



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 116/25

In the matter between:

uMNDENI weNKOSI OF iNKOSI LUTHULI

First Applicant

iNKOSI BHEKIZIZWE NIVARD LUTHULI

Second Applicant

and

EXECUTIVE COUNCIL, KWAZULU-NATAL

First Respondent

PREMIER, KWAZULU-NATAL

Second Respondent

**MEMBER OF THE EXECUTIVE COUNCIL
FOR COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS,
KWAZULU-NATAL**

Third Respondent

THULINI TRADITIONAL COUNCIL

Fourth Respondent

**MINISTER OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Fifth Respondent

**DEPARTMENT OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

Sixth Respondent

**NATIONAL HOUSE OF TRADITIONAL AND
KHOI-SAN LEADERS**

Seventh Respondent

**DEPARTMENT OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS, KWAZULU-NATAL**

Eighth Respondent

PRESIDING OFFICER OF THE SECTION 23(4) INQUIRY

Ninth Respondent

and

Neutral citation: *uMndeni weNkosi of iNkosi Luthuli and Another v Executive Council, KwaZulu-Natal and Others* [2026] ZACC 35

Coram: Mlambo DCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Nuku AJ, Opperman AJ, Rogers J, Savage J and Tshiqi J

Judgment: Dambuza J (unanimous)

Heard on: 24 February 2026

Decided on: 11 September 2026

Summary: KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 — sections 21(4), 22, 23 and 24(1) — removal of traditional leader — misconduct inquiry

Constitution — sections 30, 31, 211 and 212 — cultural rights — customary law

ORDER

On application for confirmation of the order of the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg (High Court):

1. The order of the High Court declaring sections 21(4), 22, 23 and 24(1) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 inconsistent with the Constitution and invalid is not confirmed.
2. Paragraph 2(b) to (e) of the High Court's order is set aside and replaced with the following order:
“2. The counter-application is dismissed.”

3. The second applicant is ordered to approach the High Court within one month from the date of this order to have the conditional counter-application set down for hearing

READTHROUGH DRAFT

DAMBUZA J (Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Nuku AJ, Opperman AJ, Rogers J, Savage J and Tshiqi J concurring):

Introduction

[1] This is an application for the confirmation of an order of constitutional invalidity granted by the High Court, KwaZulu-Natal Division, Pietermaritzburg (High Court). The High Court declared sections 21(4), 22, 23 and 24(1) (impugned provisions) of the KwaZulu-Natal Traditional Leadership and Governance Act¹ (KZN Governance Act) inconsistent with the Constitution and, therefore, invalid. The impugned provisions regulate the determination of misconduct, and the grounds and process for removal of traditional leaders within the province of KwaZulu-Natal. The High Court found the impugned provisions unconstitutional for violating the entrenched right of the first applicant, uMndeni weNkosi of iNkosi uLuthuli (uMndeni), to participate in an inquiry and adjudicate allegations of misconduct made against the second applicant, iNkosi Bhikizizwe Nivard Luthuli (iNkosi). I shall refer to them collectively as the applicants.

Facts

[2] This matter originates in a petition lodged in 2015 with the third respondent, the Member of the Executive Council for the Provincial Department of Cooperative Governance and Traditional Affairs, KwaZulu-Natal (MEC), by members of the

¹ 5 of 2005.

eMathulini Traditional Community in KwaZulu-Natal. The petition alleged extensive misconduct on the part of iNkosi, which included the imposition of extortionate levies, the confiscation of land and political favouritism in the allocation of community services. As a result of the petition, the MEC advised iNkosi to cease the collection of levies pending the enactment of the KwaZulu-Natal Traditional Leadership and Governance Bill, 2013 (Bill).² The MEC engaged the services of a firm of attorneys to interview members of the community together with the applicants regarding the allegations and to submit a report on that process. However, attempts by the attorneys to interview iNkosi and the eMathulini Traditional Council failed. In their report to the MEC, the attorneys expressed doubt that iNkosi had authority to impose and collect levies from members of the community.

[3] The interviews resulted in an inquiry constituted under section 23 of the KZN Governance Act. Pursuant to that inquiry, iNkosi was found guilty of, among other things, having acted in breach of the Code of Conduct promulgated under the KZN Governance Act, by conducting himself disgracefully and failing to act in the best interests of the community. The ninth respondent, being the presiding officer over the inquiry, recommended that the first respondent, the Provincial Executive Council, KwaZulu-Natal (PEC), withdraw iNkosi's recognition as a traditional leader as provided in section 23(1)(d) of the KZN Governance Act (recommendation). The PEC adopted the recommendation (withdrawal decision) and, acting in terms of that decision, the second respondent, the Premier of KwaZulu-Natal (Premier), withdrew the recognition of iNkosi. A request was sent to uMndeni to identify a successor to iNkosi.

[4] Following these events, iNkosi brought an application in the High Court seeking an order in two parts. Under Part A, he sought a rule *nisi* on an urgent basis, suspending the withdrawal of his recognition pending the final determination of Part B

² The Bill sought, among other things, to clarify the role and powers of traditional leaders in areas of local administration, including the collection of levies. It appears that the Bill was never enacted.

of his application – a review of the withdrawal decision.³ In the application, iNkosi asserted that, from 1979, he had always conducted himself in accordance with the customs and traditions of his community, that the MEC and his predecessors had always sanctioned his conduct and had received, and continued to receive, the moneys that iNkosi collected from the community. He complained that, contrary to the provisions of section 23(11)(d) of the KZN Governance Act, the presiding officer did not afford him an opportunity to make representations prior to adopting the withdrawal recommendation. In opposing the application, the PEC, the Premier and the MEC (government respondents) maintained that iNkosi had forfeited any claim against the provincial government by refusing to participate in the section 23 inquiry.

[5] The High Court granted the rule *nisi*, finding that the failure to provide iNkosi with an opportunity to make representations prior to adopting the withdrawal recommendation justified the provisional suspension of the withdrawal of recognition pending the review instituted by iNkosi.

[6] For a long time after the granting of the rule *nisi*, iNkosi did not pursue Part B, the review application. Ultimately, the government respondents initiated a self-review in the High Court seeking an order setting aside the withdrawal decision and remitting the matter to the PEC for redetermination, with iNkosi being afforded an opportunity to make representations regarding the appropriate sanction.⁴

[7] In response to the self-review, the applicants launched a counter-application challenging the constitutionality of the impugned provisions, the inquiry conducted in terms of those provisions and the sanction imposed pursuant to the inquiry,⁵ on the

³ Also cited in that application were the KwaZulu-Natal Department of Cooperative Governance and Traditional Affairs (fourth respondent), the Thulini Traditional Community (fifth respondent), the Thulini Traditional Council (sixth respondent) and the uMndeni weNkosi of iNkosi Luthuli (seventh respondent). These respondents did not actively participate in the proceedings in the High Court or in this Court.

⁴ *Executive Council of the Province of KwaZulu-Natal v Luthuli* [2023] ZAKZPHC 98 at para 1. It would appear that the self-review was based on an acceptance by the government respondents that iNkosi should have been afforded the opportunity to make representations prior to the adoption of the section 23 inquiry recommendation.

⁵ *Id* at para 3.

basis that they excluded uMndeni from participating and presiding over the inquiry. iNkosi also launched a conditional counter-application seeking an order that, in the event of the constitutional challenge being unsuccessful, the “decision” of the presiding officer be reviewed and set aside, that the section 23 inquiry commence afresh and that, in the section 23 inquiry, the presiding officer be directed to “call for and receive the evidence of [uMndeni] and him”.

[8] The High Court upheld the applicants’ arguments. It found that, in failing to defer to uMndeni in relation to presiding over the section 23 inquiry, and providing no mechanism for the family to participate in that inquiry, the impugned provisions are unconstitutional.⁶ The High Court relied on a report prepared by Dr Vusumuzi Kumalo, who holds a PhD from the University of the Witwatersrand and is a lecturer in the Department of History and Political Studies at Nelson Mandela University, which set out the customary laws and practices of eMathulini Traditional Community on the appointment and removal of traditional leaders.⁷ According to the report, the right to appoint, discipline and remove traditional leaders is the prerogative of uMndeni.⁸ Furthermore, iNkosi is entitled to receive, among other things, payment of tribal levies for use in the “upliftment of the community” and for assisting “financially destitute members of the community”.⁹

[9] The High Court held that the impugned sections unreasonably infringed upon the rights of uMndeni under sections 30, 31, 211 and 212 of the Constitution by conferring on the MEC the authority to bypass uMndeni in relation to the disciplinary process. It then dismissed the self-review on the basis that “if the impugned sections are unconstitutional and invalid, the finding of misconduct must equally be set aside”. It confirmed the rule *nisi* that was granted in 2020 and pronounced that there would be no order in respect of the conditional counter-application. The High Court thus struck

⁶ Id at para 58.

⁷ Id at para 16.

⁸ Id.

⁹ Id at para 19.

down the impugned provisions and suspended the operation of the order pending confirmation of the order of invalidity by this Court.¹⁰

[10] The government respondents sought leave to appeal to the Supreme Court of Appeal, but withdrew their appeal prior to the matter being heard. They did not participate in the confirmation proceedings in this Court, despite being repeatedly directed to do so. The self-review is therefore not before this Court. Acting upon this Court's request, the Tshwane Society of Advocates (TSA) acted as *amicus curiae* (friends of the court) and nominated Mr Mojapelo SC, Ms Qofa-Lebakeng and Mr Mokwala to make written and oral submissions to the Court on the constitutionality of the impugned provisions. This Court is indebted to the TSA and its counsel for their assistance.

Issues

[11] Because these are confirmation proceedings brought in terms of section 172(2)(a) and (d) of the Constitution, the jurisdiction of this Court is inherently engaged. The issues for determination by this Court are—

- (a) whether condonation should be granted for the applicants' late lodgement of this application;
- (b) whether the order of constitutional invalidity should be confirmed by this Court; and, if necessary,
- (c) the appropriate remedy.

Condonation application

[12] The primary consideration in condonation applications is whether it is in the interests of justice to grant condonation in the particular circumstances.¹¹ In making this determination, this Court requires a full explanation of the cause of the delay,

¹⁰ Id at paras 56-8.

¹¹ *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) (*Van Wyk*) at para 20 and *S v Mercer* [2003] ZACC 22; 2004 (2) BCLR 109 (CC); 2004 (2) SA 598 (CC) at para 4.

accounting for the entire period of delay.¹² Other relevant factors include the length of the delay, its effect on the other litigants, the reasonableness of the explanation for the delay and the importance of the issues that must be determined.¹³

[13] The applicants filed this application over a month out of time. Their legal representatives attribute the delay to difficulty in communicating with the applicants, who live in a remote rural area. They allude to the police's refusal to commission the applicants' affidavits because of a typographical error. Although the delay is not insignificant, the explanation is adequate. The applicants' conduct was not unreasonable considering their circumstances, and no inconvenience or prejudice was occasioned to the respondents as a result of the delay. The correct interpretation of the impugned provisions and their constitutional validity transcend the interests of the parties to this dispute. Condonation is therefore granted.

Submissions on the confirmation of the order of invalidity

uMndeni

[14] Although iNkosi and uMndeni are co-applicants, the order of constitutional invalidity is grounded in the violation of uMndeni's rights. Significantly, the case pleaded in the counter-application is that the impugned provisions subvert uMndeni's right to decide whether iNkosi should be removed from the throne. At the very least, uMndeni argues, the impugned sections deprive uMndeni of its right to "participate" in the section 23 inquiry.

[15] Before this Court, counsel for the applicants emphasised the impermissibility of subjecting iNkosi to the authority of government structures – the PEC, the Premier and the presiding officer. The submissions highlight that uMndeni holds the customary decision-making authority, and therefore the right, to remove iNkosi. The argument is that the impugned provisions violate this right by creating a dispute

¹² *Van Wyk* id at para 22.

¹³ Id at para 20.

resolution mechanism that authorises: (a) a presiding officer to conduct and adjudicate an inquiry into allegations of misconduct against iNkosi; (b) the PEC to make the removal decision and impose the sanction of withdrawal; and (c) the Premier to withdraw recognition of iNkosi.

[16] uMndeni contends that the rights to adjudicate the issues raised in the inquiry, to make the withdrawal decision and to effect the withdrawal, all derive from the right to identify the rightful iNkosi under customary law. This right, it argues, finds partial expression in section 19 of the KZN Governance Act, which affirms uMndeni's right to identify iNkosi. The applicants assert that customary law affords uMndeni decisive authority to appoint *and remove* iNkosi, and that the impugned provisions are incapable of an interpretation that gives expression to uMndeni's customary law right to *remove* iNkosi. In section 23, the impugned provisions explicitly vest the power to withdraw recognition of iNkosi in the government respondents, amounting to the constructive removal of iNkosi by the government respondents. Consequently, the applicants insist, confirmation of the declaration of constitutional invalidity and striking down the impugned provisions in their entirety is the appropriate remedy in the circumstances.

Amici curiae

[17] The amici assert, in the main, that this Court should not confirm the order of constitutional invalidity for three reasons. First, the impugned provisions are capable of a constitutionally compliant interpretation. Second, the provisions serve the crucial constitutional purpose of ensuring accountability, legality, protection of communities and independent adjudication of misconduct complaints against traditional leaders. Third, the process of reading-down or targeted reading-in would be most appropriate for any interpretative guidance or refinement that may be required if the impugned provisions are found to be unconstitutional.

*Analysis**Should the declaration of invalidity be confirmed?**The statutory framework*

[18] The starting point is section 211¹⁴ of the Constitution, which recognises customary law as an independent source of norms.¹⁵ The Constitution obliges courts to apply customary law where appropriate, subject to the Constitution and applicable legislation.¹⁶ Where legislation regulates a particular sphere of customary law in a constitutionally compliant manner, such customary law must be applied in conformity with the statute. The Constitution therefore provides a framework for the relationship between indigenous and modern democratic laws and structures in South Africa. In this respect, customary laws and institutions are placed on equal footing with all other sources of law, as they ultimately rely on the Constitution as the supreme law of the Republic for their validity.¹⁷

[19] Section 212 of the Constitution provides a discretionary power to the national and provincial legislatures to enact a statutory framework for the institution of traditional leadership. The Traditional and Khoi-San Leadership Act (TKLA),¹⁸ its

¹⁴ Section 211 of the Constitution, headed “Recognition”, provides:

- “(1) The institution, status and role of traditional leadership, according to customary law are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.”

¹⁵ *Alexkor Ltd v The Richterveld Community* [2003] ZACC 18; 2003 (12) BCLR 1301 (CC); 2004 (5) SA 460 (CC) at para 51.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ 3 of 2019. In *Mogale v Speaker of the National Assembly* [2023] ZACC 14; 2023 (6) SA 58 (CC); 2023 (9) BCLR 1099 (CC), this Court declared the TKLA invalid due to the failure of Parliament to facilitate public participation before passing it. The order was suspended for a period of 24 months to allow Parliament to re-enact the statute in a manner that is consistent with the Constitution, or alternatively, to pass another statute that complies with the Constitution. Recently, in *Minister of Cooperative Governance and Traditional Affairs v Speaker of the National Assembly* [2025] ZACC 22; 2026 (1) BCLR 1 (CC), this Court granted an application for extension of the suspension period for 24 months. At the time of judgment, the declaration of invalidity remains suspended.

predecessor, the Traditional Leadership and Governance Framework Act (Governance Framework Act)¹⁹ and the KZN Governance Act are a part of this statutory framework.

[20] Furthermore, section 2 of the Constitution provides that all law and all exercises of public power must be consistent with the Constitution. As to whether traditional leaders exercise public power, section 212 of the Constitution leaves to Parliament the responsibility of giving effect to this role in relation to local communities. In this context, section 25 of the TKLA makes provision for the allocation of roles to traditional and Khoi-San leaders²⁰ and section 26 of that Act lays

¹⁹ 41 of 2003.

²⁰ Section 25 of the TKLA, headed “Allocation of roles to kingship or queenship council, principal traditional council, traditional council, Khoi-San council, traditional sub-council and traditional and Khoi-San leaders”, provides:

- “(1) A department within the national or provincial sphere of government, as the case may be, may, through legislative or other measures provide a role for a kingship or queenship council, principal traditional council, traditional council, Khoi-San council, traditional sub-council and traditional and Khoi-San leaders in respect of any functional area of such department: Provided that such a role may not include any decision-making power.
- (2)
 - (a) The process and procedure to be followed for the provision of a role contemplated in subsection (1) to any of the councils or leaders contemplated in that subsection, as well as the extent thereof, and the conditions and resources attached to any such provision, may, subject to paragraph (b), be determined by the department concerned.
 - (b) Before a department makes provision for a role as contemplated in subsection (1), such department must—
 - (i) in the case of a national department, obtain the concurrence of the Minister and consult with the National House; and
 - (ii) in the case of a provincial department, obtain the concurrence of the member of the Executive Council responsible for traditional affairs of the relevant province and consult with the relevant provincial and local houses.
- (3) Where a department has made provision for a role for any council or leader contemplated in subsection (1), such department must monitor the execution of the role and ensure that—
 - (a) the execution of the role is consistent with the Constitution and any other relevant law; and
 - (b) the role is being executed efficiently and effectively.
- (4) Where any of the councils or leaders contemplated in subsection (1) does not execute a role as envisaged in subsection (3), such role or any resources provided to such a council or leader to perform that role may be withdrawn by the department concerned: Provided that before any such withdrawal, the relevant department must

the framework for the establishment of the national, provincial and local houses of traditional leaders.²¹ A clear and comprehensive delineation of the role of traditional leaders in this country remains elusive. However, their role dating back to pre-colonial times, as affirmed in the provincial legislation that governs traditional leadership, reveals a measure of public power in their hands. Under the KZN Governance Act, their functions include managing and allocating land,²² assisting local municipalities in identifying community needs²³ and, under uncoded customary law, administering the affairs of the community in accordance with custom. To that extent, traditional leaders are bound by constitutional principles, including fairness, integrity, transparency and accountability.²⁴

first establish the reasons for the non-execution of the relevant role and, where necessary, capacitate such councils or leaders to enable them to execute the role.

(5)

- (a) When a national or provincial department has made provision for a role as contemplated in subsection (1), such department must inform the Department of—
 - (i) the extent thereof;
 - (ii) the conditions and resources attached thereto; and
 - (iii) the name of the relevant council or leader.
 - (b) When a national or provincial department withdraws a role or resources as contemplated in subsection (4), such department must inform the Department of the reasons for such withdrawal.
 - (c) The Department must keep proper records of the information contemplated in paragraphs (a) and (b).
- (6) The allocation or withdrawal of a role as contemplated in this section must be published for noting in the Gazette or Provincial Gazette, as the case may be, by the relevant department.”

²¹ Section 26 of the TKLA, headed “Houses of traditional and Khoi-San leaders”, provides:

“The houses of traditional and Khoi-San leaders are—

- (a) a National House of Traditional and Khoi-San Leaders established in terms of section 27;
- (b) provincial houses of traditional and Khoi-San leaders as may be established in accordance with the principles set out in section 49; and
- (c) local houses of traditional and Khoi-San leaders as may be established in accordance with the principles set out in section 50.”

²² Section 47(1)(a), read with section 8(1)(a) of the KZN Governance Act.

²³ Id section 8(c).

²⁴ Section 195 of the Constitution, headed “Basic values and principles governing public administration”, states:

- “(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:
 - (a) A high standard of professional ethics must be promoted and maintained.

[21] Sections 30 and 31 of the Constitution entrench, in broad terms, the right of individuals and communities to use their languages and practise their cultures.²⁵ In

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- (b) Efficient, economic and effective use of resources must be promoted.
 - (c) Public administration must be development-oriented.
 - (d) Services must be provided impartially, fairly, equitably and without bias.
 - (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
 - (f) Public administration must be accountable.
 - (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
 - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
- (2) The above principles apply to—
 - (a) administration in every sphere of government;
 - (b) organs of State; and
 - (c) public enterprises.
 - (3) National legislation must ensure the promotion of the values and principles listed in subsection (1).
 - (4) The appointment in public administration of a number of persons on policy considerations is not precluded, but national legislation must regulate these appointments in the public service.
 - (5) Legislation regulating public administration may differentiate between different sectors, administrations or institutions.
 - (6) The nature and functions of different sectors, administrations or institutions of public administration are relevant factors to be taken into account in legislation regulating public administration.”

²⁵ Section 30 is headed “Language and Culture” and provides:

“Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”

Section 31 is headed “Cultural, religious and linguistic communities” and provides:

- “(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—
 - (a) to enjoy their culture, practise their religion and use their language; and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

the dissenting judgment in *Pillay*,²⁶ O'Regan J emphasised the significance of the right to culture in our constitutional dispensation as a mode through which diversity is promoted and protected. As with all rights in the Constitution, these must be interpreted through the prism of the founding value of dignity.²⁷ Culture is a phenomenon through which human beings find meaning and shape their identities as individuals and through their communities.²⁸ It allows both individuals and communities to exercise autonomy in how they choose to live.²⁹ The right to practice one's culture is, therefore, inextricably linked to human dignity and equal enjoyment of all rights and freedoms.

[22] In *Christian Education*,³⁰ this Court characterised section 31 as a “double mechanism”, which creates a positive entitlement allowing individuals to form and sustain cultural communities whilst, at the same time, entailing a negative right preventing the State from denying this entitlement.³¹ Section 30 functions similarly, with the individual being the beneficiary of the right rather than the community. However, this Court has also noted that section 31 – and, by extension, section 30 – “acknowledge the supremacy of the Constitution and Bill of Rights” by ensuring that unjust cultural practices are not insulated from constitutional scrutiny.³² Both provisions explicitly state that cultural rights may not be exercised in a manner that is inconsistent with the Constitution.³³

[23] This Court explained the purpose of these internal modifiers:

²⁶ *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; (2007) 28 ILJ 133 (CC); 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

²⁷ *Id* at para 150.

²⁸ *Id*.

²⁹ *Id*.

³⁰ *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) at para 23.

³¹ *Id*.

³² *Id* at para 26.

³³ Sections 30 and 31(2) of the Constitution.

“The first [purpose] is to prevent protected associational rights of members of communities from being used to ‘privatise’ constitutionally offensive group practices and thereby immunise them from external legislative regulation or judicial control. This would be particularly important in relation to practices previously associated with the abuse of the notion of pluralism to achieve exclusivity, privilege and domination. The second relates to oppressive features of internal relationships primarily within the communities concerned.”³⁴

[24] Section 30 and 31 rights are, therefore, not absolute. They are designed to protect and promote cultural practices that do not infringe the constitutional rights of others or offend the spirit, purport and objects of the Constitution. Any cultural practice that offends the Constitution is excluded from this protection to the extent of the offence caused. Similarly, as discussed, this Court has stressed that the protection of indigenous laws and structures is subject to their conformity with the Constitution.

[25] As I shall demonstrate, the arguments advanced by the applicants cannot succeed given the constitutional and statutory framework that is in place in this country. In summary, the *exclusive* customary right to *adjudicate* and *decide* the outcome of the section 23 inquiry, and to impose a sanction, as advanced by the applicants, is not sustainable within our constitutional dispensation. Additionally, sections 21(4) and 23 are capable of a constitutionally compliant interpretation. Finally, sections 22 and 24(1) are not implicated by the facts of this case. Certainly, the applicants made no attempt to demonstrate how they apply in this case. Generally, our courts will only consider abstract constitutional challenges where required by law or the interests of justice. No such case was made out in this instance. With regard to the applicants’ argument that sections 22 and 24(1) impermissibly subject the monarch to the authority of government functionaries, a dispensation that excludes traditional leaders from accountability to the State would not survive constitutional scrutiny.

³⁴ *Christian Education* above n 27 at para 26.

The customary right of uMndeni to make the withdrawal decision

[26] The applicants buttress their argument on the exclusive right to adjudicate and decide with reference to section 9 of the TKLA. This provision, the applicants argue, recognises the exclusive right of royal families, such as uMndeni, to adjudicate misconduct inquiries against and the withdrawal of recognition of traditional leaders.

[27] It is helpful to illustrate the evolution of statutory law in this regard. Sections 10(2) and 12(2) of the now-repealed Governance Framework Act did afford royal families the right to “remove” a king or queen, senior traditional leader, headman or headwoman through the relevant customary structure. Such a right was available in specified instances where—

- (a) the leader was convicted of an offence which carried a sentence of imprisonment of more than 12 months without an option of fine;
- (b) physical incapacity or mental infirmity made the king or queen unable to function as such;
- (c) wrongful appointment or recognition had occurred; or
- (d) a transgression of a customary rule or principle warranted removal.

[28] However, such a right was not absolute. In the circumstances specified in subsections (1)(a), (b) and (d) of sections 10 and 12, the royal family was required to inform the President and the relevant Premier and Minister of the removal decision and furnish reasons for it. Significantly, under that Act, the “withdrawal of recognition” in such circumstances was an act of State, discharged by the Premier or the President.

[29] In the TKLA, the successor to the Governance Framework Act, the grounds for removal have been altered by substituting wrongful appointment and recognition with change of residence, together with court-ordered removal, as grounds for compulsory removal.³⁵ The TKLA also stipulates breach of the Code of Conduct and

³⁵ Section 9(1)(a) and (c) of the TKLA.

transgression of customary law and customs as grounds for discretionary removal.³⁶ In terms of section 9(3)(a), whenever the royal family or traditional council becomes aware of any of the listed grounds for removal (compulsory and discretionary), it must, within 90 days of becoming aware of the ground, inform the Premier and the senior traditional leaders concerned of the particulars of the principal traditional leader, senior traditional leader, headman or headwoman to whom the ground pertains and the details of the specific ground.

[30] When the royal family or traditional council becomes aware of grounds for discretionary removal, it may recommend withdrawal of recognition of the traditional leader concerned and furnish the Premier with reasons for such a recommendation. However, in terms of section 9(6), when there is evidence or an allegation that the withdrawal was not based on any of the grounds listed in section 9(1), the information supplied to the President or Premier was in bad faith or the recommendation made by the royal family or traditional council was made in bad faith—

“the President or Premier . . . must cause an investigation to be conducted by an investigative committee designated by the President or Premier which must, in the case of a king or a queen, include one member of the National House [of Traditional Leaders] and, in the case of a principal traditional leader, senior traditional leader, headman or headwoman, include at least one member of the relevant provincial house, to provide a report as well as recommendations on whether the withdrawal of recognition of the person concerned was done in accordance with the grounds set out in subsection (1), or whether the information brought to the attention of the President or Premier was done in bad faith or not, or whether the recommendation of the royal family or traditional council was made in bad faith or not.”³⁷

[31] In addition, section 9(4)(a) of the TKLA reads:

“When the President or relevant Premier is informed of the presence of any of the grounds referred to in subsection (1)(a) [conviction of an offence with a sentence of

³⁶ Id section 9(1)(b).

³⁷ Id section 9(6)(a)(iii).

more than 12 months imprisonment without the option of a fine, declaration by a court as mentally unfit or mentally disordered, or no longer residing permanently within the area of kingship or queenship council, principal traditional council or traditional council as the case may be], the President or Premier must, after consultation with the Minister or Member of the Executive Council responsible for traditional affairs in the particular province, as the case may be, subject to subsections (5) and (6), withdraw the recognition of the relevant king or queen, principal traditional leader, senior traditional leader, headman or headwoman.”

[32] Therefore, the reliance on section 9 of the TKLA is misplaced. Under section 9 of the TKLA, the final decision to withdraw the recognition of a king or queen, principal traditional leader, senior traditional leader, headman or headwoman vests in the President or relevant Premier, just as such authority vests in the Premier under the KZN Governance Act. When there is a dispute over the existence of a ground for removal, the scheme presented by the TKLA reflects a clear legislative intention to render the act of ultimate withdrawal of recognition independent and procedurally fair, with the final decision-making authority vesting in the State.

[33] In a constitutional democracy such as ours, this safeguards traditional communities, which are led by unelected leaders through the institution of traditional leadership. These communities remain entitled to effective, transparent and accountable governance in terms of section 41(1)(c) of the Constitution.³⁸ This is especially pertinent given the socio-economic vulnerability that typically characterises rural, traditional communities, which would otherwise be defenceless against abuses of power. In the context of section 23(1), which enumerates serious misconduct of a traditional leader that could materially harm the community in question and in terms of which the provincial leadership may withdraw recognition of that leader, the

³⁸ Section 41 of the Constitution reads, in relevant part:

“(1) All spheres of government and all organs of State within each sphere must—
 ...
 (c) provide effective, transparent, accountable and coherent government for the Republic as a whole.”

provincial leadership would be fulfilling its constitutional mandate under section 41(1)(c) when exercising its power to withdraw recognition.

[34] Section 9 of the TKLA does not reserve the sweeping decision-making authority to withdraw recognition of iNkosi for the royal family, as asserted by uMndeni. Instead, the royal family bears the responsibility of making a report and a removal recommendation to the President or the Premier about the existence of a ground on which a traditional leader should be removed. As discussed in the paragraphs that follow, such a responsibility (or right to decide that a traditional leader ought to be removed) is included in the KZN Governance Act.³⁹

[35] A further reason why the applicants' argument cannot succeed is that, contrary to their contention, the right to decide on the withdrawal of recognition does not flow from the right to identify iNkosi. The right to identify iNkosi under section 19 of the KZN Governance Act (and section 8 of the TKLA) only entitles uMndeni to identify the person who will assume or succeed to the position of iNkosi. This is a preliminary step that precedes recognition of iNkosi by the Premier on behalf of the State. The identified person only assumes office as iNkosi after the Premier recognises him or her as such.

[36] A royal family's right to identify iNkosi is founded on the customary law principle of hereditary succession. The identification of the rightful iNkosi ensures the continuity of hereditary succession within the royal family (as adapted to include the principles of democracy and equality). By way of comparison, section 8(1)(a) of the TKLA, which regulates the recognition of a traditional leader, is expressed in terms substantially similar to section 19 of the KZN Governance Act.⁴⁰ In each instance, uMndeni's recommendation is a precursor to the effective step of recognition or withdrawal of recognition, which is undertaken by a representative of the State. The authority to recognise a traditional leader and withdraw the recognition vests with

³⁹ See section 21(2) of the KZN Governance Act.

⁴⁰ See [35].

the State. This is so even when the removal of the traditional leader is initiated by uMndeni, as provided under section 21(2) of the KZN Governance Act.⁴¹

[37] A further consideration that militates against the exclusive rights that uMndeni advances is that uMndeni is not the only custodian of custom under either the TKLA or the KZN Governance Act. In terms of section 6, read with section 8, of the KZN Governance Act, a traditional council whose members are selected by iNkosi is responsible for the administration of the affairs of a traditional community in accordance with custom and tradition. It assists and guides the traditional leader in the performance of his or her functions. It must uphold the values of its traditional community. It is also tasked, among other things, with keeping proper records, having its financial statements audited by the Auditor-General and holding an annual meeting with its traditional community to account for its activities and functions.⁴² The traditional community occupies a similar role as the custodian of living customary law. None of these structures have empowered the traditional community with the right to preside over disputes relating to allegations of misconduct against iNkosi.

The role of the section 23 inquiry

[38] As I demonstrate below, when the right of uMndeni to remove iNkosi as provided in section 21(2) read with section 23 of the KZN Governance Act is given its proper constitutional expression, it is not limited by the impugned provisions.

[39] The constitutional context within which dispute resolution forums operate in this country is set out in section 34 of the Constitution. This section protects the right to have any dispute that can be determined in terms of the law (including customary law) decided in a fair public hearing before a court or another independent, impartial tribunal or forum. The requirements of independence, fairness and impartiality in section 34 uphold the rule of law by ensuring the credibility of dispute resolution

⁴¹ See [32].

⁴² Section 8(2)(a)-(b) and (d) of the KZN Governance Act.

mechanisms. They ensure that courts and tribunals are free from personal allegiances and undue interference, and that the arbiters approach matters with open minds, free from personal and political prejudices.

[40] uMndeni is not an independent or impartial body within the traditional community context. It is defined in the KZN Governance Act as “the immediate relatives of an iNkosi, who have been identified in terms of custom or tradition, and includes, where applicable, other persons identified as such on the basis of traditional roles.”⁴³ In the same Act, the “Royal Family” is defined as “the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family”.⁴⁴ Therefore, uMndeni does not meet the prerequisites for a constitutionally compliant arbiter in a dispute resolution forum.

[41] Ordinarily, the traditional dispute resolution forums available to a traditional community are Traditional Councils⁴⁵ and Traditional Courts. Although not as formally regulated as modern-day courts, traditional justice systems have always been in existence throughout Africa. They were male-dominated and presided over by headmen, chiefs or kings, assisted by a council of senior advisors and respected community leaders. Under the Black Administration Act,⁴⁶ they assumed a more formal structure. They retain an important role in traditional justice in rural parts of the country. It is anticipated that under the Traditional Courts Act,⁴⁷ which has not yet come into effect, traditional courts will be more democratised. Under section 5, Traditional Courts will be constituted of “women and men” and “presided over by a traditional leader or any person designated by the traditional leader”. Obviously, the

⁴³ Id section 1.

⁴⁴ Id.

⁴⁵ Regulated in section 16 of the TKLA and section 6 of the KZN Governance Act, read with section 3 of the Governance Framework Act.

⁴⁶ 38 of 1927.

⁴⁷ 9 of 2022.

traditional leader may not preside over proceedings determining allegations made against him or her. The inquiry envisaged in section 23 of the KZN Governance Act is specially designed to provide an impartial forum to determine such disputes where the existence of a listed ground has been identified. It is established to provide a constitutionally compliant dispute resolution forum in disputes relating to traditional leaders.

[42] Other provincial legislatures have made different choices regarding the inquiry process. For example, the Mpumalanga Traditional Leadership and Governance Act⁴⁸ provides that, if there is a reasonable suspicion that a traditional leader has breached a provision of the Code of Conduct, the Premier may refer the matter to the inner royal family “to take appropriate steps to rectify the breach.”⁴⁹ If the inner royal family has failed to take steps to rectify the breach within the time determined by the Premier or within a reasonable time, the Premier may charge the traditional leader with the alleged breach and “appoint a suitable person to conduct an inquiry into the alleged breach”.⁵⁰ That other provinces may have opted for a differently structured dispute resolution mechanism does not mean that the process provided for in the KZN Governance Act is unconstitutional. Significantly, even in the process applicable in Mpumalanga, where an investigative mechanism becomes necessary, the royal family or equivalent traditional leadership institution is not necessarily the sole presider or part of the presiding structure as of right. The Premier is the State authority who initiates the investigative process, appoints a suitable person and effects the withdrawal where deemed appropriate. The authority given to the MEC in KwaZulu-Natal is similar and allows the State functionary concerned flexibility to appoint a suitable presider, taking into account the exigencies of each case.

⁴⁸ 3 of 2005.

⁴⁹ Id section 26(2).

⁵⁰ Id section 26(3).

The right to participate in the section 23 inquiry

[43] The conclusion that uMndeni does not have a right to adjudicate or withdraw recognition of a traditional leader pursuant to a section 23 inquiry does not mean that it has no right or interest in that inquiry. The role of uMndeni as a custodian of customary law may be invaluable in appropriately resolving a dispute relating to a traditional leader.

[44] As discussed, section 211 of the Constitution obliges courts and, by implication, other dispute resolution forums, to apply customary law when that law is applicable, subject to the Constitution and any legislation that deals specifically with customary law. Sections 30 and 31 further place an obligation upon dispute resolution forums to engage in this exercise in a manner which recognises individual and communal cultural rights. Where a dispute resolution forum is called upon to interpret and apply customary law, it cannot do so blindly. Receiving input from the custodians of applicable customary law, when necessary to appropriately adjudicate the dispute, is a constitutional obligation. Any provision that *precludes* this constitutional principle would thus violate section 211 and may be struck down on that basis.

[45] One must distinguish, however, between a legislative defect and the misapplication of constitutionally compliant legislation. This Court must first determine whether the impugned provisions are inherently inconsistent with the Constitution or if the real cause for complaint is the manner in which they were applied. The question, therefore, is whether the impugned provisions are capable of an interpretation that affords uMndeni (and other custodians of the applicable customary law and customs of the community) meaningful participation in the section 23 inquiry.

[46] Consideration of the scheme of the KZN Governance Act regarding this issue is required. In terms of section 21(1), a traditional leader may be “removed” from

office on any of the six grounds listed in paragraphs (a) to (f) of that section.⁵¹ As with section 9(2)(b) of the TKLA, subsection 21(2) of the KZN Governance Act affords uMndeni the discretion to recommend the removal of iNkosi to the Premier when any of the grounds listed in subsection (1)(a) to (e) (ground (f) being misconduct under section 23) come to its attention.⁵² When any of these grounds come to the attention of uMndeni, and it resolves that iNkosi ought to be removed, it “may” inform the Premier of its decision and provide reasons for it.

[47] However, section 21(4) prescribes a section 23 inquiry as a prerequisite to removal of a traditional leader based on the grounds listed in section 21(1)(d), (e) and (f), being the transgression of a customary code or principle that warrants removal, the breach of the Code of Conduct or misconduct as contemplated in section 23.⁵³ This means that the decision taken by uMndeni under section 21(2) is not on its own effective. Practically, any resolution taken by uMndeni that iNkosi ought to be removed is subject to further steps. In some instances, a decision taken by the PEC pursuant to the section 23 inquiry could be a prerequisite and, invariably, the

⁵¹ Section 21(1) provides:

- “(1) A traditional leader may be removed from office on the grounds of—
- (a) conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;
 - (b) physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that iNkosi to function as such;
 - (c) wrongful appointment or recognition;
 - (d) a transgression of a customary rule or principle that warrants removal;
 - (e) a breach of the Code of Conduct; or
 - (f) misconduct as contemplated in section 23.”

⁵² Section 21(2) provides:

- “Whenever any of the grounds referred to in section 1(a), (b), (c), (d), and (e) come to the attention of [uMndeni], and [uMndeni] concerned decides to remove a traditional leader, [uMndeni] may, within a reasonable time and through the relevant customary structure—
- (a) inform the Premier of the particulars of the traditional leader to be removed from office; and
 - (b) furnish reasons for such removal.”

⁵³ Grounds (d) and (e) under section 21(1) have their counterparts – either verbatim or substantially – in grounds (a) and (b) of section 23(1), while ground (f) under subsection 21(1) refers to the other acts of misconduct listed in section 23(1).

Premier's final act is required. The section 23 inquiry is consistent with the investigation provided for in section 9(6) of the TKLA.

[48] Section 23(1) lists 10 grounds which trigger an inquiry into the alleged misconduct of a traditional leader.⁵⁴ The MEC is responsible for charging the traditional leader in writing with misconduct in respect of the 10 grounds.⁵⁵ Implicitly, other people, such as members of the community, may request uMndeni or the provincial authorities to initiate the section 23 inquiry based on the existence of one or more of the listed grounds, as happened in this case. Section 23(3) shares similarities with section 9(6) of the TKLA in substance, which provides that, if the traditional leader denies the allegations or fails to respond, the MEC must appoint a presiding officer to conduct an inquiry into the allegations.

[49] Subsections 23(4), (5), (7), (8) and (9), which regulate the inquiry proceedings, provide:

⁵⁴ The section, headed "Inquiry into misconduct", reads:

- "(1) Whenever there is reason to believe that a traditional leader is guilty of misconduct in that he or she—
- (a) fails or refuses to comply with the provisions of this Act or any other law with which it is his or her duty to comply;
 - (b) has breached the Code of Conduct;
 - (c) disobeys, disregards or wilfully defaults in carrying out a lawful order given to him or her by a competent authority;
 - (d) conducts him or herself in a disgraceful, improper or unbecoming manner;
 - (e) displays insubordination;
 - (f) uses intoxicants or drugs excessively;
 - (g) abuses his or her powers or extorts, or by the use of compulsion or arbitrary means obtains any tribute, fee, reward or gift;
 - (h) tries or punishes any person without the necessary authority to do so;
 - (i) is negligent or indolent in the discharge of his or her duties; or
 - (j) has been convicted of an offence, the responsible Member of the Executive Council must charge the traditional leader in writing with such misconduct."

⁵⁵ Section 23(j) of the KZN Governance Act.

- “(4) The presiding officer appointed in terms of subsection (3) must convene an inquiry into the allegations, and must give the traditional leader who has been charged no less than 14 days’ notice of the date, time and place of [i]nquiry.
- (5) At the [i]nquiry the traditional leader charged must be granted the right to be heard, either personally or through a legal representative, and may cross-examine any person called as a witness by the presiding officer conducting the [i]nquiry, inspect any document produced in evidence, give evidence in person, and call any other persons as witnesses.
- ...
- (7) The presiding officer may subpoena any person to attend the [i]nquiry and adduce evidence relating to the charge against the traditional leader.
- (8) Any person subpoenaed in terms of subsection (7) who fails to attend the [i]nquiry at the time, date and place specified in the subpoena commits an offence, and may on conviction be sentenced to a fine not exceeding R10 000.00, or to imprisonment not exceeding a period of six months.
- (9) The failure of the traditional leader charged to attend the [i]nquiry without a valid reason, either personally or by a legal representative, does not invalidate the proceedings against him or her.”

[50] Again, there can be no doubt that the intention is to establish a fair, transparent, neutral investigative process, headed by an independent decision-maker. Notably, under section 23(5), the KZN Governance Act affirms a traditional leader’s right to be heard either personally or through a legal representative, to call witnesses and to cross-examine witnesses called to substantiate the charges against the traditional leader. In section 23(7), the presiding officer has unlimited powers to “subpoena any person to attend the [i]nquiry and to adduce evidence relating to the charge”, under the threat of conviction of an offence and imprisonment or a fine. In its current form, section 23(5) and (7) can be applied to give effect to uMndeni’s participatory rights and draw on its knowledge of customary law. For example, where the interpretation and application of customary law form the basis of a complaint, the submissions of uMndeni, and other custodians of customary law, may be essential to assist the presiding officer in properly adjudicating the matter. This may include submissions

on the relevant customary law or norms of the community, and the appropriate remedy for breaches of said laws and norms. The presiding officer has the power to subpoena uMndeni or any other person as a witness.

[51] In the context of the KZN Governance Act, such participation may be necessary when an inquiry arises as a result of misconduct contemplated under section 21(1)(d) regarding “a transgression of a customary rule or principle that warrants removal”, or misconduct contemplated in section 23(1)(d), (g), (h) or (i) in so far as customary law may be inculpatory or exculpatory of a traditional leader’s conduct. Conversely, where an inquiry arises in relation to a purely factual matter or statutory or other violation, such as those contemplated in section 23(1)(a), (b), (c), (e), (f) or (j), no such participation by uMndeni or similar keepers of traditional knowledge may be necessary for the inquiry to properly seize itself of the applicable law and appropriate remedy. In such circumstances, the presiding officer may exercise the discretion afforded under section 23(7) to rightly determine that the participation of uMndeni or other traditional authorities is unnecessary given the nature of the issues raised. Importantly, the traditional leader under investigation, or his or her legal representative, may call such traditional authority, including uMndeni, in the exercise of his or her rights under section 23(5).

[52] The aforesaid should not be interpreted as a binding list of circumstances in which customary law is or is not implicated, and in which uMndeni or similar custodians of customary law must or must not be included in an inquiry. It must be acknowledged that, as section 23(7) grants a discretionary power, it does not explicitly require the presiding officer to subpoena uMndeni when the inquiry engages customary law. This Court found in *Dawood*⁵⁶ that, when discretionary powers are wide enough to be exercised in a manner that could limit rights, employing a constitutionally compliant reading of the empowering provision is not ordinarily

⁵⁶ *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC).

sufficient.⁵⁷ However, this Court also found that “discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear”.⁵⁸ This is such an instance. Presently, there is only one such factor, being whether the issues to be decided engage customary law. If this is so, uMndeni, or any other custodian of customary law, must be subpoenaed. Where customary law is implicated, the presider is obliged to have the proper content of the applicable customary law before the inquiry and to use its power of subpoena to facilitate this. The salient principle is that, where customary law is implicated in a misconduct inquiry, the presiding officer must take appropriate measures to ensure the proper interpretation and application of customary law to the matter at hand. The failure of the presiding officer to do so would constitute a reviewable error in the application of the law.

[53] As stated, apart from the royal families or iMinden iyaMakhosi, other persons and bodies are also identified as custodians of the customary law, culture and community customs: traditional leaders, traditional councils, community elders, Houses of Traditional Leaders and traditional communities. The KZN Governance Act explicitly identifies three role players in the custodianship and development of customary law and customary community – the traditional leader, the traditional council and uMndeni. In *Shilubana*,⁵⁹ this Court described the status of these traditional authorities as “the high-water mark of any power within a traditional community on matters of succession”.⁶⁰ These structures are therefore crucial sources of evidence on the customary law and past and present customs, particularly in relation to the appointment and removal of traditional leaders.

[54] Application of applicable law as required by the Constitution is necessary for fair, efficient and effective administration of justice. This necessarily includes the

⁵⁷ Id at para 54.

⁵⁸ Id at para 53.

⁵⁹ *Shilubana v Nwamitwa* [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC).

⁶⁰ Id at para 72.

identification of the relevant sources of evidence on the disputed issue, including customary practices. It is also the presiding officer's responsibility to ensure that affected parties are invited to participate in the proceedings, in compliance with the right to a fair hearing under section 34 of the Constitution. In addition to subpoenas, established methods of ensuring participation include public notices of hearings on relevant media platforms. The presiding officer must use these methods to ensure that the inquiry is effective. Where he or she fails to do so, that is a matter of application of the law rather than the law being defective.

[55] Were the applicants' contention to be proved – that they were denied participation in the inquiry – that may be an infringement of their right to procedurally fair administrative action under section 33 of the Constitution. It may constitute reviewable non-compliance with sections 21(4) and 23(7) of the KZN Governance Act. As such, a material irregularity in the inquiry process may render the decision reviewable. Of course, whether a particular decision constitutes administrative action, particularly under the Promotion of Administrative Justice Act⁶¹ (PAJA), is a complex question that must be addressed on a case-by-case basis.⁶² It is not incumbent on this Court to answer this question at present. Indeed, both the applicants and government respondents initially sought judicial reviews prior to the constitutional challenge being raised on cross-appeal.

[56] I have made the point that the purpose behind the recognition and protection of customary law and institutions is not to segregate them into an autonomous legal order. The aim is to regulate traditional institutions and leadership as integrated within the constitutional State. The State assumes responsibility for facilitating accountability and safeguarding the interests of the community. This is imperative where serious allegations of extortion, abuse of power and political discrimination

⁶¹ 3 of 2000.

⁶² *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) at para 36. See also *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 1999 (10) BCLR 1059 (CC); 2000 (1) SA 1 (CC) at para 143.

affecting the rights and dignity of community members arise, such as in the present case.

[57] With regard to the challenge to sections 22 and 24(1), as I have stated,⁶³ these are abstract challenges. Section 22 of the KZN Governance Act empowers the PEC to summon a traditional leader, where deemed necessary, to appear before it for an investigation and section 24(1) empowers the MEC, after consultation with the Premier, to suspend a traditional leader suspected of misconduct, pending finalisation of the proceedings instituted in terms of sections 22 and 23. This Court's position on dealing with abstract challenges is clear.⁶⁴

[58] Recently, in *Solidarity*,⁶⁵ this Court held:

“Abstract legal challenges are generally treated with disfavour by courts, which are reluctant to ‘peer into the future’ to determine academic, hypothetical or speculative issues when doing so may necessitate predicting facts and legal problems that may not arise or that have not arisen. . . . *Possible unconstitutionality that may arise in due course is usually not enough to convert a challenge into a justiciable one, unless rights are at stake, or it is shown that imminent or inevitable harm would arise.*”⁶⁶ (Emphasis added.)

⁶³ See [25].

⁶⁴ See *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) at para 165, where Chaskalson P held:

“Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.”

See also *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation (SOC) Ltd* [2020] ZACC 5; 2020 (4) SA 409 (CC); 2020 (6) BCLR 748 (CC) at para 47; *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (1) SACR 545 (CC); 2014 (5) SA 317 (CC); 2014 (5) BCLR 606 (CC) at paras 9-13 and *J T Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1996 (12) BCLR 1599 (CC); 1997 (3) SA 514 (CC) at para 15.

⁶⁵ *Solidarity Trade Union v Minister of Health* [2026] ZACC 19.

⁶⁶ *Id* at para 43.

[59] As I have stated, the applicants have not demonstrated that it is in the interests of justice to consider their abstract challenge to the two provisions.

Remedy

[60] The confirmation application reached this Court by way of a counter-application to the government respondents' self-review application before the High Court. The High Court dismissed the self-review for the sole reason that the impugned provisions were unconstitutional. As stated, the High Court did not otherwise consider the merits of the self-review. It also did not consider the conditional counter-application, brought by iNkosi to review and set aside the proceedings undertaken in terms of section 23 and for the section 23 inquiry to start afresh, because it upheld the constitutional challenge.⁶⁷ Therefore, the conditional counter-application remains pending. Inexplicably, however, the record relating to the conditional counter-application was omitted from the record that served before this Court.

[61] Having declined to confirm the findings of the High Court, it remains for this Court to determine an appropriate remedy. This Court considers that the initial complaint by members of eMathulini community was lodged nearly a decade ago, and that iNkosi elected not to participate in the section 23 inquiry despite the efforts of the investigators and the presiding officers. In addition, having obtained a rule *nisi* setting aside the withdrawal decision, iNkosi neglected to pursue his substantive review entirely, ultimately leading to the government respondents initiating the self-review after they had delayed implementing the recommendations of the presiding officer.

[62] However, despite delays, it would be inappropriate for this Court to decide the conditional counter-application. There is no appeal to this Court against an order relating to it, and, as stated, this Court has had no sight of the record in that application. It is undesirable for this Court to decide a matter which has not been

⁶⁷ See [7].

canvassed before it or the lower courts, particularly when, as in this case, the basis for the further challenge is not apparent from the record. It is necessary that the conditional counter-application be finalised without further delay. For that reason, this Court issues an order that iNkosi, as the applicant in the conditional counter-application, approaches the High Court within a month of the date of the order granted in this application, to have the counter-application set down for hearing.

Conclusion

[63] First, the claim to an exclusive right to adjudicate and the right to withdraw recognition, as made by the applicants, must fail. It is inconsistent with the constitutional imperatives of accountability, independence and impartiality in dispute resolution. Second, sections 21(4) and 23 are capable of a constitutionally compliant interpretation and implementation. What is apparent is that the correct implementation of section 23 requires engagement with the correct sources of customary law. The judgment demonstrates that, properly interpreted, the impugned provisions are well capable of constitutionally compliant application.

Order

[64] The following order is made:

1. The order of the High Court declaring sections 21(4), 22, 23 and 24(1) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 inconsistent with the Constitution and invalid is not confirmed.
2. Paragraph 2 of the High Court's order is set aside and replaced with the following order:
 "2. The counter-application is dismissed."
3. The second applicant is ordered to approach the High Court within one month from the date of this order to have the conditional counter-application set down for hearing.

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