

SOUTH AFRICA / JUDGMENT

Mditshwa and Others v Sabona and Others (634/2016) [2020] ZAECHMHC 15 (3 March 2020)

[2020] ZAECHMHC 15

COURT

Eastern Cape High Court, Mthatha

BEFORE

Majiki

CASE / FILE NUMBER

634/2016

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IN THE HIGH COURT OF
SOUTH AFRICA

(EASTERN CAPE LOCAL
DIVISION, MTHATHA)

CASE

NO. : 634/2016

Heard

on : 27,

28, 30 August,

17

September 2018,

29

April 2019 to 2 May

2019

and 28 October 2019

Date

delivered: 03 March 2020

In

the matter between:

NOMNTU
MDITSHWA
First
Applicant
MDITSHWA
ROYAL FAMILY Second
Applicant
SENZANGAKHONA
BHUNGWENI Third
Applicant
And
NKOSIPHENDULE
JACKSON SABONA First
Respondent
NONTUTHUZELO
MDITSHWA Second
Respondent
NONZUZO
MQHABALAKI Third
Respondent
NKOSIPHENDULE
BNKOSANA SABONA
Fourth Respondent
MADONDILE
NKILANA Fifth
Respondent
MTWENI
ROYAL FAMILY COUNCIL
Sixth
Respondent
DEPARTMENT OF
CO-OPERATIVE
GOVERNANCE AND
TRADITIONAL AFFAIRS
(EASTERN
CAPE PROVINCE)
Seventh Respondent

JUDGMENT

MAJIKI J:

- [1] On 27 August 2018 this court commenced hearing evidence in an application brought by the applicants against the respondents. The hearing was in consequence of the court order of 24 March 2016 referring the application for oral evidence for the determination of a specific issue arising from the application. The most relevant parts of the order were:

1. The determination of which one, if any, as between Mditshwa Royal Family and the Mtweni Royal Family Council is the legitimate royal family within the area of jurisdiction of eMtweni Traditional Council and Lower Ntafufu administrative area, Lusikisiki in the manner contemplated in section 1 of the Eastern Cape Traditional Leadership and Governance Act, 4/2005 (the Act) and
 2. What cost order should be made
 3. That the provisions of rules 35, 36 and 37 of the Rules of this court *mutatis mutandis* apply to this application.
 4. That the evidence to be tendered at the hearing be that of persons who have already deposed to affidavits already filed of record, save that any party desirous of calling persons whose affidavits have not already been delivered be able to do so upon serving on the other an affidavit embodying such witness's testimony, at least fourteen (14) days before the hearing.
 5. Determination of costs of the hearing of 22 March 2016 and all reserved costs.
- [2] Initially the applicants approached court on urgent basis seeking an order in the following terms in the main;
- 2.1 Rule Nisi calling upon the respondents to show cause, if any, why the following order should not be made;
 - 2.1.1 Declaring the establishment of Mtweni Royal Family Council as being inconsistent with Act and as such illegal;
 - 2.1.2 Reviewing and setting aside the decision of the Mtweni Royal Family Council to remove the first applicant as the head of Mtweni Traditional Council;
 - 2.1.3 Reviewing and setting aside the decision of Mtweni Royal Family Council in appointing the second respondent as head of Mtweni Traditional Council, the position which is occupied by the first applicant;
 - 2.1.4 Reviewing and setting aside the decision of Mtweni Royal Family Council to remove third applicant as the Inkosana / headman of Lower Ntafufu Administrative Area, Lusikisiki;
 - 2.2.5 Reviewing and/or setting aside the decision of Mtweni Royal Family Council dividing Lower Ntafufu Administrative Area, Lusikisiki into two (2) administrative areas.
 - 2.2.6 Declaring the convention of a community meeting held at Ndzimankulu Great Place on 24 February 2016 by the respondents without the consent of the applicants illegal;
 - 2.2.7 Interdicting and or restraining the first to sixth respondents from convening and holding meeting of both Mtweni Royal Family Council meetings and community meetings without the consent of the applicants;

2.2.8 Interdicting and or restraining the first respondent or any of their supporters from in any manner interfering with the applicants in the execution of their duties.

[3] Only the first, second, third and the sixth respondents opposed the application. The main answering affidavit was deposed to by the second respondent. The second and third respondents have since died.

[4] On 8 November 2016 the representatives for the applicants and the first, third and sixth respondents (the respondents) agreed to the order in the following terms in the main,

4.1 Parties were granted leave to file reports from the experts on the issues as to which is the legitimate royal family between Mditshwa Royal family and Mtweni Royal Family Council;

4.2 The services of the experts to be secured in twenty one (21) days of the order;

4.3 The opinion of the experts were to be filed in forty five (45) days after the expiry of twenty one (21) days mentioned above.

4.4 The experts to file joint minutes within twenty (20) days after expiry of twenty one (21) days mentioned in 3.3 above, summarising areas of agreement and areas of dispute between their reports.

[5] During the hearing, it was recorded on behalf of the applicants that they dispense with the filing of the expert report. Thereafter, the parties filed the stated case marked as exhibit "A" in that regard, in the following terms:

1. "Whereas this Honourable Court made an order on 8 November 2016, which order was by consent.
2. Whereas in terms of the court order dated 8 November 2016, the parties were required to file opinion of experts on the question.

2.1 Which is the legitimate royal family between Mditshwa Royal Family and Mtweni Royal Family Council?

3. And whereas only the opposing respondents have filed an expert opinion evidence prepared by Professor D.S. Nonkonyana
4. And whereas the applicant had secured services of Professor Sobahle who did not file any report as on the date of trial.
5. And whereas the parties are desirous of disposing of the matter on the narrow issue identified in the court order dated 24th March 2016 appearing at page 296 to 297 of the paginated bundle.
6. The applicant shall tender evidence which may include the witnesses who have not filed an affidavit nor a statement.

7. The respondent shall use the expert report of Professor D.S. Koyana, though its content is not necessary admitted by the applicants.
8. The report is only accepted as the report prepared by Professor Koyana.
9. Accordingly, the parties agree to abandon paragraph 4 and 5 (recorded as 3.1 to 3.4 above) of the court order dated 8 November 2016 and the applicant shall proceed without an expert reports” (brackets added).

BACKGROUND

- [6] The first applicant is the first born child of the marriage between the late chief Mthethunzima Mditshwa (chief Mthethunzima) and the second respondent. They were born two female children in the said marriage. Recently, she became the only surviving child. Chief Mthethunzima was the chief of amaGingqi clan, he was murdered on 8 January 2001.
- [7] Following chief Mthethunzima's death, there could be no agreement about succession, among those who were supposed to identify his successor. This led to the intervention by king J M Sigcawu, the then head of Qawukeni Traditional Council. On 2 April the king appointed a delegation led by Nkosi Nonkonyana, a chief under the Qawukeni Traditional Council and counsel for the applicants herein, to investigate the matter and submit a report and recommendations to him. Mr Nonkonyana later paid lobola for the first applicant. The report is referred to as Nonkonyana report herein.
- [8] In 2001 the royal family that was the recognised structure was amaGingqi or Mtweni royal family. Mtweni is an ancestor from whom the royal family descend, Gingqi is their clan. The king's delegation undertook the work which involved consultations and meetings with the royal family, the community and the tribal authority. The delegation noted the divergent views in its report. The initial predominant view was the royal family's one, that Mr Zamilé Sabona should act for the son of the deceased, born out of wedlock, Tamsanqa who was six (6) years old then. The

other predominant view, after consultation with the community, was that the first applicant acts as the chief. The latter became the king's committee's recommendation.

- [9] It is common cause that Mtweni tribal authority endorsed and certified the decision for the first applicant to so act from 2 April 2001 until an heir was appointed. The letter to that effect dated 2 April 2001 is annexed to the answering affidavit marked “C”. According to the first applicant she was appointed to act for Tamsanqa in line with the then prevailing patriarchal appointment system. On 22 May 2013 she was duly issued with government's recognition certificate.

- [10] It is further common cause that on 10 August 2012 Mtweni royal family council was launched, chaired by Mr Jacob L Ndabeni. (Mr J L Ndabeni)

[11] According to the respondents, on 26 January 2016 the Mtweni royal family council took a resolution to remove the first applicant as acting chieftainess and head of Mtweni traditional council. The first applicant was advised of this decision on 9 February 2016. An annexure to the answering affidavit is a letter dated 02 February 2015, contents of which refer to a meeting of 26 January 2016. The letter also refers to a community meeting held on 2 February 2016. The contents of the letter communicated the removal of the first applicant as aforestated. The applicants refer to the same letter as the letter which led her to initiate these proceedings, launched on 25 February 2016. It is apparent that

the reference to 2015 was erroneous in the letter. The surrounding facts and another letter with similar advices to the MEC

for co-operative government and traditional affairs (COGTA), annexed by the first applicant making reference to 2 February 2016, point to

2016. The first applicant also confirmed that on 22 February 2016 she learnt from that office that they received a letter removing her.

[12] The applicants acknowledged that the first applicant was recommended by the royal family and subsequently appointed as an acting chief. However, they state that in terms of the certificate of recognition she was recognised as the chief of amaGingqi clan by the Eastern Cape government.

[13] As things are, despite the resolution of Mtweni royal family that sought to remove the first applicant, her recognition is still in place.

[14] It is also common cause that on 11 November 2013 the first applicant addressed a letter to Mr J L Ndabeni advising of the need to review the establishment of the royal family. Further, she complained about meetings held by Mtweni royal family without consulting her. Finally, she directed the said Mr J L Ndabeni to refrain from convening meetings. According to the first applicant the Mtweni royal family council ceased to exist in 2013.

ISSUE

[15] The evidence reveals that between the period November 2013 and the launch of the application papers herein on 25 February 2016 the amaGingqi community was confronted with the existence, attempts to disqualify Mtweni royal family council on the one hand and the emergence of Mditshwa royal family on the other hand. Despite being alive of the issues that arose regarding the decisions which each took, the reasons thereof and the ongoing challenge of those decisions, the area of focus of this judgment relates to the isolated issue of, which royal family, if any, is the legitimate royal family in the areas that fall within the jurisdiction of the chieftaincy that is the subject of the dispute herein.

PARTIES CONTENTIONS ON THE TWO STRUCTURES IN QUESTION

- [16] According to the first applicant on 11 November 2013 her letter to Mr J L Ndabeni, annexed to her founding affidavit as “NM1” directed to him not to regard himself as the head of the royal family; advised that the royal family was formed without consulting her and that there was need to review its establishment so that Mditshwa royal family could be established in terms of government policy guide (the policy guide). The annexure marked “A” to the replying affidavit in support of this contention is a resolution of Mditshwa royal family’s special meeting dated 11 November 2013. One of its preambles is worded; “whereas the royal family convened for a special meeting on 11 November 2013 in reaction to the most recent developments concerning the disestablishment of Mtweni royal family council.” The meeting’s resolutions on the other hand related to the issue of the legal representatives to be engaged by first applicant on behalf of Mditshwa royal family. The resolution was signed by the secretary, Lungile Ndabeni that being the same Mr J L Ndabeni the letter of the same date, referred to above was addressed to.
- [17] Mr J L Ndabeni deposed to a confirmatory affidavit to the founding affidavit. He specifically averred that he was the chairperson of amaGingqi royal family. Its name was unilaterally changed by the first respondent. He said “Mtweni royal ceased to exist after receiving a letter from the said applicant ...”
- [18] The first applicant stated that she had discussions with the second respondent and Mr J L Ndabeni. It was on the advice of the second respondent, that she wrote “NM1”, advising that she quashed the structure, as it was not properly established. In her testimony in court she said she did not know Mtweni royal family council. Mtweni was the traditional council which used to be Mtweni tribal authority. When she referred to the second respondent as the chairperson of Mtweni royal family committee in “NM1”, it was because it was stated that she was the chairperson. She also called for Mtweni royal family committee to be disbanded because she had heard of its existence however, it was not properly structured.
- [19] According to the applicants, the first applicant did not only remove Mr J L Ndabeni, the whole structure was disbanded because it was not lawfully established and not a royal family, as contemplated in the legislation governing institutions of traditional leadership. After that, they learnt of the re-emergence of the structure, they regard as illegal, when it called them to meetings around January
2016. The first applicant averred that she heard of Mtweni royal family committee’s establishment after the royal family disbanded. The re-emerged structure was chaired by Mr J L Ndabeni.
- [20] According to the respondents Mr J. L. Ndabeni was removed as chairperson because the first applicant was not satisfied with his appointment. She was of the view that he was not in the royal line.
- [21] Section 1 of both the Traditional Leadership Governance Framework Act 41/2003 and Eastern Cape Act 4/2005 (Eastern Cape Governance Act) define the royal family as follows:

“... 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 customary and includes, where applicable, other family members who are close relatives of the ruling family”

- [22] According to the respondents on 17 December 2013 Mtweni royal family council identified the core royal houses of the family. A document headed Umlibo Wendlu ka Nomvalo is annexed to the main answering affidavit marked “E”. It is signed by the first respondent as the secretary of Mtweni royal family council and co-signed by the first applicant as the acting head of Mtweni traditional council. It was sent to Cogta for the listing and gazetting of Mtweni royal family council in a forwarding letter marked “F”. Annexure “F” was signed by the first applicant, as the chairperson of Mtweni royal family council and co-signed by the first respondent as the secretary. Annexure “F” was received at the local offices of Cogta on 9 June 2014. The same documents were handed up as annexures “A” AND “B” of bundle B during the hearing. For purposes of this judgment they will be referred as annexures “E” and “F”.
- [23] During the hearing the first applicant disputed that the signature in annexure “F” was her signature. In her replying affidavit the first applicant stated that she signed annexure “E” as the head of traditional council and not as an endorsement or recognition of a defunct structure. In court she conceded that according to annexure “F” the first respondent was the secretary of Mtweni royal council. She however, disputed that the first respondent worked with and served as her secretary in Mtweni royal family committee. She said she only put the stamp of the traditional council. When she wrote “NM1” and copied him, she heard that he was said to be the secretary of Mtweni royal family committee.

ORAL EVIDENCE

- [24] In her testimony the first applicant categorically stated that she did not agree with annexure “E”. Despite the fact that she had read it before she signed it, she was of the view that it was still going to be investigated. She however, conceded that a royal family is not only constituted by the members of the ruling house, in this instance, that of chief Mthethunzima.
- [25] She had handed up the minutes as exhibit “B”. That was the record of the meeting of 11 November 2013. According to the minutes the first applicant requested the second respondent to chair the meeting and Mr J.L. Ndabeni to record the minutes. The second respondent informed the meeting that she received a letter from the first applicant, “NM1” herein. The second respondent briefed the meeting about the difficulties experienced with establishment of AmaGingqi royal family council that included “every person of the clan.” The first applicant obtained advice from other royal families to obtain government regulations and regularise the structure.
- [26] The minutes went on to record that the first applicant led a discussion on the establishment of Mditshwa royal family. She tabled a document from Eastern Cape Cogta with the heading, “Policy guide on the identification, recognition and appointment of traditional leader,”

signed on 28 March 2013. Amongst other things, it regulates the establishment of royal families. The first applicant requested the meeting to appoint and confirm houses that constitute the core royal family. Those present at the meeting confirmed that the houses present at the meeting constituted the core houses to constitute Mditshwa royal family. She handed up the list of those people as exhibit "C". The same people also signed the attendance register. She was then appointed the chairperson as she held the position of her late

father. Mr J.L. Ndabeni became the secretary of the Mditshwa royal family.

[27] The first applicant at first insisted that in 2001 she was appointed by Mditshwa royal family. She was taken through minutes in exhibit B, her founding affidavit which averred that the other purpose for sending "NM1" was to establish Mditshwa royal family. The first applicant then confirmed that before 11 November 2013 Mditshwa royal family was not in existence. However, she insisted that the royal family even during the time of the reign of her father was the family of Mditshwa.

[28] She went on to say, in 2016 the first respondent was not a member of the royal family. She only came to realise of the first respondent's keen interest in royal family matters at the time of the preparation of the burial of chief Mthethunzima. He was part of Gingqi clan but she did not know how the first respondent and his elder brother Zamil Sabona were related to the Mditshwa family. She conceded that the first respondent was part of the delegation

that negotiated lobola on behalf of her family, during lobola negotiations for her intended marriage between her and Mr Nonkonyana.

[29] The first applicant conceded that she is the descendent of Mtwana and further that Mditshwa chieftainship flows from the house of Nomvalo. She said she did not know that Nomvalo had five wives, however, she could not dispute that. She agreed that the son in Nomvalo's great house was Mthelekiso. She said she did not know that the son in the right hand house was Sabona, she however, again she said could not dispute that. As for the rest of the houses appearing in annexure "E" she said she did not know them. However, if such was the outcome of the investigation, she disputed it because

not all the houses were part of the royal family meetings.

[30] With regard to Professor Koyana's report, she said she disagreed with it. In particular, with regard to what Professor Koyana stated were the outcomes of the meeting of 10 August 2012, the meeting which set up Mtwani royal family. Professor Koyana had recorded that the outcome of the said meeting was the identification core royal houses of the family. Professor Koyana had listed Sabona as the progeny of the right hand house, the next from Mditshwa great house. He then proceeded to list Noyila, Kwezi and Nzekeni as third to fifth, being ixhiba, left hand house and Kwezi's right hand house, in that order. At first, the first applicant had said she was not certain of the origin of Sabona. Subsequently, she said she did not know its origin. Same as the origin of Noyila and Nzekeni. She however, was certain

that Noyila and Ndzekeni were not descendants of Nomvalo. She said she also did not agree with the learned professor's conclusions, based on annexure "E".

- [31] According to her the close relatives of chief Mthethunzima were Gunyazile Bhungweni, Sizwe Philani Bhungweni and others as appearing in exhibit "C", compiled on 11 November 2013.
- [32] It was pointed out to her that in the list she referred to, there was also Yolokazi, her daughter, who was fifteen (15) years old at the time the list was compiled. She conceded that it was not correct to include her, so did Naledi and Asisipo. They were 12 and 11 respectively in 2013.
- [33] She also conceded that Mr J.L. Ndabeni also appearing in the list did not belong to the descendants of Nomvalo. However, she said on 11 November 2013, he was elected or chosen by the second respondent to be part of royal family.
- [34] She could not state or refer to the minutes of the royal family which changed her appointment from that of an acting chief to a permanent chief. However, she said the said minutes do exist and Cogta was aware of that.
- [35] In re-examination she confirmed the genealogy appearing on the Nonkonyana report from Gingqi to Mthethunzima. She also confirmed that at the unveiling of chief Diko, also a member of Gingqi clan, she and the first respondent spoke, the first respondent was introduced as the person who would present the genealogical tree AmaGingqi.
- [36] The third applicant also testified. He said he is an Inkosana of Lower Ntafufu administrative area. According to him he was appointed by Mditshwa royal family. He could not be certain of the date. In his affidavit he had annexed minutes of the meeting of 6 November 2012 as the meeting that resolved to appoint him. He confirmed the genealogy of the Gingqi clan as the one contained in the Nonkonyana report, in the same manner as the first applicant. He said chief Mthethunzima was the only child from his mother MaKhumalo. His father had two other wives, MaTawuzela and MaJuly. Of those only MaTawuzela had children, a son, Mpatiswa and a daughter Nomahlikihlana. He also testified about the houses of Mditshwa, Nomvalo, Mtelekiso and his own origin.
- [37] He said he belonged to Bhungweni house, a house in the great house of Nomvalo. Nomvalo's only son, Bhungweni was from an extra marital relationship. That is where the Bhungweni clan originated from. Damages were paid for Bhungweni. He emphasised the house of Nzimankulu which was where he said he descended from. He then mentioned the houses of Nyeleni and Sizindeni. Significantly, he omitted what in annexure "E" appears as the houses of Mthelekiso, the origin of Sabona, Noyila, Kwezi and Nzekeni.

- [38] He confirmed that he knew about the existence of Mtweni royal family council. He said he did not know when it came into existence. However, he was part of its formation. He also remembered that, later, there was a meeting he was invited to by the said structure, on 18 January 2016, which led to the current court proceedings. He said he and the first applicant did not attend the said meeting.
- [39] He stated that Mditshwa royal family had been in existence but was re-established in order to comply with the policy guide. He could not remember when it was constituted. He was shown the register of the meeting of 11 November 2013, after which he then confirmed that he had signed that register and was present at the said meeting. He said the meeting was chaired by the first applicant.
- [40] Despite the fact that the first applicant had testified that the first respondent was involved in the preparation of chief Mthethumzima's funeral, the time she started to realise his interest in royal family matters throughout, the third respondent denied that he, the first respondent and others were responsible for running the affairs of Mditshwa chieftainship. He confirmed that the said people met during the period of the preparation of the unveiling ceremony of chief Diko and that they all attended together. He however, denied what the first applicant had said that the first respondent had presented on the lineage of amaGingqi at the said ceremony. He said at best, the first respondent may have spoken whilst he was outside.
- [41] According to him the first applicant was not a member of amaGingqi royal family committee. Mtweni royal family committee was established after the existence of amaGingqi royal family committee. The first applicant was not consulted when the former was established. Further, he said he was also, neither part of the meeting of 15 April 2014 which revised Mtweni royal family nor was he advised that he was included in the said structure.
- [42] In cross examination he conceded that all the houses in annexure "E" are blood relatives of Mditshwa. They are part of the lineage of Nomvalo. He said he did not know why most of those houses were not part of the meeting convened to structure Mditshwa royal family to be legislatively compliant. He could not know if the said meeting was properly convened. He said that was because he was not one of the leaders in the royal family. He said, even the issue of the validity of the decisions taken in the absence of the said houses, depended on the people chairing the meeting.
- [43] He said he considered those appearing on the list sent to Cogta for gazetting on 9 June 2014, in annexure "F", as the core houses of Mditshwa chieftaincy. That had always been so even from the time of Nomvalo. In history, at some instances, Rabiya Sabona had acted for chief Mthethunzima. He also said he would not dispute that in 2002, following the death of chief Mthethunzima the said houses (as referred to in annexure "E") sat and identified the first applicant as acting chief as he was away working in Natal.

- [44] Further, he said he did not know that the collective of those houses was called Mtweni or amaGingqi royal family, until 10 August 2012, when a formal structure with office bearers was constituted, in line with government requirements, and thereafter retained the name Mtweni royal family council.
- [45] After lunch adjournment, in the course of cross examination, he stated that he had remembered that the first respondent had asked the first applicant to sign the document which was initially the list of families of amaGingqi. That document was later changed to reflect Mtweni royal family. He was present when the first respondent gave it to the first applicant to sign. The first respondent had said he was still going to investigate it. The first applicant then signed and stamped it.
- [46] He conceded that there were no two royal families. In 2011, the first applicant sought to reconstitute the previous existing one, in order for it to comply with the legislation.
- [47] He denied that he was appointed by amaGingqi royal family to be a permanent headman of Lower Ntafufu administrative area. He said its attempt on 6 November 2012 to do so did not succeed.
- [48] The first respondent and the expert witness, Professor Koyana testified for the respondents. The first respondent gave the lineage of Mditshwa chieftaincy from Mtwā. However he, focused on the five houses which he said were the core houses of Nomvalo. He restated what was contained in annexure "E". He said those houses usually met to handle all issues affecting each of the houses, for example, if there was to be ceremony at a particular homestead from the said houses.
- [49] Regarding chieftaincy, he confirmed that his grandfather Rabiya acted for chief Mthethunzima in the chieftaincy. The said Rabiya was instrumental in ensuring that when chief Mthethunzima was old enough to assume his duties, came back and was installed as a chief. When chief Mthethunzima was to be buried, he and the third respondent were approached by the second respondent to go with her and find Tamsanqa and his sister to attend the funeral of their father.
- [50] Regarding succession it was those five core houses that discussed about the person who would act for Tamsanqa. The discussions were held by the Mtweni or amaGingqi royal family. After the intervention of the delegation of king Sigcawu, they communicated that the royal family's position was that Zamilē Sabona should act. They were surprised when chief Nonkonyana said he wanted to consult with the community as well. In his view, that was unusual and he had no faith in its genuinity. However, the process led to the appointment of the first applicant as acting chief. At all material times there was no other parallel structure as all five houses participated in the one royal family
- they constituted.

- [51] Further, he said that it was only after the first applicant's appointment that clashes mushroomed among the five houses. The meeting of 10 August 2012 came about in the process of trying to forge unity among the houses. It was also agreed that the royal family should drop the name AmaGingqi, which had always been used interchangeable with Mtweni and that it should stick with the Mtweni name, especially for formal purposes. The first applicant had been part of the royal family meetings. In that regard he particularly referred to two Mtweni royal family meetings. On 17 December 2013 the Mtweni royal family met in order to endorse the houses that constituted the amaGingqi royal family. That was when she endorsed and signed annexure "E". Again on 9 April 2014 she telephonically contacted the first respondent to convene the houses of Mtweni royal family for a meeting that was to be held on 10 April 2014.
- [52] In the said meeting she reported that after she removed Mr J L Ndabeni as the chairperson of the royal family because he went to Taleni locality and organised the inauguration of one Nonzuzo Mqhabalaki as headman of Lower Ntafufu location. She said she had therefore, called the meeting of the royal family in order to seek, and was granted the mandate to launch interdict proceedings under case number 1026/2014. She then went ahead to obtain the interim interdict. She annexed the court order therein to her founding affidavit in these proceedings as "MM11". The averments in the founding affidavit she deposed to in the proceedings in 1026/2014 confirm that she stated that she called the executive members of Mtweni royal council to a meeting on 10 April
2014. Further that, a resolution was taken to launch those proceedings.
- [53] The first respondent stated that he was unable to comment about Mditshwa royal family because it did not exist, he had no knowledge of it.
- [54] Mr Badli took over the representation of the applicants and continued with the cross examination of the first respondent. The first respondent stated that the genealogy contained in the Nonkonyana report considered only one house of Nomvalo. He always belonged to the royal family since his birth by virtue of being in the royal bloodline. However, he did not participate in its activities when he was younger as only the elders did so.
- [55] On 10 August 2012 when Mtweni royal family council was launched there were government officials who attended the meeting and guided them. They followed that guidance without having seen the policy guide, he would not know if they complied with it. However, there had never been a complaint that they did not comply with it.
- [56] As regards the keeping of minutes and the attendance register, he said that requirement was introduced after the policy guide came into operation. However not all royal families were strictly compliant with that, still. When their meetings were convened, the chairperson would usually confer with the second respondent and the members of the royal family about the impending meeting. On 10 August 2012 there was neither a recording of minutes nor signing of the register. It was more of an imbizo or celebration. The first applicant had sent

an apology for her non-attendance in the said meeting.

- [57] He conceded that the attendance register of 23 May 2016 was incorrect. He and other members of the family who were in the meeting did realise that next to the second respondent's name, there was a signature, despite the fact that she had already passed on. Either, someone had signed in the space provided for her or she herself had signed the proforma, probably, before the actual meeting, before her passing. However, they could not put their figure on the reason behind the incorrect reflection. They had corrected that, together with other errors in the text of the minutes in a subsequent meeting. Ordinarily, their attendance register would have the list of people expected compiled before the meeting commenced or during the meeting. It would only be when the person actually signs that, such would be confirmation that the person was present.
- [58] It was pointed out to him that on 6 November 2012 there were documents of the royal family that still bore the stamp of amaGingqi royal family committee signed by Mr J.L. Ndabeni, the chairperson. With regard to initials in annexure "RR1" to the replying affidavit indicating that it was from C.F. Mtiki, he was adamant that F.C. Mtiki on 6 November 2012 had already resigned from the royal family committee. He could not accept that he was the author of the letter, RR1, because it did not contain his signature. It just bore his typed initials in reverse and his surname. The first

respondent said he did not attend the meeting of 6 November 2012, he even doubted that there was such a meeting. Legitimate meetings by then should have been of Mtweni royal family with minutes signed by C.F. Mtiki and not by Bhungweni.

- [59] He confirmed that the meeting of 6 February 2013 was convened by Mtweni royal family. It was called in order to discuss concerns they had after they received complaints about the first applicant. The first applicant conceded her flaws and made a commitment that she was going to self-correct.
- [60] With regard to "NM1" he confirmed that he received it from the second respondent. He never responded to it. He saw no need to respond. He also confirmed that the second respondent told him that the first applicant was complaining about Mr J L Ndabeni's appointment as a chairperson. He said according to the first applicant he was not close enough, or from the core royal family, like the second respondent or himself. Neither the first applicant nor Mr J L Ndabeni had told the members of Mtweni royal family or even him, as the secretary, that the first applicant wanted that the royal family be reviewed in accordance with the laws and that it be changed to be Mditshwa royal family. Mr J L

Ndabeni stepped down as chairperson after he was sent "NM1" on 11 November 2013. It was not true that Mtweni royal family held meetings without consulting the first applicant. It was much later that the first applicant and Mr J L Ndabeni did not attend the Mtweni royal family meetings, despite being invited.

- [61] He got to know of the existence of Mditshwa royal family during the current proceedings. According to him it was launched just before the commencement of the current court proceedings. In 2013 when he received “NM1” he did not take cognisance of its reference in the letterhead as Mditshwa royal family. He was more concerned with the objectives of the contents of the letter. He said despite the, letter the first respondent continued to attend their meetings, in 2013.
- [62] In annexure “F” when it was indicated that the old structure lapsed after December 2013, that referred to the office bearers and not the whole structure. It was the agreement that the structure of the office bearers would be formed in December 2013, such was not based on the government directives. In the meeting held on 15 April 2014 there were no government officials present. The first applicant was also not present, she was elected as an additional member in her absence. She lived in Durban and she ordinarily, would not be readily available. He did not remember the details of how the process of elections unfolded. However, he said there was no one appointed to specifically conduct the elections.
- [63] The left hand house of Nomvalo was represented in the meeting, the chairperson, he the secretary, represented the right hand house so did his deputy, his sister Tandiwe and the deputy chairperson N J Sabona. The treasurer Mr Gunyazile Bhungweni represented the Qadi to the great house of Mtelekiso. Nodzanga was added to Noyila house because he was not born out of wedlock. Mtiki is from the right hand house of Mphikwa.
- [64] On 2 February 2016 their resolution to withdraw the first applicant as the chairperson was confirmed by the community.
- [65] He said he would deny that during the formation of Mditshwa royal family there was compliance with what is required, as long as the first applicant formed it with the great house only and excluded the right hand house and him, in particular.
- [66] Professor Koyana provided expert testimony on the respondents’ instructions. He submitted a written report which was admitted as exhibit “B”. He testified that his source of information was the application filed in this matter and the consultations with the relatives and non-relatives of the family concerned, who were brought by his briefing attorneys. In his report as well as in his oral testimony he reflected on the common cause historical facts. He also reflected on annexure marked “E”, which was attached as annexure “D” in his report.
- [67] With regard to the Mditshwa and Mtweni royal families he noted that the first applicant wrote NM1, the same day she said Mditshwa royal family was established. The attendance register included minors. Further, he noted that in the genealogy list in the Nonkonyana report, houses of Sabona, Kwezi, Ndzekeni, amongst others, were excluded. It focused on the descendency of the great house only. He said annexure “E” was inclusive of all the houses of Nomvalo.

- [68] He said in his view, the first applicant's formation Mditshwa royal family was an afterthought. The legitimate structure is Mtweni royal family.
- [69] According to Professor Koyana he did not consider it as important to keep record of people who attended his consultative session and what each of them said. He said he made notes, sifted what he was told and formulated his opinion. His interviewees were members of the community across sections. He did not consult with litigants. He had read their versions in the affidavits. He said the first respondent was present in the consultation however, as a community member and not as a party in the proceedings.
- [70] He said he did not consult with the first applicant, but if she was present he would have done so. Where he put question marks with regard to when and where the reviewing of Mtweni royal family meeting and the establishing of Mditshwa royal family one were held, those were rhetorical questions. They were meant to signify the impossibility of such.
- [71] He was satisfied that Mtweni royal family was representative of all the houses. Further, that its formation was in accordance with the Eastern Cape Governance Act. He did not concern himself with the policy guide. He acknowledged that the policy guide came into being after 10 August 2012, the time when Mtweni royal family was launched. However, he regarded the Act as paramount. If there was compliance with the Act, then the formation of the royal family ought meet the policy guide.
- [72] He did consider the other Gingqi family tree he was given but he disregarded it because it did not make sense to him. According to him, whether one moves so far back in the ancestry of the ruling house, the descendants of that ancestor would be part of the core royal family, no one could be excluded. In essence, at all levels considered, the ruling house ought to be inclusive and not be confined to the ruling house only. Chief Mthethunzima's family is part of the core royal family, they are his immediate relatives.
- [73] The applicants bore the onus to make out a case for the orders they sought. In evaluating the evidence, the judgment sets out the common cause facts, accepted facts, rejected ones with reasons thereof and the findings. No much emphasis is placed on the evidence and testimony that does not relate to the central issue for determination. There were various meetings, letters, processes that tended to show that the process in the functioning of the structures that are subject to the dispute were poor, or even utterly irregular. Despite the fact that reference is made to them in the outline of evidence, in the end they are not much considered, where they do not relate to the central issue for determination. No pronouncement is made on the decisions taken at such meetings, as long as those did not relate to determination of which royal family is the legitimate one. That is for the simple reason that, it is not impossible for a legitimate institution to make unlawful or

wrongful decisions, for example, for want of compliance with prescribed procedures. When the matter was referred for oral

evidence, only 2.1.1 of the orders initially prayed for, to an extent, remained live in this matter.

- [74] The applicant's case is that the first applicant heard of Mtweni royal family during November
2013. That prompted her to write "NM1" expressing the need to review it and form Mditshwa royal family. It then ceased to exist. Thereafter, she then had a problem with its re-emergence after "MN1".
- [75] Mr J L Ndabeni stated that he used to chair amaGingqi royal family, its name was unilaterally changed by the first respondent to Mtweni royal family committee. It ceased to exist after receipt of "MN1". Mr J L Ndabeni's evidence cannot be true in this regard. Common cause facts establish that Mtweni royal family was launched on 10 August 2012. Hence the first applicant said it ceased to exist after she wrote MN1 on 11 November 2013.
- [76] This is the first problem with the applicant's case, in her version she sought to disband a structure through a letter. The letter merely expressed a need to review the structure, so that Mditshwa royal family could be established, in accordance with government policy. A special meeting was then held that same day. Mditshwa royal family was established at that special meeting. She conceded that there was no Mditshwa royal family before 11 November 2013.
- [77] Annexure "A" to the replying affidavit which is said to be a resolution for establishment of the royal family has no record of such a resolution. One of the preambles therein, refer to the meeting being convened in reaction to recent developments concerning the disestablishment of Mtweni royal family council. The actual resolution relate to legal representation. The record of the minutes states that the first applicant led a discussion on establishment of Mditshwa royal family. Further that, those at the meeting confirmed that they constitute core houses to constitute Mditshwa royal family.
- [78] People who attended the meeting were the first applicant, the second respondent, from the great house, the representatives of Bhungweni from Iqadi to great house, Mgcinwa and Somangali both from left hand house of Mtelekiso. Mgcinwa and Somangali are not referred to in both genealogy lists, that is, that in Nonkonyana report and in annexure "E". There was also no reference to them in oral testimony. In the houses testified about only Mditshwa and Bhungweni houses, from the ruling house, attended the said meeting. Mr J L Ndabeni who was chosen by the second respondent and not of Nomvalo descendancy.
- [79] The said meeting did not even include the Sabona house, at the least. So was the case with other houses which the applicants could not dispute that they were descendants of Nomvalo, for example, the third applicant had included the houses of Kwezi and the house from Nyeleni in his testimony. It has not been said they were invited but failed to attend.
- [80] The first applicant did not dispute the list of houses in annexure "E", except to say it was meant to be investigated on and that not all people appearing therein attended royal family meetings. She conceded that Sabona had presented on Gingqi genealogy at chief Diko's unveiling of tombstone. The third applicant conceded that Rabiyana Sabona, once, even

acted for chief Mthethunzima. Mr J L Ndabeni in his confirmatory affidavit to the further replying affidavit confirmed that royal family meetings were not restricted to the great house. He referred to the attendance registers in “RL1” and “RL2” for meetings of 6 February 2013 and 6 November 2013 respectively, as indicating that other houses of Nomvalo were always part of the royal family.

[81] The representativity Mr J L Ndabeni referred to is not reflected in the meeting of 11 November

2013. That being the meeting which, in the applicants’ version, reviewed Mtweni royal family committee and constituted Mditshwa royal family.

[82] The royal family is an institution composed of immediate relatives of the ruling family, identified in terms of the custom. These would be the immediate relatives of chief Mthethunzima herein. Section 1 of the Eastern Cape Governance Act further state that, where applicable, the institution includes other family members who are close relatives of the ruling family.

[83] It is crucial to state what royal family is not, a fact which the first applicant conceded. The royal family is not only a forum of immediate relatives of the ruling family. Common cause facts herein show that in the history of the royal family, it was always representative of the descendants of Nomvalo, beyond the lineage of the ruling house.

[84] Common cause facts also indicate that there was amaGingqi royal family until 10 August 2012 when Mtweni royal family was launched. Therefore, what was stated by the first and third applicants that Mditshwa royal family always existed, which according to the first applicant, even recommended her acting appointment in 2001 cannot stand. The third applicant even sought to state that the first applicant was never part of amaGingqi royal family. That is in direct contradiction of what the first applicant had said. According to the first applicant she stopped attending royal family

meetings after she realised that the royal family’s constitution was not in accordance with policy guide. Therefore, in her own version she was part of royal family meetings, at least until she wrote “NM1”. That royal family could not have been Mditshwa, that was not yet in existence.

[85] Something has to be said about the third applicant as a witness. He was not an impressive witness at all. He was quick to avoid crucial questions during cross examination. He would either say, he was not around the area when certain things happened or if he was present, say he could have been absent at that given time. For example, when the first applicant was first recommended, he said he was away working in Natal. Even if he was away, as a person who later became central in such issues, he ought to have gained knowledge of such as important issue, following the vacuum created by sad demise of chief Mthethunzima. Also, he gave the same lame excuse when asked about when the first respondent presented the genealogy at chief Diko unveiling ceremony.

[86] His testimony progressed for the worst when after he had conceded that, the houses in annexure “E” were blood relatives of the ruling house because they originated from Nomvalo. However, but after the lunch break tried to align his evidence with that of the first applicant, that annexure “E” was meant for investigation. He said he had forgotten this throughout his testimony. It is difficult not to suspect that he probably discussed about the said issue with the first applicant or her people during the lunch break. Further, when he was quizzed about how the first respondent asked the first applicant to sign the document, his testimony changed. At first he was asked whether there was a discussion about annexure “E”, he said he did not remember, subsequently when it was suggested that

it would have been strange to present such document without discussion, he suddenly stated in detail, that the first respondent first greeted, took out the document and said, there was the lineage, handed it to first applicant to sign and indicated that he was going to investigate it.

[87] Summarily, when the first applicant sought to regularise the royal family to be in line with policy guide, she only consulted the third applicant and the second respondent. She sent NM1 suggesting review of the royal family; she convened a meeting, which excluded many houses that had always constituted the royal family; in that same meeting she sought to disband that royal family and constitute Mditshwa royal family. That can never be. Such offends what is envisaged of a royal family, in section 1 of the Eastern Cape Governance Act.

[88] It was submitted on behalf of the applicants that houses of Nomvalo share the same clan with chief Mthethunzima, they are not his immediate relatives. Further, that the policy guide refer to the royal family as members core in the ruling house. The Eastern Cape Governance Act specifically state that, where applicable, the royal family includes other family members who are its close relatives. In the circumstances of this case, it is not difficult to establish what was applicable, right from the time before even chief Mthethunzima himself, took reigns. The Sabona family, amongst others, was involved in matters affecting the ruling house and the chieftaincy. In that way they remain, family members who are close relatives of ruling house and therefore core members of the ruling house. That was the applicable

practice, in my view, it would not be possible to just wish it away.

[89] In this I find support in *Netshimbupfe and another v Cathcart and Others* 2018(3) AllSA 379. Therein, Dambuza J wrote the minority judgment which was however in agreement with the order in the majority judgment. She quoted what the high court had stated. She also affirmed what the next court, the Full court had stated, that it had made a firm finding that identification had not taken place in accordance with the custom of the community

concerned. The relevant parts of the high court’s judgment she quoted as being the basis of the said finding were:

“[19] It is common cause between the parties that in terms of the custom of the Tshimbupfe community a successor must be identified by the khadzi and the ndumi. They are members of the royal family. They play an important role in the identification of a successor. It is, inter alia, their duty to be present at a specially convened meeting of the royal family to identify a successor or of a khosi that has passed on, even where it is obvious who the successor is

[22] Of course, custom may be proved by a party who is relying on a particular custom, if the rules of the custom are not ascertainable with sufficient certainty so that judicial notice may be taken thereof. In casu, the parties are in agreement that it is the custom that the khadzi and ndumi must be present at a meeting of the royal family convened to identify a successor to a traditional leader. That being the custom, the identification of the fifth respondent at a meeting of the royal family without the khadzi and ndumi being present and without their identification of the fifth respondent for whatever reason, is not in accordance with the custom of the community.”

[90] With regard to annexure “E” I do not find the evidence of the first applicant convincing that she never endorsed it. She signed and stamped it. She was with the first respondent when he went to present it at chief Diko’s funeral. Even if I would be benevolent and accept that annexures “E” and “F”

are still subject of a further process before they are accepted, that would not alter the fact that, the applicable practice, was to involve those houses in royal family matters.

[91] In my view, if there was still a need to, the family would have to seek to find one another towards endorsing a list that would be acceptable to all, or most of them. Similarly, if there were issues of some or other compliance with the policy guide, that would not be a licence to have an existing structure unilaterally disbanded or engage in a flawed process of setting up another structure.

[92] In my view, South African traditional leadership in its historical customary nature as a governance structure has a distinct feature of being communal. Further, it now exists in a democratic society. Therefore, in this date and time it cannot move from being inclusive to being exclusive. If anything, the aim should be to attempt that it remains more inclusive. Where practical, available relatives of the ruling family should be part of the structure. It would be an anomaly for a community that had practiced a system that included houses as far back in descendance, like houses of Nomvalo herein, to be unilaterally changed to be exclusive and consider only the ruling family and its favourites for the constitution of a royal family. Unless, the other members, having been invited, decide not to participate.

[93] The respondents’ case is that all five houses of Nomvalo had always handled matters affecting any of the houses. They formed part of the royal family, they discussed issues of succession for the chieftaincy, amongst others. This is not seriously contested except for the first applicant’s saying that not everyone attended royal family meetings in those houses.

- [94] There were valid criticisms on some procedural aspects of the meetings held at the instance of the respondents. For example, the attendance register of the meeting held on 23 May 2016 and the concerns about the meeting of 12 December 2012. However, the issues discussed in those meetings are not subject of the dispute herein. The decisions taken at such meetings could be challenged at forums designed to adjudicate on such.
- [95] Also, the fact that on 6 November 2012 there were documents that still referred to amaGingqi royal family that did not discount the fact that on 10 August 2012, Mtweni royal family was launched.
- [96] With regard to annexure “F”, the first applicant disputed her signature on it for the first time in court. In her replying affidavit the complaint was about the list having not been gazetted yet. The evidence about the practice of involvement of all the houses of Nomvalo was not seriously challenged.
- [97] Overall the first respondent’s evidence was satisfactory. In areas where he was pointed to weaknesses in their actions, those related to procedural aspects in the holding of meetings. Those meetings have no bearing in the determination of the issue that is up for determination in these proceedings.
- [98] Professor Koyana was criticised amongst others, for not having a record of the identity of his sources of information; seeking views from people organised by the respondents which tended to show that he was partial and for usurping the court’s function by concluding that Mtweni royal family was the legitimate royal family. Professor Koyana had the court papers that contained litigants’ versions. His evidence was tested in court. He explained how he came to his conclusions. Further, he said he would have interviewed any person from that community he had come in contact

with, even the first applicant, nevertheless, he had already considered her affidavit. That he was usurping the court functions is inconsistent with what the parties had outlined in the stated case, in paragraph 2.1. Therein, it is clearly specified as that the experts were to file opinion on which is the legitimate royal family. The applicants made a choice to abandon the filing of their expert report. I do not agree with the criticism levelled against Professor Koyana. I am satisfied that his opinion is supported by established or common cause facts, in this matter.

- [99] In the circumstances, I am satisfied that the legitimate royal family within the area of jurisdiction of Mtweni Traditional Council and Lower Ntafufu Administrative Area, Lusikisiki in the manner contemplated in section 1 of the Eastern Cape Governance Act, is Mtweni royal family.

In the result,

1. The application is hereby dismissed.

2. The applicants are hereby ordered to pay the costs of application and those to include all reserved costs and the qualifying, travelling and accommodation costs of the expert witness, Professor Koyana, jointly and severally, the one paying the other to be absolved.

B MAJIKI

JUDGE OF THE HIGH COURT

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----- to appeal is hereby dismissed with costs. Judgment setting aside the special plea should be

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