

SOUTH AFRICA / JUDGMENT

Lurhani and Another v Premier of the Eastern Cape Province Government and Others (3048/2013) [2018] ZAECMHC 19; [2018] 2 All SA 836 (ECM) (27 March 2018) [2018] ZAECMHC 19

COURT

Eastern Cape High Court, Mthatha

BEFORE

Jolwana

CASE / FILE NUMBER

3048/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

[EASTERN

CAPE LOCAL DIVISION: MTHATHA]

REPORTABLE

CASE NO.

3048/2013

In

the matter between:

MZIKAYISE

GOODMAN LURHANI

1st Applicant

MBANGATHA

ROYAL FAMILY

2nd Applicant

And

THE

PREMIER OF THE EASTERN CAPE

PROVINCE

GOVERNMENT

1st

Respondent

MEC

FOR LOCAL GOVERNMENT & TRADITIONAL

AFFAIRS: EASTERN
CAPE
2nd Respondent
THE
CHAIRPERSON: HOUSE OF THE
TRADITIONAL
LEADERS: EASTERN CAPE
3rd Respondent
MBALISWENI
TRADITIONAL COUNCIL
4th Respondent
NOBONGILE
MBANGATHA
5th Respondent
PARAMOUNT
CHIEF;
WESTERN
PONDOLAND
6th Respondent
COMMISSION
ON TRADITIONAL LEADERSHIP
DISPUTES
AND
CLAIMS
7th Respondent
EASTERN
CAPE COMMITTEE OF THE
COMMISSION
ON TRADITIONAL
LEADERS
DISPUTES AND CLAIMS
8th Respondent
MZINGISI
MBANGATHA
9th Respondent

JUDGMENT

JOLWANA J

- [1] This is an application for the review and setting aside of the 1st respondent's decision to dismiss 1st applicant's claim for the position of senior traditional leadership of Mbalisweni Traditional Community in the district of Libode.
- [2] The applicants approached court for the following orders set out in the notice of motion:
- "1. Reviewing, correcting and/or settling aside the decision of the first respondent that although the applicant's father was indeed Ndoyisile's son, he was an adulterine child and therefore not entitled to succeed his father;*

2. Declaring that the first respondent's decision is not based on a correct interpretation of Mpondo customary law;
 3. Declaring that the first respondent should have found that according to Mpondo customary law where a chief dies without a male issue a child born of the late chief outside his marriage is entitled to succeed him and takes precedence to all other possible heirs;
 4. Declaring that issues of rituals are matters for the Royal Family and that these were not matters for decision by the first respondent;
 5. Alternatively to 4 and in the event the court finds that they were important, declaring that in this case such rituals were in any case performed and could not be a bar to first respondent finding that the applicant is the rightful successor to Ndoyisile (after the death of his father);
 6. Ordering any of the respondents, only in the event of it opposing this application, to pay applicants' costs, including costs of two counsel."
- [3] Of the nine respondents only four respondents opposed the application, the 1st, 2nd, 3rd and 5th respondents.
- [4] Applicants later filed an amended notice of motion. The orders sought in the amended notice of motion are as follows:

"1. Reviewing, correcting and/or settling aside the decision made by the first respondent on the 7th October 2013 of refusing the claim for senior traditional leadership of the first applicant;

2. Restoring the senior traditional leadership of the fourth respondent and thus of the amaMpondo of Mbalisweni to the great house of Ndoyisile; and
3. Declaring that according to the relevant Mpondo customary law and practices the first applicant is the rightful heir to the senior

traditional leadership of the fourth respondent and the amaMpondo ase Mbalisweni Traditional Community;

4. Directing the first, second and third respondents to within 15 days of the granting of this order, recognise the first applicant and to appoint him as the senior traditional leader of the fourth respondent and of the amaMpondo aseMbalisweni; and
5. Directing the 1st and 2nd respondents to pay costs of the application jointly and severally each paying the other to be absolved, including the costs of two counsel and the 5th respondent only in the event of her opposing this application, to pay the costs of this application, including the costs of two counsel."

- [5] In the papers various grounds for the orders sought were articulated including non-compliance with some of the provisions of the Traditional Leadership and Governance Framework Act 41 of 2003 (The Framework Act). The heads of argument exchanged between the parties dealt extensively with all the issues including the issues raised under the Framework Act in the same way that they were dealt with quite extensively in the affidavits including the supplementary affidavits that were filed by the parties.
- [6] This extensive exchange of papers including the supplementation, with the leave of court where necessary, helped to clarify and explain a number of issues between the parties, resulting in the narrowing down of the contested issues along the way. On the 23 January 2018, a week before the matter was heard, applicants filed a practise note to clarify applicant's position regarding issues that remained contested, the basis thereof as well as the remedy now sought by the applicants.
- [7] In part the applicants articulated their position as follows:

"Applicants want the decision of the first respondent reviewed and set aside on a number of grounds:

- The summary of the evidence contained in the report of the Committee put before the Premier differs substantially from the transcript of the proceedings;
- The Committee misconstrued the evidence as is evidenced by their summary of the evidence of Prince Maraqana when compared to what he said in the transcript;
- The Committee and therefore the Premier erred in their interpretation of Mpondo customary law of succession of illegitimate children as is clear from a comparison of the Committee's position and that of literature;
- The Committee erred in failing to appreciate living customary law as related to it by the witnesses relating to the case of Maqayise.

The Committee clearly failed to have regard to paragraph 81 and 82 of Langa J in the Bhe judgment;

REMEDY: In view of the fact that:

- The Premier has power to deviate from the decision of the Committee in terms of section 26 (4) of the Act;
- The discrepancies between the evidence led before the Committee and the summary put before the Premier before she took her decision;
- The number of documents (including opinions of King T Sigcau, Prof Peires and Prof Jackson) which were referred to in the evidence and to which the Committee makes no reference;

Applicants submit that the matter be referred back to the Premier to give him an opportunity to take a decision after he has had an opportunity to refer to these documents and if he sees the need to deviate to have the opportunity to decide the reasons for such deviation. The first respondent to pay the costs including the costs of two counsel.”

[8] On the date of the hearing of the matter I issued a directive to counsel for them to hold a pre-hearing conference and furnish me with a joint minute articulating what the common cause issues are, what the contested issues are and what the proposed relief should be. I further directed that any matter not agreed to or about which there was a disagreement should be reflected as such in the joint minute.

[9] Shortly before the hearing of the matter I was furnished with a joint minute reading as follows:

“INTRODUCTION

1. Having held the pre-hearing conference before the Honourable Mr Justice Jolwana, the parties file herewith a joint minute of their common cause issues.

2. The parties agree:

2.1 Ndoyisile was the headman of Mbalisweni;

2.2 He had one son, Mdlomela who was killed in Lusikisiki;

2.3 He also had a son born in an extra marital relationship between Ndoyisile and a wife of someone else;

2.4 That son’s name was Nkaca. His son is Mzikayise Lurhani, the first applicant;

2.5 The committee in its report state:

(i) An adulterine child belongs to the husband of the mother;

(ii) Mr Maraqana said that while adulterine children were on two occasions accepted to succeed, that is not a deviation from the general rule that adulterine children do not succeed their biological fathers. (See para 8.2.4.1 at page 172);

(iii) Because Nkaca was an adulterine child, he could not really claim to be successor to Ndoyisile;

3. In the light of these findings and those of the Premier the parties agree that the issue of Mpondo customary law, is dispositive of this case.

AD RELIEF

4. The parties agree that in the event the Honourable Court finds that the Committee and the Premier erred in their interpretation of Mpondo customary law, the appropriate relief is:

4.1 Set aside the decision of the first respondent;

4.2 Remit the matter to the first respondent in order:

4.2.1 To take the appropriate steps as contemplated in section 26 of the Act read with section 11 and 12 of the Act taking into consideration this Court's decision in regard to Mpondo customary law."

[10] The decision sought to be reviewed and set aside is that of the Premier who, in terms of the Framework Act is the decision maker and is empowered to receive recommendations from the Committee of the Commission on Traditional Leadership Disputes and Claims, (the Committee). After receiving the recommendations from the committee, the Premier is empowered to either take a decision that is in line with the recommendations of the Committee or take a decision that differs with the recommendation. In the event of the Premier taking a decision that differs from the recommendations of the Committee, the Premier is required to provide reasons for taking a decision that is at variance with the Committee's recommendation.

[11] In this regard section 26 (4) of the Framework Act provides as follows:

"If the President or the relevant functionary takes a decision that differs with the recommendation conveyed in terms of subsection (2), the President or the relevant functionary as the case may be must provide written reasons for such decision."

[12] In this case the Premier took a decision in terms of which he accepted the Committee's recommendations which had recommended

that first applicant's claim be dismissed. In upholding the Committee's decision the Premier merely, almost verbatim,

adopted the recommendations. There is nothing in the Framework Act that suggests that she was not entitled to do so. The Premier is only required to provide reasons if his or her decision is different from the recommendation of the Committee. More about this later in this judgment. The papers before me included a transcript of audio visual recordings of the Committee's proceedings which was filed in terms of Rule 53 of the Uniform Rules of Court.

[13] In order to understand the decision of the Premier which appears to have been based only on the recommendations of the Committee, it is necessary to look at the material that served before the Committee. In its recommendations the Committee indicated that it relied on the written submissions of the claimant, literature review, interviews and audio visually recorded public hearings. There is no report or document containing any other interviews that were made, if any, other than those of the transcribed record referred to above. On literature review the recommendations indicate that two books were considered namely AJ Kerr, (1990) a book on Customary Law of Immovable Property and Succession as well as a book by T.W. Benett

(2004) on Customary Law in Southern Africa.

[14] It appears from the transcribed record that a number of people gave oral testimony to the Committee. Those who gave evidence to the Committee indicated themselves as either being in support or against 1st applicant's claim. The Framework Act contains provisions which makes it clear that members of the Royal Family play a very significant role in the determination of who the rightful person is to fill a position of traditional leadership.

[15] Section 11 of the Framework Act provides, in part as follows:

"11 Recognition of senior traditional leaders, headman or headwomen

(1) Whenever the position of senior traditional leader, headman or headwoman is to be filled-

(a) The royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled and with due regard to applicable customary law-

(i) Identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 12 (1) (a), (b) and (d) apply to that person; and

(ii) Through the relevant customary structure inform the Premier of the province concerned of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and

(b) The Premier concerned must, subject to subsection (3) recognise the person so identified by the royal family in accordance with

provincial legislation as senior traditional leader, headman or headwoman, as the case may be."

[16] Section 1 (1) defines "royal family" as follows:

"royal family" means 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."

[17] These provisions notwithstanding, the witnesses were only required to state their names and take the oath. For a reason that I do not understand and which is not explained in the recommendations those who testified were not required to state if and to what extent are they related to the royal family or even belong to the Mbalisweni Traditional Community. Even those who did identify themselves either as closely related to the Mbangatha family or as people of Mbalisweni Traditional Community did so on their own. Requiring people to explain their proximity to the Mbangatha family or the royal family either as it relates to the family tree, or as it relates to the current reigning senior traditional leader or to the claimant would not have derogated from the fact that the hearings were public hearings to which everybody was entitled to participate.

[18] It is equally puzzling that no independent research was commissioned in light of the fact that both the claimant and the current

ruling

family and those who supported them could not have been immune from subjective personal interest which could taint the historical

narrative they portrayed to the Committee. No less than twenty people made oral submissions to the Committee which were so

diametrically opposed to each other that it was clear that people made submissions not only to narrate their stories but also and most importantly to support and express their opposing views to the other side. This could not and should not have escaped the minds of the Committee and commissioning an independent research would have been one of the many ways in which the Committee would have ensured that their report was independent and to the extent possible, free from subjective personal interests of those who made submissions. Most importantly a credible report based on the correct understanding of the history of the Mpondo people in general and the people of Mbalisweni in particular would have been furnished to the Premier.

[19] Having made this observation it is perhaps now apposite to look at how the Committee analysed the evidence and submissions made before it. The Committee started by saying that Nkaca was assimilated to the Ndoyisile family. The Committee goes further to say that: “Nkaca had been brought to live with Ndoyisile’s people, became generally regarded as a Nyawuza”. What is meant by generally regarded as a Nyawuza is not explained. I do not understand how, if it is not disputed by all concerned that Nkaca was a Nyawuza, he can be said to have been generally regarded as a Nyawuza as against being a Nyawuza not because he was regarded as such, but because he was a Nyawuza. This has nothing to do with whether or not Nkaca was entitled to assume the position of his father in the traditional leadership of Mbalisweni.

[20] The Committee also makes a finding that “Ndoyisile’s relatives gently but definitely rejected the claim of Nkaca and his son to the chieftainship of the amaNyawuza Community”. However, no light is shared as to which relatives rejected the claim and how this rejection was done but the Committee finds that relatives of Ndoyisile “gently but definitely rejected the claim”. It is not clear from the evidence if Mzuvukile Sambamba is one of the relative referred to but some of his evidence is quoted. He does not describe himself as being related to Ndoyisile. At page 413 of the court record he describes himself in the Committee hearing in the following terms:

“I am from Bhedla, Sambamba family from Mbalisweni. I am Mzuvukile Sambamba from Mkhambeni in Mbalisweni...”

[21] His is the only evidence referred to as having been in support of the claim. Reference is made, with some of it being quoted, to the evidence of Mpondokazi Valelo. Her evidence must be one of those who are regarded as the “Ndoyisile’s relatives who gently but definitely rejected the claim”. This is factually incorrect. If one considers the family tree and if my understanding is correct Mpondokazi Valelo belongs to the house of Valelo who was the first born son of Mbangatha. I have no doubt that she is in fact a family member. If this is correct it escapes me how the Committee could have come to the conclusion and made a suggestion even if indirectly that all Ndoyisile’s relatives “gently but definitely reject the claim”. These relatives and their proximity to the royal family are not disclosed.

[22] This takes me to the second applicant which filed a replying affidavit to deal pertinently with some of the issues raised by the respondents in the answering affidavits. The deponent is Donald Bayimbi Sinqumbu. At page 56 of the court record he describes

himself in the following terms.

“I am the elder son of Melo and grandson of Mtshutshisi. Mtshutshisi or Siquumbu as he was sometimes called was chief Welem’s

elder son from his right hand house of Marhambeni.”

[23] In the replying affidavit at page 604 of the court record he makes this telling submission at para 71:

“Nowhere in the evidence is a relative of Ndoyisile supporting the respondents. Nobongile is not a Faku. She is not a

relative of Ndoyisile.”

[24] The deponent on behalf of the second applicant, having received the transcribed record and being a close family member in terms of the Framework Act and having perused the record, tells this court that of all those no less than twenty people who testified before the Committee there is no relative of Ndoyisile who supported the respondents. This begs the question, what did the Committee mean when it said that “Ndoyisile’s relatives gently but definitely reject the claim”? Which are these Ndoyisile relatives that the Committee was referring to. It is also very significant that this point is not dealt with by the respondents at all in the heads of argument or even in the submissions that were made in court during argument. I, therefore, must accept that in making this conclusion the Committee, even if, unintentionally, made a serious error and in this regard misled the Premier who would have had no basis for doubting this finding by the Committee. The centrality and the indispensability of the role of the royal family in these matters in terms of the Framework Act need not be over emphasized and the Framework Act recognises this fact.

[25] In addition to this mistake, there is another mistake of gigantic proportions made by the Committee in the analysis of the evidence of Prince Maraqana. In summarising Mr Maraqaza's evidence the Committee wrote as follows in the recommendations to the 1st respondent:

"8.2.4 Further nails to the coffin of Nkaca / Mzikayise's right to succeed Ndoyisile were put by Mr Maraqana and other speakers, thus:

8.2.4.1 Mr Maraqana said that while adulterine children were on two occasions accepted to succeed in Qaukeni Great Place that did not then necessarily create a deviation from the general rule that adulterine children do not succeed their biological fathers. For instance a situation once arose in Nyandeni which caused (white) authorities to say to those in power "but this same situation arose in Qaukeni and was treated in this way. How can you now treat it so differently as if to suggest that the custom in Qaukeni is different from the custom in Nyandeni?" To which the Nyandeni chieftaincy responded:

"We are well aware of that, but nothing binds us to do it the way the Qaukeni authorities did it." He also made it perfectly

clear that the Pondos of Mbalisweni were not at all bound by what Qaukeni did on the two occasions referred to by him."

[26] Even a cursory reading of the evidence given by Mr Maraqana paints a totally different picture from the one painted above. This is what Mr Maraqana said to the Committee:

"My name is Mzwandile Maraqana. I am the son of Ngangenyathi. Ngangenyathi was the son of Jabavu. Jabavu of Toni. Toni is the young brother to Marhelane, sons of Sigcau. They are two. I want to start there. I am over 60 years of age and old enough to respondent to issues relating to custom. I grew up in Qaukeni. If you asking about Mpondo custom, my professor there (referring to Commissioner Koyana) was the one who taught me. He was my lecturer, when I was studying Law. I have got two Law Degrees. To crown it all he is the one who taught me Customary Law. The first commission that investigated whether the Mpondos had a Kingship or not was led by me. This Commission of yours Dr Mndende emanates from the first one in which I presented. What I want to say before I present is that I am on both sides. If you talking educated people I am there, and uneducated people who know Mpondo customs, I am also there.

I want to come in and respond to a question that, do Mpondos fetch a child born outside marriage in cases where the deceased leader does not have a child from his wives? I will give input by making two examples. When King Mandlonke died in 1937, he had just been installed in 1935 and had two wives, Magingqi and Mankosinane. From Magingqi who was the great wife and a daughter of Chief Zimele in Port St Johns he died without a child. But Mampofana, the minor wife was pregnant at the time. So, the Kingship claim between Nelson and another traditional leader I don't even want to call his name had to wait until the child was born just to make sure that there was a child even before looking at whether he was eligible customarily or not was not the issue at that stage. Unfortunately, the child was a girl whom the Mpondos named

‘Yintombokwenzani’ because they were expecting a progeny to resuscitate the dying house. It was said that a search for the child be done. The claim was stopped until 1944 where a case dubbed ‘Sigcau v Sigcau’ where the matter was resolved after a long search by the Mpondos. Right, I am done with this one.

Let me come to the second one, King Mqikela, Mqikela was son of Faku. He had a number of wives. The Gcalekas arrived with a girl who was named Masarhili as she was sister to Sarhili. She was made wife to Mqikela because they were trying to prevent wars. Remember Dr Mndende that Faku had led his army up to where the hospital called St Elliot is, in an attempt to cross Mbashe. Soldiers were sent to prevent him so that he could not cross. To avoid further attacks by Faku the Gcalekas decided to send Masarhili to marry Mqikela. Unfortunately, she was sort of old in years when she came in and could not give birth. When Masarhili could not give birth, so they had to look amongst the other seven wives of Mqikela. They looked among them, but no one wanted to give Masarhili a child since she was barren. None of them wanted to. So, they looked again and find a child by the name of Sigcau after whom we are called. Sigcau was already a fully grown man with his wives where he was born. He was born outside marriage by Mqikela. He was fetched, the necessary rituals performed and put as son of the great house of Masarhili. The name Sigcau, she [Masarhili] said she is going to give him a name from her home so that we are called Sigcau.

I want to say Dr Mndende, it is a Mpondo custom to fetch a child from where he is born even if it's from a woman married to another man. Because the other thing that happens is that it happens that you don't want to enter into a lot of talking, all you know is that child is from the King's isende [loins] even if he is there. The child is left to grow there as long as his rituals are done, if there is no reason for him to be fetched from where he is. There is no reason to change the surname for the child to be accepted as long as there are elderly man who know and have been part of this process (collecting the child and doing his rituals according to the customs of the (family)). I can only change my surname if I have to be involved in positions like being a chief. Only then things are forced to be changed around. What I am saying is that it is a traditional custom in Mpondoland to fetch a child from outside marriage. I have given you too examples that should be enough. That is what I wanted to give clarity on.”

[27] This is the main submission that Mr Maraqana made. Nowhere else does he deviate from what is stated above or made a submission that could be interpreted to be so at variance with his main submission as to have led the Committee to come to the conclusion that he later changed his submission to be what the Committee said it was. On the contrary he re-affirmed his submission even elsewhere in the record.

[28] The transcribed record of the Committee's proceedings was served on respondents' attorneys on 4 May 2015. This means that when the 1st respondent and all four members of the committee filed the answering affidavit and confirmatory affidavits in January 2016 they had the record for more than eight months which is almost a year. It is therefore fair to say that at the very least they would have been aware of the disturbingly glaring discrepancy between what is said to have been said by Mr Maraqana in the recommendations and what

he says in the transcribed record for more than eight months. Yet neither the Premier nor the Chairperson of the Committee or any of its members tried to explain how the Committee could have reported and misquoted Mr Maraqana in the manner that they did in the recommendations to the Premier.

- [29] Most crucially and assuming that for some reason this discrepancy did not come to the attention of the 1st respondent or any of the members of the Committee despite the record being available to them, the deponent on behalf of the 2nd applicant deals with this issue in the following terms at paragraph 72 of his replying affidavit:

“The commission at paragraph 8.2.4.1 misinterpreted if not misrepresented the evidence of Prince Maraqana. He never testified that there was a general rule that adulterine children do not inherit. In fact he said the opposite as is clear from paragraphs of his evidence referred to above. Prince Maraqana appears to have taken with exception the misrepresentation of his testimony at the hearing before the commission. His affidavit confirmed this.”

- [30] Again no attempt has been made by the 1st respondent to clarify this issue. This is important because the 1st respondent relied on the recommendation of the Committee in arriving at the decision to dismiss 1st applicant’s claim for senior traditional leadership of Mbalisweni Traditional Community. At paragraph 24 of the 1st respondent’s answering affidavit the 1st respondent says “In this case I considered the recommendations of the committee and thereafter I made my decision.”
- [31] What this means is that on the 1st respondent’s own showing the 1st respondent did not place herself in a position of being able to make an informed decision by taking into account the record of the proceedings and the submissions made during the Committee’s hearings. This is very significant because the 1st respondent, in taking the decision that she took was exercising powers entrusted to her in terms of the section 26 (4) the Framework Act.
- [32] It seems to me that section 26 (4) empowers the Premier to either take a decision that is in line with what was recommended by the Committee or to take a decision that differs with the recommendations in which case the Premier must provide reasons for such a decision. I cannot see how the Premier could have applied her mind to the recommendations and come to a decision to accept the recommendations without the record of the proceedings of the Committee. Had the Premier deemed it necessary to place herself in a position of being able to take an informed decision, she would have ensured that the record of the proceedings are furnished to her. That would have enabled her to pick up the discrepancy between Mr Maraqana’s evidence in the record and Committee’s recommendations.
- [33] The 1st respondent makes the following averment at paragraph 14 of her answering affidavit:

“14. The upshot of the impugned decision is that in Mpondo custom, Nkaca Lurhani was not entitled to inherit the chieftainship that was left vacant by Ndoyisile Pheza. This is based on the Mpondo customs. It is therefore my contention that in making the impugned decision I applied myself to the issue at hand, did not consider irrelevant considerations and considered relevant

consideration in particular the recommendation that was conveyed to me by the committee and what was the applicable Mpondo custom, at the time when the traditional leadership position concerned with the proceedings was allegedly lost which is to the effect that:

14.1 A child born out of wedlock belongs to the kraal of the husband to his or her mother.

14.2 A natural father does not acquire the right to a child conceived in adultery by payment of damages.

14.3 If a married woman has a child by an adulterer it is the child of her husband. If the husband takes no steps to obtain possession of the child, his heir after his death can claim it. He does not lose the right to the child whether it be male or female.

14.4 An adulterine child by a married woman cannot inherit from or succeed the natural father. He or she is presumed to be the legitimate child of his mother's husband. No kind of customary ritual can cure and/or cleanse him or her as a child that has been born from a conduct that is deemed to be disgraceful (inyala).”

[34] It is unfortunate that in making this submission nothing is said about the evidence that points in the different direction. Even the Committee itself did not deal with the evidence that was presented to it which indicates that what is said above may not be true for the Mpondo custom.

[35] However, the 1st respondent seems to acknowledge the possibility that Mpondo customary law may have been incorrectly interpreted by the Committee. At paragraph 55.2 of the answering affidavit the following averment is made:

“55.2 The PAJA does not provide guidelines as to what may be understood under the term ‘exceptional circumstances. However, my evidence is that:

55.2.1 Remitting the matter back for decision making by the Premier would afford the latter to consider the conflicting Mpondo customary law position on the issue at hand. There is therefore a purpose in remitting the matter back.

55.2.2 The applicants have filed a lot of new material in this application, which did not serve before me when I made the impugned decision. I am entitled to consider this as it would be unjust to have this matter decided by this court without me having had an opportunity to consider the new information upon which this application is now founded. The outcome on the issue is therefore not a foregone conclusion.”

- [36] Two points need to be made about this submission. The first one is that the 1st respondent acknowledges that at the very least, Mpondo customary law is conflicting on the issue in her view. This was not pointed out by the Committee which brushed aside all the evidence that conflict with the Committee understanding of what the customary law is. In any event the Committee was clearly wrong in focusing on what the “Western” law is and the “customary” law is as against dealing with Mpondo customary law in general and the customary law as has been practised in the Mbalisweni Traditional Community.
- [37] The second point is that the 1st respondent is correct in saying that “a lot of new material in this application, which did not serve before me when I made the impugned decision has been filed by applicants. Not only was some of the information not available to the 1st respondent but also some of it was not placed before the Committee. For instance the deponent on behalf of the 2nd applicant, Mr Siquumbu did not attend the committee hearings as well as most of the members of the Mbangata Royal Family. This did not help the Committee hearings as it denied them of valuable evidence which the Committee would have had to consider in making its recommendations to the 1st respondent. If one looks at the family tree from 1803 to date this is the picture that emerges: Mbangata’s successors were Valelo, Welem, Pheza and Ndoysisile. This matter relates to the successor to Ndoysisile.
- [38] What the 1st respondent does not explain is her failure to use readily available information that had been recorded during the hearings in the form of all the submissions that had been made at the hearings. What the 1st respondent did was to decide the matter in the absence of that information to which she was entitled and was readily available. All she needed to do was to ask the Committee for all the information on which the recommendations are based.
- [39] The members of the 2nd applicant held a meeting on 27 December 2015 in which they discussed the matter of the successor to Ndoysisile in which they ratified the steps taken by their representative Donald Bayimbi Siquumbu who deposed to an affidavit on behalf of the Mbangata Royal Family in these proceedings. The minutes of that meeting which are annexed to the replying affidavit contain the following extract at page 625 of the record:

“Mr Siquumbu told the meeting that in 1937 the Royal Family led by Welem and his sons Siquumbu, Pheza, Maduntsu as well as other Mbangatha

Houses chose the home of Pheza as the Great House Mbalisweni. This meeting went on to choose Pheza’s Great son Ndoysisile as the heir in terms of the custom and traditional leadership.

He went on to say that in 1945 the Whites removed Ndoysisile from the chieftainship, but all the people who were appointed to act, acted for Ndoysisile’s son Mdlomela. He continued and said that when Mdlomela died in 1951 the Whites said Mpondos must go and vote for a new chief because Ndoysisile’s House had no one. He said that, at that time the Royal Family sat and nominated Nkaca, Ndoysisile’s son from outside marriage as heir.

Because Nkaca was only six years old at that time, Makhukhu was asked to act for Nkaca and contest against Nyemfu during elections. Indeed Makhukhu won and raised Nkaca as requested.

In 1968, before his death, Makhukhu called the Royal Family meeting and told them that he was planning to hand over the chieftainship to Nkaca in accordance with the 1951 resolution. He told the Nyawuza's that he was old and ill and that the son he was acting for was ready to take over because he was working, had built his home, had children and that he was already circumcised. He concluded by saying all rituals as the son of the Nyawuzas had already been performed.

Siqumbu said that Makhukhu died before fulfilling this. The whites and minor houses assisted by Nyandeni Great Place overthrew the Royal Family so that they could appoint traditional leaders of their choice even if they didn't qualify. He said that this is the reason why Mbalisweni had no Royal Family chosen in accordance with the custom since 1968."

[40] The facts as alleged in this extract have not been gainsaid in any meaningful way by any of the respondents nor has any attempt been made to seek leave of court to file a supplementary affidavit. Most importantly the 7th, 8th and 9th respondents were joined as respondents on 13 September 2016 by this court. It is not without significance that the 9th respondent who is the son of the 5th respondent did not take the advantage of the leave granted by court on the 13 September 2016 in which the court, inter alia, gave the 7th, 8th and 9th respondents time frames within which to file answering affidavits. The replying affidavit containing these factual allegations was filed on 13 February 2016. The 9th respondent was therefore aware of these allegations and chose not to challenge them.

[41] There is also a supporting affidavit filed together with the founding affidavit. It is deposed to by Mr Danisile Sambamba and contains a history of the Mbalisweni Traditional Community since

1845. It also contains a history of the circumstances in which Nkaca was born. At paragraph 46 of his affidavit Mr Sambamba makes the following averments:

"46. While Mpondos don't discriminate the origin of their sons outside marriage, the available evidence shows that some come from adulterous relationships where the traditional leader made somebody's wife pregnant. At some stage the traditional leader gets a not yet married girl pregnant. The third area would be through UNGENO which happens when the traditional leader impregnates somebody's widow. The fourth would be when the traditional leader gets an unmarried woman pregnant. This woman could be a divorcee or a never married woman who had been giving birth to children from different fathers.

a. On adultery: Mthika was one of the sons of Mbangatha who started the Ngocweni headmanship in the present area of Indwe within the

Mbalisweni Traditional Council. When he died he was succeeded by his great son Maqayisa. When Maqayisa died, he had no male issue from his wife. While the Pondos were still searching or investigating whether the deceased headman had any surviving son or sons from outside his marriage, they allowed a number of people to act until they have agreed who should succeed the late Maqayisa. The search discovered that the late headman Maqayisa had a son by the name of Mlahlwa from his adulterous relationship with the wife of one Ndobe. At that time Mlahlwa had

just married and had a baby boy Khalambas and were using the Ndobe family surname. The Pondos paid six cows and brought the child together with his wife and a baby boy Khalambas from the Ndobe family to the Nyawuzas. He was immediately installed as headman. Khalambas was the father to headman Mongezi.

- b. According to Paramount Chief M.J. Sigcau, “at some stage, Cabe was the King of Amampondo. He had two wives with three sons from the great house – Qiya (great son), Dweru and Gangata. In his right hand house he had two sons. Gwarhu and Njilo. The adulterous relationship between Gangata and Qiya’s wife led to a bitter fight between the two, with Pondos joining either Gangata or Qiya. Qiya, the great son and heir was defeated and forced out of Pondoland. On their way to the Tembuland area his pregnant wife turned back to the Great Place. King Bala, the adulterine child of Gangata fathered twins Khonjwayo and Chitwayo.”

[42] The historical facts contained in Mr Sambamba’s supporting affidavit were, to the lesser or greater extent, given to the Committee hearings including the examples in respect of the Mlahlwa and Maqayisa as well as the Gangata incident. It is very strange that in its analysis of the evidence the Committee completely ignored this evidence and did not even mention it in its recommendations. In the record of the Committee’s hearings this evidence is contained in pages 325 – 352 of the court record. It is unfathomable that the Committee ignored such a substantive submission. At the very least the Committee needed to deal with it even if it were to come to the same conclusion that it did in which case it would have had to explain itself. I must mention for the sake of completeness that evidence to the same effect was given by Mr Maraqana as stated above but Mr Maraqana’s evidence was not ignored as Mr Sambamba’s was but was distorted. This, no doubt would have had the effect of misleading the Premier even if unintentionally. This underscores the importance of the 1st respondent having placed herself in a position of being able to pick up on these irregularities and decided on how to deal with them.

[43] It is equally strange that in seeking to stand by her earlier decision to dismiss applicants’ application in the answering

affidavit the 1st respondent still does not challenge this historical evidence by pointing out that the historical facts alleged are in correct and putting up her own version of what happened in the Mbalisweni Traditional community in the past if her view is that there are inaccuracies in the historical facts alleged.

[44] The 5th respondent filed an answering affidavit in which she describes herself as the chieftainess, the reagent of Mbalisweni Administrative and head of Mbalisweni Traditional Council and acting as such for her son, Mzingisi Mbangatha who was later joined as the 9th respondent. I hasten to add that despite his obvious interest in the matter the 9th respondent does not oppose the application. In her short and unconventional answering affidavits, the 5th respondent does not deal squarely with the issues raised by the applicants in their founding and supporting affidavit. I describe the answering affidavit as being

unconventional in that while the 5th respondent is opposed to the granting of the relief sought by applicants she does not deal with the issues raised in the founding and supporting affidavits.

[45] She merely puts up her own understanding of what the Mpondo custom is on succession as follows:

“15.1 Under Customary Law and in particular under Pondo custom a mother of a child is a very important figure. The status of a child is intertwined and very much dependent on the status of its mother.

15.2 When a married girl is pregnant by somebody, including a Chief, that child belongs to the father and the mother of that girl. That child assumes the clan name and surname of the girl. For all intents and purpose, it becomes the child of the father and mother of the girl.

15.3 Where a woman girl has been married and such marriage has been dissolved and she had said returned to her maiden home, she becomes what is known as idikazi under Pondo custom and any children she gives birth to belongs to her mother and father and again assume the clan-name and surname of the father of the said idikazi.

15.4 A child born by a married couple who is fathered by the husband in that marriage relationship belongs to that husband's house and assumes the clan-name and surname of its father.

15.5 A child born by a woman during the time when, such woman is a party to a marriage with her husband, who is a product of adulterine affair between its mother and another man assumes the clan-name and surname of the husband to the woman. That child has no claim whatsoever in the family of the adulterine father who is its natural father. All his rights and claim are at the place to which its mother is married.

15.6 In the present case the father of the applicant, Nkaca is a child referred to paragraph 15.5 above. Nkaca's mother was Makhetshe who was married to Mfitshi Lurhani. During the subsistence of that marriage, Makhetshe committed adultery with Chief Ndoyisile Mbangatha as a result of which Nkaca was born. Having been born by a woman who was married to Mfitshi Lurhani whose clan-name is Amaqhinebe, Nkaca is a Qhinebe and is the son of Mfitshi Lurhani. He has no claim whatsoever in the house of Ndoyisile Mbangatha, who is a Nyawuza by clan.

15.7 Where a chief does not have a son with his wife, but has a son outside the marriage with another woman the status of that child will be as in paragraph 14.2 to 14.4 and will depend on the status of that woman.

16. By Isende Lenkosi – child by this it is meant a child who is a natural child of a Chief Isende means testicle. The question is whether such child could ever assume the throne/ chieftainship of his father. On this issue the Pondo Custom is clear and as follows:

- (a) Firstly it would depend on the status of the mother of that child. If the mother of that was a married woman and that child was conceived at a time its mother was still married to her husband, such child can never assume chieftainship.
- (b) All his rights and claim are at the place or house of the husband of his mother. It must be noted that under Pondo custom adultery is scandal and it is something which must always be kept under wrap. There is no way therefore that such a child can be paraded and boasted about by the adulterine father or anyone for that matter.
- (c) Secondly where a Chief has no issue or child in his marriage, but where he has a child from outside his marriage with an unmarried

woman such child might inherit his chieftainship, but such child will only inherit if all the houses of that chief have been exhausted and in all of them there is no male issue. This is something that rarely occurs.”

[46] Having put up her own understanding of Mpondo custom interestingly the 5th respondent does not at all dispute what is said to have happened in Mbalisweni as alleged in the founding affidavits. Moreover, the 5th respondent’s answering affidavit does not deny any of the allegations made by the applicants in their founding and supporting affidavits. What is contained in the founding affidavits is not challenged at all by the 5th and 9th respondent, certainly not in any direct way by the 5th respondent who opposed the application. There is not even a denial of the allegation that the so called adulterine child has ever been allowed to take the position of chieftainship or headmanship in the history of the Mbalisweni Traditional Community as alleged by applicants.

[47] The law on what a respondent is required to do in an answering affidavit is trite. In Erasmus Superior Court Practice Second Edition Volume 2 D1-64 the legal position is summarised as follows:

“The requirements for a respondent’s answering affidavit, which deals with the allegations contained in the applicant’s

founding affidavit, are the same as for that of the applicant. If the respondent’s affidavit in answer to the applicant’s

founding affidavit fails to admit or deny or confess and avoid, allegations in the applicant’s affidavit, the court will, for the purposes of the application, accept the applicant’s allegations as correct.”

[48] In *Ebrahim and Another v Georgoulas and Another* 1992 (2) SA 151 (NPD) at 154 C-D Khumalo J had this to say:

“It is also necessary to mention that the respondent has chosen to say nothing about most of the allegations made against him leaving

unanswered the important question whether there was in fact a sale or not. The legal point taken suggests that there was in fact a contract but its validity is challenged. His failure to react to the allegations raised does not assist him. These allegations must therefore be accepted.”

- [49] The parties’ counsel in this matter signed a joint agreement in terms of which they agreed that the issue for determination by this court is the Mpondo customary law of succession in relation to adulterine children. As indicated above the Committee reached the conclusion that it did not on the analysis of all the evidence placed before it but by ignoring all the evidence that indicated that adulterine children do in fact inherit from their natural father in terms of the customary law as has been practiced in the Mbalisweni Traditional Community and in the areas in which amaMpondo live as is clear from the historical facts to which it was referred. This approach by the Committee unwittingly misled the 1st respondent who bona fide accepted the Committee’s recommendations unaware that the Committee did not analyse all the evidence placed before it.
- [50] Before examining the authorities on Mpondo customary law it is imperative that I must again point out that the evidence about the Mlahlwa/Maqayisa and the Gangatha adulterous relationship with Qiya’s wife as a result of which King Bala was born has not been challenged by any of the respondents. If the incidents of Mlahlwa/Maqayisa and Gangata are unchallenged and therefore must be accepted as true it cannot be correct that under Mpondo customary law adultery is scandal or inyala. It is important to point out that no basis was laid by any of the respondents for the conclusion that adultery is scandal in Mpondo customary law. One should guard against one’s an individual’s sense of morality and religious convictions cannot be a basis for the conclusion that adultery is scandal under customary law as practiced for decades by Mpondos. It is a fact that in most religions adultery is not acceptable.
- [51] Secondly in her answering affidavit the 5th respondent admits that under Mpondo customary law an adulterine child born by an unmarried woman “might inherit his chieftaincy if there is no male issue in all the houses of that chief”. It might very well be that what the married woman has done in having an adulterous affair with the chief is scandalous in her husband’s family. However it does not appear to be scandalous for a man to be in such a relationship as looked at from that chief’s family. . I do not understand the respondents to be saying that a chief that has committed adultery with somebody’s wife is seen by his family and his community as having committed a scandal. In any event the historical narrative contained in the applicants’ founding and replying affidavits which has not been challenged by the respondents shows that this is in fact not the case. I could not find any authority for the proposition that his behaviour is regarded by his family as scandalous nor have the respondents cited any authority for their submission.

[52] In addition to what happened in the cases of Mlahlwa/Maqayisa and Gangatha there are authorities which make it clear that an adulterine child does inherit under certain circumstances. Professor J.L. Bekker, in Seymour's Customary Law in Southern Africa, fifth edition at page 294 says:

"The Pondo differ: the natural son of a family head by an unmarried woman, provided he is lawfully in the custody of the family head, can only inherit on failure of male issue of the family head and all his wives; it seems that he cannot be placed in a particular house or section."

[53] Then at page 295 he says:

"Among the Pondo and the Zulu, adulterine children have ultimate rights of succession only, that is they can succeed only when there are no regularly begotten males (which include children of valid ukungena and ukuzalela alliances) in the whole of the deceased's family head's family group."

[54] Historical evidence reveals that adulterine child have been fetched from their mother's homes and allowed to ascend to position in traditional leaderships in the past in similar situations as 1st applicant's situation. This historical evidence is undisputed by the respondents. I was referred by applicant's

counsel Mr Mtshaulana to the reported case of Mlahlwa v Maqayise Prentice Hall 1954 (1), Native Appeal Cases page 39-40. This case involved the same Mbangatha family that is before court in this matter. The facts of this case are worth mentioning as reported:

"One Mbangatha had at least three wives. In the Great hut Valelo was the eldest son, in the second hut Mtika was the eldest son, and Mpandula the second; Mtika's eldest son was Maqayise and Mpandula's was Mbhesi whose eldest son was Marashu, in the third hut Qolo was the eldest son and his eldest son was Momoza. Maqayise had two wives neither of whom produced any sons by him. His Great wife was Maselane. During the subsistence of his marriage with Maselane Maqayise cohabited with one Nolausi, the wife of Ndabambi and she bore him a son, Mlahlwa, the birth taking place after Maqayise's death. Columbus is the eldest son of Mlahlwa, cattle were paid for the child Mlahlwa who was taken to the late Maqayise's kraal and grew up there and was married from that kraal; after Maqayise's death his widow Maselane was ngenaed by Momoza and Sifici was the eldest son of that union."

On these facts Sifici claimed in the Court of the Paramount Chief of Western Pondoland to be the heir of Maqayise being the son of his Great Wife. Columbus, however, claimed the heirship by virtue of the fact that his father Mlahlwa was fetched to Maqayise's

kraal so that he could inherit the estate.

In the chief's court judgment was given in favour of Columbus but on appeal to the Native Commissioner's Court this was set aside and judgment of absolution from the instance entered, the Native Commission holding that neither of the parties was entitled to succeed and the matter now comes on appeal on the ground that although his father was the illegitimate son of Maqayise by a married woman, he (Mlahlwa) was paid for and taken to Maqayise's kraal and there brought up as a son of that house and in accordance with Pondo customs he became a son of that house

and could succeed to his father's estate and so could his son Columbus."

[55] It is reported that even though Mlahlwa did not succeed in the Native Appeal Court, the Mbalisweni traditional community recognised

Columbus as chief and his descendants have never lost their position as traditional leaders.

SUBMISSIONS

ON PONDO CUSTOMARY LAW.

[56] Mr Mtshaulana based his argument on two main submissions which are also foreshadowed in applicants' papers. The first one is that the decision of the committee and the Premier must be set aside on the ground that both erred in their interpretation of Pondo customary law of succession of illegitimate children. Put differently the Committee and the Premier misconstrued the evidence of the witnesses on Pondo customary law of succession. I have already dealt with the latter issue extensively above when I dealt with the Committee's analysis of the evidence and the reasons for the wrong analysis which included the unfortunate misrepresentation of Mr Maraqana's evidence.

[57] I have also dealt with the fact that evidently the Committee did not have a transcribed record of its proceedings when it compiled the recommendations with the result that it did not hand over the record of its proceedings when it gave the Premier its recommendations.

Therefore, the Premier had nothing else but the recommendations themselves to rely on. Therefore she could not have exercised a discretion to reject them if she felt that the evidence did not support the recommendations or they were somehow incorrect or the Committee's recommendations were at variance with the evidence.

[58] The second main point made on behalf of the applicants is that the Committee and the Premier failed to recognise living customary law among the Pondos in Mbalisweni traditional community as related to them by the various witnesses at the hearings before the Committee.

[59] I have already pointed out above that the evidence that dealt with living customary law was not dealt with in that as indicated, Mr Maraqana's submissions were unfortunately misrepresented by the Committee in its recommendations to the Premier. Secondly the evidence of the Mbalisweni community members and Mbangatha family members which pointed to historical events that happened in the past that indicated that illegitimate children where there are no male issue by the deceased are in fact considered was simply ignored by the Committee and as such is not properly dealt with and analysed in its recommendations. This resulted in the recommendations being irrational to the extent that crucial evidence is not dealt with and rejected if the Committee felt that it had any basis for rejecting it.

[60] In any event even at the risk of repetition, I must emphasize that the Committee never put itself in a position of analysing the evidence properly by failing to have its own video recorded proceedings transcribed so that it could then analyse the evidence

properly and make evidence based recommendations instead of relying on vague memory and hand written notes that may or may not have been comprehensively made. In any event even if the Committee members could have made or did make comprehensive notes, which I doubt, such notes would not have been as good as a transcribed record and were evidently not furnished to the Premier. Mr Bodlani, counsel for the 1st, 2nd and 3rd respondents makes the following submissions in his heads of argument:

“47 When considering a dispute or claim, the Commission is required to consider and apply customary law and the customs of the relevant

traditional community as they applied when the events occurred that gave rise to the dispute or claim. It follows that in deciding whether to uphold or dismiss a recommendation the Premier must satisfy him or herself that the recommendation is in line with the customary position of the relevant traditional community as it was when the events occurred that gave rise to the dispute or claim.

48. The question then is what was the Mpondo customary law position regarding the inheritance of adulterine children during and/or at about the time of Nkaca's birth. The correct answer to this question will lead this Court to the correct finding on this very preeminent question in this matter. The customary position regarding adulterine children in the Mpondo and other areas has been interpreted and explained in various decisions of the Native Appeal Court.”

[61] He then refers to a number of decisions by the Native Appeal Court and most importantly the case of Mlahlwa v Maqayise where as indicated above, it was held that an adulterine child by a married woman cannot succeed to the natural father. He then makes the following submission:

“49.4 An adulterine child by a married woman cannot inherit from or succeed the natural father. He or she is presumed to be the legitimate child of his mother's husband. No kind of customary ritual can cure and/or cleanse him or her as a child that has been born from a conduct that is deemed to be disgraceful (inyala).”

[62] Mr Notununu who appeared for the 5th respondent indicated that his submissions are in line with the submissions that have been made on behalf of the 1, 2 and 3rd respondents.

[63] The Committee summarised its understanding of customary law in the following terms in its recommendations to the Premier:

“6. Customary Law and Practices of Succession

6.1 According to Bennett: Customary Law in Southern Africa (2004: 37), the African system of succession is invariably patrilineal. The rules of succession to a deceased are the same for all systems of customary law in South Africa. The guiding principle is always primogeniture in the male line. The ideal candidate for heir is therefore the deceased's eldest son or failing him the eldest son's eldest male descendant, namely, the eldest surviving grandson. Failing any male issue in the eldest son's line, succession passes to the second son and his male descendants and so on through all the deceased's sons.

6.2 If the deceased had no descendants the whole range of male ascendants are considered in order of "seniority". It is governed by the principle of primogeniture that even in polygamous marriages prevails. The rules are plain, straight forward and part and parcel of their system of family law, catering among others for the status and well being of all members of an extended family the author concludes. Kerr: Customary Law of Immovable Property and Succession (1990:99 says the same.

6.3 In many African communities an adulterine child belongs to the husband of its mother and his people. In addition that child adopts the surname of his mother's husband."

[64] The Committee seems to have been guided by this understanding as expressed in paragraph 6 of its recommendations when it decided on the recommendations to the Premier. The question is whether what is stated above is necessarily correct as a general exposition

of customary law especially Mpondo customary law. I do not think so. The case of Mlahlwa is the clearest example of how Mpondo customary law is practised by Mpondos in Mbalisweni. As stated above Columbus was the heir of an adulterine child Mlahlwa who had been fetched to Maqayise's kraal so that he could inherit the estate. It is not without significance that in the Court of the Paramount Chief of Western Pondoland Columbus was successful. It is even more important that there is uncontradicted and unchallenged evidence that when Columbus lost his case when the Native Appeal Court held that an adulterine child by a married woman cannot be a successor to the natural father, the people ignored the decision of the Native Appeal Court and continued to recognise Columbus as their chief.

[65] Mr Bodlani submitted that in so doing the Mbalisweni community was being contemptuous of the Native Appeal Court in Maqayise. What he did not explain is that if that traditional community was being contemptuous of the Court's decision what were they following in recognising Columbus as their chief, if they were not practising their customary law as understood by them at the time. Furthermore, I was not pointed to any case in the past since Maqayise or before when that community faced with a similar situation as in Maqayise acted differently and contrary to what they did following the Native Appeal Court's decision.

[66] It seems to me that in fetching Nkaca from his mother's home at an early age of 6 years and letting him grow amongst his natural father's people following the death of his natural father and expressing their desire for him to succeed his father when he becomes old enough they were again re-affirming their customary law. This is acknowledged by the Premier who in her letter in which her decision is articulated says:

"It is clear that Nkaca the adulterine child of Ndoyisile Pheza was assimilated to Ndoyisile's family at the instance of his close relative Makhukhu."

[67] In the following sentence the Premier says:

"This was out of Ubuntu, not because of any wish to make him a successor to Ndoyisile in the event of him not having any legitimate issue."

[68] This second sentence is not justified by any reference to the record nor is its basis explained. It also ignores the fact that at the time Nkaca was "assimilated", first of all Ndoyisile was already dead and secondly it was already known in his family that he did not have "any legitimate issue".

[69] This takes me to an article written by Sandra Burman who was at the time, a research fellow of both Queen Elizabeth House, University of Oxford and the University of Cape Town, African Customary Law, Juta & Co, Ltd 1991 titled, "Illegitimacy and the African Family in a Changing South Africa" pages 36-51. In that paper she points out that there is a conflict between the law of the state and the customary law ascribed to the African population.

She then says:

"However customary law is in practice, if not in the textbooks a constantly changing legal system and the great social changes which have been taking place have led to very different practices from those described in the customary law manuals. What follows is thus also an examination of the discrepancy between, on the one hand, the customary law on illegitimacy as enshrined in the written authorities and applied by the state courts and on the other, what is actually occurring. The latter may be described as customary law in practice....."

[70] The description of the children born of a married woman as disgraceful (inyala) is not born out by history as lived in the

Mpondos in general and the Mbalisweni traditional community in particular. In general there are authorities which recognise

the fact that adulterine children do in fact succeed and have always succeeded historically when circumstances made it necessary.

For instance Professor J.C. Bekker in Seymour's Customary Law in Southern Africa 5th Edition 1989 Juta & Co. Limited at page 295 where he deals with the institution or adoption of an heir in the various traditional communities in Southern Africa, says about the Mpondo:

“Among the Pondo and the Zulu adulterine children have ultimate rights of succession only that is, they can succeed only when there are no regularly begotten males (which include children of valid ukungena and ukuzalela alliances) in the whole of the deceased family head’s family group.”

- [71] H.W. Warner, described as the Late Permanent Member, Southern Native Appeal Court in a Juta & Company Ltd publication called, a Digest of South African Native Civil Case Law 1894 – 1957 at page 271 he says:

“According to Pondo custom, an adulterine child cannot under any circumstances, inherit the property of his mother’s husband. The illegitimate issue of the husband can, however, inherit in the absence of legitimate male children.”

- [72] Clearly the notion of illegitimate children being a disgrace (inyala) as a general concept that can be ascribed to Mpondo customary law is clearly not born out by authorities and Customary Law as lived and practised by Mpondos in general and more specifically the Mbalisweni traditional community. There is a case to be made, at the very least, for the notion of a disgrace to be attributable to colonization and common law and in no small measure Christianisation. This point is well made by Burman (supra) at page 50 where she says:

“Indeed in some cases involving illegitimacy which were observed in court, it was far from clear which system the parties involved believed they were following, they had not necessarily considered the question and were uncertain when questioned. Nor were they necessarily both operating on the same assumptions. This is perhaps an inevitable outcome of Christianisation and urbanisation that has been taking place since the turn of the century and before, complicated by enforced periodic returns to rural areas as a result of apartheid legislation and also indigenous customs.”

- [73] Unfortunately customary law was not afforded space to develop on its own. On the contrary it was influenced by many factors

including the fact that the ultimate arbiters of customary law disputes were the native commissioners who were white magistrates.

This would have been one of the reasons why the writers of our Constitution, in entrenching equality in the Bill of Rights also

deemed it necessary not only ‘to recognise’ customary law but also to make constitutional provisions that deal with traditional leadership and customary law.

- [74] Section 211 of the Constitution provides thus:

“1. The institution, status and role of traditional leadership, according to customary law are recognised subject to the Constitution.

2. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs which includes amendments to or repeal of, that legislation or those customs.

3. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically

deals with customary law.”

- [75] There are also the following constitutional provisions which are equally importantly and relevant in this matter:

“30. 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.

31(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, practice their religion and use their language.”

- [76] The following questions do come to mind:

1. Is the Mbalisweni traditional community a cultural community?
2. Do they have the right to enjoy their culture as Mpondos?
3. Are they entitled to determine their traditional leadership succession according to their customary law?

- [77] My answer to all these questions is a resounding yes. In addition I must point out that these rights have always been there in that the Mpondos, have lived according to these rights and cultures and customs. They are not a constitutional era invention. All that the Constitution is doing or has done is to give them their rightful place within and amongst other traditional communities. To impose a moral code that prescribes how a traditional leadership succession is determined in specific circumstances cannot be done according to what obtains in other communities which may or may not have been influenced by the factors referred to above, is not development of customary law but its subjugation. This, our Constitution outlaws. That the Committee and the Premier described the customary law practice of Mpondos with respect to a child born of married woman by another man as a disgrace that cannot be cleansed by any performance of any ritual is a disguised attempt at appealing to cultural modernisation that seeks to deny the Mpondos in general and the Mbalisweni traditional community and the Mbangatha Royal Family their right to practice their culture and determine their right of succession freely in line with their custom. This is the very thing that the Constitution seeks to outlaw, the subconscious dominance of one culture by another or the promotion of one culture or subjective morality at the expense of another.

- [78] The Constitutional Court has spoken on what the correct approach to customary law in the constitutional dispensation is. In *Bhe and others v Magistrate, Khayelitsha and other* [2004] ZACC 17; 2005 (1) SA 580 (CC), Langa DCJ had this to say:

“57. Historically in South Africa, children whose parents were not married at the time they were conceived or born were discriminated against in a range of ways. This was particularly true of children whose family lives were governed by common law. Much of the stigma that attached to extramarital children was social rather than legal, but that stigma was deeply harmful. The legal consequences of extra marital birth at common law flowed from the Dutch principle that “een wijf maakt geen bastard”, the implications of which were that the extra marital child was not recognised as having any legal relationship with his or her father, but only with his or her mother. The child therefore took the mother’s name, inherited only from his or her mother and the father of the child had no parental obligations or rights vis-à-vis the child. The law and social practise concerning extra marital children without doubt conferred a stigma upon them which was harmful and degrading.”

[58] It is important, however, in assessing the discrimination and stigma attached to extra-marital birth to distinguish between common law and customary law. As Jones records:

‘The African means of dealing with extra marital birth is essentially accommodative in intent and character; it is oriented towards social inclusivity. The mechanisms of maternal filiation provides an extra marital child with a father, with a male ritual and social sponsor with a place in a conjugal unit, and it manufactures for the child a full lineal identity. Very importantly, these attributes are socially visible – they counter what would otherwise be clearly evident deficits in an extra-marital child’s social make up and are preserved and upheld by way of taboo against reference to the child’s real paternity or social position. As far as is possible within the bounds of cultural reason, the effect of the African system is therefore to ensure that an extra marital child’s position is not compromised by the circumstances of his or her birth’.

Nevertheless, extra marital sons had reduced rights of inheritance under customary law as they would only inherit in the absence of any other male descendants. Contemporary research suggests too that there is social stigma attached to extra-marital children, though the stigma probably varies depending on the circumstances and community concerned.

[59] The prohibition of unfair discrimination on the ground of birth in section 9 (3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child’s biological parents were married either at the time the child was conceived or when the child was born. As I have outlined, extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus, when section 9(3) prohibits unfair discrimination on the ground of “birth”, it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children’s

parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not.”

[79] It seems to me that the Mpondos have been recognising the place of an illegitimate child in his or her father’s family long before the advent of the constitutional dispensation. I therefore, cannot see how under the constitutional dispensation founded on a Bill of Rights,

the rights of illegitimate children to succeed, subject to the decision of the Royal Family to correctly determine who the rightful successor should be, can be negated. Were it to be negated even unwittingly, that would, in my view, be tantamount to the denial of the Mpondos' right to practise their culture. This would in effect be the subjugation of customary law to other cultural influences from which it should be freed and disentangled and given space to develop generically unhindered by common law influences or religious influences.

[80] I am reminded of the observations made by T.W. Bennett in his book, Customary Law in South Africa, a Juta Publication in which at page 34 he observes:

"Until the advent of a new constitution in 1993, customary law had never been fully recognised as a basic component of the South African legal system. Instead, Roman – Dutch law was treated as the common law of the land. This unequal relationship began with the foundation of a settlement by the Dutch East India Company in 1652."

[81] At page 78 he then says:

"Roman – Dutch and customary law are now treated as equal partners. The recognition and application of customary law, however rests on a right to culture for which special provision is made in ss 30 and 31 of the Final Constitution. Although neither section in fact makes any reference to customary law, it is generally taken to be a significant element of the African cultural tradition."

[82] The state, in all its formations including courts, must not close its eyes and ears to the battering that customary law and African culture were subjected to in the past. Were they to do so, they will have betrayed the indigenous people of this country who chose to observe their cultural practices and the constitutional provisions relating to culture and customary law will come to nought with the state and courts being complicit in that betrayal.

[83] In fact section 11(1) of the Framework Act gives the responsibility of identifying a senior traditional leader to the royal family subject to applicable customary law. It does not give that responsibility to the traditional community as a whole or the Premier. This must be in recognition of the fact that succession is primarily a family affair. Therefore whether the rituals, if any, that need to be observed in legitimising a child have been correctly observed is similarly a family affair to which the community at large gets informed as correctly pointed out by Mr Maraqana, in this case.

[84] In the circumstances I am satisfied that the Committee misinterpreted Mpondo customary law and therefore the Premier should have taken a decision that differs with the recommendations of the committee and provided written reasons for such decision as provided for in section 26 (4) of the Framework Act. That decision should have been that according to Mpondo customary law, a child born of an adulterous relationship can succeed as an heir to his father and can ascend to a position of traditional leadership if the royal family so determines.

[85] On the issue of costs counsel were in agreement that this is a matter that was deserving of two counsel being employed in light of its complexity. Furthermore the 5th respondent was, in my view, obliged to resist the application as she had existing rights that were worthy of protection in a matter in which she could have known no better on what the customary law is and that having been recognised as the senior traditional leader by the Premier before, her opposition was in no way extravagant. In the circumstances and in the exercise of my discretion she must also get an order for costs even though she has not been successful in opposing the application.

[86] Accordingly, the following order will issue:

1. The decision of the first respondent dismissing first applicant's claim for the position of senior traditional leadership of Mbalisweni Traditional Council is reviewed and set aside.
2. The first respondent is directed to take appropriate steps as contemplated in section 26 read with sections 11 and 12 of the Framework Act with 60 days from the date of this order.
3. The first respondent is directed to pay costs of applicants' application including costs of two counsel.
4. The first respondent's is directed to pay 5th respondents costs.

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants: P.Z. MTSHAULANA SC

WITH M MATHAPHUNA

Instructed by: M.M HOLI ATTORNEYS

MTHATHA

Counsel for 1st, 2nd & 3rd Respondents: A. BODLANI

Counsel for the 5th Respondent: M. NOTUNUNU

Instructed by: M NOTUNUNU & ASSOCIATES

Matter heard on: 01 February 2018

Judgment

handed down on: 27 March 2018

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