interdictory relief should not have been brought. There were no plans to have Prince Misuzulu coronated on 3 December 2021.

[20] In any event, Prince Mbonisi's application was consolidated with the applications under case numbers 2751/2021P and 2752/2021P and were jointly heard on 12 January 2022 by Madondo AJP. He delivered a consolidated judgment on 2 March 2022.

[21] On 7 January 2022, shortly before the hearing of the three applications referred to above, the mediation panel released its report. It found that there was consensus that the next King should come from the Kwakhangelamankengane Royal House, the late Queen's palace, but that there were divisions within the Royal Family over kingship, caused by huge disagreements on the legitimacy of the process followed in appointing Prince Misuzulu and Prince Simakade. It recommended that the Minister

and the President should wait for the court cases to conclude, before proceeding with any other action.

[22] On 12 January 2022, Madondo AJP heard the consolidated cases and he handed down the judgment and orders on 2 March 2022.⁴ The application brought by Queen Sibongile under case number 2751/2021P was dismissed.⁵ In respect of the application by the Princesses under case number 2752/2021P, Madondo AJP suspended the execution of the last will and testament of His late Majesty pending the final determination of the action, to be instituted by the Princesses, challenging the authenticity and validity of His late Majesty's will. Prince Mbonisi's application under case number 10879/2021P was dismissed with costs including costs of two counsel.

[23] The findings in Madondo AJP's judgment will be dealt with in greater detail later, as they are central to the recognition decision and to the high court's conclusion that the identification issue was *res judicata*.

Recognition decision

[24] On 12 March 2022, ten days after Madondo AJP's judgment was handed down, Prince Buthelezi sent a letter to the President requesting him to make the necessary arrangements to finalise the *de jure* commencement of Prince Misuzulu's reign. The letter was signed by Prince Buthelezi on behalf of, and with the agreement of members of the Royal Family, namely Queen Mayvis MaZungu, Prince Philemon ka Tshelendoda and Princess Indlunkulu Thoko UmaNtombela.

[25] On 12 March 2022, the President was still not in possession of any appeal papers in respect of Madondo AJP's judgment, notwithstanding Prince Mbonisi's attorneys of record having advised him of their intention to appeal and requesting an undertaking that the President not consider any pending or subsequent applications for the recognition of the King-Elect by the Zulu Royal Family.

⁴ p 126-166, High Court Judgment.

⁵ p 126, High Court Order.

[26] On 16 March 2022, the Minister wrote a letter to the President in which she expressed her support for the decision to recognise Prince Misuzulu, on the strength of Madondo AJP's judgment dismissing the relevant applications. The Minister emphasised that Prince Misuzulu had been identified as the next King at the two meetings of the Royal Family held on 14 May 2021 and 29 September 2021.

[27] The applications by Prince Mbonisi for leave to appeal were dismissed and the appeal by the Princesses lapsed and was withdrawn. In the absence of any application for leave to appeal against the order and judgment of Madondo AJP, the President recognised Prince Misuzulu in terms of ss 8(3)(a) and (b) of the Leadership Act,⁶ pursuant to an application, dated 12 March 2022, in terms of s 8(1)(a)(ii) of the same Act. The President's decision to recognise Prince Misuzulu as Isilo was published in Government Notice No1895 in the Government Gazette of 17 March 2022.

Proceedings in the Pretoria High Court proceedings

[28] The respondents, who are members of the Zulu Royal Family and aggrieved by the identification and recognition decisions, instituted review proceedings against fourteen respondents, including King Misuzulu, the President, the Minister and Prince Buthelezi in the high court.

Prince Mbonisi's application

[29] Prince Mbonisi together with other members of the Royal Family and Prince Simakade brought two separate applications in the high court. They were heard jointly. In case number 19891/2022, Prince Mbonisi was the first applicant.

[30] Prince Mbonisi and his co-respondents sought an order to review 'and set aside the meeting of 14 May 2021 on the basis that it was not a lawfully constituted meeting of the Royal Family for the purpose set out in section 8(1)(a) of the [Leadership Act]

⁶ Sections 8(3)(a) and (b) of the Leadership Act provide as follows:

'Whenever the President recognises a king or queen, or a Premier recognises the successor to a principal traditional leader or recognises a senior traditional leader, headman or headwoman, the President or the Premier, as the case may be, must-

(a) publish a notice in the Gazette recognising such person as a king or queen, or publish a notice in the relevant Provincial Gazette recognising such person as a principal traditional leader, senior traditional leader, headman or headwoman;

(b) issue a certificate of recognition to such person; and...'

read with section 17(3) of the KwaZulu- Natal Traditional Leadership and Governance Act 5 of 2005' (the KwaZulu- Natal Act) ... 'on the basis that it was not procedurally fair; alternatively unlawful for the purpose set out in section 8(1)(a) of the [Leadership Act]; and a review and setting aside of the decision '... of those who were present in the meeting of 14 May 2021 to identify [King Misuzulu] as King of the Zulu Kingdom and to apply to the President for the recognition of [King Misuzulu]...'

[31] Further, the review and setting aside of the decision of the President to recognise King Misuzulu, in terms of s 8(3)(a) and (b) of the Leadership Act, was sought on the basis that it was unlawful and therefore unconstitutional. A direction was also sought that a meeting of the Royal Family 'as defined' in the Leadership Act together with the 'ruling family' in consultation with the Zulu Royal Council be held for the sole purpose of identifying a successor to the throne. Certain mechanisms to facilitate such a meeting were also sought as part of a court order. In the alternative, the President was urged to cause an investigation to be conducted by an investigative committee designated in terms of s 8(4)(a) of the Leadership Act.

[32] The basis of the attack on the President's decision was that the President disregarded the Zulu customary law and customs in recognising Prince Misuzulu as the King. Prince Mbonisi and his co-respondents averred that the President may not recognise a King where the process in s 8(1)(a) of the Leadership Act had not been complied with. They were not aware of the meeting of 14 May 2021, in which there had been a discussion about the nomination of Prince Misuzulu as the King of the Zulu Kingdom. They stated that according to minutes of the meeting of 14 May 2021, Prince Misuzulu was merely introduced as the new King of the Zulu Kingdom by Prince Buthelezi.

[33] Prince Mbonisi and his co-respondents contended that the responsibility to identify an heir to the throne of the Zulu Kingdom is given to the Royal Family, together with the Ruling Family to be exercised for, and on behalf of, the Zulu Kingdom. As members of the Royal Family, they were deprived of the right to a lawful and fair procedure of identifying an heir to the Zulu throne. They wanted to be afforded an opportunity to have a royal family meeting in terms of s 8(1)(a) of the Leadership Act and to deliberate on the identification process of a person to occupy the throne. This

would enable them to also reflect on the grounds referred to in s 9(1) of the Leadership Act⁷ and to act in the interest of the Zulu Nation by ensuring that they present to the Kingdom a suitable person.

Prince Simakade's application

[34] Prince Simakade was the applicant in case no 38670/2022. The application for review was brought under PAJA, alternatively, the principle of legality. He sought an order 'declaring that the identification of the Prince Misuzulu as Isilo of the Zulu Nation by the seventh respondent, meaning the persons attending a meeting on 14 May 2021, convened by Prince Buthelezi, and purporting to be the Zulu Royal Family, is unlawful and invalid'. The recognition by the President of King Misuzulu and the publication thereof in the specified *Government Gazette* of 17 March 2022 and the coronation or recognition ceremony of King Misuzulu, which took place on 29 October 2022 were also sought to be reviewed and set aside as unlawful and invalid. In the alternative, Prince Simakade sought a remittal to the President with a direction to act in terms of ss 8(4) and 8(5) of the Leadership Act, subject to the terms he proposed.

[35] Prince Simakade's attack, on the identification decision of 14 May 2021, was that the meeting at which Prince Misuzulu was identified was called by Prince Buthelezi, who had no authority to do so, as he was not a member of the Zulu Royal Family.

[36] Prince Simakade averred that his claim to the throne derives from the fact that he is the eldest son of the late Isilo, having been born in 1970. He was affiliated to the

⁷ The said sections provide as follows:

'9 Withdrawal of recognition of king or queen, principal traditional leader, senior traditional leader, headman or headwoman

(1) The recognition of a king or queen, principal traditional leader, senior traditional leader, headman or headwoman, subject to subsections (2) and (3)-

- (a) must be withdrawn if he or she-
 - (i) has been convicted of an offence with a sentence of imprisonment for more than 12 months without the option of a fine;
 - (ii) is declared mentally unfit or mentally disordered by a court; or
 - (iii) no longer permanently resides within the area of the kingship or queenship council, principal traditional council or traditional council, as the case may be; or
- (b) may be withdrawn if he or she-
 - (i) has been removed from office in terms of the code of conduct; or
 - (ii) has transgressed customary law or customs, on a ground that warrants withdrawal of recognition;
- and
- (c) must be withdrawn if so ordered by a court.'

House of the late Queen, the Great Wife, amongst other things, to regularise his birth and accord him the same rights and obligations as an oldest biological son of the late Queen. He alleged that he is the rightful heir to the throne of the Zulu Nation or kingship, through the custom of ukufakwa esiswini.

[37] Prince Simakade claimed that he was affiliated to the House of the late Queen when he was about eleven years old. Before then, he had been living with his biological mother at kwa Mthenjana 'Nhlophenkulu' in Nongoma. By agreement between his maternal grandparents and His late Majesty, he went to live at the late Queen's palace at KwaKhangelamankengane. He became part of the late Queen's household. The custom of ukufakwa esiswini entailed the slaughtering of a cow at the late Queen's palace and the sending of three heads of cattle by His late Majesty to his biological mother as a form of compensation.

[38] Regarding his written statement of 11 May 2021, Prince Simakade rejected the contention that he disavowed entitlement to the throne. He maintained that he had written the statement in the past tense on the assumption that a proper process would be followed in the identification of the king. Had he known that the correct customary, or statutory process was not followed in the appointment of Prince Misuzulu, he would not have made the statement.

[39] The President and the Minister opposed the review applications. The President maintained that he complied with ss 8(3)(a) and (b) of the Leadership Act in taking the recognition decision, and that his decision was both rational and lawful. In addition, the President and the Minister stated that they were guided by the findings of Madondo AJP, in the Pietermaritzburg High Court under case numbers 2751/2021P and 10879/2021 and a letter from Prince Buthelezi requesting the President to recognise Prince Misuzulu.

[40] King Misuzulu and Prince Buthelezi also opposed the review applications. Prince Buthelezi deposed to the answering affidavit on behalf of King Misuzulu and the Coronation Committee. King Misuzulu filed a confirmatory affidavit in support of Prince Buthelezi's opposing affidavit and in addition deposed to his own answering affidavit. They also relied on the findings of Madondo AJP.

[41] Prince Buthelezi rejected the suggestion that he had no authority to convene the meetings of the Zulu Royal Family to discuss matters pertaining to the Zulu Royal Family. This had been his responsibility ever since his appointment as the Traditional Prime Minister of the Zulu Nation by the late King Cyprian Zulu in 1954. He called meetings on the instruction of the reigning King, and, in the absence of the King, he has always been entitled to call meetings on his own accord as and when the need arose.

[42] According to Prince Buthelezi, the Zulu Royal Family consists of the descendants of King Mpande. The members of the Zulu Royal Family are central to the decision-making process of the successor to the king by Zulu custom. The Royal Family consists of the royal houses of the five reigning kings, inclusive of the family of the deceased king, in this case the Zwelithini Royal Family. He stated that the surviving elders of the Zulu Royal Family are Queen Mayvis Zungu Zulu (the widow of King Cyprian Zulu ka Solomon); Queen Thoko Ntombela Zulu (the widow of Regent Mcwayizeni Israel ka Dinuzulu); and Prince Philemon Fihlinqindi (the uncle of the late king and the grandson of king Dinuzulu).

[43] By contrast, averred Prince Buthelezi, Prince Mbonisi did not grow up in the Zulu royal courts. His mother was not married to King Cyprian. His late Majesty embraced him and used him to run errands. But this did not give him the right or status to drive programmes of the Zulu Royal Family, including calling its meetings. This was Prince Buthelezi's responsibility as a Traditional Prime Minister of the Zulu Nation.

[44] As regards the impugned meetings, Prince Buthelezi confirmed that after the official memorial service of the late Queen on 7 May 2021, he convened a meeting at which her last will and testament was read. He saw it fit to call a meeting of the Royal Family urgently because all the members of the Royal Family were present. Subsequently, he convened a further meeting of the Royal Family on 14 May 2021, where the Royal Family unanimously agreed that Prince Misuzulu should ascend to the throne as the King of the Zulu Nation. He presided over that meeting in his capacity as the Traditional Prime Minister of the Zulu Nation.

[45] Prince Buthelezi emphasised that the identification of Prince Misuzulu as the King was in accordance with the established Zulu custom. The heir to the throne was a matter settled or predetermined by the Zulu custom. In terms of the Zulu custom, a queen born of royalty takes precedence over any other queen or wife of the king. It is also settled customary law that the queen born of royalty, for whom the nation paid lobola, is the bearer of the king to ascend to the throne after the death of the reigning king. The Zulu Nation paid lobola for the late Queen. In terms of the Zulu custom, the payment of lobola by the nation to secure the betrothal of the late Queen to the late King served as a guarantee to the Zulu Nation that the first son born out of that marriage would be the successor to the throne.

[46] He stated that the implications of the Zulu Nation paying lobola for the bride are far reaching. It creates an inextricable social pact between the two nations, that the first son born of marriage between the two Royals will produce a successor to the throne. The late Queen's status as a daughter of another royal family, the King of eSwatini, was itself a predeterminant that she would bear a successor and, also by Zulu custom, elevated her above all other wives (present or future).

[47] Prince Buthelezi concluded that King Misuzulu's ascension to the throne was a foregone conclusion, and the Royal Family had no 'wobble room' to depart from the settled customary law position. To do so, would have been offensive and contrary to the provisions of s 17 of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (the KZN Act). Additionally, there was nothing that disqualified him, in terms of s 9 or s 59 of the Leadership Act, from being nominated as the King. Therefore, the Zulu Royal Family had no choice but to identify him as the King.

[48] Regarding Prince Simakade's claim to kingship, Prince Buthelezi stated that he was not eligible to succeed the late King, since he was not the biological son of the late Queen; his mother was not married to the late King; and further that, in any event, in his statement dated 11 May 2021 he expressly disavowed any claim to the throne.

Findings of the high court

[49] Davis J made it clear that the identification issue was not an issue that was before him. He characterised the question that was before him in these terms:

‘The question that came before this court was not to make a determination as to who should be king of the AmaZulu. The applicants didn’t ask the court to determine that issue. The applicants brought two review applications and the court was required to determine those. The first was whether the incumbent king, King Misuzulu Ka Zwelithini Zulu (King Misuzulu) has correctly been appointed as King in terms of Zulu custom and the second was whether the President had correctly recognised the King in terms of the [... Leadership Act]. In respect of the first question Madondo AJP had already pronounced in related litigation in the Kwazulu-Natal Division, Pietermaritzburg, on 2 March 2022 that King Misuzulu is the rightful heir to the throne. This Court had to decide whether that decision is *res iudicata* (something which has already been decided) as this Court cannot sit as one of appeal. Only once it has been found that the decision of Madondo AJP is not *res iudicata* could the first review application be proceeded with. The second review application was whether the recognition of the King by the President had been lawfully made in terms of the Leadership Act or not.’

[50] After a careful analysis of Madondo AJP’s judgment, Davis J concluded that: ‘...the plea of *res iudicata* raised on behalf of the respondents is good and it is not open for this court to overturn the judgment of Madondo AJP which is what would happen if the principal relief, namely the review and setting aside of the identification decision of 14 May 2021, were to be ordered.’

Notwithstanding his finding on the identification issue, Davis J proceeded to determine whether the recognition decision had been lawfully made in terms of the Leadership Act. Davis J concluded that the decision by the President to recognise King Misuzulu was reviewable under the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in that he failed to comply with mandatory procedure in the empowering provisions of the Leadership Act, in particular ss 8(4) and 8(5). Because it was alleged that the identification of Prince Misuzulu as a king was not in terms of Zulu customary law and customs, the court was duty bound to cause the investigation to be conducted by an investigative committee.

[51] Accordingly, Davis J granted the following order:

‘1 It is declared that the recognition by the First Respondent (the President of the Republic of South Africa) of the Second Respondent (King Misuzulu Ka-Zwelithini Zulu) as iSilo of the Zulu Nation as contained in Government Gazette number 4657 of 17 March 2022

(the recognition decision), was unlawful and invalid and the recognition decision is hereby set aside.

2 The matter of the recognition of the iSilo of saMaZulu is remitted to the First Respondent who is directed to act in terms of sections 8(4) and 8(5) of the Traditional and Khoi-San Leadership Act 3 of 2019 and to appoint an investigative committee as contemplated in that Act, to conduct an investigation and to provide a report in respect of allegations that the identification of the Second Respondent was not done in terms of customary laws and customs,

3 The first respondent is ordered to pay the Applicants' costs of their applications, including the costs of two counsel, where employed.

4 In respect of applications for condonation for late filling of papers or to strike out allegations in affidavits, each party is ordered to pay its own costs.'

The President and King Misuzulu appeal against paragraphs 1 and 2 of the order of the high court and in addition, the President also appeals against the costs order in paragraph 3.

[52] Prince Simakade's cross-appeal is against the following parts of the order and judgment:

- (a) The dismissal of the relief sought by Prince Simakade pertaining to the conditions of remittal to the Investigation Committee;
- (b) The omission from paragraph 2 of the court's order of the word '*afresh*' after the word '*investigation*';
- (c) The findings in paragraphs 30-36 of the high court judgment in relation to *res judicata*;
- (d) The words '*or to strike out allegations in affidavits*' in paragraph 4 of the court's order;
- (e) The dismissal of Prince Simakade's first and second applications to strike out; and
- (f) The dismissal of Prince Simakade's claim for costs against King Misuzulu in respect of the first and second applications to strike out.

[53] Prince Mbonisi and his co-respondents' cross-appeal is directed against the remittal order of the high court. While they accept that the order of the high court setting

aside the recognition decision was correct, they contended that the high court misapplied the principles of *res judicata*, with the consequence that it failed to decide the application of the Zulu Royal Family to review and set aside the meeting of 14 May 2021, in which Prince Buthelezi announced King Misuzulu to be *Isilo* of the Zulu Nation. They contend further that the high court should have set aside the recognition decision and remitted the matter to the Zulu Royal Family for it to conduct the process of identification, as required in ss 8(1)(a) and (b) of the Leadership Act.

Submissions by the President and the Minister

[54] In this Court the President and the Minister submitted that Davis J erred in concluding that the recognition of Prince Misuzulu was reviewable. They argued that this conclusion was based on, firstly, an incorrect interpretation of the Leadership Act and secondly, a misunderstanding of the effect of Madondo AJP's judgment. Thirdly, the high court did not give sufficient weight to the letter from Prince Buthelezi on behalf of the Royal Family dated 12 March 2022 seeking the recognition of King Misuzulu and the letter from the Minister dated 16 March 2022 in support of an application to recognize King Misuzulu.

[55] Their further criticism of the judgment is that it suffers from internal inconsistency. Once the court found that the identification issue was *res judicata* and could not be revisited, it was no longer open to it to direct that it be considered by the investigative committee to be appointed by the President.

[56] The President and the Minister submitted that they complied with the statutory injunctions. They maintained that as at 12 March 2022, when the President received a request from Prince Buthelezi to recognise Prince Misuzulu, there was no appeal that had been lodged against Madondo AJP's judgment. It was therefore open to the President to endorse the application and the submissions made, in terms of s 8(1)(a)(ii) of the Leadership Act, by Prince Buthelezi on behalf of the Royal Family, on 12 March 2022.

[57] Counsel for the President and the Minister submitted that in making the recognition decision the President relied on Madondo AJP's findings, Prince Buthelezi's

letter and the Minister's letter confirming that: (a) the Royal Family at a meeting held on 14 May 2021 identified Prince Misuzulu as the successor to the Zulu throne, (confirmed at the meeting of 29 September 2021); (b) in accordance with Zulu customary law and customs; and that (c) there was no genuine allegation or a dispute⁸ as to the identification of Prince Misuzulu, as he was the rightful heir to the throne in terms of customary law.

Submissions by King Misuzulu

[58] King Misuzulu took issue with the finding in paragraph 2 of Davis J's order because it places into question his position as King since it sanctions 'an investigation... in respect of allegations that the identification of the second respondent was not done in terms of the customary law and customs'. King Misuzulu submitted that in law, the decision to recognise him as the king was lawful and should not have been set aside. In this respect King Misuzulu aligns with and supports the President, in asking for the setting aside of the declaratory order in paragraph 1 of the high court's order.

[59] Counsel for King Misuzulu submitted that paragraph 2 of the high court's judgment reflects several errors in law and reasoning. He argued that Davis J misdirected himself in two respects. First, he found that he was not tasked to determine the rightful King of AmaZulu. Counsel submitted that while that is true in respect of Prince Mbonisi's application, it is not true in respect of Prince Simakade's application. The Prince Simakade application sought, in prayer 8 of the amended notice of motion, an order declaring that he was lawfully identified as Isilo by the Zulu Royal Family at the meetings held on 5 May 2021, 23 May 2021, and 5 September 2021. He argued that Davis J was enjoined to determine whether King Misuzulu or Prince Simakade was the lawfully identified King of AmaZulu. He submitted that this demonstrated that Davis J materially misdirected himself in the identification of the issues before him.

[60] Secondly, Davis J stated that his first task was to determine whether King Misuzulu had been lawfully appointed as King in terms of the Zulu custom. Davis J however, went on to say that he need not determine that issue if he found that it was *res judicata*, in light of Madondo AJP's judgment. Ultimately, he found that the issue was

⁸ *Chief Avhatendi Ratshibvumo Rambuda and Others v Tshibvumo Royal Family and Others* [2024] ZACC 15 (17 July 2024)

indeed *res judicata*, and, therefore, he need not decide it. By so doing, proceeded the argument, Davis J failed to apply any customary law in the matter, whatsoever. Instead, he decided the matter in terms of the common law doctrine of *res judicata*. He contradicted himself because he found that the question of whether or not King Misuzulu was correctly identified in terms of customary law should be subjected to further investigation, despite finding that the matter was *res judicata* or subject to issue estoppel.

[61] As regards the recognition decision, it was submitted that the President acted lawfully and there was no basis to set aside his decision. It was argued, first, that regardless of the outcome of the dispute concerning the recognition decision, King Misuzulu remains the correctly identified King under Zulu customary law. It was submitted that to interpret the Leadership Act to mean that the identification process by the Royal Family, in terms of customary law, is without consequence in the absence of recognition by the President, would be a failure to recognise traditional leadership according to customary law. This would lead to an unjustifiable subordination of customary law to executive decisions.

[62] I disagree with this submission. The legislation was designed such that it requires both the identification and the recognition decisions to comply with the provisions of the Leadership Act, although they are made by different bodies functioning under different legal regimes. The identification decision is required to be made by a royal family in terms of customary law and customs of the traditional community concerned, without the involvement of the President. The President is only involved in the second stage of the process, when the application is made to him to recognise a person so identified. In doing so, the President exercises a public power conferred on him by the Leadership Act. Although the two decisions are taken by different bodies, exercising powers derived from different legal regimes, one under the customary law and customs while the other in terms of the statute, both decisions are required to comply with the Constitution.

[63] As regards the President's failure to act in terms of s 8(4) of the Leadership Act, it was argued on behalf of King Misuzulu that when the President recognised him there was no evidence or allegations that his identification was not done in terms of Zulu

customary law and customs. There was neither evidence nor allegations to sustain the conclusion that Zulu customary law was not complied with in his identification. And, in any event, proceeded the argument, all the allegations were addressed in the judgment of Madondo AJP.

Submissions by Prince Mbonisi

[64] Prince Mbonisi and his co-respondents support the finding of the high court that the President failed to comply with ss 8(4) and (5) of the Leadership Act. They, however, contended that the court should have reviewed and set aside the meeting of 14 May 2021, in which Prince Misuzulu was identified and nominated as the King of the Zulu Nation. This was because, first, the Royal Family had not been afforded an opportunity under s 8(1)(a) of the Leadership Act to identify an heir to the Zulu throne. Secondly, the meeting of 14 May 2021 was not lawfully constituted and did not meet the purpose as set out in s 8(1)(a) of the Leadership Act read with s 17 (3) of the KZN Act. They argued that the meeting was not that of the Royal Family as it was not made up of a core structure, consisting of immediate relatives to the ruling family. Some of the attendees were not members of the Royal Family and even those who were alleged to have been present at the meeting did not confirm to have been in attendance. It was therefore submitted that the jurisdictional requirements necessary for the validity of the recognition decision were not met.

[65] Prince Mbonisi and his co-respondents argued further that the court erred in finding that the issue of the identification of the king was already decided by Madondo AJP in his judgment and had become *res judicata*. They accordingly submitted that the high court misapplied the principles of *res judicata* and misunderstood the import of Madondo AJP's judgment, because Madondo AJP reserved the right of the Royal Family to review the identification after the recognition decision was made.

[66] Prince Mbonisi and his co-respondents' second leg of the attack, on the recognition decision, was that the President failed to consult the Premier of the KwaZulu-Natal Province before taking the recognition decision. The President consulted only the Minister, in contravention of s 8(1)(b) of the Leadership Act, which obliges him to consult the Premier and the Minister. They further contended that the President acted irrationally

in relying on Madondo AJP's decision for his decision which was the subject of appeal by the Zulu Royal Family.

Submissions by Prince Simakade

[67] Counsel for Prince Simakade took issue with the submission that in the high court, Prince Simakade sought an order declaring that he was lawfully identified as king by the Royal Family. In defence of the high court's approach, he argued that Prince Simakade had elected, before the hearing in the high court, not to persist with his request in the further amended notice of motion for substitutory relief. In light of this explanation there exists no basis for finding that the high court misdirected itself in its characterisation of the issues before it for determination.

[68] Counsel further submitted that the remittal order of the flawed identification decision of the high court to the Zulu Royal Family was inappropriate, as it would inevitably result in complex disputes of fact on the identity of the Zulu Royal Family. He argued that it is inappropriate that the issues of customary law and customs that relate to the identification decision be adjudicated on by a court, instead of a statutory investigative committee which is mandated to determine such issues under the Leadership Act. This is where Prince Simakade parts ways with Prince Mbonisi, who is in support of the judicial review of the identification decision and remittal to the Zulu Royal Family.

[69] It was submitted that the President's decision to recognise Prince Misuzulu was flawed in circumstances where there were allegations that his identification had not been done in accordance with Zulu customary law and customs. The President was obliged under s 8(4) of the Leadership Act to designate an investigative committee to investigate the allegations. It was argued that sufficient facts were placed before the President, which necessitated the establishment of the investigative committee. In this regard, mention was made of Princess Thembi's letter of 3 June 2021 addressed to the President, alleging that there was a dispute; the letter of 5 August 2021 by the Premier of KwaZulu-Natal to the Minister stating that the Zulu Royal Family was divided on the final decision as to who should be the successor to His late Majesty; and a letter from Prince Misuzulu, in which he asked the President to appoint a panel of three judges to

make a determination on the issue and the terms of reference of the mediation panel acknowledging the existence of a dispute.

[70] It was argued that faced with these allegations regarding the identification process, the President was obliged to designate an investigative committee as required by ss 8(4)(a) and (b) of the Leadership Act and his failure to do so constitutes a ground of review under s 6(2) of PAJA, alternatively under the principle of legality. Secondly, it was submitted that the President's recognition decision was irrational to the extent that he failed to take into account relevant considerations such as the meeting of 5 May 2021 at which Prince Simakade was identified as Isilo which was referenced in the Dispute Letter of Princess Thembi.

Discussion

[71] In relation to the appeals of the President and King Misuzulu, the issue is whether Davis J was correct to declare that the President's recognition decision was unlawful and invalid and to review and set it aside. As regards Prince Mbonisi's cross-appeal, the issue is whether Davis J's remittal order to the President instead of to the Zulu Royal Family was correct and whether the principle of *res judicata* was applicable to the identification decision.

[72] In respect of Prince Simakade's cross-appeal the issues are whether the principle of *res judicata* was applicable to his application and whether the high court erred in remitting the matter to the President without directions as sought by him. The last issue relates to the applications for striking out and associated costs.

[73] The starting point is the Constitution. Chapter 12 of the Constitution, in which ss 211 and 212 are located, recognises the institution, status and role of the traditional leadership. It enjoins the courts to apply customary law when it is applicable and any legislation that specifically deals with customary law. The Leadership Act is legislation that deals with traditional leadership. Section 8 of the Leadership Act, among others, provides for the identification and recognition of king or queen.

The provisions which are relevant to this matter are ss 8(1)(a) and (b) and (3). They read as follows:

‘(1) Whenever the position of a king or queen is to be filled or the successor to a principal traditional leader is to be identified, the following process applies:

(a) The royal family concerned must, within 90 days after the need arises for the position of a king or queen, or principal traditional leader to be filled, and with due regard to applicable customary law and customs-

(i) identify a person who qualifies in terms of customary law and customs to assume the position of a king or queen, or principal traditional leader, as the case may be, taking into account whether any of the grounds referred to in section 9(1) or 16(11) (h) or 16 (14)(a), (c), (d), (e) or (k) apply to that person; and

(ii) apply to the President or relevant Premier, as the case may be, for the recognition of the person so identified as a king or queen, subject to section 3(2), or principal traditional leader which application must be accompanied by-

(aa) the particulars of the person so identified to fill the position of a king or queen, or principal traditional leader; and

(bb) the reasons for the identification of that person as king or queen, or principal traditional leader.

(b) The President may, after consultation with the Minister and the Premier concerned, and subject to subsections (3) and (4), recognise as a king or queen a person so identified in terms of paragraph (a) (i), taking into account whether a kingship or queenship has been recognised in terms of section 3.

....

(3) Whenever the President recognises a king or queen, or a Premier recognises the successor to a principal traditional leader or recognises a senior traditional leader, headman or headwoman, the President or the Premier, as the case may be, must-

(a) publish a notice in the *Gazette* recognising such person as a king or queen, or publish a notice in the relevant *Provincial Gazette* recognising such person as a principal traditional leader, senior traditional leader, headman or headwoman;

(b) issue a certificate of recognition to such person; and

(c) inform the National House of the recognition of a king or queen and inform the relevant provincial house of the recognition of a principal traditional leader, senior traditional leader, headman or headwoman.’

[74] The identification of a king or queen must be considered in terms of the customary law and customs subject to the Constitution and any legislation that specifically deals with it. This is so because traditional leadership is governed by customary law.⁹ The power to choose a king or queen resides in the Royal Family which is one of the traditional structures established by the Leadership Act. The President has no role in the identification of a king or queen. His role is to recognise the identified king or queen and this he does upon a request by the Royal Family.

Whether the identification issue was *res judicata*

[75] As already stated, the high court upheld the appellants' plea of *res judicata*. It found that the identification of the king had been conclusively determined between the parties by Madondo AJP and that it was not open to it to overturn his judgment.

[76] The question is whether the finding of the high court should be endorsed. The doctrine of *res judicata* is based on the irrebuttable presumption that a final judgment on a claim submitted to a competent court is correct. It is founded on public policy, which requires that litigation should not be endless. This Court, in *Prinsloo N O v Goldex 15 (Pty) Ltd*,¹⁰ explained the nature of the *res judicata* plea as follows:

'...The gist of the plea is that the matter or question raised by the other side had been finally adjudicated upon in proceedings between the parties and that it therefore cannot be raised again. According to Voet 42.1.1, the *exceptio* was available at common law if it were shown that the judgment in the earlier case was given in a dispute between the same parties, for the same relief on the same ground or on the same cause (*idem actor, idem res et eadem causa petendi* (see eg *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*¹¹ ...and the cases there cited).'

[77] It was held in *Ascendis* that '[I]ts strict terms applied when a later dispute involves the same party, seeking the same relief, relying on same cause of action.'¹² In

⁹ *Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others* [2018] ZACC 28; 2018 (12) BCLR 1525 (CC) para 30.

¹⁰ *Prinsloo N O v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) paras 10-11.

¹¹ *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd* 2001 (2) SA 232 (SCA) at 239F-H.

¹² *Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC) (*Ascendis*) para 111.

Boshoff v Union Government,¹³ the strict application of the requirements of this doctrine was relaxed. Thus, *res judicata* doctrine 'was enforced when a plaintiff demanded the same thing on the same ground, or (which is the same) on the same cause for relief, or further, where the same issue had been subjected to final previous judicial determination'.¹⁴ This gave rise to what is known as issue estoppel.

[78] This relaxation of the doctrine is explained as follows by Scott JA in *Smith v Porritt*:¹⁵

'Following the decision in *Boshoff v Union Government* 1932 TPD 345 the ambit of the *exceptio res iudicata* has over the years been extended by the relaxation in appropriate cases of the common law requirements that the relief claimed and the cause of action be the same (*eadem res* and *eadem petendi causa*) in both the case in question and the earlier judgment. Where the circumstances justify the relaxation of these requirements those that remain are that the parties must be the same (*idem actor*) and that the same issue (*eadem quaestio*) must arise. Broadly stated, the latter involves an inquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed. Where the plea of *res iudicata* is raised in the absence of a communality of cause of action and relief claimed it has become commonplace to adopt the terminology of English law and to speak of issue estoppel. But, as was stressed by Botha JA in *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (A) at 669D, 667J-671B, this is not to be construed as implying an abandonment of the principles of the common law in favour of those of English law; the defence remains one of *res iudicata*. The recognition of the defence in such cases will however require careful scrutiny. Each case will depend on its own facts and any extension of the defence will be on a case-by-case basis (*Kommissaris van Binnelandse Inkomste v Absa* (*supra*) at 67E-F). Relevant considerations will include questions of equity and fairness, not only to the parties themselves but also to others...'¹⁶

[79] This Court, in *Shokkos v Lampert N O*,¹⁷ held that to establish the relationship of 'party and privy' the privy must 'derive title' from the party.¹⁸ Similarly in *Rail Commuters Action Group & Others v Transnet Limited & Others*,¹⁹ it was held that for a plea of *res judicata* to succeed, the parties concerned in both sets of proceedings

¹³ *Boshoff v Union Government* 1932 TPD 345.

¹⁴ *Ascendis* para 112.

¹⁵ *Smith v Porritt* [2007] ZASCA 19; [2007] SCA 19 (RSA); 2008 (6) SA 303 (SCA).

¹⁶ *Ibid* para 10.

¹⁷ *Shokkos v Lampert NO* 1963 (3) SA 421 (W).

¹⁸ *Ibid* at 425H-426A. See also *Cassim v The Master & Others* 1960 (2) SA 347 (D) at 355A-D.

¹⁹ *Rail Commuters Action Group and Others v Transnet Limited and Others* 2006 (6) SA 68 (C).

must either be the same individuals or ‘persons who are in law identified with those who were parties to the proceedings’.²⁰ On the other hand, in *Man Truck & Bus SA (Pty) v Dusbuss Leasing CC and Others*,²¹ Rabie AJ stated that the list of privies should ‘not be limited only to those listed by Voet. The question as to whether a person should be so regarded, should depend upon the facts of each particular case and should not only apply to the specific person or persons against whom judgment had been obtained’.²² In *Man Truck* it was held that the sole members and controlling minds of two close corporations who had bound themselves as sureties for and co-principal debtors with their close corporations were bound by a court decision in earlier proceedings against the said close corporations, even though they were not themselves parties to that litigation.

[80] This Court remarked, in *Royal Sechaba Holdings (Pty) Ltd v Coote and Another*,²³ that there is no reason why a court cannot relax even the same-person requirement. In *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC & others*,²⁴ Wallis JA stated that it was not clear that Voet confined ‘same person’ narrowly to those who ‘derived their rights from a party to the original litigation’ and continued: ‘[I]t may be that the requirement of “the same person” is not confined to cases where there is an identity of persons, or where one of the litigants is a privy of a party to the other litigation, deriving their rights from that other person. Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the issue be litigated all over again with the same witnesses and the same evidence in the hope of a different outcome, merely because there is some difference in the identity of the other litigating party.’²⁵

[81] Prince Simakade and Prince Mbonisi disputed that *res judicata* was part of application to the identification decision. In his application for leave to appeal, Prince

²⁰ Ibid at 82H-83A.

²¹ *Man Truck & Bus SA (Pty) v Dusbuss Leasing CC and Others* 2004 (1) SA 454 (W) (*Man Truck & Bus*). This judgment was followed in *Kruger and Another v Shoprite Checkers* (65/05) [2006] ZANHC 114 (26 May 2006), where a close corporation and its sole member were found to be privies.

²² *Man Truck & Bus* para 34.

²³ *Royal Sechaba Holdings (Pty) Ltd v Coote and Another* [2014] ZASCA 85; [2014] 3 All SA 431 (SCA); 2014 (5) SA 562 (SCA) (*Royal Sechaba Holdings*) para 19.

²⁴ *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* [2013] ZASCA 129; 2013 (6) SA 499 (SCA); [2013] 4 All SA 509 (SCA).

²⁵ Ibid para 43. See also *Royal Sechaba Holdings* para 20.

Simakade contended that he was not directly or individually cited in the application before Madondo AJP, and, therefore, the doctrine could not apply to his application. Thus, Prince Simakade disputed that the 'same parties' requirement, in terms of issue estoppel or *res judicata*, had been established. Prince Simakade also challenged whether the 'same cause of action' requirement had been met, because his application sought final review relief, while the application before Madondo AJP sought interim interdictory relief.

[82] In their application for leave to cross-appeal, Prince Mbonisi and his co-respondents contended that Davis J was wrong to apply the doctrine of *res judicata* to the identification decision, because Madondo AJP had not decided whether the meeting of 14 May 2021 was lawfully constituted; had not decided whether the identification of the King Misuzulu was done in accordance with customary law in the context of the review; and had not decided on the composition of the Zulu Royal Family for purposes of identifying a successor to the throne. Therefore, Prince Mbonisi contended, the Madondo AJP judgment did not render the review *res judicata*. In addition, Prince Mbonisi and his co-respondents contended that the high court erred in finding that the doctrine of *res judicata* was applicable in circumstances where interim interdict applications have been dismissed.

[83] Princes Mbonisi and Simakade's contention that the plea of *res judicata* does not find application to the identification of the king issue, should be rejected. The high court correctly applied the principles of *res judicata*. I say this for the following reasons. Prince Mbonisi's application was one of the three applications which were jointly heard by Madondo AJP. He dealt with it separately in his judgment. He started off by identifying four issues which were before him for consideration.

[84] The first was whether a coronation implicating public funds was imminent and the second was whether the applicants in that application had *locus standi* 'and valid reasons to stay the process leading to the identification, recognition and coronation of Prince Misuzulu'. The third and fourth issues were whether 'Prince Misuzulu was legitimately and appropriately identified and nominated as the successor to the late Isilo and (whether) there is any dispute as to the Zulu kingship'.

[85] In his judgment, Madondo AJP recorded that Prince Misuzulu was ‘the designated heir and prince-elect of the Zulu Kingdom in terms of the Zulu customary law and customs [who] ha[d] been identified and nominated by the Zulu Royal Family as the successor to the late Isilo’²⁶ and that:

‘[T]he Zulu Royal Family met on 14 May 2021 and identified and nominated Prince Misuzulu as the successor to the Zulu throne. No dispute was raised in this regard. The applicant princesses’ application has all along been based upon the alleged ‘forged will’. No dispute has ever been raised regarding the Zulu Royal Family’s decision of 14 May 2021 or the composition thereof. After the death of the late Queen, the application, which was enrolled to be heard on 7 May 2021, was removed from the roll on 6 May 2021 to enable the internment of the late Queen’s mortal remains to take place. On 17 May 2021, the applicant princesses re-enrolled the urgent application with the added relief against Prince Misuzulu, without the leave of this court. The applicant princesses vaguely stated that some 140 members of the Royal Family who were listed on the attendance list, were not members of the Zulu Royal Family, however they could not identify who those people actually were. This statement was later changed to aver that no decision was taken on 14 May 2021 and that the meeting was not convened for the purpose of identifying a successor to the throne but for cleansing purposes. However, no proof of such averments was tendered.’²⁷

[86] Regarding the dispute about the Zulu kingship, Madondo AJP found that both Prince Mbonisi and the Princesses in their papers did not dispute the entitlement of Prince Misuzulu to succeed to the Zulu throne “*and no such dispute was raised at the meeting or subsequently thereafter*” and that it was common cause that there was no other contender to the Zulu throne.²⁸

[87] Madondo AJP found that, on 11 May 2021, Prince Simakade had addressed a letter to Prince Buthelezi, requesting that ‘the letter should be read out at the Zulu Royal Family meeting of 14 May 2021’, where he disavowed any claim to the throne, or any intention to claim it, and indicated his willingness to abide by the decision of the Zulu Royal Family.²⁹ Madondo AJP emphasised that ‘if anyone disputed Prince Misuzulu’s

²⁶ High Court Judgment para 46.

²⁷ Ibid para 51.

²⁸ Ibid paras 92, 93, 98 and 103.

²⁹ Ibid para 98.

identification and nomination, he or she should have done so at the Royal Family meeting where the matter was discussed'.³⁰

[88] Regarding the President's and/or the Premier's obligation to investigate or refer the matter back to the Zulu Royal Family for consideration and resolution, Madondo AJP found that Princess Thembi's letter, addressed to the President, did not comply with s 8(4) of the Leadership Act and that 'the President should act when there is evidence or an allegation that the identification of a person as a king or queen was not done in accordance with customary law and custom. No such evidence or allegation has been brought to the notice of the President in this regard. The letter of Princess Thembi lacked the necessary allegation that Prince Misuzulu, who was identified by the Royal Family, had not been identified in accordance with Zulu customary law and traditions, and that Prince Simakade has a better right or entitlement to succeed to the throne'.³¹

[89] Madondo AJP concluded that Prince Mbonisi had failed to make out a case that there was a dispute about the successor to the throne that required the President or the Premier to investigate or refer the identification back to the Zulu Royal Family for consideration and resolution.³²

[90] As regards Prince Simakade's entitlement to succeed to the throne, Madondo AJP found that the purported identification of Prince Simakade, at a subsequent meeting, was 'doomed', as he had declined the nomination. And that even if he had purported to accept the nomination, he could not have legitimately been identified, as he does not qualify in terms of Zulu customary law and customs.³³ In respect of the criteria used in the identification process, Madondo AJP stated that Prince Misuzulu was identified and nominated on the basis that his mother, the late Queen, was the daughter of a Royal Family, the eSwatini Royalty, being a daughter of King Sobhuza II and her ilobolo was paid by the Zulu Nation. She therefore preceded other wives of His late Majesty and became a Great Wife, who was expected to bear a successor to the throne.

³⁰ Ibid para 93.

³¹ Ibid para 101.

³² Ibid para 101.

³³ Ibid 101.

[91] Prince Simakade's further contentions that *res judicata*, in relation to his application, did not apply on the grounds that he was not a party in Prince Mbonisi's application and further that his application was for a review, whereas the relief sought in the Prince Mbonisi application was for an interim interdict, should be rejected. First, he was cited as one of the respondents in the Prince Mbonisi application, and therefore he had an opportunity to fully participate in those proceedings. The relaxation of the *res judicata* requirements will, in these circumstances, not cause him any prejudice. Second, although the relief sought in the two applications differs, the applications were based on the same issues, namely whether King Misuzulu was rightfully identified as the King and whether the President complied with his statutory obligations in recognising him as a King. It is also correct that interim relief was sought in the Prince Mbonisi application and that ordinarily, *res judicata* may not be raised because the interim order lacks finality as is susceptible to being changed or revisited.³⁴ But where an application for an interim order is dismissed, it becomes final in effect³⁵ and the plea of *res judicata* may be raised.

[92] I agree with the high court's conclusion that although the causes of action differ in nature, the issues to be decided in both causes of action are the same. Prince Mbonisi and Prince Simakade are therefore precluded by estoppel from re-litigating the identification issue which was finally determined by Madondo AJP.

Recognition decision

[93] Notwithstanding the high court's finding on the identification issue, it proceeded to hold that a determination of the recognition decision remained. The question there was whether that decision was lawfully made, in terms of the Leadership Act. In defending the recognition decision, the President stated in his answering affidavit that he had regard to the report of the mediation panel, which, among other things, recommended that he should wait for the outcome of all cases before proceeding. After the judgment of Madondo AJP, he received a letter from Prince Mbonisi's attorneys of record on 9 March 2022, among others, stating that the process of identifying and

³⁴ *African Wanderers Football Club (Pty) Ltd v Wanders Football Club* 1977 (2) SA 38 (A).

³⁵ *Mkhize NO v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 50; 2019 (3) BCLR 360 (CC) para 42.

selecting a king was now hampered by Madondo AJP's judgment which erroneously recognised the meeting of 14 May 2021 as a meeting envisaged in s 8(1)(a)(ii) of the Leadership Act and informing him that they had instructions to take the matter on appeal.

[94] The President went on to state that on 12 March 2022, he received a letter from Prince Buthelezi advising him that Prince Misuzulu's appointment to the throne was announced in the regent's will and by law the regent had the authority to make such an announcement. Such announcement was not unexpected as it had been understood from the time of His late Majesty's marriage to the late Queen that the heir to the throne would come from her. The decision was in accordance with Zulu customary law and traditions, was unanimous as to the successor to the throne. No dissension was recorded, and no query was raised. In that letter, Prince Buthelezi requested the President to make the necessary arrangements for the commencement of King Misuzulu's reign. The recognition of Prince Misuzulu was also supported by the Minister.

[95] Another document which the President considered was the resolution of a meeting of all the houses of the royal family which took place on 29 September 2021, where Princess Thembi had declined to attend because she did not recognise the authority of King Misuzulu. Based on these facts, the President stated that he concluded that there was insufficient evidence that was placed before him to persuade him to cause investigation in terms of s 8(4) of the Leadership Act.

[96] The high court found that the President's decision to recognise Prince Misuzulu as king, in circumstances where there were allegations that his identification was not in accordance with Zulu customary law and customs, was flawed. It held that in terms of the Leadership Act he should have caused those allegations to be investigated by the investigative committee. It concluded that the decision by the President to recognise Prince Misuzulu was reviewable under PAJA.

[97] Davis J held that s 8 contemplates two thresholds or triggers, either 'evidence' or 'an allegation'. The latter denotes a low threshold and is something less than evidence. He held in that regard that 'the mere making of an assertion that traditional

laws and customs had not been followed [is] sufficient.³⁶ He held further that regardless of whether the President relies on evidence or an allegation, the Leadership Act does not contemplate that he would perform an evaluative process. Once an allegation has been made, the peremptory provision, that the President ‘must cause an investigation to be conducted by an investigative committee’, is activated.³⁷ The low threshold used in the context of the inception of a new leadership reign, Davis J found, is to dispel any uncertainty regarding the validity of a new leader’s appointment and to ‘recognise only a leader without any outstanding issues regarding his/her entitlement to a throne.’³⁸

[98] Davis J accordingly concluded that s 8(4) was applicable in the circumstances, and was binding on the President when he took the recognition decision.³⁹ For this reason, Davis J concluded that it was ‘incorrect for the President to consider the matter as requiring the existence of a “dispute”, being the language employed by the inapplicable section 59’.⁴⁰ While he acknowledged that ‘the President at least partially appreciated the applicability of section 8(4)’, he found that the President did not follow it,⁴¹ even though *‘[t]here can ... be no doubt that the threshold of “allegations” regarding the lawfulness of the election process, has been met’*.⁴²

[99] The question is whether the high court was correct in its conclusion. Put differently, the question is whether the allegations that were raised by King Misuzulu’s detractors that his identification was not in accordance with Zulu customary law and traditions, constituted a sufficient basis for the President to cause those allegations to be investigated by an investigative committee.

[100] Sections 8(4) and (5) read as follows:

‘(4) Where there is evidence or an allegation that the identification of a person as a king ... was not done in terms of customary law and customs, the President or the relevant Premier, as the case may be—

³⁶ Pretoria High Court Judgment, para 56.

³⁷ *ibid* para 56.

³⁸ *ibid* para 57.

³⁹ *ibid* para 52.

⁴⁰ *ibid* para 52

⁴¹ *ibid* para 53

⁴² *ibid* para 59

(a) must cause an investigation to be conducted by an investigative committee designated by the President ... which committee must, in the case of a committee designated by the President, include at least one member of the National House ... to provide a report on whether the identification or election of the relevant person was done in accordance with customary law and customs and if not, which person should be so identified or whether a new election should be held; and

(b) must, where the findings of the investigative committee indicate that the identification or election of the person referred to in subsections (1) and (2) was not done in terms of customary law and customs, refer the report contemplated in paragraph (a) to the royal family ... for its comments;

(5) The President... may, after having considered the report of the investigative committee as well as the comments of the royal family, subject to subsection (3) recognise a person as king or queen... as the case may be'.

[101] While I agree that it is the existence of evidence or allegations that will trigger the designation by the President of an investigative committee, and that the threshold for an allegation is something less than evidence. I, however, disagree with the high court's conclusion that the mere making of an assertion that customary law and customs had not been followed in the identification, would be sufficient to justify its referral to an investigative committee. In my view, it is not just any allegation that will trigger the referral. Otherwise, any statement or allegation of fact by a group of people who are opposed to the identification of a person as king or queen would be sufficient to trigger the referral to an investigative committee and therefore stymie the recognition of a king or queen. I agree with counsel for King Misuzulu that an allegation which would trigger the referral must contain the facts necessary to sustain the conclusion that customary law was not followed in the identification. In other words, an allegation must be such that it constitutes a sufficient basis for the conclusion that the identification of a king or queen was not done in terms of the customary law and customs of the traditional community concerned.

[102] Princess Thembi's letter of 3 June 2021, which purports to be a dispute letter, does not identify the respects in which Zulu customary law was not followed in the identification of King Misuzulu. Her complaint is that, first, the meetings of 7 May and 14 May 2021, at which Prince Misuzulu was nominated, were called by Prince Buthelezi, whom she alleges had no authority to do so. She states that the meetings of the Royal

Family should have been called by the senior Prince whom she fails to identify. Secondly, the late Queen's will nominated and appointed Prince Misuzulu as heir to the throne. Princess Thembi states that the late Queen, as a regent had no authority whether in terms of customary or statutory law to appoint a successor given that her position is a caretaker in nature. But the nomination of Prince Misuzulu by the late Queen in her will was not necessary for his identification. It is the Zulu customary law and customs which determine whether or not he is eligible to be identified as the king.

[103] The allegations must set out the provisions of the traditional customary law which regulates the identification process and the respect in which the identification process deviated from the established customary law. It is not enough to merely make a bald assertion that the process identifying the king or queen was not followed.

[104] Thirdly, Princess Thembi claims that the nomination of Prince Misuzulu at the meeting of 7 May 2021 was not free and fair, given the fact that Prince Thokozani, who wanted to raise certain customary and legislative issues relating to the nomination of Prince Misuzulu, was rudely instructed by Prince Buthelezi to sit down. But even if there were some irregularities in the meetings concerned, the Zulu Royal Family reaffirmed, in a meeting of 21 September 2021, that Prince Misuzulu was the rightful King of the Zulu Nation. The lawfulness of this meeting has not been challenged.

[105] Apart from these differences, Princess Thembi and Prince Buthelezi agree on the status of the late Queen, that she was a Great Wife in terms of the Zulu law of customary succession and that the heir to the throne would be from her house and the heir would be identified, whether by birth, as the first-born son or other position of seniority, in terms of custom. Ordinarily, in terms of this hereditary arrangement Prince Misuzulu, as the late Queen's first-born son qualifies to be the heir to the throne. According to Princess Thembi, Prince Misuzulu does not automatically qualify to be the heir because Prince Simakade, who was born out of wedlock before him, became the first-born son of the late Queen through the custom of *ukufakwa esiswini* and by virtue of having been installed as 'Isokangqangi'⁴³. The automatic right of a child to become

⁴³ *The first-born son of a king before he assumed kingship.*

an heir, who is affiliated to the house through the custom of ukufakwa esiswini, is disputed by Prince Mbonisi.

[106] It is noteworthy that Princess Thembi and Prince Mbonisi, both members of the core Royal Family, have contradicting views on the application of Zulu customary law of succession with regard to the identification of the king. According to Prince Mbonisi, it is His late Majesty's brothers and sisters who are responsible for identifying an heir to the throne. There is no custom or tradition that overrides the power and authority of the royal family to decide on the identity of an heir. No tradition or custom recognises an automatic right to be identified as an heir.

[107] Prince Mbonisi further went on to say that 'the position of birth does not give a first born male automatic right to be recognised as an heir. The only entitlement that all the sons have is the right to be considered as potential heirs but not the right to be identified. That a son is the first born of the first wife of the king is a strong factor to be considered with other factors by the elders of the ruling family when determining who among the King's children should be identified'. Prince Mbonisi denied that the late Queen was the Great Wife. Prince Mbonisi maintained that a Great Wife is appointed by a reigning king, and such position is not automatic. It is earned.

[108] The lawfulness of the meeting of 14 May 2021 and the decisions which were taken in that meeting, were raised in the proceedings before Madondo AJP. He rejected the challenge. He concluded that there was no dispute for the Premier or the President to investigate and to refer back to the Zulu Royal Family for consideration and resolution in terms of s 8(4) of the Leadership Act. In the circumstances, the high court erred in reviewing and setting aside the recognition decision and remitting the matter to the President for him to establish an investigative committee. The fact of the matter is that by the time that the President took a decision to recognise Prince Misuzulu, there was neither evidence nor allegations that the Zulu customary law and customs were not complied with in the identification of Prince Misuzulu. As such, the provisions of ss 8(4) and (5) did not find application.

[109] Consultation is necessary for four reasons, namely provincial relevance; integration of governance; legitimacy; and the stability of constitutional principle of

cooperative governance. As regards provincial relevance, kingships and queenships are rooted in specific provinces. The Premier is the head of the provincial government and has direct oversight on matters relating to traditional leadership within that province. With regard to integration of governance, traditional leadership structures function alongside the municipal and provincial governance structures. The Premier ensures that the recognition of a king or queen aligns with the provincial government's needs, service delivery and cooperation within municipalities.

[110] In relation to legitimacy and stability, recognition of a king or queen often involves sensitive cultural, historical and political issues. The Premier is closer to their communities and is better positioned to understand local disputes, rival claims, or community support. Consultation helps avoid conflict and ensures legitimacy. With regard to constitutional principle of cooperative governance, Chapter 3 of the Constitution requires all spheres of government, ie national, provincial and local, to cooperate in good faith. By consulting the Premier, the President is upholding this principle of cooperative governance. In this case the Premier was engaged throughout the process leading to the recognition of Prince Misuzulu. He wrote a letter to the Minister in support of Prince Misuzulu's recognition.

[111] It is clear from the correspondence exchange between the President and the Minister that after the President became concerned that there was division amongst the members of the Zulu Royal Family regarding the identification of the king, he asked the Minister to intervene and to work in conjunction with the Premier of the KwaZulu-Natal province to resolve the dispute. The Minister communicated with the Premier throughout, up until she sent a memorandum to the President in which recommended that the President should recognise Prince Misuzulu. In the memorandum, the Minister confirmed that the Premier of the province was in support of the recommendation. In my view the President, as required by the Leadership Act, consulted with the Premier before deciding to recognise Prince Misuzulu as the rightful king. It therefore follows that Prince Mbonisi's attack on the recognition decision based on the President's failure to consult with the Premier, must also fail.

Prince Simakade's cross-appeal against the refusal of striking out applications

[112] This cross-appeal is not properly before this Court. The order and the ruling which are sought to be appealed against, are not part of the record. But in any event, it is apparent from the record that the objection by Prince Simakade to certain parts of Prince Misuzulu's answering affidavits, was adequately dealt with by Prince Misuzulu when he deposed to his own answering without relying on Prince Buthelezi's unsigned answering affidavit. And where necessary, he obtained confirmatory affidavits from the relevant witnesses.

[113] Finally, it is necessary to comment on the status of the appeal record. The record was poorly prepared, which makes it difficult for a court to prepare for the hearing and do justice to the case. Additionally, it increases costs. The record comprises more than 5000 pages, consisting of 25 volumes and a supplementary volume. Some pages were duplicated and in the heads of argument reference was made to the incorrect pages in the record. In some instances, the quality of the copies was very poor and sometimes completely illegible. It is apparent that the parties made no real attempt to comply with the rules of this Court, in particular rule 8, in preparing the record. This Court held, in *Government of the Republic of South Africa v Maskam Boukontrakteurs (Edms) Bpk*:

'In recent years this Court has on a number of occasions drawn attention to the unnecessary inclusion in appeal records of numerous and sometimes lengthy documents and has made appropriate orders relating to the needless costs occasioned thereby. (See eg *Omega Africa Plastics case supra*; *Olivier NO v Rondalia Versekeringsmaatskappy van SA Bpk* 1979 (3) SA 20 (A) at 36B-D; *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at 1030; *Die Meester v Joubert en andere* 1981 (4) SA 211 (A) at 228.) Despite what has been said and ordered in these and other cases the practice of including unnecessary documents in appeal records persists. In my opinion, it is the duty of attorneys responsible for the preparation and lodging of appeal records to ensure that, if possible, this does not occur and thereby to obviate the incurring of unnecessary costs. Failure to perform this duty could amount to a breach of the duty of care owed by the attorney to his client. The time may come when this Court may consider it appropriate in such cases to order that such unnecessary costs be paid by the attorney concerned *de bonis propriis* (cf *Machumela v Santam Insurance Co Ltd* 1977 (1) SA 660 (A) at 664A-C).'⁴⁴

⁴⁴ Ibid at 692G-693A.

[114] Not only the appellants' attorneys but also the respondents' should apply their mind to the matter and neither is entitled merely to rely on the status of the documents in making the decision.⁴⁵ Whilst the primary obligation to prepare the record rested with the appellants, in this case, it is apparent that all parties were equally to blame for the non-compliance. This is especially so in this case since the respondents were granted leave to cross-appeal against certain aspects of the high court's order. I have considered whether a punitive order for costs should not be made. But in view of the fact that no party can be singled out, and that all the parties were at fault in respect of the preparation of the record, it seems to me that the special cost order is not clearly warranted.

Costs

[115] As regards the second appellant's costs, there is no reason why the first and second respondents should not be ordered to pay his costs. The dispute between the parties is about the kingship of the Zulu Nation and at the heart of this matter is the lawfulness of the Royal Family's decision to identify the second appellant as the King of the Zulu Nation and the decision of the first appellant to recognise him as such. Although the high court made an order, which is in their favour, the first and second respondents were dissatisfied with certain aspects of the order.

[116] As far as the dispute between the first appellant and the first and second respondents is concerned, I am of the view that it would be just and equitable not to order the first and second respondents to pay the first appellant's costs. This is so because the first and second respondents' challenge to the first appellant's decision to recognise Prince Misuzulu is not vexatious.

Order

[117] In the result I make the following order:

1 The first and second appellants' appeal is upheld.

2 The order of the high court is set aside and replaced with the following:

‘(a) The first applicant's application under case number 19891/2022 is dismissed;

⁴⁵ *Salviati and Santori (Pty) Ltd v Primesite Outdoor Advertising (Pty) Ltd* 2001 (3) SA 766 (SCA) at 774.

(b) The first applicant is ordered to pay the second respondent's costs including the costs of two counsel where so employed;

(c) The applicant's application under case number 38670/2022 is dismissed;

(d) The applicant is ordered to pay the second respondent's costs including the costs of two counsel where so employed.'

3 The first and second respondents are ordered to pay the second appellant's costs including costs of two counsel.

4 The first and second respondents' cross-appeals are dismissed with costs, such costs to include costs of two counsel.

Deputy President Zondi

Appearances

For the first appellant: M Moerane SC, N Muvangua and N Chesi-
Buthelezi

Instructed by: The State Attorney, Pretoria
The State Attorney, Bloemfontein

For the second appellant: T N Ngcukaitobi SC, J A Klopper and N Buthelezi

Instructed by: Cavanagh and Richards Attorneys, Centurion
Honey Attorneys, Bloemfontein

For the first respondent: T Masuku SC, M Simelane and N Nyathi

Instructed by: JG and Xulu Incorporated, Johannesburg
Pieter Skien Attorneys, Bloemfontein

For the second respondent: A Dodson SC, S Pudifin-Jones and N Seme

Instructed by: Hammann-Moosa Inc., Makhado
Webbers Attorneys, Bloemfontein.