

SOUTH AFRICA / JUDGMENT

Radingwana and Another v Premier: Limpopo Province and Others (Rev 4849/2020) [2022] ZALMPPHC 49 (4 October 2022)

[2022] ZALMPPHC 49

COURT

Limpopo High Court, Polokwane

BEFORE

Muller

CASE / FILE NUMBER

Rev 4849/2020

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Policy

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

(LIMPOPO DIVISION,

POLOKWANE)

Case no: Rev 4849/2020

REPORTABLE:

YES/NO

OF

INTEREST TO THE JUDGES: YES/NO

REVISED.

In the matter between: SENTSHO COLLENGE
 RADINGWANA
 1ST APPLICANT
 RADINGWANA ROYAL
 FAMILY
 2ND APPLICANT
 And
 THE PREMIER: LIMPOPO
 PROVINCE
 1ST RESPONDENT
 THE MEC: LIMPOPO
 CO-OPERATIVE GOVERNANCE
 HUMAN SETTLEMENTS AND
 TRADITIONAL AFFAIRS
 2ND RESPONDENT
 LIMPOPO PROVINCIAL
 COMMITTEE ON TRADITIONAL
 LEADERSHIP DISPUTE AND
 CLAIMS
 3RD RESPONDENT
 MATAU SARAH RADINGWANA
 4TH RESPONDENT

JUDGMENT

MULLER J:

- [1] The first applicant applies to review and set aside the recommendation of the third respondent and the decision of the Premier[1] to accept the claim of Moleme Jackson Radingwana[2] as the senior traditional leader of the Baroka Ba Radingwana traditional community[3] as well as the appointment of the fourth respondent as acting senior traditional leader. The first applicant[4] also seeks to be declared to be the senior traditional leader of Baroka Ba Radingwana traditional community.
- [2] The third respondent is the Limpopo Provincial Committee on Traditional Leadership Disputes and Claims[5] which was established by the Premier in terms of section 26A of the Traditional Leadership and Governance and Framework Act.[6]
- [3] The fourth respondent is the wife of the late Moleme who has passed away in 2015. She appeared before the Kgatla Commission on behalf of the late Moleme by virtue of their marriage relationship at the time of his death.
- [4] The background facts are that Sentshso is the eldest son of Khudu Benitta Radingwanal.[7] Khudu was a candle wife. She was from the royal kraal from Maroteng. Her sole purpose was to give birth to the rightful senior traditional leader. Sentsho states that Pholo Radingwana who had taken over as senior traditional leader from the acting senior traditional leader Podile was the acting senior traditional leader until about 1969.[8] Pholo

handed the chieftainship over to Khudu immediately after having married her. Moloko Piet Radingwana[9] was identified and nominated by the royal family as the seed raiser.[10] He accepted the nomination. Khudu was blessed with three children. (The irony is that none of her children were fathered by the seed raiser.) The eldest and youngest were females.[11] Sentsho, as the only male child, was formally recognised as the senior traditional leader of the Baroka community from 15 April 2007 by the Premier.[12]

- [5] Subsequent to the death of Pholo, Khudu moved back to her parental kraal at Mohlaletse as a result of being threatened to be killed by a group of the community who were against the leadership of a female.
- [6] In 1977 Moleme was identified and recognised as regent until the heir (Sentsho) was old enough to take over the leadership. The mother[13] of Moleme who was not of the royal kraal was not a candle wife and could not claim the leadership position.
- [7] According to custom, the mother of a senior traditional leader must be a candle wife. Moleme decided to marry a candle wife. The royal family objected. He was not the rightful heir to take over the leadership. In 2005 the royal family identified Sentsho as the rightful heir. Moleme was removed as regent and Sentsho was recognised and appointed.
- [8] In 2016 Sentsho attended the Kgatla Commission where he had made representations. He was not supported by family members because of an unexpected death in the family. He was notified by letter on 20 March 2020 that his senior traditional leadership was dissolved and that Moleme was recognised as the acting senior traditional leader by the

Premier in his stead.

- [9] The royal family was not requested to identify the senior traditional leader by either the Kgatla Commission or the Premier in relation to the recognition and appointment of Moleme.
- [10] Sentsho raised a host of grounds to review the decision of the Kgatla Commission and the Premier. The most important ground is that Moleme was never identified by the royal family as a senior traditional leader and he, therefore, is unable to be the rightful senior traditional leader. Closely related to the foregoing is that the mother of Moleme was not a candle wife and he as a result has no right to have lodged a claim as the senior traditional leader. His appointment is also contrary to the provisions of Limpopo Traditional Leadership Act.[14]
- [11] Khudu confirmed in a confirmatory affidavit that she is the mother of Sentsho and is a candle wife of the Baroka Radingwnana community. The Radingwana Royal Family[15] supports the application and confirmatory affidavits from several members of the royal family are attached.

- [12] Sentsho served a supplementary affidavit. He repeated the contents of the founding affidavit and added more detail and attacked the decision of the premier on the principle of legality and the provisions of the Promotion of Administrative Justice Act.[16] Sentsho commenced his version by pointing out that the complete record of the proceedings before the Kgatla Commission was not filed.
- [13] He proceeded to aver that the Kgatla Commission obtained the evidence from Khudu unconstitutionally because a researcher interviewed her. The Kgatla Commission accepted the record of the interview. According to Sentsho, Khudu stated that the seed raiser was indeed Moloko but that evidence was not taken into account in its final report and recommendations.
- [14] Sebtscho maintaina that the Kgatla Commission's report that Khudu appointed her own seed raiser is devoid of any truth. The Kgatla Commission was biased. Khudu never divorced when she returned to her kraal. She was allowed to return, as if she was never divorced. The Kgatla Commission failed to visit her kraal to determine the true facts from her.
- [15] The Deputy Director of the second respondent, in opposition to the application, deposed to an answering affidavit on behalf of the first, second and third respondent. She stated that the audio records of the Kgatla Commission could not be retrieved because of damage, with the exception of the disc containing the interview of Khudu. She stated that Podile 1 had two sons. The eldest and the rightful heir, Mmotong passed away at a young age before he got married. His younger brother had a son Dichidi who also died before he got married. The royal family then decided to marry a candle wife to give birth to the heir. Khudu was married as a second candle wife, since Mamogale was unable to give birth to a male child.
- [16] The deponent stated that the royal family agreed in 1969 with the community on the need for a candle wife. The lobolo for the candle wife was collected from and paid by the community. In the event that a traditional leader is deceased the candle wife and her family will be informed who the seed raiser is. Moleme was nominated as the seed raiser. A seed raiser is the most senior male closet to the inner circle of the royal family. Khudu was allocated Moleme as her seed raiser. However, Moleme was very young and Moloke appointed himself as the seed raiser. Khudu failed to follow tradition by taking Moloke as seed raiser instead of Moleme. As a result, Khudu was expelled by the royal family. The deponent stated that early in the 1960's the Baroka community did have a candle wife system. Mamogale was the first candle wife when the royal family decided to introduce a candle wife system. Her son died young without children. Moleme was the acting chief from 1977 until 2007 when the chieftaincy was handed to Sentsho. The royal family has decided that the fourth respondent must proceed with the claim after Moleme has passes away. The deponent stated that Moleme was not the rightful heir and that commission recommended that the royal family must marry a candle wife and appoint a seed

raiser so that she could give birth to the rightful heir.

[17] She avers that Sentsho had the opportunity at the sitting of the commission to call witnesses but elected not to do so with the result that his evidence was not corroborated that Molohe was the nominated seed raiser. Molohe lacked support from the royal family. The royal family met on 27 November 2019 and decided then that Moleme be appointed as the acting traditional leader until a candle wife and seed raiser can be appointed.

[18] Sentsho in his relying affidavit maintains that Mathume was not a candle wife, but the wife of Petlwane, not Podile 1. Moleme and his brother are not the children of Podile. Mathume had them before she came to the Baroka Community when she married Podile. The truth of the contents of a letter from the magistrate Sekhukhuneland dated 2 August 1976 is denied by Sentsho. The letter states in relevant part:[17]

“Selatole later handed chieftainship to Podile son of Sentsho on his return. Podile died and it went to Pholo.

Pholo in live handed it to Khudu the expelled Chieftainess. Beside Sentsho and Podile all the rulers were regents. The bakgemana decided and agreed to marry a ngwetsi for the chief lapa viz Mmotong who died young and childless. The said ngwetsi and thus candle wife was Mamogale from Mohlaletse who begot one daughter and a son Sanders Podile who died young. Mamogale also died. Ditheba and Podile again got a wife from a local family viz Mamashu Radingwana and Podile begot a son from Mamashu and his name was Moleme Mmotong Radingwana.

Mamashu was not a candle wife. The bakgoma, after Podile's death and that of Ditheba, decided and agreed to get a candle wife once more for Mmtong's son who died young nl Sanders Podile Radingwana. We got a candle wife form Mohlaletse in the person of Khudu Radingwana now returned to Mohlaletse and she was allotted to Moleme Mmotong Radingwana the direct biological son of Podile to look after Khudu although he was much younger than Khudu. After Khudu's arrival she ignored her appointed bull and one Peterus Moleke Radingwana appointed himself the bull and this caused confusion in the tribe and among the bakgoma. Before Moleke Petrus Radingwana she slept with his elder brother Sentsho Phole Radingwana even before she arrived at Mohlaletse. When she stayed openly with Petrus the tribe sort of condoned the situation but he Petrus became harsh and aggressive while Khudu ignored any advice from the bakgoma na until the situation erupted as we stated to you on the 23 August 1975. Our final decision is contained in our letter handed here on 27/10/75 and we confirm that decision and stand by it as indicated in our of the 26/6/76. His full names are MOLEME JACKSON RADINGOANA PIN 5217358. He was born in 1950 and he is today 26 years of age. He is unmarried. His highest scholastic standard is std V and left off while doing std VI in 1971. He is just at home and unemployed.”

- [19] Sentsho denies that Khudu was expelled or divorced but avers that she was chased away. The finding of the Kgatla Commission that Khudu appointed a seed raiser herself is incorrect, according to him. Khudu confirmed that Podile is not the father of Moleme. His father is unknown. He confirms that the custom is that the heir to the throne can only be born from a candle wife and further that in terms of custom a seed raiser must be nominated by the royal family. Thus Moleme could never be a chief.
- [20] It is to my mind clear that the identification of Khudu by the royal family (or bakgoma) as a candle wife is common cause. The dispute is whether Moleme or Moleke was nominated as 'the bull' or seed raiser. This dispute, it seems to me is at the heart of the uncertainty which has plagued the Baroka since the 1970's. The Premier appointed the Kgatla Commission to investigate to put the dispute at rest. The dispute has now reached this court because it has failed to fulfil its task to investigate the competing claims and the facts thoroughly when it had the opportunity to do so once and for all.
- [21] I now turn my attention to the work of the Kgatla Commission. The record filed does not contain all the evidence adduced at the hearing of the commission. However, the verbatim statement made by Khudu to a researcher of the commission has survived and is included in the record. The remainder of the evidence presented at the hearing is missing.
- [22] Khudu confirmed during the recorded interview for the commission that Molohe was still alive at the time of the interview and also that he was available to be interviewed.
- [23] The disputant, Moleme stated in a document with the title "Short history of the traditional Leadership of the Baroka-Ba-Radingwana that it was decided by the Royal family and the traditional community to marry a candle wife, namely Khudu. In terms of the tradition 'the bull' will sit with the candle wife at the wedding table at the kraal of the candle wife. The lobolo will not be paid unless there is agreement who the seed raiser is. When the bull is chosen the most senior male person or closest to the inner circle of the royal family in seniority.[18] Moleme was chosen. Khudu despite having being shown the seed raiser chose Molohe as the seed raiser. He was further removed in terms of family relations from the inner circle than Moleme. Khudu's misconduct was not condoned by the community and it was decided to send her back to her parental kraal. She was divorced and returned with her children. Molohe followed her. Moleme was appointed as acting chief.
- [24] It is best to commence with the findings and the recommendation of the Kgatla Commission made to the Premier and what his decision was:

"9. FINDING/S

9.1 The claim raised by the disputant is legitimate but does not qualify him to be an heir for the Roka Radingoana Traditional Community in terms of their customary law of succession.

9.2 He was the most senior in the Baroka-Ba-Radingoana royal family.

9.3 He was removed when Collenge[19] was appointed the chief of Baroka-Ba-Radingoana

9.4 Radingoana Sentsho Collenge is not the rightful heir because he was not sired by the seed raiser appointed by the royal family.

10. RECOMMENDATION/S

The Commission recommends that the Baroka-Ba-Radingoana should marry a candle wife. The royal family must appoint a seed raiser and the son born from the union would resuscitate the house of Mmotong of Baroka-Ba-Radingoana.”

[25] The Premier accepted the recommendation made by the Kgatla Commssion on 6 June 2017. The Premier notified Sentsho on 29 May 2019 as follows:

“1.

2.

3. I have considered the findings and recommendations of the committee in terms of the provisions of the Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003) as amended.

4. The claim/dispute for restoration and/or recognition of the Baroka Ba Radingoana Senior Traditional Leadership by Radingoana Moleme Jackson is granted.

5. In the view of the above, you are therefore informed that your senior traditional leadership is dissolved with immediate effect.”

[26] The Kgatla Commission was appointed in terms of section 25 of the Traditional Leadership and Governance Framework Act[20] to investigate and make recommendations on the particular leadership dispute. Section 25(3)(a) of the Framework Act stipulates also that:

“When considering a dispute or claim, the Commission must consider and apply customary law and the customs of the relevant traditional community as they applied when the events occurred that gave rise to the dispute or claim.”

[27] Customary law and customs of a traditional community which find application cannot be applied in isolation from the law of the land. Section 25(3)(a) cannot be given an interpretation that customs and customary laws are the only laws applicable to the community as if the community is severed from the rest of the Republic and thus not subject to the laws of the land. To refer to an outlandish example. If the community custom prescribed that if the child of the candle wife is born with a deformity it must be killed, must the Commission slavishly find that such a killing is excused? A community is an integrated part of the Republic and does not operate in a vacuum or a bubble which insulate the community. Its custom remains subject to the Constitution and the laws of the land.

- [28] Little is known of Moleme from the facts. The so-called letter from the magistrate Sekhukhuneland which purports to be a record of a meeting that was held between the bakgoma and the magistrate on 28 June 1976, is important evidence of the state of affairs at the time which cannot simply be ignored. Proper weight must be accorded to its contents.
- [29] Moleme whose identity number is [...][21] turned 18 years of age in 1969 when he married Khudu as seed raiser for the future senior traditional leader. He was still attending school in 1971 doing standard VI.[22] He dropped out of school in 1971 whilst doing standard VI.
- [30] Section 1 of the Age of Majority Act[23] provided that:
- (a) “All persons, whether male or female, attains the age of majority when they attain the age of twenty-one years.”
- [31] However, section 11(3) of the Black Administration Act[24] provided that:
- “The capacity of a Black to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Black, be determined as if he were a European: Provided that-*
- (b) If the existence or extent of any right held or alleged to be held by a Black or of any obligation resting or alleged to be resting upon a Black depends upon or is governed by any Black law (whether codified or uncoded) the capacity of the Black concerned in relation to any matter affecting that right or obligation shall be determined according to the said Black law.”
- [32] The marriage of a candle wife to a seed raiser is customary law issue. The question whether Moleme was a major when the marriage ceremony took place must, therefore, be determined in terms of the customary law applicable at the time and not in terms of Age of Majority Act.
- [33] Moleme was still school going and could not have established his own kraal. In 1976 he was ‘just at home and unemployed.’[25] ‘Home’ in this context refers, in my view, to his parental home. There can also not be any doubt that Khudu entered into this marriage on the insistence and with the encouragement of the Radingwana royal family, knowing full well what her role as candle wife will entail and who the seed raiser is.
- [34] The Kgatla Commission accepted that the Baroka customary law of succession is based on a system of male primogeniture where the eldest son born of the traditional leader and a candle wife, ascends the throne. If the candle wife fails to bear a male issue, a second candle wife is sought from the same family. The same rule applies if she died without giving birth to a male issue. A seed raiser is selected by the royal family in accordance with the principle of seniority.
- [35] The Commission makes the following observation in its report:

“The candle wife’s position is a very significant position in the royal family and community. An heir can marry a candle wife either after the death of his mother or after he is kgoshi and his mother is unable to perform her role as a candle wife. (Monnig: 256 The Pedi Monnig HO 1967 Van Schaik)”

- [36] According to Sentsho, the acting chief at that time was Pholo. Pholo is his father and was still alive. He asserts that his father Moleke was the seed raiser and that he is the rightful successor.
- [37] The customary institution relating to a candle wife is, in my view, a sui generis institution. The sole purpose of a candle wife is to bear the future senior traditional leader from a male identified by the royal family to be a seed raiser. The candle wife (who must be from a royal kraal) is chosen by the royal family with the consent of the community. The community contributes to the lobolo agreed upon between the royal family and the family of the candle wife. The parties entered freely into the relationship. A fiction is created as a result of this arrangement whereby children born of such relation are regarded for all purposes as the legitimate children of the deceased traditional leader. The eldest succeeds the deceased.
- [38] Section 31 of the Constitution provides:
- “(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community-*
- (a) to enjoy their culture, practice their religion and use their language, and
 - (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
- (2) The right in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”
- [39] A senior traditional leader is expected by the royal family and the community to have relations with a candle wife which was picked by hand for him to produce his successor, even against his will, if his wife is not of royal blood. It matters little that his wife might be against such an arrangement. A seed raiser is exactly what the name tells us. His purpose is to procreate a male child to become the next senior traditional leader.
- [40] In an open and democratic society based on human rights, as set out in the Bill of Rights, the future of the cultural practice of identifying a candle wife with the sole purpose of conceiving a child with a seed raiser, will no doubt, come under scrutiny as being inconsistent with the Constitution.[26] I am nonetheless convinced that a great number of communities have already made the required changes that the Constitution demands to accommodate woman as senior traditional leaders.[27]
- [41] The Kgatla Commission recommended that this practice be followed for the next senior traditional leader to succeed the deceased leader, without addressing the constitutional validity of the institution. The Premier followed suit. And so, also Sentsho and Moleme.

[42] The constitutionality of the custom was not raised in the papers nor in argument. Before I leave the topic, a word of caution is necessary; a court should not generalise when dealing with custom, when no evidence is placed before it what the particular customs and traditions of a community are. It is quite common that customs are differently practiced by different communities. Experience, in this court, has taught that litigants rarely, if ever, explain what the custom is appertaining to the dispute before the court, in the papers.

[43] The Commission erroneously treated the claimants as adversaries.[28] The Commission allowed Sentsho and Moleme to adduce evidence in respect of their competing claims. Sentsho was criticised by the Commission for not calling corroborating witnesses, presumably to “prove his case” whilst the Commission had the obligation to investigate these competing claims by calling Khudu, Molohe and members of the royal family, or to introduce expert evidence, if necessary, to determine the line of succession of traditional leadership. It was necessary particularly, where there is evidence to suggest that the nomination of a candle wife was not customary at the time and because the royal family ‘sort of condoned the situation’ that Khudu had a son the father of which was not the nominated seed raiser.

[44] For a practice to be recognised as law, such practice must be reasonable, certain and uniformly practiced for a long time.[29] Customary law is vibrant and evolving, and must be allowed to develop. The court is obliged to apply customary law as it was practiced at the relevant time. For that purpose evidence of what the practice was at relevant the time is of importance to determine what

the custom was.

[45] There was in addition, no clarity with regard the allegation that Khudu divorced Moleme by returning to her parental kraal nor whether she was actually chased away because her position as candle wife was unacceptable in terms of custom as a result of her not having had children with Moleme. In *Shilubana and Others v Nwamitwa*[30] the Constitutional Court stated:

‘... the practice of a particular community is relevant when determining the content of a customary-law norm. As this court held

in *Richtersveld*, the content of customary law must be determined with preference to both the history and the usage of the community concerned. “Living” customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. Where there is, however, a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.’ [31]

- [46] The criticism levelled at the perfunctory manner with which the commission was conducted itself is, in my view, well founded. An important witness, like Moloke, who is alive, was not called by the Commission. The Commission considered it prudent to obtain evidence from Khudu by sending its researcher to consult with her. The failure to utilise the opportunity to consult Moloke, at the same time, is simply unacceptable and is a glaring failure to obtain crucial evidence from the person who could have shed light on the custom, and whether Moloke was a seed raiser or not. Khudu and Moloke are presently both elderly persons, but that alone cannot be a bar to them being called to appear before the Commission to present evidence.
- [47] Counsel for the applicant in the heads of argument contended that the failure to present an order of court as proof that Khudu was divorced prove that she was only chased from the community of the Baroka and is also proof that the Commission was biased.
- [48] I disagree. The proposition advanced has not taken into account that the so-called customary union was entered into in 1969. A candle wife is traditionally not regarded as being married of the seed raiser. It is a symbolic marriage. Divorce in terms of customary law occurred when the wife is returned to her family. Return of the lobolo is clear sign of divorce. Dissolution of the customary union is also possible if the parties and the guardian of the wife consent although it is rare[32]. When a wife intends to divorce her husband she returns to her parental home. She reports her departure to the traditional leader. If the husband accepted her actions, they are considered to be divorced.[33] It is to be recalled that Khudu regarded Moleme as a child - which he indeed was at the time. She returned to her parental home after she was chased away from the Baroka. As such, it is clear indication that the community and the royal family did not condone that she has indicated that she will not have relations with the seed raiser to bear a child whom she considered a child. This arrangement was a failure from inception. It is accepted, too, that custom does not permit a candle wife to choose a seed raiser. Anyone cannot be a seed raiser. He is chosen by the royal family from the family of the deceased traditional leader on the basis of seniority (not age).
- [49] In terms of section 25(7) of the Framework Act, sections 2, 3, 4, 5, and 6 of the Commissions Act[34] apply, with necessary changes to the Commission. Section 3 provides:
- “(1) For the purpose of ascertaining any matter relating to the subject of its investigations, a commission shall in the Union have the powers which a Provincial Division of the Supreme Court of South Africa has within its province to summon witnesses, to cause an oath or affirmation to be administered to them, to examine them, and to call for the production of books, documents and objects.*
- (2) A summons for the attendance of a witness or for the production of any book, document or object before a commission shall be signed and issued by the secretary of the commission in a form prescribed by the chairman of the commission and shall be served in the same manner as a summons for the attendance of a witness at a criminal trial in a superior court at the place where the attendance or production is to take place.

- (3) If required to do so by the chairman of a commission a witness shall, before giving evidence, take an oath or make an affirmation which oath or affirmation shall be administered by the chairman of the commission or such official of the commission as the chairman may designate.
- (4) Any person who has been summoned to attend any sitting of a commission as a witness or who has given evidence before a commission shall be entitled to the same witness fees from public funds, as if he had been summoned to attend or had given evidence at a criminal trial in a superior court held at the place of such sitting, and in connection with the giving of any evidence or the production of any book or document before a commission, the law relating to privilege as applicable to a witness giving evidence or summoned to produce a book or document in such a court, shall apply.”

[50] Section 3(2) authorizes the secretary of a commission to issue a summons which must be in the form prescribed by the commission’s chairperson. In *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*[35] the constitutional court explained:

“What is apparent from the text of section 3(2) is that if the attendance of a witness is sought, a summons should be issued, directing the witness to appear before the commission on a specified date. Under the section the authority to issue the summons vests in the commission’s secretary who should sign the summons presented to him or her if it is in the prescribed form. No substantive

application on affidavit is required for that purpose. Nor is the witness to be summoned entitled to a hearing or an opportunity to make representations before the summons is issued.”[36]

[51] The Commission considered Khudu a necessary witness. The provisions of section 3(1) vest the Commission with powers equal to those enjoyed by a High Court with regard to summoning witnesses;

taking their evidence under oath or affirmation and demanding the production of documents and other objects which constitute evidentiary material. If Khudu was unable to testify before the Commission, as a result of ill health,[37] or for whatever other acceptable reason, her evidence should have been obtained on commission, before a commissioner.[38] However, it could not have done so without a commissioner having been appointed by the Commission for that purpose nor to have the witness Khudu testify before its own researcher and without her having taken the oath.[39] Section 3(1) of the Commissions Act affords the Commission the power to appoint a commissioner for purposes of obtaining the evidence of a witness who is unable to testify before the Commission. The researcher was not authorised by the Commission to act as commissioner to take down the evidence of Khudu under oath or affirmation, that much is clear from his opening remarks at the commencement of his question and answer session.

- [52] The record of the proceedings before the Commission is not at the disposal of this court. It is accepted, for the purposes of this judgment, that the Commission deliberated whether Khudu should be called as a witness prior to requesting the researcher to visit her at her home and to record her version of the events in connection with the identity of the seed raiser who was allocated to her and also whether she had chosen her own seed raiser.
- [53] The record shows that her evidence was not under oath or affirmation and also that her evidence was not recorded by a commissioner appointed by the Commission for that purpose. In my considered judgment the record of the evidence of Khudu should not have been admitted as evidence. I hold that her statement is inadmissible.
- [54] There is no doubt that the best evidence that could have been presented, was the evidence of Khudu, Molohe as well as those members of the Bakgoma who were still alive and able to testify. It is disappointing that the Commission failed to call those persons to testify at the hearing, save for admitting the recorded version of Khudu.
- [55] Sentsho, in my view, cannot be heard to say that he was not afforded an opportunity to be heard. He participated at the hearing and was invited to call witnesses, but elected not to do so. It is rather surprising that he has not elected to call both his parents, who, after all, were at the centre of the controversy since 1969.
- [56] But, be that as it may, reference was made elsewhere in the judgment of the meeting of the Bakgoma in 1976 with the magistrate when the Bakgoma placed on record that Khudu was identified as the candle wife and Moleme as the seed raiser, despite being much younger than her. These minutes by the magistrate is evidence that pointed to Moleme as the seed raiser. The Bakgoma made it very clear to the magistrate, in 1975, in a letter addressed to the magistrate prior to the meeting, and also at the meeting in 1976, that the seed raiser was Moleme. That evidence supports the claim of Moleme. There is, moreover, no dispute that Sentsho is the son of Moleke. This court is by no means convinced on the evidence presented that Sentsho is the rightful heir.
- [57] None of the members of the royal family testified at the hearing. The view of royal family who is responsible for the identification of their senior traditional leader was not placed before the Commission. The royal family is the guardian and custodian of the custom to select a successor which is deeply rooted in the custom of the community. Their role cannot be over emphasised. It is true that the application is supported by a number of members of the royal family. I am not convinced that they make up the whole of core members of the royal family. Two opposing factions emerged within the royal family as far back as 1976 and they clearly still hold opposing views. The royal family must speak from one mouth. The time has arrived that they do so. The decision whether a candle wife should be identified and nominated is a function of the royal family. The Commission has recommended that a candle wife be appointed without having had the benefit of the views of the royal family.

- [58] The royal family must perform its function to identify a successor in terms of the customs of the Ba-Baroka Radingwana traditional community. And to the extent necessary to identify an acting chief.
- [59] The recognition of the fourth respondent as acting traditional leader dated 11 March 2021 by a faction of the royal family was done on the basis that the recommendation by the Kgatla Commission is correct without taking into account that there is pending litigation to review and set aside its recommendation.
- [60] The royal family must identify without delay a successor to the vacant position of senior traditional leader in terms of section 12 of the Limpopo Traditional Leadership and Institutions Act, Act 6 of 2005, and also identify an acting senior traditional leader.
- [61] The first applicant is entitled to the costs. He was successful to review the recommendation and the decision of the premier. The first, second and third respondents are liable to pay costs, such costs to include the costs subsequent upon the employment of two counsel.

ORDER.

- (1) The recommendation of the Kgatla Commission (the third respondent) dated 12 April 2017 is reviewed and set aside.
- (2) The decision of the Premier (the first respondent) based on the recommendation of the Kgatla Commission dated 6 June 2017 is reviewed and set aside.
- (3) The identification of the fourth respondent as acting senior traditional leader is reviewed and set aside.
- (4) The first, second and third respondents are ordered to pay the costs jointly and severally, the one paying the other to be absolved, such costs to include the costs subsequent upon the employment of two counsel.

GC MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES

1. For the applicants

: Adv L Mfazi

: Adv P Hopane

2. For the respondents

: Adv C Madavha

3. Date judgment reserved : 11 August 2022

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4. Date judgment delivered : 4 October 2022
- [1] The first respondent.
- [2] Hereinafter called “the late Moleme”.
- [3] Hereinafter “the Baroka community”.
- [4] Hereinafter called “Sentsho”.
- [5] Hereinafter called “the Kgatla Commmission”.
- [6] Act 41 of 2003.
- [7] Hereinafter called “Khudo”.
- [8] The fathers of Podile and Pholo were brothers. Podile’s father was the eldest.
- [9] Hereinafter called Moloko
- [10] Sometimes also referred to as “the bull”.
- [11] Both sisters Mamogale and Mankopodi have passed away.
- [12] Premier Notice No 1: Provincial Gazette 1898 dated 8 February 2011.
- [13] Dikgapi Mmamushu Leutle. She was not of royal blood.
- [14] Act 6 of 2005. Hereinafter called “the Limpopo Act”.
- [15] The second applicant.
- [16] Act 3 of 2000. Hereinafter “PAJA”.
- [17] Only the relevant part of the document is quoted.
- [18] Not in years but in family relation to the deceased chief.
- [19] The first applicant Sentsho.
- [20] Act 41 of 2003. Hereinafter “the Framework Act”.
- [21] Traditional Leadership Dispute and Claim form dated 30 August 2012 of Moleme as well as his death certificate.
- [22] Grade 8 today.
- [23] Act 57 of 1972. Commencement date June 1972. The Act repealed article 123 of the Volksraad Resolution December 1853.
- [24] Act 38 of 1927.
- [25] Report of the Magistrate supra.
- [26] Section 9 and 10 of the Constitution.
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- [27] Section 9 of the Constitution.
- [28] Sigcau and Another v The President of the Republic of South Africa and Others (961/2020) [2022] ZASCA 121 (14 September 2022).
- [29] Van Breda v Jacobs 1921 AD 330,334.
- [30] 2009 (2) SA 66 (CC).
- [31] Par 46.
- [32] Bekker JC and Coertze JJJ Seymour's Customary Law 4th ed Juta (1982) 175.
- [33] Bennett TW Customary Law in South Africa Juta (2004) (Reprint 2014) 271.
- [34] Act 8 of 1947.
- [35] 2021 (5) SA 1 (CC).
- [36] Par 12.
- [37] Old age alone is no excuse. Trollip v Tromp and Van Zweek (1880) 1 NLR 32; Joseph v Parker 1917 EDL 281.
- [38] Rule 38(3) to (8) of the Uniform Rules of the High Court could have given guidance.
- [39] 'British Yeoman' v Hunt Leuchars & Hepburn 1912 NLR 418, 419-22.

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