

SOUTH AFRICA / JUDGMENT

Molosi and Others v King Phahlo Royal Family and Others (1005/2022) [2024] ZASCA 73 (10 May 2024)

[2024] ZASCA 73

COURT

Supreme Court of Appeal

BEFORE

Zondi, Schippers, Mothle, Tolmay, Keightley

CASE / FILE NUMBER

1005/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1005/2022

In the matter between:

SIMPIWE SYDWELL MOLOSI FIRST

APPELLANT

NTOMBENKONZO MASETI SECOND

APPELLANT

DOSINI ROYAL FAMILY

THIRD

APPELLANT

and

KING PHAHLO ROYAL FAMILY FIRST

RESPONDENT

LUZUKO MATIWANE SECOND

RESPONDENT

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA THIRD RESPONDENT

MINISTER OF CO-OPERATIVE GOVERNANCE AND

TRADITIONAL AFFAIRS

FOURTH RESPONDENT

PREMIER OF THE EASTERN CAPE PROVINCE FIFTH RESPONDENT

Neutral citation: Molosi and Others v King Phahlo Royal Family and Others (1005/2022)

[2024] ZASCA 73 (10 May 2024)

Coram: ZONDI, SCHIPPERS and MOTHLE JJA and TOLMAY and KEIGHTLEY AJJA

Heard: 22 February 2024

Delivered: 10 May 2024

Summary: Traditional Leadership and Governance Framework Act 41 of 2003 – section 9 – nomination of king or queen – dispute as to which is legitimate royal family – at appeal hearing transpired that President had subsequently recognised one of the parties as king under s 9 – in circumstances, appeal moot.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Makaula, Stretch and Bloem JJ sitting as full court):

The appeal is dismissed.

Keightley AJA (Zondi, Schippers and Mothle JJA and Tolmay AJA concurring):

[1] The substance of this appeal concerns the kingship of AmaMpondomise and, more particularly, who has the right, as the royal family, to identify a person as king (or queen, as the case may be) under the relevant provisions of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Act).[1] It was this question that engaged the Eastern Cape Division of the High Court, Mthatha (the high court) as both the court of first

instance (per Jolwana J) and as a full court on appeal against the order of Jolwana J (the full court). Following the full court's

dismissal of the appeal, special leave was granted to the appellants to appeal to this Court.

[2] But for events that occurred at the hearing of the appeal before this Court, this judgment would have dealt with the substantive issue that had engaged the high court. However, for reasons I record shortly, it

has become unnecessary to do so. Before traversing these events, I set out the relevant background to the appeal.

- [3] The history of AmaMpondomise goes back centuries to before the 1300s. Following events in the 1800s the then-king of AmaMpondomise, King Mhlonthlo, was stripped of his kingship by an administrative proclamation of the colonial government at the time for his alleged involvement in the murder of a colonial magistrate. King Mhlonthlo was subsequently acquitted but from 1904, when he was stripped of his kingship, he lived as a commoner until his death in 1912.
- [4] Post-1994, the Act established a Commission to consider, among other things, cases in which it was claimed that a kingship had been established in terms of customary law. The first Commission, the Nhlapho Commission, was succeeded by the Tolo Commission. They considered a claim by AmaMpondomise for recognition of their kingship. Litigation followed after the Nhlapho Commission, and subsequently also the Tolo Commission, concluded that AmaMpondomise never had a kingship. Two separate review proceedings were instituted consecutively. Both the Nhlapho Commission decision, and subsequently the Tolo Commission decision, were set aside. The latter was set aside by way of a judgment of the high court, per Brooks J[2] (the Brooks judgment). Among other things, Brooks J made an order declaring that ‘AmaMpondomise did have a kingship and that such kingship is hereby reinstated.’
- [5] Having succeeded in the restoration of their kingship, the next step for AmaMpondomise was to fill the vacant position of king or queen. This process is governed by s 9 of the Act. In relevant part, it provides:
- ‘(1) Whenever the position of a king or a queen is to be filled, the following process must be followed:
- (a) The royal family must, within a reasonable time after the need arises for the position of a king or a queen 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 of a king or a queen as the case may be, after taking into account whether any of the grounds referred to in section 10(1)(a), (b) and (d) apply to that person; and
- (ii) through the relevant customary structure-
- (aa) inform the President, the Premier of the province concerned and the Minister, of the particulars of the person so identified to fill the position of a king or a queen;
- (bb) provide the President with the reasons for the identification of that person as a king or a queen; and
- (cc) give written confirmation to the President that the Premier of the

province concerned and the Minister have been informed accordingly; and

- (b) the President must, subject to subsection (3), recognise a person so identified in terms of paragraph (a)(i) as a king or a queen, taking into account(i) the need to establish uniformity in the Republic in respect of the status afforded to a king or queen;

(ii) whether a kingship or queenship has been recognised in terms of section 2A; and

(iii) the function that will be performed by the king or queen.

- (2) The recognition of a person as a king or a queen in terms of subsection (1)(b) must done by way of-

- (a) a notice in the Gazette recognising the person identified as king or queen; and

- (b) the issuing of a certificate of recognition to the identified person.

- (3) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in terms of customary law, customs or processes, the President on the recommendation of the Minister-

- (a) may refer the matter to the National House of Traditional Leaders for its recommendation; or

- (b) may refuse to issue a certificate of recognition; and

- (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.

- (4) Where the matter that has been referred back to the royal family for recognition and resolution in terms of subsection (3) has been reconsidered and resolved, the President on the recommendation of the Minister must recognise the person identified by the royal family if the President is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law. ...'

[6] A dispute arose between the parties regarding who should be recognised as king or queen. Section 9 requires the royal family to identify the person to fill that position. Two families, namely the third appellant, the Dosini Royal Family (the Dosini family) and the first respondent, the Phahlo Royal Family (the Phahlo family), both purporting to be the royal family of AmaMpondomise, wrote to the President identifying a person to fill the vacant position. The Dosini family, nominated the second appellant, Ms Ntombenkonzo Maseti as queen. The Phahlo family nominated the second respondent, Mr Luzuko Matiwane as king.

[7] The claims of both families date back to a common-cause event that took place in the 1300s. The king of AmaMpondomise at that time, King Ngcwina, disinherited his son born of the Great House, Dosini. In his stead, he named a son of a support house, Cira, as his heir and successor as king. The Phahlo family's claim to being the royal family is based on the unbroken lineage of kings from King Ngcwina to King Cira and ultimately to King Mhlonthlo

who, as previously noted, was divested of his kingship by colonial proclamation in 1904. According to the Phahlo family, had King Mhlonthlo still been alive, he would have resumed the kingship on its restoration. His death in 1912, and the subsequent death of his son, Mr Matiwane's

father, means that Mr Matiwane is next in line to assume the kingship now that it has been restored. It was on this basis that the Phahlo family, being the royal family linked to Kings Ngcwina, Cira and ultimately Mhlonthlo, nominated Mr Matiwane to the President in accordance with s 9(1)(a) of the Act.

[8] The Dosini family's claim on the other hand is founded directly on what occurred in the 1300s when King Ngcwina favoured Cira as his successor. The Dosini family say that they are directly linked to Dosini, the legal successor to King Ngcwina. According to them, King Ngcwina acted contrary to customary law by, as they put it, purporting to disinherit Dosini. On their version, AmaMpondomise kingship was lost in the 1300s on Dosini's disinheritance, and it was this kingship that was restored by the Brooks judgment. On this basis, the Dosini family claim to be the true royal family and that they are entitled to nominate Ms Maseti, being a direct descendant of Dosini, as queen.

[9] Faced with two nominations by two families, each asserting that they were the royal family of AmaMpondomise, the Director-General in the Presidency responded to the families in letters dated 2 August 2019. Although there were two letters, they were in identical form, save for obvious changes pertaining to the details of the addressee. For simplicity's sake, I refer to them in the singular as the President's letter.

[10] The letter noted that the President had taken into account the Brooks judgment, which recognised the kingship of AmaMpondomise. The President's letter went on to record receipt of the two letters from the Dosini and Phahlo families, each claiming to represent the royal family, with their respective nominations. It recorded further that the Dosini family, in its letter, 'acknowledged that there is a dispute within AmaMpondomise Royal Family as to who is the rightful incumbent', and that the Dosini family had requested the President to appoint a commission to conduct an investigation to determine the rightful heir. The President's letter continued that it was evident that the royal family could not reach a unanimous decision to choose a common incumbent to ascend to the throne. In view of this, the letter stated that the provisions of ss 3A and 9 of the Act were triggered. After citing the relevant provisions of these sections, the President's letter continued:

'12. The President has been advised by the Minister of Cooperative Governance and Traditional Affairs that Government does not have the legal authority to be involved in any of the royal family processes of nominating an heir. Only the Royal Family through the customary structure has the authority to identify a person who qualifies in terms of customary law to assume the position of a king or queen. Once the royal family has finalised its processes of choosing the rightful heir, it then notifies government to facilitate all the required administrative processes of recognising and appointing the Kingship and the King respectively.

13. The President has therefore decided to refer the matter back to the Royal Family for reconsideration and resolution. The two families are requested to resolve the matter internally and nominate one common heir for the President to recognise as the King of AmaMpondomise.’
- [11] The President’s letter prompted the respondents to take legal action. On 18 September 2019 they served an application on the appellants, seeking an order (among other prayers):
- (a) Declaring as unlawful, and setting aside, the resolution dated 31 May 2019 issued by the Dosini family in terms of which it identified Ms Maseti as the queen of AmaMpondomise.
 - (b) Declaring that the Dosini family is not a royal family entitled and responsible for the identification of any person and making recommendations to the President in terms of s 9 of the Act to assume kingship or queenship of AmaMpondomise which position was left vacant by King Mhlonthlo.
 - (c) Granting a final interdict against the Dosini family from identifying a person to assume the kingship or queenship and making recommendations to the President under s 9 for the assumption of the position of kingship or queenship left vacant by King Mhlonthlo.
- [12] The respondents’ case was premised on their claim to being the royal family of AmaMpondomise. In brief, they averred that the kingship that was restored by the Brooks judgment is that which had been lost by King Mhlonthlo when he was dispossessed of his kingship by the colonial government in 1904. The reinstatement of the kingship meant that it was reinstated to the royal family house that was ruling at the time of dispossession, namely the Phahlo family. Custom dictates that the first son of the Great House of the king, or his direct descendant must assume the position left by his father or grandfather, unless compelling reasons exist to disentitle him. The Phahlo family had unanimously identified Mr Matiwane, the grandson of King Mhlonthlo, as heir to the kingship.
- [13] The respondents disputed the Dosini family’s claim to being the royal family on the basis that, having been disinherited by his father King Ngcwina in the 1300s, Dosini had never assumed the kingship. His disinheritance had not been challenged over the approximately 700 years since King Ngcwina and successive kings had followed Cira in the direct line of succession until King Mhlonthlo. It was the latter’s lost kingship as a result of colonial action that had been reversed by the Brooks judgment, and not that claimed to have been lost by the Dosini family. The Phahlo family was the legitimate royal family to nominate a king or queen under the Act. The Dosini family, who did not descend from a king, were not the royal family entitled to nominate a candidate. Their ‘posturing’ as the royal family was unlawful and was harmful to AmaMpondomise

nation, which was entitled to align its affairs by nominating a king to lead them in terms of the Act.

- [14] In their opposition, the appellants confirmed their original position. They asserted that King Ngcwina had violated AmaMpondomise customary law by disinherit Dosini in favour of Cira. This illegal act remained illegal despite the lapse of time. Accordingly, the Dosini house had never lost its right to the kingship, and this had been restored by the Brooks judgment. The appellants categorised Mr Matiwane as being nothing more than a junior member of the greater royal family, the Great House which was the Dosini house. It was thus the Dosini family which was the royal family lawfully entitled to nominate the king or queen.
- [15] In addition to their defence on the merits, the appellants raised a point in limine. They averred that the high court lacked jurisdiction because the respondents had failed to exhaust the internal remedies under the Act to resolve the dispute. More specifically, they referred to s 21 of the Act.[3] This section deals with the process for settling ‘dispute(s) or claims(s) concerning customary law or customs aris(ing) between or within traditional communities’. It requires community members and leaders to seek to resolve the dispute internally, and in accordance with custom. If this cannot be achieved, disputes must be referred to the relevant house of traditional leaders for resolution and, if this is unsuccessful to the Premier. Finally, s 21 provides that an unresolved dispute must be referred to the Commission. It should be noted that the Commission is no longer in existence.[4] Despite this, the appellants pressed their case that the respondents’ application for declaratory and interdictory relief was premature, and that the relief sought should be refused on this basis.
- [16] The high court, in its first judgment, dismissed the appellants’ defence on both the point in limine and the merits in a judgment of 14 January 2020. It granted the declaratory and interdictory relief outlined earlier. In addition, it directed the President and the Minister of Co-operative Governance and Traditional Affairs to comply with their obligations in s 9(1)(b) of the Act within 30 days and to consider the Phahlo family’s resolution identifying Mr Matiwane as the king of AmaMpondomise. Costs were granted against the appellants. In a subsequent judgment, dated 28 July 2020 (the second high court judgment), the high court dismissed an application for leave to appeal by the appellants. At the same time, it granted the respondents relief under s18(3) of the Superior Courts Act 10 of 2013 (the SC Act) giving them leave to execute its judgment and order handed down on 14 January 2020 pending the finalisation of any further appeal processes.
- [17] According to the record filed before this Court, a petition was lodged by the appellants on 16 September 2020 for leave to appeal the high court’s judgment and order. On 29 December 2020, this Court granted the appellants leave to appeal the high court’s order to the full court of the Eastern Cape Division, Mthatha. The full court dismissed that appeal (the full court judgment). This Court granted the appellants special leave to appeal to it. The record reflects that a petition for special leave to appeal against the full court judgment was lodged with this Court on 13 June 2022. Special leave was granted on 9 September 2022. The appeal to this Court was enrolled for hearing on 22 February 2024.

- [18] As noted earlier, had it not been for revelations disclosed to this Court at the hearing of the appeal, this judgment would have dealt with the issues as they were presented before the high court, both at first instance and as a full court. However, matters took an unanticipated turn during the appeal hearing. In answering a question from the Court, counsel for the respondents disclosed that Mr Matiwane had already been appointed as king by the President, and that this had occurred shortly after the second high court judgment was handed down. This fact was not disclosed in the record. On closer questioning, it appeared that both parties were aware of this critical development, but gave no explanation for this non-disclosure. The respondents were directed to file an affidavit together with the certificate of recognition issued by the President and the proclamation of that recognition in the Government Gazette.
- [19] The certificate is dated 21 September 2020, and the required notice of recognition was published in the Government Gazette of 9 October
2020. This was after the second high court judgment dismissing the leave to appeal and granting s 18(3) relief to the respondents. The recognition of Mr Matiwane as king preceded the full court appeal granted by petition to this Court. There is no reference to the recognition Mr Matiwane as king in the full court judgment and the parties have not explained why the fact of the recognition was not disclosed to that court.
- [20] The failure on the part of the legal representatives to disclose the fact that Mr Matiwane had already been recognised as king prior to the hearing in the full court, and then to proceed with an appeal before this Court, is disturbing. Worse, we were informed that the President's recognition was subject to a review application. This fact too was not disclosed to this Court prior to the hearing of the appeal. We were informed that both parties were represented by their attorneys and senior counsel, a fact that makes the non-disclosure by the legal representatives all the more egregious. The conduct of the attorneys and counsel must be severely censured.
- [21] The obvious question that arises in this appeal is that if Mr Matiwane has already been recognised under the Act as the king by the President, what practical effect would there be in a further appeal against the declarator and interdict granted by the high court? Section 16(2)(a)(i) of the SC Act provides that:
- ‘When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.’
- [22] The rule is aimed at reducing the heavy workload of appellate courts.[5] The test is whether the judgment or order will have a practical effect or result, not whether it might be of importance in a hypothetical future case, or whether the parties believe that a practical result could be achieved in other respects.[6] This Court has a discretion which may be exercised where, for example, the matter raises an important question of law that arises frequently and thus pertains to a ‘live issue’ in this sense. Invariably, cases of this nature involve questions of statutory interpretation and application.[7]

- [23] The declarator and interdict were precursors to what was envisaged would be the President's exercise of his power in the future. The case made out by the respondents was that in light of the President's referral back to the parties of the dispute as to which royal family may nominate a king or queen, they had no option but to seek declaratory and interdictory relief from the high court. That relief was granted, and the applicants were given leave to enforce it. Thereafter, the President exercised his power under s 9 and recognised Mr Matiwane as king. Once that happened, the whole point and practical need for the relief granted to the respondents fell away. The live issue between the parties, namely whether the Phahlo family required the protection provided by the interdict and declarator, was moot. It follows that it would serve no practical purpose to revisit whether the relief was correctly granted by way of a further appeal to this Court.
- [24] The remaining question is whether this Court should nonetheless exercise its discretion and consider the appeal. The underlying dispute between the parties is essentially one of fact, rather than law. The high court endorsed the respondents' case that Mhlonthlo's kingship flowed in a direct line of descent from King Ngcwina; that King Mhlonthlo was dispossessed of his kingship by the colonial government; and thus that the Phahlo family was the royal family entitled to nominate a king to fill the position left vacant by King Mhlonthlo.
- [25] The Dosini family relied on a different fact of dispossession in support of their claim, namely, an allegedly unlawful dispossession effected some 700 or more years ago by King Ngcwina. Given the lapse of time since the events relied upon by the Dosini family, it is not surprising that there is no ready factual evidence to hand to judge the rights or wrongs of what happened when King Ngcwina disinherited Dosini in favour of Cira. In any event, the interdict and declaratory relief sought by and granted in favour of the Phahlo family was deliberately narrowly tailored. It was specifically aimed at obtaining clarity on which asserted royal family could legitimately nominate a replacement for King Mhlonthlo. The broader question sought to be relied upon by the Dosini family, namely whether their ancestor was unlawfully disinherited 700 years did not require

determination

by the high court, nor by this Court on appeal, were the matter to proceed. All of these considerations point to it being inappropriate for this Court to exercise its discretion to consider the appeal.

- [26] Finally, the appellants submitted that as the President's recognition of Mr Matiwane as king was subject to a review application instituted by them, we should hear the appeal, as the interdict granted by Jolwana J would otherwise remain effective and could jeopardise the appellants' legal prospects in the future. The submission is groundless. This Court has no details of the review application, or even whether it is being actively pursued. It would be an exercise of pure speculation for this Court to conclude that the review saves the matter from mootness, or that the Court should exercise its discretion and consider the appeal. In any event, unless and until the President's decision is set aside, it remains valid and effective.[8]

[27] The fact of the matter is that the appeal process was overtaken by events that occurred subsequent to the first high court judgment. For whatever reason, neither party disclosed to either the full court or in the appeal record filed in this Court that the President had formally recognised Mr Matiwane as king. This was a fact crucial to the exercise by this Court of its appellate power. The failure to make this disclosure has had the direct result that valuable Court time and resources have been expended on this matter, directly undermining the very purpose of the rule against mootness. Such conduct is to be deprecated. This is an issue affecting costs. Although the respondents have succeeded in having the appeal dismissed, they should not be given the benefit of a costs order in their favour. The appropriate way to deal with costs is to make no order in that respect.

[28] In the result, I make the following order:

R M KEIGHTLEY

ACTING JUDGE OF APPEAL

Appearances

For the appellants: G Shakoane SC

K Lefaladi

M Mathaphuna

Instructed by: Mkata Attorneys, Mthatha

Honey Attorneys, Bloemfontein

For the first to second respondents: M Gwala SC

S X Mapoma SC

Instructed by: Mvuzo Notyesi Inc, Mthatha

NW Phalatsi & Partners, Bloemfontein

[1] The Act has subsequently been repealed under Schedule 4 of the Traditional and Koi-San Leadership Act 3 of 2019. However, it is

common cause that the Act remains applicable for purposes of this appeal.

[2] *Matiwane v President of the Republic of South Africa and Others* [2019] 3 All SA 209 (ECM).

- [3] Section 21 reads: ‘Dispute and claim resolution (1)(a) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter arising from the implementation of the Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.
- (b) If a dispute or claim cannot be resolved in terms of paragraph (a), subsection (2) applies. (2) (a) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules and procedures.
- (b) If a provincial house of traditional leaders is unable to resolve a dispute or claim as provided for in paragraph (a), the dispute or claim must be referred to the Premier of the province concerned, who must resolve the dispute or claim after having consulted-
- (i) the parties to the dispute or claim; and (ii) the provincial house of traditional leaders concerned.
- (c) A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.
- (3) Where a dispute or claim contemplated in subsection (1) has not been resolved as approved for in this section, the dispute or claim must be referred to the Commission.

[3] Section 21 reads:

‘Dispute and claim resolution

(1)(a) Whenever a dispute or claim concerning customary law or customs arises between or within traditional communities or other customary institutions on a matter arising from the implementation of the Act, members of such a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve the dispute or claim internally and in accordance with customs before such dispute or claim may be referred to the Commission.

(b) If a dispute or claim cannot be resolved in terms of paragraph (a), subsection (2) applies.

(2)(a) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules and procedures.

(b) If a provincial house of traditional leaders is unable to resolve a dispute or claim as provided for in paragraph (a), the dispute or claim must be referred to the Premier of the province concerned, who must resolve the dispute or claim after having consulted-

- (i) the parties to the dispute or claim; and
- (ii) the provincial house of traditional leaders concerned.
- (c) A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.
- (3) Where a dispute or claim contemplated in subsection (1) has not been resolved as approved for in this section, the dispute or claim must be referred to the Commission.
- [4] The Commission referred to in the Act is that established under s 22. It is a matter of public record that the first such Commission was the Nhlapho Commission. It was succeeded by the Tolo Commission by virtue of s 28(11) of the Traditional Leadership and Governance Framework Amendment Act, 23 of 2009. The Tolo Commission's term of office has also expired.
- [5] Premier, Provinsie Mpumalanga en n Ander v Groblersdalse Stadsraad 1998
- (2) SA 1136 (SCA) at 1141D.
- [6] Absa Bank v Van Rensburg 2014
- (4) SA 626 (SCA) at para 7 (Van Rensburg).
- [7] Van Rensburg above fn 6, at paras 8–10.
- [8] Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others
- [2009] ZASCA 85; 2010 (1) SA 333 (SCA) (3 September 2009).

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Prepared on 10 October 2026 · Esheria