

SOUTH AFRICA / JUDGMENT

Rikhotso v Premier Limpopo Province and Others (943/2017) [2022] ZALMPTHC 6 (9 May 2022) [2022] ZALMPTHC 6

COURT

Limpopo High Court, Thohoyandou

BEFORE

AML Phatudi

CASE / FILE NUMBER

943/2017

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HIGH COURT OF SOUTH AFRICA
LIMPOPO
LOCAL DIVISION, THOHOYANDOU
CASE
NO: 943/2017

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO
REVISED.
09/05/2022
MASENYANI THOMPSON
RIKHOTSO
APPLICANT
AND
PREMIER LIMPOPO
PROVINCE
FIRST RESPONDENT
MEC: CO-OPERATIVE
GOVERNANCE,
HUMAN SETTLEMENT AND
TRADITIONAL
AFFAIRS
(COGHSTA)
SECOND RESPONDENT

DISTRICT MANAGER: MOPANI DEPT
OF TRADITIONAL AFFAIRS
THIRD RESPONDENT
MAHUMANI TRADITIONAL
COUNCIL
FOURTH RESPONDENT
MAHUMANI ROYAL
FAMILY
FIFTH RESPONDENT

JUDGEMENT

AML PHATUDI J

Introduction

[1] Traditional leadership is best suited with the Royal Family. The bestowed power to identify, nominate and or appoint a person to fill a position of a senior traditional leader, headman or headwoman, has always been on the Royal family of the traditional community concerned and in accordance with the customary law.[1] History illustrates that Traditional Leadership has not always taken the same form or defined by the same source or form of law.[2] Prior to the advent of the South African constitutional democracy, the “Bantustans” created by the apartheid government

exacerbated different forms of Customary law governing different tribes within the borders of South Africa.[3]

[2] The Constitution of the Republic of South Africa Act, Act 108 of 1996 (Constitution) institutionalised governance of traditional leadership in traditional communities and the development of common law relating to the South African Customary law in general. Section 211 of the Constitution encapsulates the said governance as follows:

“1. The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.

2. A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.”
3. The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically

deals with customary law.

- [3] It is not only undesirable for a position of Traditional leadership to be vacant or remain vacant for a long period, but infelicitous to remove one from such a position without a reasonable cause.
- [4] Mr Masenyani Thompson Rikhotso claims to have always been a headman of the Nsavulani Community that settled at Mopani District, Limpopo. He further claims that the Premier wrongfully and illegally removed him from such a position. Such removal prompted him to seek legal advice. Acting in accordance with the advice, he instructed legal representatives to institute an application to review and set aside a decision taken to remove him as headman of Nsavulani. This is his review application.
- [5] Rikhotso articulates an order he seeks in the notice of motion as follows:
1. Reviewing and setting aside the administrative decision of the first respondent of removing the applicant... as headman of Nsavulani on 08 March 2013.
 2. Declaring the termination and/or suspension of the applicant's salary and allowance as Headman of Nsavulani ward to be unlawful and void ab initio.
 3. Re-instating the applicant from his position of headman of Nsavulani ward within 30 days of making this order.
 4. That the first and second respondents pay applicant's salary and allowance for the period 01st October 2011 to 31st October 2017 in the amount of R506 646.50 within 30 days of making of this order.
 5. Alternatively, reinstating the applicant's salary and allowance and to pay the arrears from 01st October 2011 to 31st October 2017 in the amount of R506 646.50 within 30 days of making of this order.
 6. First and second respondents pay the costs of this application on attorney and own client scale.
 7. Further and alternative relief.

Parties

- [6] Masenyani Thompson Rikhotso, a headman of Nsavulani ward, a community settled within Mopani District, Limpopo, is the applicant. The respondents are, as cited in the founding papers, first, the Premier of Limpopo, who is bestowed in terms of Limpopo Traditional Leadership and Institutions Act, Act 06 of 2005 (the Act) to recognise the appointment and removal of senior traditional leader, headwoman or headman. The Member of the Executive Council (MEC) for Co-Operative Governance, Human Settlements and Traditional Affairs (COGSTA) in Limpopo, the second respondent. The District Manager for the Department of the Traditional Affairs for the Mopani District Municipality is included as the third respondent. Mahumani Traditional Council and Mahumani Royal Family are the fourth and fifth respondents respectively.

- [7] I find it appropriate to mention that the applicant cites the fourth and fifth respondents as parties who may adversely be affected by the order sought. As a result, the applicant seeks no order as to costs from the said respondents. Fortunately or unfortunately, the fourth and fifth respondents are the parties who incessantly opposed the application. I, for ease of reference, will collectively refer to them as “the respondents”. I refer the first, second and third respondents, who are duly represented by State attorney, as “the Premier”.

Factual

background.

- [8] Nsavulani traditional settlement is a ward under the authority of Mahumani Traditional Council, the fourth respondent, led by Chief Mahumani as the Senior Traditional Leader. One can safely say that Chief Mahumani reign from Mahumani Royal Family, the fifth respondent.
- [9] Nsavulani was first led by Magezi Rikhotso. Kheto David Rikhotso, the father to the applicant, succeeded Magezi. Due to Kheto’s advanced age, Rikhotso Royal Family identified and appointed the applicant to take the leadership reign. Limpopo Premier recognised him as Nsavulani Headman effective 20 January 2003. The Premier removed him as headman on 28 March 2013. By then, the Premier had already terminated the applicant’s salary in October 2011.
- [10] The applicant’s removal from his position as headman, is premised on allegations that he
- (a) was not attending Headmen forum on Wednesdays; (b) neglected his duties; (c) wrote a letter to Nature Conservation impersonating himself as Hosi [Chief] Nsavulani utilising an illegal date stamp; (d) wrote a letter to the office of the Premier attempting to stop the process of 2011 circumcision school and (e) tried a case arising from Headman Magalaka’s jurisdiction without their required consent.
- [11] Based on the said allegations, the respondents held a meeting on 17 October 2011 and resolved to remove the applicant as headman of Nsavulani.
- [12] The applicant contends that the respondents’ resolution is illegal in that only Nsavulani Royal Family can resolve to remove him as Headman and not the fourth and/or fifth respondent.
- [13] Khavhareni Aarone Mahumani (Chief Mahumani) deposed to the answering affidavit on behalf of and relating to the respondents’ contentions. He concedes that the applicant was recognised as the headman and his salary terminated on dates specified in the founding papers. He denies that termination of the applicant’s salary is unlawful because he was “properly

disciplined” and found guilty on numerous offences. He refers to a letter penned in Tsonga by Mahumani Traditional Council dated 03 August 2011 inviting Headman Rikhotso MT; Headman Rikhotso’s father and immediate Royal Family[4] to a meeting specifically-

“2.1 To discuss [the applicant’s] failure to attend the meetings of the Royal Council held on Wednesday;

2.2 A meeting that was called by the honourable Chief, which was held for handing out of clothes, in which representatives from your section were not present to attend.

2.3 You wrote a letter to the Department of Environmental Affairs alluding to the arrest of the (white) permit holder.

2.4 You wrote a letter to the Premier’s office in which you expressed disagreement in relation to initiation [school].

2.5 You are invited to the meeting to come and give an account on the above.”[5]

[14] The Premier and the respondents deny illegality to the removal of the applicant as a headman. Chief Mahumani avers that the Fourth respondent customarily choses who the headmen of the wards that fall under its jurisdiction should be and not the ward headman’s Royal Family. He further avers that the Premier followed the provisions of s13 of Limpopo Act to the letter.

Litigation history

[15] I find it apposite to digress and bring to the fore the parties’ litigation history.

[16] It is evident from the umpteenth communique between the applicant and all respondents, albeit denial of receipt of some, that the parties engaged each other prior to the applicant resorting to launching this application to review and set aside the Premier’s decision to withdraw his certificate of recognition as Headman of Nsavulani. Their failure to resolve the matter amicably prompted the applicant to ultimately launch this application on 18 September 2017 together with the condonation application as envisaged in terms of s9 of Promotion of Administrative Justice Act, Act 03 of 2000 (PAJA). This

Local Division granted condonation as sought.

[17] On 16 January 2019, the Judge who granted condonation, considered merits. He upheld an in limine point of prescription and dismissed the applicant’s application with cost. The application for leave to appeal the said order suffered the same fate on 13 August 2019. The disgruntled applicant petitioned the Supreme Court of Appeal on 11 September 2019 with no mother of success. Costs followed the event in all instances. The applicant never gave up. He then approached the Constitutional Court. He succeeded on the 25 January 2021. The astute judgement of the Constitutional Court, through the pen of Majiedt J, set aside this Division’s order and remitted the matter back to this Court for consideration of the merits of the application[6].

- [18] The Judge who previously presided over the matter, found it appropriate not to preside and consider the merits as ordered by the Constitutional Court. He placed the matter on my table as he thought his objectiveness or his independence expected of a judge might be compromised. I agreed.
- [19] I directed the registrar of this division to arrange with the parties the date upon which the merits of the case may be heard. The parties agreed on placing the matter on the roll for 13 January 2022 notwithstanding the Courts being on recess period. On the said day, the file was unfortunately not ready for hearing. I stood the matter down for 27 January 2022 with specific directives to the parties. All parties agreed that only merits are before this court. I heard the application virtually.

Issues

- [20] This brings me to the issue to be determined. The crux of the issue is whether the Premier complied with the requirements set out in Limpopo Traditional Leadership and Institutions Act when removing the applicant as Headman of Nsavulani.

The Law

- [21] I deem it necessary to set out the statutory framework within which this court must determine the issues. I find it inevitable firstly to indicate that the national and provincial legislation regulates the filling of a position of a senior traditional leader, headman or headwoman. The relevant national legislation is the Traditional Leadership and Governance Framework Act (Framework Act), which was amended by the Traditional Leadership and Governance Framework Amendment Act (2009 Amendment Act). The Framework Act anticipates the promulgation of provincial legislation dealing with traditional leadership. Limpopo legislation is the Limpopo Traditional Leadership and Institutions Act (Limpopo Act). Section 2(1) of Limpopo Act makes the Limpopo Act subject to the Framework Act. Section 12 of Limpopo Act stipulates

“12 Recognition of senior traditional leader, headman or headwoman (1) Whenever a position of a senior traditional leader, headman or headwoman is to be filled— (a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to the customary law of the traditional community concerned— i. identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and ii. through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of the specific person. (b) the Premier must, subject to subsection (2)— i. by notice in the Gazette recognise the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, headman or headwoman, as the case may be; ii. issue a certificate of recognition to the person so recognised; and iii. inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional leader, headman or headwoman.

- (2) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the Premier— (a) may refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations; or (b) may refuse to issue a certificate of recognition; and (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.
- (3) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection
- (2) has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.”

[22] Section 13 of Limpopo Act regulates the procedure for the removal of a senior traditional leader, headman or headwoman. The section provides:

- (1) Relief of Royal duties shall be on the grounds of
 - (a) Conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;
 - (b) Physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for that senior traditional leader, headman or headwoman to function as such;
 - (c) Wrongful appointment or recognition;
 - (d) A transgression of a customary rule or principle that warrants removal; or
 - (e) Persistent negligence or indolence in the performance of the functions of his or her office.
- (2) Whenever any of the grounds referred to in subsection (1) (a), (b),
 - (d) and (e) come to the attention of the royal family and the royal family decides to remove a senior traditional leader, headman or headwoman, the royal family concerned must, within a reasonable time and through the relevant customary structure-
 - (a) Inform the Premier of the province concerned of the particulars of the senior traditional leader, headman or headwoman to be removed from office; and
 - (b) Furnish reasons for such removal.”

Evaluation of issues

- [23] It is common cause that the Premier recognised the applicant as the headman of Nsavulani. It is further common cause that the Premier terminated the applicant’s salary on 17 October 2011 on the bases of a resolution taken by fourth and fifth respondents.

- [24] The Premier contend that the removal of the applicant is not illegal because the applicant has been found guilty of certain misconduct stipulated in the memorandum drawn by the senior manager- Institutional Support and Anthropology Services in the Department of CoGHSTA.
- [25] The Premier contend that his action of removing the applicant in term of section 13(1) (2) (3) is a result of a recommendation following the applicant's misconduct. The applicant's misconduct is set out in the memorandum as follows:

“The Royal Family of Rikhotso and Mahumani Royal Administration held a meeting on the 11 October 2011 where they took a resolution to remove Rikhotso Masenyani Thompson as Headman due to the following allegation of which he was called three time to respond and explain, but failed to do so.

1. As a headman, he is required to attend the headman's forum and to attend court to try cases from all villages. It was identified that he had not attended the meetings consecutively since 01 December 2010 and he did not since 01 December 2010 and he did not even delegate or apologised.
2. He is neglecting his duties as headman.
3. He wrote a letter to nature conservation impersonating himself as Hosi Nsavulani utilizing an illegal date stamp.
4. He wrote a letter to office of the Premier attempting to stop the process of 2011 circumcision school.
5. Tried a case from Headman Magalaka's jurisdiction without consultation and official permission.

- [26] As indicated earlier, the applicant submits that “the resolution by the fourth and fifth respondents to remove [him] as headman of Nsavulani is illegal on two grounds: Firstly, it is the Nsavulani Royal Family that should resolve to remove [him] if [he] has committed an act of misconduct that justifies such a resolution. Secondly, before the Royal Family takes a decision to remove a headman, it must firstly, charge the headman and disciplinary proceedings be instituted by the Traditional Council. If found guilty, the Premier will, as a sanction, direct the Royal Family concerned to proceed against the headman in terms of section 13 of the Limpopo Act. It is only thereafter the Premier may remove the headman”.

- [27] The applicant's contention is that the Premier's action is illegal in that Nsavulani Royal Family did not take the resolution to remove him as headman. The resolution is that of the fourth respondent, a body that is not empowered to do so.

- [28] The fourth and fifth respondents rebuts the applicant's contention by stating in their answering affidavit “the first respondent customarily chooses who to be their headman, not the headman's family...”

- [29] It appears, in my view, that the secondary issue between the parties is who recommends for appointment and/or recommends for the removal of Headmen/women. It must be remembered that the Headman or Headwomen means a traditional leader who is under the authority of, or exercises authority within the area of jurisdiction of, senior traditional leader in accordance with customary law and is recognised as such in terms of Limpopo Act.
- [30] For a better understanding of the definition of a headman/headwoman, in consideration of what a royal family is, is important. A Royal Family means the core customary institution or structure constituting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of ruling family[7] See *Langa v Premier, Limpopo and Others* (CCT 174/20) [2021] ZACC 38; 2022 (3) BCLR 367 (CC) (5 November 2021); *Mphephu-Ramabulana and Another v Mphephu and Others* (CCT 121/20) [2021] ZACC 43; 2022 (1) BCLR 20 (CC) (12 November 2021)
- [31] The question to determine is whether the fourth and fifth respondents, of which the latter is the royal family of the senior traditional leader, have powers to recommend to the Premier for the removal of the applicant as the Headman of Nsavulani.
- [32] It is trite law that the Royal Family of the community concerned plays an important role in identifying senior traditional leader, headman or headwoman. Equally, it is the Royal Family concerned, which decides to remove a senior traditional leader, headman or headwoman and the Royal Family concerned must within a reasonable time, inform the Premier of the particulars of such a leader.
- [33] It is unfortunate to interpret either sections 12 or 13 of Limpopo Act to mean that the senior traditional leader's royal family is the one responsible for appointing and/or recommending removal of a Headman or Headwoman and not the Royal Family of the headman/woman concerned.
- [34] Section 13 of Limpopo Act spell out the procedure for the removal or relief of a senior traditional leader, headman or headwoman. Section 13(2) is of relevance in determining the issues before this court. For ease of reference, the section stipulates-
- ‘whenever any of the grounds referred to in subsection (1) (a) (b) (d) and (e) come to the attention of the royal family and the royal family decides to remove... the headman/headwoman, the royal family concerned must, within reasonable time, and, through the relevant customary structure, inform the Premier of the province concerned’.(Emphasis added)
- [35] It is evident that the fourth respondent's contention that it “customarily chooses who to be their (wards) headman”, is misconceived and misplaced relating to the appointment or identification of who the headman or headwoman. The appointment of the headman is by custom and the law bestowed on the Royal Family of the community concerned and not the tribal council or any other person. The Premier is only bestowed with the power to recognise whomsoever appointed by the Royal Family. Equally, it is only the Royal Family of

the headman or headwoman concerned that may recommend for the removal of the headman or headwoman. I am thus not inclined to accept the fourth respondent's contention that they have the power to remove the applicant as headman in terms of section 13 of Limpopo Act.

- [36] It is only the headman's or headwoman's Royal Family concerned that can decide to remove a headman/woman. In this matter, it is only Nsavulani Royal Family that can resolve and recommend to the Premier for the removal of the applicant as a headman.
- [37] There is always an exception to the rule. Section 13(5) spells out the exception. It provides-
"Whenever it comes to the attention of the Premier that the grounds referred to in subsection (1) (a) exist and the royal family has not decided to remove the senior traditional leader, headman or headwoman as the case may be. The Premier must forthwith terminate the salary of the traditional leader concerned with effect from the date when the said grounds came into existence, after the Premier has given the royal family thirty (30) days to respond to the allegations."
- [38] In this case, the applicant has not been convicted of the offence with a sentence of imprisonment for more than 12 months without an option of a fine.
- [39] The offence alleged to have been committed by the applicant are those enlisted by the applicant himself in his founding affidavit. The said offences are well spelt out in the memorandum penned by the senior manager referred to herein above. The offence fall within the ambit of section 13(1) (d) and/or (e).[8]
- [40] I demonstrated earlier that the royal family of the headman/woman, Nsavulani in casu, is the only person with the power to decide to remove the headman/woman and only such Royal Family concerned must inform the Premier of the Province concerned. To rub it in, both the National Act and Limpopo Act stipulates that 'the Royal Family concerned must take a decision to remove the headman and must inform the Premier'[9]. Unfortunately, Nsavulani Royal Family neither made any decision nor recommended to the Premier for the removal of the applicant.
- [41] The first respondent's action of removing the applicant as the headman of Nsavulani without the recommendation of Nsavulani Royal Family is non-compliant with the provision of section 13(2) of Limpopo Act. The Premier's action falls to be reviewed and set aside.
- [42] The first, second and third respondents concedes that they terminated the applicant's salary due to a resolution of the fourth and fifth respondents that recommended the removal of the applicant as the headman of Nsavulani.
- [43] Setting aside the first respondents decision to remove the applicant as the headman automatically reinstates his salary from the date of his removal. The issue of quantification is best left in the capable hands of the Department responsible with the salaries of public office bearers. The Remuneration of Public Office Bearers Act regulates and quantifies the remuneration and salaries of Public Office bearers like the applicant.

[44] It is trite law that costs follow the event. The applicant succeeds in reviewing the respondents' decisions to remove him as the headman of Nsavulani. He is entitled to costs including reserved costs and costs occasioned by the postponement of the hearing scheduled for 12 January 2022.

[45] I in the result, make the following order

Order

45.1 The administrative decision of the first respondent of removing Masenyani Thompson Rikhotso as headman of Nsavulani ward in the District of Mopani on 08 March 2013 is review and set aside.

45.2 The first respondent's termination of Masenyani Thompson Rikhotso's salary and allowances as headman of Nsavulani is reviewed and set aside.

45.3 Quantification of the applicant's salary and allowances is referred to the relevant Department for quantification thereof.

AML PHATUDI

JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPLICANT : Mr.V.R. Mathivha

INSTRUCTED BY : Mathivha attorneys

FOR THE 1st, 2nd and 3rd

RESPONDENTS

: Adv M.J. Mushasha

INSTRUCTED BY : State attorneys

Thohoyandou

FOR THE 4th and 5th

RESPONDENTS

: Adv R. Baloyi

INSTRUCTED BY : Mahumani Inc

JUDGEMENT

DATE : Judgement handed down electronically by circulation to the parties' legal representation by email and publication through SAFLII. The date deemed handed down is 09 May 2022.

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- [1] All South African Provinces defines this in their respective Traditional Leadership and Institutions Acts. See for instances –s 12 of Limpopo Traditional leadership and Institutions Act, Act 06 of 2005.
- [2] KZN customary code// Transkei, Venda
- [3] TBVC state had different laws to regulate
- [4] The letter forms part of the record submitted in terms of R53 by 1, 2 and 3 respondents.
- [5] Translation provided jointly by the parties' legal representatives.
- [6] *Rikhotso v Premier, Limpopo Province and Others* (CCT 79/20) [2021] ZACC 1; 2021 (4) BCLR 436 (CC) (25 January 2021)
- [7] Traditional Leadership and Governance Framework Act and Limpopo Traditional Leadership and Institutions Act
- [8] S 13(1) (d) and (e)
- [9] Section 12 of Traditional Leadership and governance Framework Act 41 of 2003 with section 13 Limpopo Traditional Leadership and Institutions Act 6 of 2005.
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