

SOUTH AFRICA / JUDGMENT

Tshibvumo Royal Family and Another v Rambuda and Others (801/2018) [2020] ZALMPTHC 9 (29 October 2020) [2020] ZALMPTHC 9

COURT

Limpopo High Court, Thohoyandou

BEFORE

Kganyago

CASE / FILE NUMBER

801/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

LIMPOPO

LOCAL DIVISION, THOHOYANDOU

CASE

NUMBER: 801/2018

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER

JUDGE: YES/NO

(3)

REVISED.

In

the matter between:

TSHIBVUMO
ROYAL FAMILY
1ST APPLICANT
MBULAHENI
LUCAS MAVHUNGU
2ND APPLICANT
And
CHIEF
AVHATENDI RATSHIBVUMO 2 RAMBUDA
1ST RESPONDENT
NDWAMBI
DONALD RAMBUDA
2ND RESPONDENT
RAMBUDA
TRADITIONAL COUNCIL
3RD RESPONDENT
RAMBUDA
ROYAL FAMILY
4TH RESPONDENT
PREMIER
OF LIMPOPO PROVINCE
5TH RESPONDENT
MEC
COGHSTA
6TH RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The parties in this application have a long history of litigating against each other. Thambelani Tshibvumo Singo (deceased) was the headwoman of Tshibvumo settlement. As the headwoman she fell under Rambuda Traditional Council (third respondent) whom its Senior Traditional Leader of the Rambuda tribe is Chief Avhatendi Ratshibvumo 2 (first respondent). The deceased has ruled Tshibvumo settlement from 1982 until her death on 24th December 2014. During her lifetime the deceased was married to Nyelisani Aliso Mavhungu. The second applicant is the son of both the deceased and Alison.
- [2] After the death of the deceased, the first applicant identified the second applicant as the successor to the deceased. Their resolution was communicated to the third respondent on 19th February
2016. The first respondent did not approve the decision of the first applicant and told the first applicant that a decision has already been taken to appoint second respondent as the successor to the deceased. It is the first respondent's contention that the children of the deceased were born from Mavhungu family in Thengwe and are not from a royal family, and therefore cannot be given the headmanship. The first respondent further told the first

applicant that they have already initiated the process of recognising the second respondent as the headman of Tshibvumo settlement.

- [3] That led to the first applicant instituting an urgent application against the respondents seeking an order that it be declared that the powers to identify the successor to the deceased rest with it; that the fifth respondent be interdicted from considering the application for recognition of the second respondent as headman of Tshibvumo settlement under Rambuda Traditional Council; that the fifth respondent be directed to return the application by the second respondent for his recognition as headman of Tshibvumo settlement; and that the third respondent be directed to forward the application by the first applicant for recognition of the second applicant as the person identified by the first applicant.
- [4] At the hearing of the urgent application, the parties reached an agreement which was made an order of court. The terms of the agreement which were made an order of court read as follows:

“4.1 That this matter is removed from the urgent roll.”

4.2 The application is referred to the Premier of Limpopo Province (fifth respondent) for consideration as representation on behalf of the applicant in application for recognition of second respondent (Ndwambi Donald Rambuda).

4.3 In the event the fifth respondent shall have recognised the second respondent prior to the issue of this order, the applicant is given leave to supplement its papers by way of proceeding with the review of the fifth respondent's recognition of the second respondent and such supplementation should be served and filed within 15 days of obtaining knowledge of the fifth respondent's recognition of the second respondent as headman of Tshibvumo settlement.

4.4 The applicant is directed to serve the copy of this order together with the notice of motion and founding affidavit to the fifth respondent through the sheriff.

4.5 The fifth respondent is required to notify the applicant's attorneys within ten (10) days of service of this order whether the second applicant's application had been considered and if so whether the fifth respondent had recognised the second respondent.

4.6 The costs of this application is reserved and either party is granted leave to enrol this matter after finalization of the fifth respondent's administrative action as provided for in section 12 of the Limpopo Traditional Leadership and Institution Act No 6 of 2005.”

- [5] On receipt of the court order, the fifth respondent confirmed to the applicants in writing that it had not yet recognised the second respondent as headman of Tshibvumo settlement and that it has stopped the process of recognising the second respondent as directed by the court order of 24th March 2016.
- [6] During May 2018 the applicants received a letter from the sixth respondent informing them that the fifth respondent had recognised the second respondent as the headman of Tshibvumo settlement with effect from 09th March 2018. The applicant felt that the

recognition of the second respondent by the fifth respondent was illegal and that it was in contempt of the court order of the 24th March 2016 and further that the fifth respondent has given them an undertaking that it had stopped the process of recognising the second respondent.

- [7] Aggrieved by the decision of the fifth respondent, the applicants brought a second urgent application seeking an order interdicting the recognition of the second respondent as headman of Tshibvumo settlement; that the fifth and sixth respondents stop payment of salaries and allowance that become due to the second respondent by virtue of his recognition; that the fifth and sixth respondents submit proof to the Registrar of salaries and allowance that were due to the second respondent as a consequent of his recognition been stopped; and that the orders shall operate as interim interdict pending the finalisation of the review of the decision of the fifth respondent to recognise the second respondent as headman of Tshibvumo settlement.
- [8] The first to fourth respondents opposed the applicant's urgent application. At the hearing of the application the parties reached an agreement wherein the respondents made an undertaking not to proceed with the installation ceremony of the second respondent as headman of Tshibvumo settlement pending the final determination of the review proceedings against the recognition of the second respondent by the fifth respondent with effect from 9th March 2018. The agreement was made an order of court by consent.
- [9] The applicant proceeded to institute the third application against the respondents wherein they are seeking to review and set aside the fifth respondent's decision to recognise the second respondent as headman of Tshibvumo settlement with effect from the 9th March 2018; a declaratory order that the second applicant be declared the legitimate headman of Tshibvumo settlement; that the fifth respondent issue a certificate recognising the second applicant as the headman and also notify the Provincial House of Traditional

Leaders; and that the second applicant be paid salaries and allowances due to him as a recognized headman of Tshibvumo settlement

with effect from date of recognition.

- [10] The applicants' grounds of review are that the first applicant is empowered to identify the person to fill the position of headman or headwoman left vacant by the demise of the deceased. It is the applicants' contention that the fifth respondent did not attempt to resolve the dispute between the applicants and first to fourth respondents, but despite that proceeded to recognise the second respondent as headman of Tshibvumo settlement.
- [11] The respondents submit that the first applicant does not exist and that the first applicant is named after the surname of the deceased. According to the respondents the applicants are not Tshibvumo, but they are the Mavhungu's. It is the respondents' contention that the name Tshibvumo Royal Family/Council is a sham to loot the Rambuda headmanship at Tshibvumo, and that it amounts to day-light theft. The respondents further submit that the

Royal Family of Tshibvumo settlement is the Rambuda family and not the applicant as alleged, and thus the applicants did not have the prerogative to identify who would fill the headmanship vacancy at Tshibvumo settlement. The fifth and sixth respondents did not file any opposing papers.

- [12] The fifth and sixth respondents on receipt of the applicant's review application filed with the Registrar the records which it has based its decision to recognise the second respondent as a replacement to the deceased. Part of the memo dated 18th January 2018 written by the sixth respondent to fifth respondent read as follows:

"1. PURPOSE

To request the Honourable Premier to replace Nthambeleni Singo and recognise Rambuda Ndwabi Donald as headman of Tshibvumo village under Rambuda Traditional Council Vhembe District.

2.

BACKGROUND

Tshibvumo is a village under Rambuda Traditional Council in Vhembe District. The first person to rule over Tshibvumo village was the late headman Rambuda Mboneni in 1946. She was given Tshibvumo area by her late elder brother Rashibvumo who was ruling Rambuda Traditional Community by then. Headwoman Mboneni ruled the area until she passed on in

1978. After her death, the Rambuda Royal Family identified Makhadzi vho-Nthambeleni Singo to be a headwoman of Tshibvumo area. She ruled until she passed on in 2014.

Since the Tshibvumo headmanship is from Rambuda Royal House, the royal family now took a decision to replace Makhadzi vho-Nthambeleni Singo with Rambuda Ndwambi Donald who is the first born son of the late Senior Traditional Leader Rambuda Azwihangwisi Prince. According to the royal family, they now took a decision of replacing headwoman Singo Nthambeleni with a male, reason being that, the males will bear future successors.

The late Chief Rambuda was married to two wives, Alice Tshikalange (first wife) and Ndikundisani Themeli. The first wife was blessed with three daughters and three sons namely, Ndwambi, Donald, Ofhani (passed on) and Avhatendi.

3 DISCUSSION

The Rambuda royal family held a meeting on the 19th December 2017 where they identified and appointed Rambuda Ndwambi Donald as Headman of Tshibvumo village. Rambuda Donald is the first born son of the late Chief Rambuda Azwihangwisi Prince. According to Rambuda royal family, the first born son from the first wife becomes heir to the throne. The identification of Rambuda Ndwabi Donald is in terms of the Notice of Withdrawal of the application dated and signed at Thohoyandou on the 24th day of August 2016 and also the affidavit made by a senior

citizen Ntakadzeni Nthengwe. Attached are the documents mentioned. Rambuda Ndwambi Donald is 39 years old and unemployed.”

[13] The affidavit by the senior citizen Ntakadzeni Nthengwe read as follows:

“I’m hereby to certify that I am the first born child of the late Mboneni Rambuda, who was the headwoman of Tshibvumo village. After her death me and my siblings did not contest the throne because we were not told by the Chief J.R Rambuda that the headmanship is not hereditary and we do not qualify since we are not of the Rambuda clan. As a result the late Singo Nthambeleni was appointed by the late Chief J.R Rambuda and the Rambuda Royal Family, she ruled for more than 20 years without our interference. The children of the late Singo Nthambeleni are in the same status as me, they don’t qualify to ascend the throne.”

[14] The notice of withdrawal of the application referred in the sixth respondent’s memo to the fifth respondent read as follows:

“KINDLY TAKE NOTICE that, the applicant hereby withdraw its application by agreement between the parties.

FURTHER TAKE NOTICE that, by agreement between the parties, each party is to pay its own legal costs.”

[15] The applicants on receipt of the records from the fifth and sixth respondents filed a supplementary affidavit and stated that traditional practise has been developed over the years within Rambuda Traditional Community that a female headwoman is succeeded by her own children, and that the second respondent is, in fact, the first in line to succeed the late Senior Traditional Leader, Azwihangwisi Prince Rambuda, and that it is a mystery why he was not identified to succeed his own father.

[16] The respondents in their answering affidavit to the applicants’ supplementary affidavit has stated that the deceased was installed as a headwoman of Tshibvumo area quite aware of the fact that her post as such was not hereditary so as to pass down to her children.

[17] In court counsel for the applicants argued that the recognition of the second respondent as headman of Tshibvumo settlement was done in contempt of the court order of 24th March 2016, and that the withdrawal of the application was only relation to costs. The applicants further submitted that prayer 1 to 5 of the order dated 24th March 2016 was final. The applicants further submitted that the fifth respondent has failed to comply with section 12 of Limpopo Traditional Leadership and Institution Act 6 of 2005 in recognizing the second respondent.

[18] Counsel for the respondents submitted that Tshibvumo settlement had at all times been an area reigned over by Rambuda Royal Family and mostly by headwoman from Rambuda Royal Family, so identified and nominated to act as such by the Rambuda Royal Family. He further submitted that for generations, the position of headwoman at Tshibvumo settlement was non-hereditary, meaning that the headwoman who reigned there were not succeeded by

their children. That after the demise of headman/headwoman, the vacant position would be referred to Rambuda Royal Family who will identify the next person to be installed.

[19] There are two issues which this court is called upon to determine. The first issue is whether it is the fourth respondent or the first applicant that has the power to identify the person to fill the position of a headman or headwoman of Tshibvumo settlement. The second issue is whether the decision of the fifth respondent to recognize of the second respondent as the headman of Tshibvumo settlement should be reviewed and set aside.

[20] In terms of section 1 of the Limpopo Traditional Leadership and Institution Act 6 of 2005 (LTLTA), a headman or headwoman means a traditional leader who is under the authority of, or exercise authority within the area of jurisdiction of a senior traditional leader in accordance with customary law. The LTLTA defines a Royal Family as the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, who have been identified in terms of custom, and includes, where applicable, other family members who are close relatives of the ruling family.

[21] The procedure for recognising a Senior Traditional Leader, headman or headwoman is regulated by section 12 of the LTLTA which read as follows:

“

(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 a 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 so 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] The main issue in the case at hand is who has the power to identify the successor to the headwoman (deceased) between the Royal Family of the Senior Traditional Leader and that of the deceased. In terms of section 1 of the LTLTA a headman or headwoman is under the authority of or exercises authority within the area of jurisdiction of a Senior Traditional Leader. In this case the applicants fell under the authority of the first respondent. The Royal Family of the first respondent which is the fourth respondent is the one which has identified the second respondent as the successor to the deceased. The first applicant which is the Royal Family of the deceased has identified the second applicant as the successor to the deceased. Two candidates have been identified as successor to the deceased.
- [23] The LTLTA is silent as to which Royal Family between that of the Senior Traditional Leader and that of the headman or headwoman has the authority and power to identify a successor to the headman or headwoman. The Royal Family plays a pivotal role in the identification of the Senior Traditional Leader or headman/headwoman. In the case of identifying of a Senior Traditional Leader, there are no complications since there is only one Royal Family that is involved. With regard to the headman or headwoman the question is which Royal Family has the power and authority to identify the successor of the headman or headwoman since the headman or headwoman is under the authority or exercise authority within the area of jurisdiction of a Senior Traditional Leader. Since the Senior Traditional Leader is having authority over the headman or headwoman, does that mean that the Senior Traditional Leader has the power and authority to unilaterally identify the successor and impose him or her to the Royal Family of the headman or headwoman.
- [24] The LTLTA recognizes the establishment of a Royal Family for a headman or headwoman. The LTLTA does not make a distinction between the Royal Family of a Senior Traditional Leader and that of a headman or headwoman. If it was the intention of the legislature of the LTLTA that the Royal Family of the headman or headwoman plays a lesser role, it would have

clearly stated that and also the limited role which it was supposed to perform. In my view, the Royal Family of the Senior Traditional Leader will be responsible for the identification of a successor to a Senior Traditional Leader, whilst that of the headman or headwoman will be responsible for the identification of the successor to the headman or headwoman.

[25] As the Senior Traditional Leader is exercising authority over the headman or headwoman, after identifying the successor, the Royal Family of the headman or headwoman will then inform the Senior Traditional Leader of their decision and resolution. The Senior Traditional Leader will in turn submit the name of the person identified to the Premier (fifth respondent) for recognition. However, should there be a dispute between the Senior Traditional Leader and the Royal Family of the headman or headwoman regarding the person identified, the LTLTA does not have a procedure to resolve that.

[26] The LTLTA was enacted as a result of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Act) which is a national legislation which provides for traditional leadership as an institution to local level on matters affecting local communities. Section 21 of the Act read as follows:

“(1)

(a) Whenever a dispute or a 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 customs before such dispute or claim may be referred to the Commission.

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

(2)

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

(b) If a provincial house of traditional leaders is unable to resolve a dispute or claim as provided for in paragraph

(a), the dispute or claim must be referred to the Premier of the Province concerned, who must resolve the dispute or claim after

having consulted -

(i) the parties to the dispute or claim; and

(ii) the provincial house of traditional leaders concerned.

(c) A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.

(3) Where a dispute or claim contemplated in subsection (1) has not been resolved as provided for in this subsection, the dispute or claim must be referred to the Commission.”

[26] In *Netshimbupfe and Another v Carthcart and Others*[1] Mothle AJA in the majority judgment at para 18 said:

“The legislative framework in my view is couched in terms which expects parties to a dispute which arise out of customary law, custom or processes, to first turn to the statutory processes provided for in legislation, before approaching courts. These statutory processes are the route to access the internal system of customary law and sources. This view finds support in the Framework Act and court precedents. Section 21 (1) of the Framework Act, dealing with dispute and claim resolution, provides that the parties to the dispute or claim must seek to resolve the dispute internally and in accordance with customs before such dispute or claim may be referred to the Commission’ (my emphasis). Section 21 (2) (a) of the same Act also refers to the house of traditional leaders being obligated to resolve the dispute or claim in accordance with its internal rules and procedures (my emphasis).”

[27] The two Royal Families have each identified the person to succeed the deceased. This has created a dispute as to who should succeed the deceased. As the two Royal Families were unable to resolve the dispute on their own, ordinarily, they should have referred the dispute to the provincial house of traditional leaders for resolution. They have failed to do that but instead approached the courts before exhausting the internal remedies. At the hearing of the first application, the parties agreed to refer the matter directly to the fifth respondent disregarding the provincial house of traditional leaders. That agreement was made an order of court and was at no stage set aside or abandoned. It therefore remains valid and enforceable.

[28] Paragraph 2 of the court order of the 24th March 2016 require the fifth respondent to regard the application served on him as a representation by the applicant in an application for recognition of the second respondent. The fifth respondent was required to consider those representations before making any

decision. On reading the applicants’ representations, it should have been clear to the fifth respondent that there is a dispute as to who should succeed the deceased, hence he gave an undertaking that the process of recognising the second respondent has been stopped. At that moment the fifth respondent was obliged to have acted in terms of section 12 (2) (a), or (b) and (c) of the LTLTA.

[29] The matter was left hanging in the hands of the fifth respondent for almost two years without having acted in terms of section 12 (2) (a), or (b) and (c). The fifth respondent recognised the second respondent on the basis of a memo from the sixth respondent. The memo by the sixth respondent, was based on a notice of withdrawal of the application by the applicants dated 24th August 2016.

- [30] The court order of the 24th March 2016 was a final order. As at the 24th March 2016 the live dispute that was the subject of adjudication was the issue of costs which could only be determined after the finalisation of the application before the fifth respondent. The fifth respondent has not yet finalized the application before him as at 24th August 2016. The final order of the 24th March 2016 could therefore not be withdrawn by either party. It can only be set aside by a court of superior authority, or the parties may agree to abandon it due to what they might have agreed upon, or in exceptional circumstances by rescission. The only dispute which the applicants were capable of withdrawing was the pending costs which have not yet been adjudicated. The applicants dispute that they have withdrawn the court order of the 24th March 2016, but that the withdrawal was only in relation to the pending costs. The question is if indeed the court order was withdrawn on 24th August 2016, why waited for almost two years before acting on that withdrawal. In my view, the fifth respondent was misled by the sixth respondent when informed that the court order of 24th March 2016 has been withdrawn by the applicants.
- [31] The applicants by making a representation to the fifth respondent to consider in the application for recognition of second respondent, was in my view, equivalent to declaring a dispute which required the fifth respondent to act in terms of section 12 (2) of the LTLTA. The fifth respondent has failed to act in terms of section 12 (2) of the LTLTA, but acted in terms of misinformation provided to him by the sixth respondent in recognising the second respondent. The fifth respondent has therefore failed follow a material procedure provided for in section 12 (2) of the LTLTA when realizing that there is evidence that the person identified as the successor to the deceased might have not been identified in accordance with customary law, customs or processes. Therefore, in terms of section 6 (2) (b) of Promotion of Administration Justice Act 3 of 2000 this court is empowered to review the administrative action by the fifth respondent. The decision of the fifth respondent to recognise the second respondent stand to be reviewed and set aside. Since the fifth respondent has not yet exhausted the remedies provided for in section 12 (2) of the LTLTA, it will be just and equitable to refer the matter back to him to exhaust the internal remedies provided for in the LTLTA.

[32] In the result I make the following order:

32.1 The decision of the fifth respondent to recognise the second respondent as the headman of Tshibvumo settlement with effect from 9th March 2018 is reviewed and set aside.

32.2 The matter is referred back to the fifth respondent to be dealt with in accordance with the remedies available to him in terms of the LTLTA.

32.3 The first to fourth respondents to pay the applicants' costs including the reserved costs of the 23rd April 2019.

MF. KGANYAGO J

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

APPEARANCE:

Counsel for the Applicants:

Mr VR Mathivha

Instructed by:

Mathivha Attorneys

Counsel for the Respondents:

Adv NL Malange

Instructed by:

NL Choene Attorneys

Date of hearing: 13th September 2020

Date of Judgment

29th October 2020

[1]

[2018] ZASCA; 2018 3 A11 SA 397 (SCA) (4 June 2018)

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