

SOUTH AFRICA / JUDGMENT

Mbubana v Commissioner Kgatla R.T and Others (800/2018) [2025] ZALMPTHC 10 (20 May 2025)

[2025] ZALMPTHC 10

COURT

Limpopo High Court, Thohoyandou

BEFORE

M V Semanya

CASE / FILE NUMBER

800/2018

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THE

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

CASE

NO. 800/2018

(1) REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

DATE:

19 May 2025

SIGNATURE:

In

the matter between:

ZWIDOFHELANGANI

MBUBANA

APPLICANT

and

COMMISSIONER

KGATLA R.T

FIRST

RESPONDENT

PROVINCIAL

COMMITTEE: COMMISSION
ON TRADITIONAL LEADERSHIP
SECOND
RESPONDENT
PREMIER
OF LIMPOPO PROVINCE
THIRD
RESPONDENT
RAMOVHA
ROYAL FAMILY
FOURTH
RESPONDENT

MEC: COGHSTA
FIFTH
RESPONDENT
CHIEF
TSHILILO JEFFREY RAMOVHA
SIXTH
RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 20 May 2025.

JUDGMENT

SEMENYA DJP.

- [1] The applicant launched a judicial review of the administrative decision taken by the Premier of the Limpopo Province, the third respondent, in which the applicant's claim for the restoration of Mbubana/e senior traditional leadership of the Mulendzhe traditional community was declined. The applicant launched the claim in his current capacity as the headman of the Tshitomboni community. The Tshitomboni area currently falling under the senior traditional leadership of Chief Tshililo Jeffrey Ramovha, the sixth respondent in this matter.
- [2] The notice of motion has been amended twice and the final order sought by the applicant is, firstly, that of the reviewing and the setting aside of the Premier's decision to decline the claim for restoration of the Mbubana senior traditional leadership of Mulendzhe traditional community. Secondly, the reviewing and setting aside of the recommendation of the Provincial Committee: Commission on Traditional Leadership dated 13th June 2017. Thirdly, that the Premier of Limpopo Province be ordered to recognise the Tshitomboni-tsha-Ha-Mbubane as a traditional community; and, lastly, that the Premier of Limpopo Province be ordered to recognize Zwidofhelangani Mbubana the senior traditional leader of the Tshitomboni-tsha Ha-Mmbubana community.

- [3] The dispute over traditional leadership in this matter arises out of the applicant's claim that his forefathers lost their status of senior traditional leadership in 1957 when the erstwhile white government grouped a several of traditional leaders under the leadership of the Ramovha Mudalo Frank. The applicant claims that the grouping resulted in the reduction of the status of the Mbubanas and other traditional leaders from that of independent headmen to the status of headmen.
- [4] The background facts of the application are that the applicant lodged a claim for the restoration of the status of senior traditional leadership with the Commission on Traditional Leadership Disputes and Claims (the Kgatla Commission) which was established by the Premier of the Limpopo Government. The Commission was established in terms of the Traditional Leadership and Institutions Act[1] (the Limpopo Act) read with conjunction with the Traditional Leadership and Governance Framework Act[2] (the Framework Act). The Kgatla Commission conducted public hearings concerning the dispute and recommended to the Premier of Limpopo to decline the claim. After the recommendations of the Kgatla Commission, the Premier wrote a letter to the applicant and the Mmbubane community in which he informed them about his decision to decline their claim.
- [5] The facts, both oral and written, which are in the main common cause, are that the Mbubanas were the first people to settle at Tshitomboni-tsha- Ha-Mmbubana under the leadership of Chief Thukani Mbubana between the years 1600 and 1700. Meanwhile, the death of King Phophi Thohoyandou, who ruled over the whole of Venda, with his kingdom established at Dzata, led to the relocation of one Kutama Nelunguda Mphaphuli from Dzata. He arrived at Tshitomboni where conquered and subjugated Chief Thukhani Mbubana and established himself and his followers at Tshitomboni-tsha-Ha-Mmbubana. The Mphaphulis later crossed the Luvubu River and settled at Mbilwi, leaving the Mbubanas in charge of Tshitomboni.
- [6] After the relocation to Mbilwi, the Mphaphulis and the Mbubanas reached an agreement in terms of which one Nyatshisevhe Mphaphuli, a Khadzi (paternal aunt) to the Mphaphulis whose marriage had failed, was allocated an area known as Tshitopeni to rule over as a headwoman under Mmbubana Muofhe. Nyatshisivhe became romantically involved with Piet Mboyi (Booi, Ramovha), who was a policeman or a messenger in the area. She would, from time to time, cause Booi to represent her in meetings called by the representatives of the white government at Sibasa. Piet Booi took over the reign of Tshitopeni after the passing of Nyatshisevhe.
- [7] The applicant avers that the Mbubanas lost their senior traditional leadership status when all headmen were invited to a meeting by the erstwhile apartheid government, in which they were informed that the government intends to build new traditional leaders' offices. All headmen in attendance were told to indicate the one who is most senior among them and they all pointed at Mbubana. To their surprise, one Mudalo Frank Ramovha was recognised by the erstwhile apartheid government as a senior traditional leader who was to rule over others, simply because he was the one who could read and write. He was made to rule over

other headmen such as Mbubane, Phaphazela, Hasani, among others. The name of the entire area over which the Ramovhas were to rule was changed from Tshitomboni to Mulendzhe.

[8] The grounds of review are stated as follows in paragraphs 30 and 31 the founding affidavit:

"30. The Premier of Limpopo Province in his capacity as head of the Limpopo Provincial Government performed an administrative action when deciding to reject the applicant's application for the restoration of the Mbubana original status of senior traditional leadership.

31. The refusal to restore the Mbubanas' original status of senior traditional leadership constitutes a reviewable administrative action in terms of section 6(2)(b)(c)(e) (iii) and (f) (cc) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA)."

[9] The sections relied upon by the applicant provides as follows:

6. Judicial review of administrative action

(2) A court or tribunal has the power to judicially review an administrative action if--

...

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(e) the action was taken-

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(f) the action itself.-

(ii) is not rationally connected to-

(cc) the information before the administrator;

[10] In this court the applicant repeats the allegations that the Mbubanas are the original occupants of Tshitomboni-tsha-Ha-Mmbubana. The applicant further states that the Mphaphulis arrived in 1700 and lived peacefully with them until they relocated to Mbilwi, leaving the Mbubanas to look after their shrines. The applicant states that the Mbubanas were senior traditional leaders before the apartheid government decided to take control of traditional leadership through statutes. Mulendzhe tribal authority was, according to the applicant, established at Tshitopeni under the leadership of Frank Mudalo Piet Booi.

[11] The applicant contends that the Commission ignored the evidence contained in a letter addressed to it by the Mphaphulis in which according to the applicant confirms that Mbubana remained in charge of Tshitomboni-tsha-Ha-Mmbubana as senior traditional leader when the Mphaphulis moved to Mbilwi. It is further stated in the letter that Chief

Mbubana was required to report all activities taking place at Tshitomboni- tsha-Ha-Mmbubana to the Mphaphuli kingdom. The applicant avers that the Commission was not supposed to have regard to the version of the Ramovhas in that it was placed before it by a lawyer. It is further contended that the Commission undertook to conduct its own independent investigations, but has made its recommendations available to the premier without doing so.

- [12] In answer to the averments in the founding affidavit, the first, second and third respondents stated, correctly so in my view, that the applicant merely refers the court to specific provisions of PAJA in the founding affidavit without pointing to any specific conduct, if any, that justify the reviewing and the setting aside of the decision of the Premier.
- [13] It is trite law that in motion proceedings, the affidavits constitute both the pleadings and the evidence and that the issues and averments in support of the parties' cases should appear clearly therein[3]. The applicant seeks an order in terms of which he is recognised as the senior traditional leader of Tshitomboni-tsha-Ha-Mmbumbana. The recognition of traditional leadership in the Limpopo Province is governed by section 12 of the Limpopo Act. The Limpopo Act, which lays down the procedure to be followed before one could be recognised as a senior traditional leader. Firstly, the Limpopo Act stipulates that the royal family must identify a person who is to occupy the position of a senior traditional leader in accordance with the dictates of the customary law. Secondly, the traditional council must be notified about such identification. Thirdly, the Premier must be given the particulars of the person identified to fill the position and the reasons for his or her identification. Lastly, the Premier shall, if satisfied that the correct procedures have been followed, issue the identified person with a certificate of recognition as a senior traditional leader.
- [14] It follows from the provisions of section 12 that it is the responsibility of the executive, in this instance the Premier, to issue a recognition certificate to a person identified by the royal family as a senior traditional leader. The applicant seeks an order in terms of which, if granted, will amount to this court's usurpation of the Premier's powers. In addition, the relief sought is not supported by any form of evidence that proves compliance with section 12 of the Limpopo Act in the founding affidavit. In the result, this relief stands to be rejected.
- [15] The applicant further seeks an order in terms of which this court should recognise the Tshitomboni-tsha-Ha-Mbumbana as a traditional community. Section 3 of the Limpopo Act provides as follows:

"3 Recognition of traditional communities

- (1) A community envisaged by section 2(1) of the Framework Act may apply to the Premier in writing for recognition as a traditional community.
- (2) An application referred to in subsection (1) must contain the following particulars:
 - (a) a description of the community;

- (b) the size of the community;
 - (c) the name of the community;
 - (d) the name of the senior traditional leader and headmen or headwomen, if any;
 - (e) names of persons whom the community regards as its leaders in accordance with the community's customary law and their customary designations;
 - (f) the envisaged number of councillors; and
 - (g) a description of the area within which the community generally resides.
- (3) The Premier must, upon receipt of the application referred to in subsection (1), if satisfied that the community concerned complied with the provisions of subsection (2), refer the matter to the provincial house of traditional leaders, the relevant local house of traditional leaders, and any senior traditional leader whose traditional community is, in the opinion of the Premier, likely to have an interest in the matter and if applicable, the king or queen under whose jurisdiction the group would fall, for their comments, which comments must be submitted within 30 days of the referral.
- (4) The Premier must, within three months of receipt of the application referred to in subsection (1), subject to subsection (3), take a decision on whether to recognise the community concerned as a traditional community and inform the community concerned of the said decision.
- (5) Before taking a decision not to recognise the community concerned as a traditional community, the Premier must invite the community concerned to furnish reasons why the application should not be turned down on the basis of the reasons stated by the Premier.
- (6) The Premier must, when recognising a traditional community in terms of subsection (4)-
- (a) simultaneously determine the territorial area of the traditional community concerned;
 - (b) issue a prescribed certificate of recognition to the traditional community in question; and
 - (c) within 30 days of the decision publish details of such recognition by notice in the Gazette.
- [16] It is evident from section 3(1) that it is a community and not an individual who must apply for recognition as in the present case. Furthermore, the application must be directed to the Premier and not the court. Furthermore, the applicant failed to place any evidence in his affidavit in support of the recognition of the traditional community order that he seeks. No evidence has been placed before the court to justify the order that will have the effect of performing the function that a statute has assigned to the executive.
- [17] The respondents raised a point in limine of non-joinder of the Mulendzhe traditional community. The argument proffered by the respondents is that section 3(3) enjoins the Premier to refer the application for recognition of a traditional community to any senior traditional leader whose traditional community is likely to have an interest in the matter. In

this regard, the respondents argue in reliance on *Electronic Media Network Limited & Others v e-TV Ltd and Others*[4] in support of the argument that consultation with the Mulendzhe traditional leadership was crucial in this matter. The Constitutional

Court said following:

"...Consultation, as distinct from negotiations geared at reaching an agreement, is not a consensus-seeking exercise. Within the context of national policy development it must mean that a genuine effort is being made to obtain views of industry or sector role players and the public. In other words, a genuine and objectively satisfactory effort must be made to create a platform for the solicitation of views that would enable a policymaker to appreciate what those being consulted think or make of the major and incidental aspects of the issue or policy under consideration. People or entities must be left to express themselves freely on as wide a range of issues, pertinent to a policy proposal, as possible. The standpoints of interested parties, who want to have their views taken into account, must thus be allowed to reach a policymaker. But, consultation fulfils a role that is fundamentally different from negotiation."

[18] It is common cause that the Mbubanas currently fall under the traditional leadership of the Ramovhas. The version of the applicant is that the apartheid government merged several communities under different traditional leaders into one Mulendzhe community. In terms of section 3(3), the Mulendzhe traditional community under the leadership of Ramovha an interested party in this application. The respondents correctly contend that participation of traditional leaders is an integral part of the principle of fairness and serves as a "safeguard that not only signals respect for the dignity and worth of the participants." [5] It is for this reason that the statute makes it imperative for the Premier to refer the matter to traditional leaders before a decision to recognise a traditional community. The government respondents' point in limine of non-joinder of Mulendze traditional community has merit.

[19] There is one more reason why the order sought by the applicant cannot be granted. It is that, in addition to consultation with other traditional leaders, section 6 (a) of the Limpopo Act requires the applicant to determine the territorial area of the traditional community which he seeks to be recognised. The applicant failed to do so or to aver in his affidavit that he has done so. In short, compliance with the provisions of section 3 of the Limpopo Act is imperative for recognising a traditional community. The relief sought by the applicant in this regard should therefore be rejected.

[20] The respondents further raised a point in limine of dispute of fact. They contend that the applicant has relied on two different events as those that led to the loss of their senior traditional leadership status. In the first instance, the applicant avers that the Mbubanas lost their status in 1700 when they were conquered by the Mphaphulis at Tshitomboni-tsha-Ha-Mmbubana. Having said that, the applicant avers further that the senior leadership status was lost in 1956 when the apartheid government made the Mbubanas headmen.

[21] In addition to the two points, the respondents rely on the so-called concession made by the applicant in the replying affidavit that a dispute of fact does exist. In paragraph 10, the applicant states that the only dispute of fact that exists between his version and that of the respondents is that, according to the respondents, the Mphaphulis caused Nyatshisevhe to remain the senior traditional leader of the entire Tshitomboni area when they relocated to Mbilwi. In contrast, the applicant avers that Nyatshisevhe was made headwoman of the Tshitopeni area only.

[22] How a court should approach disputes of fact in applications has been stated as follows in *Wightman t/a J W Construction v Headfour (Pty) Ltd*[6]

"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed."

[23] The dispute of fact is, in my view, either not material or is non-existent. This review stems from the decision of the Premier to reject the application for the restoration of the status of senior traditional leadership. It is common cause that the Premier relied on the recommendations of the Commission in this regard. As already stated above, this fact was common cause before the Commission. In addition, the respondents stated in their answering affidavit that Nyatshisevhe was made a headwoman of Tshitopeni and not the entire Tshitomboni area.

[24] On the issue of the exact date on which the Mbubanas allegedly lost their senior traditional leadership status, I find that what the respondents regard as a dispute of fact is, is more of a contradiction than a dispute of fact. The written version placed before the Commission by the Mbubana royal family was that the Mbubanas were conquered and their dynasty was subjected to the administration of Thovhele Kutama Nelunguda Mphaphuli in 1790. In their founding affidavit before this court, the applicant adapts the words used to describe the act of the Mphaphulis from "conquering and subjugating" to "living together harmoniously". However, it is clear that the different description of the act of the Mphaphulis means that at some stage in history, the Mphaphulis became the rulers over the Mbubanas. It is for this reason that the respondents argue that the Mbubanas lost their senior traditional leadership, not when the apartheid government placed them under the Ramovhas, but when they were conquered by the Mphaphulis.

[25] The applicant contends that the Commission overlooked what he refers to as crucial evidence in the form of a letter addressed to it by the Mphaphulis. The writer of the said letter states that Khosi Mbubana is known to the Mphaphulis as a senior traditional leader. He acknowledges that Thovhele Nelunguda established his kingdom at Tshitomboni until he passed away. He further states that Thovhele Nelunguda's son moved to Mbilwi, leaving Chief Mbubana in charge of Tshitomboni. According to the writer, Chief Mbubana was required to report all activities taking place at Tshitomboni to the Mphaphuli kingdom. In the last paragraph of the letter, it is stated that the Mbubanas of Tshitomboni were never

under Ramovha, but that they were

under the Mphaphulis who were owners of the area where Tshitomboni is situated. He goes further to state that Mmbubana was a Chief and should be reinstated as such.

- [26] In the written submissions placed before the Commission by the Mbubana royal family, the Mbubanas are described as 'headmen'. The writers of the report state that "at a meeting held at Tshilindi on the 25th September 1956, the native commissioner chaired a meeting attended by Headman Mbubana, Mukhomi, Phaphazela ..." The version of the applicant about the status of the Mbubana traditional leadership, as stated before the Commission, in the letter addressed to the Commission by the Mphaphulis and in the founding affidavit, is confusing to say the least. It is not clear how they, as senior traditional leaders, were supposed to report to the Mphaphulis. In addition, it is not clear how they would be senior traditional leaders in an area 'owned' by the Mphaphulis.
- [27] With regard to the provisions of section 6 of PAJA, the respondents correctly contend that the applicant has failed to specify grounds that justify the review and the setting aside of the Premier's decision. In the founding affidavit under the heading of "GROUNDS OF REVIEW" the applicant simply states that the refusal to restore the Mbubanas' original status of senior traditional leadership constitutes a reviewable administrative action in terms of section 6(2)(b)(c)(e)(iii) and (f) (cc) of PAJA. Section 6 of PAJA gives guidelines concerning the type of conduct that may be reviewed in terms of this Act. The applicant failed to follow the provisions of this Act. This court is not inclined to embark on conjecture. It is the applicant who must prove its case on a balance of probabilities. The applicant dismally failed to discharge this onus.
- [28] The respondents argue that the Mbubanas lost their senior traditional leadership at the time when they were conquered and subjugated by the Mphaphulis in the 1700. The respondents contend that the Commission were mandated in terms of section 25(2)(vii) of the Frameworks Act, to investigate traditional leadership claims and disputes that arose after the 1 September 1927. The respondents submit that the present dispute falls outside the scope of the Commission. The applicant contends that the Mphaphulis have denied in a letter to the Commission that they have subjugated the Mbubanas. It has already been stated earlier that the Mphaphulis refer to the area occupied by the Mbubanas as their 'own. area. The Mbubanas also informed the

Commission that they were conquered by the Mphaphulis. The applicant's contentions contradicts its own version. The applicant's

contention that the respondents failed to produce evidence to challenge that of the Mphaphulis has no merit.

[29] On costs, the applicant launched this application in terms of PAJA which is the product of section 33 of the Constitution of the Republic of South Africa, 1996. Section 33 entrenches the citizens' rights to a just administrative action. The applicant sought to enforce this right. The principle laid down in the Oudekraal[7] is applicable in this case. The applicant cannot be ordered to pay the costs.

[30] In the result the following order is made:

The applicant's claim is dismissed with no order as to costs.

M V SEMENYA

DEPUTY JUDGE PRESIDENT

LIMPOPO LOCAL DIVISION, THOHOYANDOU.

APPEARANCES:

For the applicant:

ADV U B Makuya

Instructed by: Mathivha Attorneys.

For the first, third and fifth respondents:

ADV GDM Dube

Instructed by the Office of the State Attorney: Thohoyandou.

Heard: 15 October 2024.

Date delivered: 20 May 2025.

[1] 6 of 2005

[2] 41 of 2003

[3] Minister of land affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200D

[4] 2017 (9) BCLR 1108 CC

[5] Joseph & Others v City of Johannesburg & Others 2010 (3) BCLR 212 CC

[6] 2008 (3) SA 371 (SCA)

[7] Oudekraal Estates (Pty) Ltd v City of Cape town and Others 2004 (6) SA 222 (SCA)

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Prepared on 10 October 2026 · Esheria