

SOUTH AFRICA / JUDGMENT

Mphephu and Another v Mphephu-Ramabulana and Others (773/2012) [2017] ZALMPTHC 1 (30 January 2017) [2017] ZALMPTHC 1

COURT

Limpopo High Court, Thohoyandou

BEFORE

E M Makgoba

CASE / FILE NUMBER

773/2012

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

LOCAL DIVISION, THOHOYANDOU)

CASE

NO: 773/2012

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: YES

REVISED.

In

the matter between:

MASINDI

CLEMENTINE

MPHEPHU FIRST

APPLICANT

MBULAHENI

CHARLES MPHEPHU SECOND

APPLICANT

and

REGENT

TONI PETER MPHEPHU- RAMABULANA FIRST

RESPONDENT

PRESIDENT

OF THE REPUBLIC OF SOUTH AFRICA SECOND

RESPONDENT

THE
MINISTER OF COORPORATIVE GOVERNANCE THIRD
RESPONDENT
AND
TRADITIONAL AFFAIRS

PREMIER:

LIMPOPO FOURTH
RESPONDENT
NATIONAL
HOUSE OF TRADITIONAL LEADERS FIFTH
RESPONDENT
LIMPOPO
HOUSE OF TRADITIONAL LEADERS SIXTH
RESPONDENT
COMMISSION
ON TRADITIONAL LEADERSHIP SEVENTH
RESPONDENT
DISPUTES
AND CLAIMS
MPHEPHU
RAMABULANA ROYAL FAMILY COUNCIL EIGHTH
RESPONDENT

JUDGMENT

MAKGOBA JP

[1] The Applicants, both descendants of the Mphephu – Ramabulana royal family, brought an application against the Respondents seeking an order in the following terms:

1.1 declaring that the eighth respondent's decision of 14 August 2010 to identify the first respondent as a suitable person to fill the position of king of the Venda Traditional Community is unlawful, unconstitutional and invalid;

1.2. declaring that the second respondent's decision dated 14 September 2012 to recognize the first respondent as "a King of Vhavenda Community" is unlawful, unconstitutional and invalid;

1.3 reviewing and setting aside the decisions referred to in the above paragraphs;

1.4 declaring that the rule of primogeniture as it applies in customary law to the succession to the position of the traditional leader is inconsistent with the Constitution and invalid, to the extent that it precludes women from succeeding to the position of a traditional leader;

1.5 declaring that the word "progressively" in the Preamble and in sections 2(3)(c) , 2A(4)(C) and 2B(4)(c) of the Traditional Leadership and Governance Framework Act 41 of 2003 is inconsistent with the Constitution and invalid;

1.6 declaring that in terms of customary law:

- 1.6.1 the first applicant is the sole Queen of Vhavenda queenship; alternatively
- 1.6.2 the second applicant is the sole King of the Vhavenda kingship;
- 1.7 substituting the second and eighth respondents' decisions referred to above to a decision that:
- 1.7.1 the first applicant is recognized as the sole Queen of the Vhavenda queenship; alternatively,
- 1.7.2 the second applicant is recognized as the sole King of the Vhavenda kingship, in terms of the Traditional Leadership and Governance Framework Act 41 of 2003.
- 1.8 Alternatively to the above sub paragraphs:
- 1.8.1 reviewing the seventh respondent's failure to investigate and make recommendations to the second respondent on who would be the incumbent of the kingship/queenship of the Vhavenda:
- 1.8.2 remitting the matter to the seventh respondent to investigate and make recommendations to the second respondent on who should be the incumbent of the kingship/queenship of the Vhavenda;
- 1.8.3 remitting the matter to the second respondent for a decision afresh on the identification and recognition of the incumbent of the kingship/queenship of the Vhavenda in terms of customary law and the Traditional Leadership and Governance Framework Act No 41 of 2003;
- 1.8.4. issuing directions to the second and the seventh respondents in terms of section 8 of the Promotion of the Administrative Justice Act No 3 of 2000 that in complying with this Court's order-
- 1.8.4.1 the declaratory relief in the above paragraphs must be taken into account;
- 1.8.4.2 it must be recognized that in terms of customary law of the Vhavenda kingship/queenship a person who was ndumi or khotsimunene to a king may not be appointed as his or her successor;
- 1.8.4.3 it must be recognized that in terms of the customary law of the Vhavenda kingship/queenship, a person who is born of the former king and of his most senior dzekiso wife is entitled to be appointed, unless a valid reason under customary and statutory law exist not to appoint such person;
- 1.8.4.4 the seventh respondent must make its recommendation to the second respondent within 4 months of the date of the court's order;
- 1.8.4.5 the second respondent must make his decision within 60 days of receiving the recommendation referred to in the preceding paragraph or, failing such recommendation, within 2 months of the expiry of the period of doing so.
- 1.9 In the further alternative to the above paragraphs;

1.9.1 remitting the matter to Mphephu-Ramabulana royal family to identify and to inform the second respondent who qualifies to assume the position of king or queen of the Vhavenda;

1.9.2 remitting the matter to the second respondent for a decision afresh on the recognition of the person identified by the Mphephu-Ramabulana

royal family as the king/queen of the Vhavenda in terms customary law and the Traditional Leadership and Governance Framework Act No 41 of 2003;

1.9.3 issuing directions to the second respondent and the Mphephu-Ramabulana royal family in terms of section 8 of the Promotion of Administrative Justice Act No. 3 of 2000 that in complying with the court order;

1.9.3.1 the declaratory relief in paragraph 1.4 and 1.5 must be taken into account

1.9.3.2 it must be recognized that in terms of the customary law of the Vhavenda kingship/ queenship a person who was a ndumi or khotsimunene to a king may not be appointed as his or her successor;

1.9.3.3 it must be recognized that in terms of customary law of the Vhavenda kingship/queenship, a person who is born of the former king and or his most senior dzekiso wife is entitled to be appointed, unless valid reason under customary and statutory law exists not to appoint such person;

1.9.3.4 the Mphephu-Ramabulana royal family must make its recommendation to the second respondent within 4 months of the date of the court's order;

1.9.3.5 the second respondent must make his decision within 60 days of receiving the recommendation referred to in the preceding paragraph or failing such recommendation, within 2 months of the expiry period for doing so.

1.9.4 directing those of the respondents who oppose the application to pay the costs jointly and severally.

[2] In essence, the issues in this matter concern a dispute or a claim concerning customary law or customs relating to Kingship within the traditional community of the Vhavenda, the dispute being a claim that the First Respondent is not the rightful heir to the throne.

[3] The First, Second, Third, Seventh and Eighth Respondents (jointly referred to herein as "the respondents") oppose this application.

FACTUAL BACKGROUND

[4] The Commission on Traditional Leadership Disputes and Claims ("the Commission") being the Seventh respondents herein, was established in terms of section 22 of the Traditional Leadership and Governance Framework Act No 41 of 2003. The Act came into operation in September 2004. Members of the Commission were appointed in terms of section 23 of the Act with effect from 1 November 2004. The Commission is composed of persons who are

distinguished academics, lawyers, linguistics, experts in matters relating to institutional Traditional Leadership, history, customary law and traditional affairs in general.

[5] On 24 June 2005 and during the term of the Commission, the Commission received a claim for the restoration or the recognition of the Vhavenda Kingship from one Toni Peter Mphephu-Ramabulana, the first respondent herein. The first respondent sought the restoration or the recognition of the Vhavenda kingship under the Mphephu-Ramabulana lineage.

[6] Pursuant to receipt of the said claim, the Commission also received claims for the restoration of the Vhangona and the Vhavenda kingship; i.e

6.1 restoration of the Vhangona Kingship by Azwidowi Tshidziwelele Nephawe;

6.2 the restoration of the Kingship of Vhavenda as a whole by Aaron Fulufelo Nedzinghahe on behalf of the House of Ravhura;

6.3 the recognition of the Tshivhase Kingship by Midiavhatu Prince Kennedy Tshivhase; and

6.4 the recognition of the Mphaphuli Kingship by Gordon Mphaphuli.

[7] The Commission held its public hearings in respect of the aforesaid claims from 29 November 2005 to 1 December 2005 at Thohoyandou and again on 6 to 8 December 2005 at Thohoyandou. After the public hearings were held the Commission conducted its own research and compiled a list of questions that were directed at and given to the claimants. The claimants responded to the questions and on 9 December 2009 and at Polokwane the claimants were given an opportunity to address the Commission and elaborate on their answers.

[8] It is significant to mention that the two applicants in this matter before me neither filed any claim for the kingship of Vhavenda prior to, during or after the said hearings by the Commission, nor did they participate in it.

[9] On 21 January 2010 the Commission made its decision in the matter and found that the claim in relation to the restoration of the Kingship of Vhavenda as a whole by the first respondent, representing the Mphephu-Ramabulana royalty, was successful.

The Commission, however, did not make any determination on who is the rightful incumbent to the position of the King of the Vhavenda.

[10] Pursuant to the determination the other claimants to the restoration of the Vhavenda Kingship brought review proceedings before the Thohoyandou High Court under Case No 696/2010 seeking the review and setting aside of the Commission's findings and determinations.

The application came before Legodi J on 13 to 16 August 2012 and his judgment was delivered on 6 September 2012.

The learned Judge dismissed the application with costs and subsequently refused application for leave to appeal lodged by the first applicant in those proceedings, Nephawe. On 16 September 2013 Nephawe filed a petition to the Supreme Court of Appeal against the judgment of Legodi J refusing him leave to appeal. The petition was also unsuccessful. A further application for leave to appeal to the Constitutional Court was also dismissed with costs by the Constitutional Court.

[11] Subsequent to the judgment of Legodi J, the second respondent (the State President) was advised by the Mphephu-Ramabulana royal family that the first respondent (Toni) had been identified as a person to fill the position of the King of the Vhavenda Traditional Community.

The second respondent never received any evidence nor any allegation from the applicants herein or anyone that the identification of the first respondent was not done in accordance with the Vhavenda customary law, customs or processes as contemplated in section 9(3) of the Traditional Leadership and Governance Framework Act, 2003.

[12] During August 2010, the second respondent received a letter from the Mphephu-Ramabulana royal family dated 14 August 2010 advising the second respondent (President) of the outcome of its meeting held 14 August 2010 where the first respondent was identified as the person who qualifies in terms of customary law to assume the position of the King of the Vhavenda traditional community. The minutes of the meeting were also sent to the second respondent by the Minister, the third respondent.

[13] Due to the aforementioned litigation, the second respondent delayed the recognition of the first respondent until the review proceedings were finalised. On 21 September 2012, the second respondent issued a Notice in the Government Gazette in which he recognized the first respondent as the King of Vhavenda traditional community.

[14] It is significant to note that between 14 August 2010 (when the first respondent was identified by the royal family) and 21 September 2012 (when the first respondent was recognized by the President) the applicants in this matter had ample opportunity to place evidence before the President or make allegations that the first respondent was not the rightful person, but they failed and / or neglected to do so and a period of more than two years had lapsed.

[15] It is common cause in these proceedings that the applicants never lodged any claim or dispute in relation to the Vhavenda kingship with the Commission. This was done by the first respondent on 24 June 2005.

[16] Furthermore, it is common cause that the applicants neither participated in the Court proceedings before Legodi J nor did they

file any affidavit which raised the issue of their non-joinder nor did they seek to intervene in the said proceedings.

LEGAL FRAMEWORK

- [17] The identification and recognition of Traditional Leaders in South Africa is governed by section 9 of the Traditional Leadership and Governance Framework Act No 41 of 2003 (“the Act”). The President (second respondent in this case) must, in terms of section 9(1)(b) of the Act, as amended, recognize a person identified by the royal family (eighth respondent in this case) as a King / Queen in terms of section 9(1)(a), taking into account the need to establish uniformity in the Republic in respect of the status afforded to King / Queen, whether a recognised Kingship exists in terms of the Act and the functions that will be performed by the King or Queen.
- [18] The President plays no role in identifying the King or Queen; the Royal Family chooses a King or Queen in accordance with section 9(1)
- (a) of the Act. The President has no discretion and he must recognise once the Royal Family has made a decision, save that in terms of section 9(3) of the Act he may refuse to issue a certificate of recognition on the basis of evidence or allegations that the identification of the King or Queen was not done in accordance with customary law, customs or processes.
- [19] In terms of section 9(3), where there is evidence or allegations that the identification of a person as a King or Queen was not done in accordance with customary law, customs or processes, the President may, on the recommendation of the Minister, refer the matter to the National House of Traditional Leaders for its recommendation or may refuse to issue a certificate of recognition and must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.
- [20] In the present case it is common cause that at the time the President (second respondent) recognised the first respondent as King, he neither received any evidence nor was he aware of any evidence or any allegations that the identification of the first respondent as King was not done in terms of customary law, customs or processes.
- [21] The seventh respondent is the Commission on Traditional Leadership Disputes and Claims (“the Commission”) established in terms of section 22 of the Act. The Act was amended in 2010 by the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 (“the New Act”).
- Chapter 6 of the Act was substituted by section 21 of the New Act and the new Chapter 6 came into operation with effect from 1 February 2010.
- [22] The functions of the Commission are contained in section 25 of the Act. Prior to the 2010 amendment, section 25 gave the Commission the authority to investigate, either on request or of its own accord, inter alia a Traditional Leadership position where the title or right of the incumbent is contested like in this case.

[23] Section 25(2) (a) of the New Act does not give the Commission the authority to investigate on its own accord. Section 25(2)(b) requires a dispute or claim to be lodged by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information. Section 25(2)(a) gives the Commission authority to investigate and make recommendations on inter alia, a traditional leadership position where the title or right of the incumbent is contested like in this case and gender-related disputes

relating to traditional leadership positions arising after 27 April 1994.

[24] Section 25(3) (a) provides that when considering a dispute or claim, the Commission must consider and apply customary law and customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim.

[25] Section 25(4) (a) of the New Act provides that the Commission may only investigate and make recommendations on those disputes and claims that are before the Commission on the date of coming into operation of Chapter 6, that is 1 February 2010 and must complete

those matters within a period of five years from the date of appointment of members of the Commission in terms of section 23 or

any such further period as the Minister may determine.

[26] These powers of the Commission are made subject to section 25(5) which provides that any claim or dispute contemplated in Chapter 6 submitted after six months after the date of coming into operation of Chapter 6 of the New Act may not be dealt with by the Commission.

[27] Section 21 of the New Act provides for a dispute and claim resolution procedure which makes it mandatory for a dispute concerning customary law or customs to be resolved internally first and in accordance with customs before such dispute or claim may be referred to the Commission.

In essence, no dispute or claim may be referred to the Commission unless and until the procedures contemplated in section 21 of the Act have been exhausted.

[28] It is common cause that the applicants in the present case did not comply with the provisions of section 21 of the Act. It is furthermore common cause that the applicants did not lodge a claim or dispute as required by section 25(2) (b) of the Act. I shall revert to these two aspects when I deal with the points in limine raised by the respondents later in this judgment.

[29] The members of the New Commission were appointed with effect from 1 January 2011. Members of the New Commission never entertained any claim or dispute lodged by the applicants. The Vhavenda Kingship dispute or claim which related to the restoration of the Kingship and the determination of the lineage to which the Kingship should be restored, was finalised by the Old Commission under the Chairmanship

of Professor Moleleki on 21 January 2010 and in terms of the Old Act.

[30] When the New Commission took over, there were no records of any claim or dispute that was lodged either by the applicants or anyone else to the position of the King of Vhavenda community and the Commission therefore could not and did not consider any Kingship dispute between the applicants and the first respondent.

[31] In terms of section 25(4)(a) of the New Act the Commission would have the authority to investigate and make recommendations on the incumbent to the position of the Vhavenda Kingship if such a claim or dispute had been lodged with the previous Commission and not finalised at the date the new members of the Commission took over, and only for a period of five years from date of their appointment.

The New Commission would also have the authority to investigate the claim or dispute where such dispute had been lodged with it. In the latter event the Commission also retained a discretion not to entertain or consider a dispute or claim if the provisions of section 21 have not been complied with.

SEPARATED ISSUES

[32] On 31 August 2016 the parties, by agreement, obtained an order of Court for the separation of issues for determination by this Court. In essence, the separated issues are those components of the relief that do not require the determination of disputes of fact and that may be dispositive of the entire application before me. These include various objections in limine that the respondents have raised.

[33] The issues for separate determination are the following:

1 Whether the applicants are precluded from approaching the Court for relief, for failure to:

1.1 follow the dispute resolution process under section 21 of the Traditional Leadership and Governace Framework Act 41 of 2003 (as amended) ("the Act");

1.2 lodge a dispute with the Commission over the First Respondent's title under section 25(2) (a) or

(b) of the Act;

1.3 produce evidence and make allegations to the President under section 9(3) of the Act.

2 Whether the Court lacks jurisdiction to hear the review, in that it concerns matters that can only properly be determined by a specialist Commission.

3 Whether the Court ought to decline to consider this review application out of deference to the executive and the Commission.

4 Whether the application falls to be dismissed for want of a pre-existing jurisdictional fact, in that the applicants have not

asked that the recognition by then-Premier of the Limpopo Province be set aside or that the First Respondent be removed from his position of incumbency.

5 Whether the applicants' claim has prescribed under section 25(5) of the amended Act.

6 Whether the applicants' claim has prescribed under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

7 Whether an investigation of the incumbent of the Vhavenda kingship or queenship is pending before the Seventh Respondent (the Commission on Traditional Leadership Disputes and Claims) in terms of section 25(4) and / or section 28(11) (b) of the Act, for the purposes of the making of a recommendation to the Second Respondent (the President) or for the purposes of a final determination.

8 Whether the Second Respondent and / or the Seventh Respondent are estopped from denying that a determination of the incumbent of the Vhavenda kingship or queenship is pending before the Seventh Respondent as a result of the President's public statement of 29 July 2010.

9 Whether the applicants have a legitimate expectation that the Seventh Respondent shall investigate and determine the incumbent of the Vhavenda kingship or queenship, and if so, whether such legitimate expectation entitles the applicants-

9.1 to a determination of the incumbent by the Seventh Respondent; or

9.2 to a hearing by the Second Respondent before the taking of a decision to recognise the incumbent of the Vhavenda kingship or queenship.

10 Whether the Second Respondent's decision to recognise the First Respondent as King of the Vhavenda under section 9 of the Act constitutes administrative action reviewable under PAJA or executive action reviewable under the principle of legality.

11 Whether the aforesaid Second Respondent's decision is reviewable and unlawful, and falls to be set aside, on the grounds of review set out in paragraphs 85.1, 85.1.1, 85.2 and 85.6 of the founding affidavit and paragraphs 19-23, 24.1.6 and 24.3 of the supplementary founding affidavit (dated 8 April 2013), including, without detracting from the generality of any of the foregoing, the questions whether-

11.1 the President ought to have known that there was evidence or at least allegations that the first respondent was not identified according to customary law, and that this requires investigation, as a result of the judgment of Legodi J (which notes that the first respondent's claim to title is disputed);

11.2 the President failed to elicit any recommendation from the Minister as required by section 9(1) (b) of the TLGFA.

12 Whether the decision of the Second Respondent to

recognise the First Respondent as King of the Vhavenda and / or the decision of the Eighth Respondent to identify the First Respondent as a King of the Vhavenda is reviewable and unlawful, and falls to be set aside, for having been taken under the old (pre-amended) Traditional Leadership and Governance Framework Act 41 of 2003.

13 Whether, and without conceding that the Eighth Respondent constitutes or legitimately represents “the royal family” as contemplated in section 9 of the Act, the decision of the Eighth Respondent to identify the First Respondent as King of the Vhavenda constitutes administrative action reviewable under PAJA and / or the principle of legality.

14 Whether the decision of the Eighth Respondent is reviewable and unlawful, and falls to be set aside, for the failure to take into account the rights enshrined in the Bill of Rights (including the right to equality), and its obligation to develop customary law in line with the Constitution when it identifies the king or queen of the Vhavenda.

[34] I deal with each and every one of these issues / questions in turn.

Ad Question 1

Whether the applicants are precluded from approaching the Court for relief for failure to:

1.1 follow the dispute resolution process under section 21 of the Traditional Leadership and Governance Framework Act 41 of 2003 (as amended) (“the Act”).

1.2 Lodge a dispute with the Commission over the First Respondent’s title under section 25(2) (a) or

(b) of the Act; or

1.3 Produce evidence and make allegations to the second respondent (President) under section 9(3) of the Act.

[35] The relief sought by the applicants as against the respondents consists of a review of the identification of the first respondent by the eighth respondent, the recognition of the first respondent by the second respondent on 14 September 2012 as a King of the Vhavenda community, a review of the seventh respondent’s failure to investigate and make a recommendation on who should be the incumbent to the kingship / queenship of the Vhavenda[1].

[36] The common cause facts are that the applicants never complied with section 21 of the Act, never lodged any dispute or claim with the Commission in terms of section 25 regarding their right to the kingship title of the Vhavenda community or to the first respondent’s title and that no documents were furnished to the second respondent in terms of section 9(3) to the effect that the applicants were contesting the Kingship position to which the first respondent had been identified or that his identification was not in accordance with customary law and customs of Vhavenda.

[37] It is common cause that the Vhavenda are a traditional community that observes a system of customary law and would be subject to any applicable legislation and customs. The Courts are enjoined by the Constitution to apply customary law when that law is applicable subject to the Constitution and any legislation that specifically deals with customary law. The Framework Act is the legislation foreshadowed in the Constitution to address issues of traditional leadership and the application of customary law.

[38] Section 21 of the Framework Act provides:

“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 this 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 the 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 the 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 provided for in this section, the dispute or claim must be referred to the Commission”.

[39] In the context of the dispute between the parties in this case the Framework Act is the legislation that is intended to specifically

provide for the resolution of disputes relating to traditional leadership and the application of customary law. More significantly,

to establish a specialised forum for resolution of disputes relating to traditional leadership, being the Commission[2].

The legislature saw it fit that issues relating to disputes affecting role, status and institution of traditional leadership require

specialised expertise and knowledge regarding customary law.

Hence the procedure for dispute resolution of the kind described in the present Court proceedings is spelt out in very lucid terms in section 21 of the Framework Act.

[40] The Commission is stated to have authority to investigate and make recommendations on any traditional leadership dispute and claim[3]. There is therefore a jurisdictional requirement in the resolution of disputes or claims concerning traditional leadership and that is before a matter such as this can serve before a Court of law, legislation requires that members of such a community and the traditional leaders within that traditional community, must seek to resolve the dispute internally.

[41] The Commission also has authority to investigate and make recommendations on a traditional leadership position where the title

or right of the incumbent is contested[4]. The law recognises that disputes of this nature require specialised knowledge and has created the Commission as a specialised body to resolve, through the application of customary law, disputes of this nature.

[42] The jurisdiction of the Court can only be invoked by way of review after the processes outlined in section 21 of the Framework Act have been invoked and a complaint is raised that a claim or dispute was not resolved fairly or through the proper application of customary law.

[43] 43.1. Just when I was about to conclude this judgment a recent Constitutional Court decision in the matter of Tshivhulana Royal Family v. Netshivhulana [2016] ZACC 47, delivered on 14 December 2016, was brought to my attention.

It was held in this case that section 21 of the Framework Act in so far as it provides for exhausting internal remedies is not applicable to disputes between Premier and traditional communities.

This Constitutional Court decision does not alter my standpoint regarding the applicability of section 21 in this case before me.

The present case is distinguishable from the Constitutional Court case referred to above.

43.2. The Tshivhulana case deals with a review of the decision of a Premier to recognise a traditional leader. Clearly in this instance the Court has jurisdiction to hear the review application and parties need not exhaust any internal remedies.

The present case has to do with a situation where members of a community and traditional leaders within the traditional community or customary institution concerned must seek to resolve a dispute or claim internally and in accordance with customs before they resort to litigation.

[44] Section 25(2) (a) (iii) and (b) of the Framework Act reads:

“the Commission has authority to investigate and make Recommendation on –

(i).....

(ii).....

(iii) a traditional leadership position where the title or right of the incumbent is contested ;.....

(b) A dispute or claim may be lodged by any person and must be accompanied by information setting out the nature of the dispute or claim and any other relevant information.”

The Framework Act contemplates a resolution of such dispute or Claim to be made through application of customary law by persons who are knowledgeable on customary law and traditional leadership. A Court of law is not, in the first instance, the chosen forum for resolution of these type of disputes nor does it have within its province the expertise required for the resolution of these disputes.

In essence, therefore, a failure to lodge a dispute with the Commission in terms of section 25(2) (a) or (b) is fatal.

[45] The applicants have not lodged a claim with the Commission. The power of the seventh respondent (Commission) to investigate is limited to disputes and claims which were lodged with the Old Commission or which were lodged with the New Commission. It has no power to investigate on its own accord. There is therefore no failure on the part of the seventh respondent to investigate a dispute or claim in the present case because there was never any valid claim lodged by the applicants. A valid claim with the Commission is that which is lodged after the dispute resolution procedures envisaged in section 21 of the Act have been exhausted[5].

[46] Section 9 reads as follows where relevant:

“9(3) Where there is evidence or an allegation that the identification of a person referred to in (1) was not done in accordance with customary law, customs or processes, the President –

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

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

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

[47] It is common cause that the applicants did not place any evidence before the second respondent complaining that the identification of the first respondent as the King of the Vhavenda was not done in accordance with the customs.

The applicants are therefore, precluded to place any evidence before the second respondent at this stage and through the present review proceedings.

[48] I conclude that, in respect of the first question, the applicants have failed to demonstrate that they have:

48.1. lodged the incumbency claim with the Old Commission in terms section 25 of the pre-amended Act;

48.2. lodged the incumbency claim with the Seventh respondent (New Commission) in terms section 25 of the Framework Act;

48.3. placed any information or evidence before the second respondent regarding the first respondent's incumbency in accordance with the provisions of section 9 (3) of either the pre - or post - amended Framework Act;

48.4. complied with the provisions of sections 21 and 25 of the Framework Act before approaching this Court in terms of their Notice of Motion.

[49] The applicants therefore ought to be non – suited in this Court for failure to follow the processes prescribed in section 9, 21 and 25 of the Framework Act. They are not entitled to disregard the dispute resolution procedure and to approach this Court directly by way of review in this matter.

Ad Question 2

Whether the Court lacks jurisdiction to hear the review, in that it concerns matters that can only properly be determined by a specialist

Commission.

[50] Under the doctrine of separation of powers the Court is constitutionally constrained to exercise power outside that authorised by the Constitution and the law. The power to make law regarding the resolution of disputes or claims relating to traditional leadership lies with legislature. The Framework Act has been enacted to make special provisions relating to the processes by which traditional leaders are recognised or appointed.

The Court can therefore not arrogate to itself the power to resolve this dispute. The resolution of a dispute of the kind involved in these proceedings falls within the powers of the Commission; the Court does not have the expert knowledge which the Commission has in the application and the resolution of the dispute or claim regarding traditional leadership. However, the Court does have jurisdiction to review under the legality principle any conduct that is shown to be unlawful.

[51] In the present case the processes mandated by the Framework

Act have not been followed or exhausted and therefore this Court lacks jurisdiction to hear the review.

Ad Question 3

Whether the Court ought to decline to consider this review application out of deference to the Executive and the Commission.

[52] It is a trite law that Courts are slow to tread in the areas reserved for functionaries of government as this process leads to the blurring of separation of powers between the government and the judiciary. A Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government[6].

[53] Judicial deference is particularly appropriate when the subject matter of an administrative nature is very technical or of a kind in which a Court has no particular proficiency.

The Commission is a specialist body established by an Act of Parliament to deal with a special category of disputes affecting a traditional community. It is required to apply customary law in adjudicating the disputes and members of the Commission have expertise in traditions and customs[7].

[54] In this matter the fact that there has not been a claim properly lodged, investigated and determined by the various government

respondents makes it impossible for the Court to even consider the issues of either the rationality or legality of any impugned

decision. It is upon this basis that applicants should not be permitted to bypass the designated processes and use this Court to

bypass processes that have been determined by the Legislature to be falling within the competence of different functionaries.

[55] This question is therefore answered in the affirmative and in favour of the respondents.

Ad Question 4

Whether the application falls to be dismissed for want of pre – existing jurisdictional fact, in that the applicants have not asked that the recognition by the then Premier of the Limpopo Province be set aside or that the First Respondent be removed from his position of incumbency.

[56] It is a fact that on 30 September 1998 then Premier of the Limpopo Province in consultation with the Provincial Executive Council

approved the appointment of the first respondent as Khosi (Senior Traditional Leader) of Mphephu – Ramabulana traditional authority.

[57] The question is whether the applicants should have challenged and / or set aside the aforesaid appointment of the first respondent before they could purport to set aside the appointment of the first respondent as King as they hereby purport to do in the present review application. The answer is no and the question is answered in favour of the applicants.

[58] The reason is that the traditional leadership status of the first respondent as khosi no longer exists. As soon as the Old Commission recognised that the Vhavenda nation was a kingship falling under the Mphephu – Ramabulana lineage, that traditional authority's existence fell away. The Mphephu – Ramabulana became a Kingship as contemplated in section 2A of the Framework Act as amended. With it, ended the position of Chief or Khosi of the traditional authority. One cannot be a Chief or Khosi (senior traditional leader) of a kingship or queenship. In the circumstances, there was no need for the applicants to challenge that appointment of 1998 before embarking on the present challenge of kingship of the first respondent.

Ad Question 5

Whether the applicants claim has prescribed under section 25(5) of the Framework Act as amended.

[59] Section 25(5) provides that:

“(5) Any claim or dispute contemplated in this Chapter submitted after six months after the date of coming into operation of this Chapter may not be dealt with by the Commission”.

In this matter, the provisions of Chapter 6 of the Framework Act came into operation on 1 February 2010. It is common cause in these proceedings that the applicants never lodged any dispute or claim with either the Old Commission or the New Commission.

[60] In terms of paragraph 1.8 of their Notice of Motion, the applicants seek an order remitting the matter to the second respondent and seventh respondent for a decision afresh and for investigation and recommendation. The Commission therefore would be precluded from considering or dealing with the applicants' dispute or claim under Chapter 6 of the Framework Act even if the applicants were to submit such claim. The claim or dispute has thus become prescribed in terms of section 25(5) of the Act.

Ad Question 6

Whether the applicants' claim has prescribed under the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

[61] The first respondent was identified as King by the royal family (eighth respondent) on 14 August 2010 and recognised by the President (second respondent) on 21 September 2012.

In my view the identification and recognition of the first respondent, even though carried out by two independent persons and on two different dates, are all part of a single continuous process.

[62] The process was only completed on 21 September 2012. The present Court proceedings commenced on 19 December 2012, within the 180 day period. The claim has accordingly not prescribed in terms of PAJA.

Ad Question 7

Whether an investigation of the incumbent of the Vhavenda kingship or queenship is pending before the seventh respondent (the Commission on Traditional Leadership Disputes and Claims) in terms of section 25(4) and / or 28(11) (b) of the Act, for the purpose of making of a recommendation to the Second Respondent (the President) or for the purpose of a final determination.

[63] The applicants contended that the claim regarding the first respondent's incumbency has always been before the Nhlapo

Commission (i.e Old Commission) and that same was somehow transferred to the seventh respondent (New Commission) when the term of the Nhlapo Commission came to an end in January 2010. They contended that the traditional provisions contained in the amended Framework Act[8] transferred the matter from the old to the new Commission.

[64] The applicants are not in a position to can answer the following questions:

6.4.1 who lodged the said claim;

6.4.2 when was the said claim lodged;

6.4.3 how was the said claim lodged;

6.4.4 what are the contents of that claim and

6.4.5 where is the copy of the said claim?

[65] The true factual position is set out in the undisputed evidence of the respective Chairpersons of the two Commissions:

65.1 Professor Moleleki is on record and under oath for having stated that the Nhlapo Commission was only concerned with restoration of the recently recognised kingship of Vhavenda[9].

65.2 Mr B Tolo (the incumbent Chairperson of the seventh respondent) and third respondents all confirm that the incumbency claim complaint of has never been filed with the Nhlapo Commission including at the time of the dissolution thereof[10].

- [66] Section 28(11) (a) and (b) provides that the New Commission is the successor in law to the Old Commission, and that all disputes and claims that were before the Old Commission are deemed to have been lodged with the New Commission.
- [67] It is common cause that what served before the Old Commission was the dispute whether to restore the Vhavenda Kingship as a whole under the leadership of Vhangona (the claimant was Nephawe), or the house of Mphephu – Ramabulana (the claimant was the first respondent) or the house of Ravhura (the claimant was Ravhura). Tshivhase and Mphaphuli were also claimants.
- [68] The applicants' dispute or claim was never lodged with the Old Commission and was not pending before both the Old Commission and the New Commission. Accordingly there was nothing to be investigated by any Commission especially in relation to who the incumbent to the Vhavenda kingship should be.

Ad Question 8

Whether the Second Respondent and / or the Seventh Respondent are estopped from denying that a determination of the incumbent of the Vhavenda kingship or queenship is pending before the Seventh Respondent as a result of the President's public statement of 29 July 2010.

- [69] On the 29 July 2010 the second respondent (President) issued a public statement stating that the issue of the incumbency of the Vhavenda kingship would be decided or determined by the Commission (seventh respondent).

The applicants thus content that the respondents are estopped from denying the fact that the seventh respondent was seized with the dispute relating to the issue of the said incumbency.

- [70] In my view the applicants are wrong in their reliance on the press statement by the second respondent (President) without first

confirming with the seventh respondent as to the existence of a claim or not. Absent a claim submitted for their attention either in terms of sections 9(3) or 25(2) (b) of the Framework Act, the second respondent and the seventh respondent were under no obligation to entertain or investigate the claim.

- [71] The statement by the President had no legal status. It was a public statement that had no legal consequences. Even if the President said in his statement that he was referring a dispute or claim to the Commission, he did not have the authority or power under the Act to investigate a dispute that has never been lodged with the Commission in terms of section 25 of the Act.

In law it is not open to a Court to compel a party to perform any obligations which it does not have[11]. This includes granting an order reviewing and setting aside a failure to take a decision in that regard.

[72] The estoppel sought to be relied upon by the applicants, based on the President's statement does not find application in this matter. The lodging of a claim with the Commission is a statutory prerequisite before the Commission is clothed with the authority to investigate and make a recommendation.

Estoppel may not be used to make legal what would otherwise be illegal and cannot replace statutory requirements for the validity of an act[12]. In addition, the requirements for a successful reliance on the doctrine of estoppel are, in any event, not established by the applicants.

[73] The applicants' failure to comply with the provisions which the Legislature has prescribed for the validity of their claim before the Commission, cannot be remedied by estoppel because that would give validity to a transaction which is unlawful and therefore ultra vires.

Accordingly, the applicants' contention of estoppel falls to be dismissed.

Ad Question 9

Whether the applicants have a legitimate expectation that the Seventh Respondent shall investigate and determine the incumbent of the Vhavenda kingship or queenship, and if so, whether such legitimate expectation entitles the applicants -

9.1. to a determination of the incumbent by the Seventh Respondent; or

9.2. to a hearing by the Second Respondent before taking a decision to recognise the incumbent of the Vhavenda kingship or queenship.

[74] The applicants contended that they had legitimate expectations that the seventh respondent shall investigate and determine the claim against the first respondent's incumbency and that the second respondent (President) would afford them a hearing before he recognised the incumbent of the Vhavenda kingship or queenship.

[75] The issue raised herein is a question of law. Legitimate expectation can only guarantee procedural rights and not substantive redress.

In the present case before the applicants could claim that their legitimate expectation to participate in the incumbency challenge was denied to them or violated, they ought to have availed themselves of every opportunity to be heard, for example, by lodging a claim with the seventh respondent in terms of section 25(2) (b) of the Framework Act and / or by placing information and evidence before the second respondent in terms of section 9(3) of the Act and then demonstrate that the said opportunity had been denied to them.

[76] It is common cause that the applicants did not avail themselves of the above processes, and therefore they cannot seriously contend that their rights to participate in the Nhlapo Commission and / or the New Commission (seventh respondent) were denied or that they were not invited to participate therein.

The applicants' expectation that the Commission was to investigate and determine a claim that was never lodged with and pending before the Commission, which expectation was contrary to law, cannot be legitimate^[13].

Accordingly, such expectation cannot entitle the applicants to a determination of the incumbent by the seventh respondent and to a hearing by the second respondent in due cause.

Ad Question 10

Whether the Second Respondent's decision to recognise the First Respondent as King of the Vhavenda under section 9 of the Act constitutes administrative action and reviewable under PAJA or executive action reviewable under the principle of legality.

^[77] The decision of the Second Respondent to recognise the first respondent as King as well as the identification of the first

respondent by the royal family are administrative actions reviewable under PAJA.

See the decision of MG Phatudi J in this Court in *Nesengani and Others v. Chairperson of the Davhana Royal Council and Others* (204/2008) [2016] ZALPPTHHC (19 September 2016).

The case concerned a review of the identification and recognition by the royal family and the Premier respectively of a senior traditional

leader under section 12 of the Limpopo Traditional Leadership and Institution Act, No 6 of 2005, which is worded in an essentially

identical manner to section 9 of the Framework Act.

At par [57] the learned Judge said: "The power exercised by the Fifth Respondent in deciding on issues of the recognition of traditional leader, as defined, falls within the provisions of administrative justice governed by the Promotion of Administrative Justice Act, 2000 (PAJA) read with the Constitution of the Republic of South Africa Act, 1996. Such decisions are reviewable under the normal judicial review proceedings. This Court is therefore at large to intervene"

^[78] The question is whether in this case before me, and on the peculiar facts of this case, the decision of the Second Respondent to recognise the first respondent as King is reviewable. I answer the question in the negative and for the reasons that follow hereunder.

^[79] In terms of section 9(3) of the Framework Act once the second respondent receives proof of identification of an incumbent to fill a vacant kingship position he must, on the recommendation of the Minister, recognise the person unless there is evidence or allegations that the identification was not done according to customary laws and customs or processes.

^[80] Regard being had to the provisions of the Act and in the absence of any evidence that the President received evidence or allegations that the identification of the first respondent suffered from irregularities referred to in section 9(3), the second respondent

acted in accordance with the law and absent irregularities his actions are not reviewable under the PAJA and / or the principle of legality.

Ad Question 11

Whether the aforesaid, Second Respondent's decision is reviewable and unlawful, and falls to be set aside, on the grounds of review set out in paragraphs 85.1, 85.1.1, 85.2 and 85.6 of the founding affidavit and paragraphs 19 – 23, 24.1.6, and 24.3 of the supplementary founding affidavit (dated 8 April 2013) including, without detracting from the generality of any of the foregoing, the question whether –

11.1 the President ought to have known that there was evidence or at least allegations that the first respondent was not identified according to customary law, and that this required investigation, as a result of the judgment of Legodi J (which notes that the first respondent's claim to title is disputed);

11.2 the President failed to elicit any recommendation from the Minister as required by section 9(1) (b) of the Framework Act.

[81] I have already stated, when dealing with Question 10 above, that the decision of the second respondent is not susceptible to a review in terms of PAJA. Accordingly, the grounds relied upon by the applicants for the review and set aside of the second respondent's

decision are incompetent.

[82] The judgment of Legodi J in the review of the Nhlapo Commission's decision of the restoration of Vhavenda kingship could not have made the second respondent to know that there was evidence or allegations that the first respondent's identification was not in accordance with customary law.

The Judgment of Legodi J never entertained any doubts regarding the first respondent's incumbency. The Court repeatedly, expressed itself to have been precluded from deciding the issue of who the incumbent of the Vhavenda kingship was[14].

[83] The judgment of Legodi J to the extent that the learned Judge states that the first respondent's title is contested cannot be interpreted to mean that it is contested by the applicants in this case but at best for the applicants it can mean that it is contested by the other parties who failed in the proceedings before Legodi J and who failed in their subsequent attempts to appeal to the SCA and Constitutional Court.

[84] It was not necessary for the second respondent to have elicited recommendation from the Minister. The second respondent relied on the pre – amendment Act when recognizing the first respondent. The said Act did not require the second respondent to elicit

recommendation from the Minister before acting as he did.

Ad Question 12

Whether the decision of the Second Respondent to recognise the First Respondent as King of Vhavenda and / or decision of the Eighth

Respondent to identify the First Respondent as King is reviewable and unlawful, and falls to be set aside, for having been taken under the old (pre – amended) Traditional Leadership and Governance Act 41 of 2003.

[85] In my view the decisions of both the second respondent and the eighth respondent were correctly taken under the old Act.

Ad Question 13

Whether, and without conceding that the Eight Respondent constitutes or legitimately represents ‘the royal family’ as

contemplated in section 9 of the Act, the decision of the Eighth Respondent to identify the First Respondent as King of the Vhavenda

constitutes administrative action reviewable under PAJA and / or the principle of legality.

[86] This issue has been addressed when dealing with Question 10 above. My view is that the decision of the eighth respondent (royal family) constitutes administrative action and therefore reviewable.

Ad Question 14

Whether the decision of the Eighth Respondent is reviewable and unlawful, and falls to be set aside, for failure to take into account the rights in the Bill of Rights (including the right to equality), and its obligation to develop customary law in line with the Constitution when it identifies the king or queen of the Vhavenda.

[87] The applicants seek that this Court declare the customary law rule of male primogeniture inconsistent with the Constitution. They argue that the declaration of invalidity could be tailored to address the extent of the invalidity as it applies to the succession to the position of traditional leader and to the extent that it precludes women from succeeding to the position of traditional leaders.

The First and Eighth Respondent contend that this issue does not arise in this matter and to the extent that the applicants seek to entertain same, it is hypothetical.

[88] To demonstrate their standpoint the eighth respondent has established the following aspects:

88.1. That in Venda culture, women do assume positions of traditional leadership.

88.2. That one Makhazi Phophi assumed the position of a regent to an incoming King after the death of her brother, King Patrick Ramaano Mphephu – Ramabulana.

88.3. That Makhadzi Phophi is presently a leader of a traditional authority.

88.4. That the decision to overlook the first applicant for the position of Queen had nothing to do with her gender. She was not considered as a successor to her father because:

88.4.1. She was not born from the dzekiso wife, and

88.4.2. She was born before her father ascended the throne and therefore she was older than the reign of her father.

[89] The eighth respondent has consistently denied that the decision not to identify the first applicant was a violation of any of the rights contained in the Bill of Rights, in particular the right to equality and equal treatment.

In my view the issue of male primogeniture to the extent that it is said to have arisen, which is denied, is secondary to the issues before me and the determination thereof would be an academic exercise. I decline to make any declaratory order in this regard.

[90] In my view the first and eighth respondents have never suggested that their tradition does not recognise women leaders. It is established law as in the Shilubana Case[15] that where a particular royal house has deliberated and agreed that a woman should lead, then such traditional leadership is possible.

In the light of the above progressive steps, there is no need to seek a judicial or legislative intervention into the Vhavenda custom.

CONCLUSION

[91] The applicants argue that in the event that this Court grants them relief, a just and equitable order would be to remit the matter back to the Commission.

[92] This Court does not have the power to do so. Regard being had to the common cause fact that the Commission never considered the dispute or claim about the incumbent to the vacant kingship or queenship of Vhavenda, the question of reconsideration does not arise.

On the contrary any order referring the matter to the Commission will amount to a fresh referral of the matter to the Commission by the Court, something which is not contemplated by the relevant provisions of PAJA.

[93] In view of the answers I provided to each and every question herein above, I come to a conclusion that this matter falls to be dismissed. In the result I grant the following order:

1. The application is dismissed.
2. There shall be no order as to costs.

E M MAKGOBA JP

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on : 13 – 14 December 2016

Order handed down : 14 December 2016

Written Judgment handed down : 30 January 2017

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[1] Notice of Motion paras 1-3, p249 and para 8, pp 250 – 252.

[2] See section 22 of the Framework Act.

[3] See section 25(1) of the Framework Act.

[4] See section 25(2) (a) (ii) of the Framework Act.

[5] See section 21 of the Framework Act.

[6] Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs 2004 (4) SA 49 (CC) para [48].

[7] Nxumalo v. President of the Republic of South Africa and Others 2014

(12) BCLR 1457 (CC) para [21]; Bapedi Marota Mamone v. Commission on Traditional Leadership Disputes and Claims and Others 2015 (3) BCLR 268 (CC) PARA [82].

[7] Nxumalo v. President of the Republic of South Africa and Others 2014

[12] BCLR 1457 (CC) para [21];

Bapedi Marota Mamone v. Commission on Traditional Leadership Disputes and Claims and Others 2015 (3) BCLR 268 (CC) PARA [82].

[8] See section 28(11) (a) and (b) of the Framework Act.

[9] See Third and Seventh Respondents' affidavit by Moleleki, pages 552, 557 paras 25 and 35.

[10] See Third and Seventh Respondents' Answering, by Prof Moleleki, page 552, 555, and paras 25 and 35. See also Seventh Respondent's Answering affidavit by Mr B Tolo, page 621, 629, and 630 paras 5, 15 and 21 respectively.

[10] See Third and Seventh Respondents' Answering, by Prof Moleleki, page 552, 555, and paras 25 and 35.

See also Seventh Respondent's Answering affidavit by Mr B Tolo, page 621, 629, and 630 paras 5, 15 and 21 respectively.

[11] See Lourens v. Speaker of the National Assembly of Parliament (20827/2014) [2016] ZASCA 11 (10 March 2016).

[12] City of Tshwane Metropolitan Municipality v. RPM Bricks 2008 (3) SA 1 (SCA) para [13]; Trust Bank v. Eksteen 1964 (3) SA 402 (A); Eastern Cape Provincial Government v. Contractprops 25 (Pty) Ltd 2001 (4) SA 142 (SCA) PARAS [11] – [13]

[13] See University of Western Cape and Others v. Member of Executive Council for Health and Social Services and Others 1998 (3) SA 124 (C) at 134 C.

[14] See Annexure CM4 to the Founding Affidavit, Legodi J's judgment at pages 140 – 142, para 16.8.2 – 16.8.6.

[15] Shilubana and Others v. Nwamitwa 2009 (2) SA 66 (CC).

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