

SOUTH AFRICA / JUDGMENT

Yende and Another v Premier Mphumalanga Province and Others (80576/2014, A602/2017) [2019] ZAGPPHC 237 (26 June 2019)

[2019] ZAGPPHC 237**COURT**

North Gauteng High Court, Pretoria

BEFORE

Strijdom, Molopa-Sethosa, Potterill

CASE / FILE NUMBER

80576/2014, A602/2017

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Source record

IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

(1)

REPORTABLE: YES

/ NO

(2)

OF INTEREST TO OTHER
JUDGES:

YES/NO

(3)

REVISED.

CASE NO: 80576/2014

APPEAL NUMBER:

A602/2017

26/6/2019

In the appeal matter of: FELANI
YENDE
FIRST APPELLANT
AMAYENDE
ASOGENYANENI
SECOND APPELLANT
ROYAL FAMILY
And
THE
PREMIER”MPHUMALANGA PROVINCE
FIRST RESPONDENT
MEMBER OF THE
EXECUTIVE
SECOND RESPONDENT
COUNSEL FOR
CORPORATIVE GOVERNANCE
AND TRADITIONAL
AFFAIRS
THE CHAIRPERSON
COMMISSION
THIRD RESPONDENT
ON TRADITIONAL
LEADERSHIP DISPUTES AND
CLAIMS:MPHUMALANGA
PROVINCE
THEMBA MICHAEL
YENDE
FOURTH RESPONDENT
AMAYENDE
ASOGENYANENI
FIFTH RESPONDENT
TRADITIONAL COUNCIL

JUDGMENT

STRIJDOM AJ

Introduction

- [1] This appeal concerns the application of customary norms and criteria of the ama Yende aso Genyaneni traditional community so as to determine the rightful Nkosi (Senior Traditional Leader) of that community.
- [2] The litigation commenced as a review application in the Gauteng High Court Pretoria. Felani Yende (Felani) and Amayende Asogenyaneni Royal family (The Royal family) challenged the Third respondent, the chairperson commission on traditional leadership disputes and claims: Mpumalanga Province (the Commission) decision to recognise the fourth

respondent, Thembe Michael Yende (Themba) as the Inkosi (Senior Traditional Leader) of ama Yende aso Genyaneni traditional community.

That challenge, was unsuccessful hence the appeal to this court.

[3] The matter comes before this Court with leave of the Supreme Court of Appeal as an appeal against a decision of the High Court, Gauteng Division in terms of which the appellants' review application was dismissed.

[4] Themba and the Royal family opposed the appeal.

The

Facts

[5] Felani and Themba are half-brothers having been born of Leonard Yende the last living senior traditional leader of the community.[1]

[6] Felanis' mother, Maria Mnisi ("MaMnisi"), was the first married wife of Leonard, the deceased Chief. Her status as the great wife is established by the fact that she was the first married wife of the late Chief, Leonard Yende.[2]

[7] Themba is the eldest son of Leonard Yende, and MMA Hadebe who was not married to Leonard.

[8] Before his death in 1997, Leonard did not assume his rightful position as a senior traditional leader of the community. Instead he worked as a labourer on the farm.[3]

[9] During Leonards' era, the traditional affairs of the community were handled by Sidumo.

[10] A King or Chief or a Senior Traditional leader is such by birth or appointment\ nomination. [4]

[11] On or about 2007, Themba with the support of the Royal family lodged the claims for the recognition of the ama Yende aso Genyaneni as a traditional community and for his recognition as its senior traditional leader (Chief) of the community, with the second respondent.

[12] On or about 31 August 2010, Mr Mbulani Joseph Yende lodged his parallel and competing claim alleging to be the rightful heir to be a senior traditional leader of this community. Both these claims were referred to the commission for investigation and recommendation in terms of section 25(2) of the Traditional Leadership Governance and Framework Act, 2003. (Act No 41 of 2003) ("the Act") as amended.

[13] The commission investigated both claims together with the recognition of the community as a traditional community. At the completion of the investigations, two reports were compiled, one dealing with Thembas' claim and the other with Mr Mbulani Joseph Yendes' claim.

- [14] The Commission considered the reports, approved the recommendation and recognised the community as a traditional community that observes a system of customary law and Themba as senior traditional leader of the community.[5]
- [15] In compliance with the statutory requirements, public notices were issued on 2 November 2012.[6]
- [16] In 2012 Felani and the Royal family wrote letters objecting to the recognition of the fourth respondent.[7]
- [17] In 2014, Felani and the Royal family lodged an application for the review and setting aside of the decision (recognition).

The arguments

- [18] On behalf of the appellants it has been submitted that when Themba was recommended to be recognised, the correct and relevant customary law and customs were not considered and applied as required by Section 25(3) of the Act, (as amended) by the Traditional Leadership and Governance Framework Act 23 of 2009 (“the Amendment Act”).
- [19] It was further submitted that the proper consideration and application of the traditional community’s customs being the Zulu customs, the customary law, and traditions disavow any recognition and appointment of an extra-marital son as the successor to the late Chief, even if he were a first born son, over that of the first born of the Great House (being the house of the first married wife.)
- [20] The Traditional community owe allegiance to the Zulu nation and its’ King. As ama Zulu, the living customs of the ama Yende, which the Royal family and Felani are, and whose customary law is applicable and relevant to the current matter, recognises the principles of primogeniture within its respective criteria and qualifications. The eldest son succeeds in a single household setting.[8]
- [21] The above principles, in the Zulu custom, are qualified by the principle that in a multiple household, or polygamous relationship, where there is a great wife, that is the wife in the indlunkulu, and other wife’s and even so-called iqqadi women, the general heir is the “eldest son of the great wife, even if he is not the first maiden born son of the family head”. [9]
- [22] According to Seymour Customary Law, a Zulu household may have a number of sections, usually, the main or Great House (indlunkulu), the left and the right-hand Houses, which may further have affiliates.[10]

- [23] The Courts have recognised that customary law is by its nature a constantly evolving system. Where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. The parties should strive to place evidence of the present practice of that community before the court, and that the courts have a duty to examine the law in the context of the community and to acknowledge developments if they have occurred.[11]
- [24] It was submitted by counsel for the respondents that the contention that Felani has a right to be the heir because his mother was married to Leonard Yende is ill-founded. It presupposes that the customary law is stagnant, it does not evolve with the changing conditions and circumstances of the community and the Royal family cannot nominate a suitable person. It was further submitted that it is settled law that the community may develop their customary law in order for the customary law to be compatible with the dynamic circumstances of the community.

Constitutional context

- [25] The entire Chapter 12 of the Constitution is devoted to matters pertaining to traditional leadership and customary law. Section 211 proclaims that the institution of traditional leadership is recognised.
- [26] The Constitution also recognises traditional authorities that apply customary law and permits them to function subject to it. Every court is obligated to apply customary law when it is applicable, subject to the Constitution and Legislation that deals with customary law. In Alexkor [12] it was held;

“It is clear, therefore that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms with the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with it and becomes part of the amalgam of the South African Law.”

Relevant Legislation

- [27] Parliament passed the Traditional Leadership and Governance Framework Act (as amended). (Framework Act)[13] to regulate traditional leadership.
- [28] The commissions functions were set out in Section 25 of the Framework Act Owing to the centrality of this matter it is necessary to quote the entire section:

“Functions of Commission

- (1) The Commission operates nationally and has authority to decide on any traditional leadership dispute and claim contemplated in subsection

(2) and arising in any province.

(2)

(a) The Commission has authority to investigate, either on request or of its own accord—

(i) a case where there is doubt as to whether a kingship, senior traditional leadership or headmanship was established in accordance with customary law and customs;

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

(iii) claims by communities to be recognised as traditional communities;

(iv) the legitimacy of the establishment or disestablishment of 'tribes';

(v) disputes resulting from the determination of traditional authority boundaries and the merging or division of 'tribes';

(vi) where good grounds exist, any other matters relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927.

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

(c) The Commission may refuse to consider a dispute or claim on the ground that—

(i) the person who lodged the dispute or claim has not provided the Commission with relevant or sufficient information; or

(ii) the dispute is to be dealt with in terms of section 21(1)(a) in a case where section 21(1)(b) does not apply.

(3)

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

(b) The Commission must—

(i) in respect of a kingship, be guided by the criteria set out in section 9(1)(b) and such other customary norms and criteria relevant to the establishment of a kingship; and

(ii) in respect of a senior traditional leadership or headmanship, be guided by the customary norms and criteria relevant to the establishment of a senior traditional leadership or headmanship, as the case may be.

- (c) Where the Commission investigates disputes resulting from the determination of traditional authority boundaries and the merging or division of 'tribes', the Commission must, before taking a decision in terms of section 26, consult with the Municipal Demarcation Board established by section 2 of the Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998).
- (4) The Commission has authority to investigate all traditional leadership claims and disputes dating from 1 September 1927, subject to subsection 2(a)(vi).
- (5) The Commission must complete its mandate within a period of five years or within such longer period as the President may determine.
- (6) Sections 2, 3, 4, 5 and 6 of the Commission Act, 1947 (Act No. 8 of 1947), apply, with the necessary changes, to the Commission."

[29] Section 11 of the amended Act deals with the filling of vacancies of senior traditional leadership, It states thus:

"11 Recognition of Senior traditional leaders, headmen or headwoman

- (1) Whenever the position of 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 applicable customary law-
 - (i) Identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 12(1), (a),(b) and (d) apply to that person; and
 - (ii) Through the relevant customary structure, inform the Premier of the province concerned of the particulars of the person so identified to fill the position and of the reason for the identification of that person; and
 - (b) The Premier concerned must, subject to subsection (3), recognise the person so identified by the royal family in accordance with
- provincial legislation as senior traditional leader, headmen or headwoman, as the case may be.
- 2(a) The provincial legislation referred to in (1)(b) must at least provide for-
- (i) A notice in the Provincial Gazette recognising the person identified as senior traditional leader, headman or headwoman in terms of subsection(1);
 - (ii) A certificate or recognition to be issued to the identified person: and
 - (iii) The relevant provincial house of tradition leaders to be informed of the recognition of a senior traditional leader, headman or headwoman.
 - (c) Provincial legislation may also provide for-

- (i) the election or appointment of a headman or headwoman in terms of customary law and customs: and
- (ii) consultation by the Premier with the traditional council concerned where the position of a senior traditional leader, headman or headwoman is to be filled.
- (3) 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 relevant provincial house of traditional leaders for its recommendation; or
 - (b) May refuse to issue a certificate or recognition; and
 - (c) Must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.
- (4) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (3) 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.”

Record of proceedings

- [30] The record of the proceedings conducted by the Commission shows that at the time of the hearings into the claim by Themba, there was concern that the relevant Royal family of the ama Yende aso Genyaneni was not represented.
- [31] On page 2 of the recordings, the Speaker referred to as Speaker 2, who was the Chairman of the Committee, Mr BJ Tolo, asked “Is there any member from the house of Genyaneni present who can testify to that?”[14]
- [32] In response thereto, Mr Ezrom Vusi Yende (Speaker 3) responded and confirmed the version of Themba who is referred to in the recordings as Speaker1.
- [33] Mr Ezrom Yende is not a natural sibling of Felani. Mr Ezrom Yende originates from the ama Yende of Mahlaphahlapa who are not the same traditional community as the ama Yende aso Genyaneni. [15]
- [34] Mr Tolo further asked on the fourth paragraph of page 2 of the recordings whether there was “anyone else from the house of Genyaneni present who can testify to that?”
- [35] In response thereto another gentleman Mr Nskosana Yende who says he comes from o Genyaneni, stated that “...we gather together as a family to discuss who was to going to take over the chieftaincy and we come to a decision that his first born son Temba was fit to take over...”

- [36] As a further example of the dilemma of the representation of the Royal family on page 7 of the recording, the 3rd paragraph, the Speaker, a member of the commission, asks: “now as I deliberately ask again which number are you from Leonards children and how many are you all as Leonards children?”
- [37] In response thereto Themba stated that: “We are four children all together with two boys and two girls”
- [38] At paragraph 5 of the recording on page 7 the Speaker from the commission further enquires: “I hear you are saying there are two boys and two girls, is there any of your siblings in the house today I would like to ask few things?”
- [39] Themba answered: “Sadly he is not here but working though at some meetings he would like to accompany us...”

Analysis

of facts and relevant law

- [40] In section 1 of the National Act, the Royal family is defined 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.”

- [41] In section 11, as referred to above, it is the Royal family concerned that must identify the person who qualifies to succeed and it must do so applying the relevant customary laws.

- [42] Felani and his sisters are thus the relevant and proper components of the Royal family.

- [43] In the last paragraph on page 7 of the recording the chairperson, Mr Tolo remarked as follows:

“I am worried about one thing and that is that your siblings are not here to support you in your claim, what evidence do we have that they support you, we don’t want that situation where tomorrow they come and dispute your claim and this that your brother should be chief...”

- [44] Neither Felani nor the sisters were present at the hearing.

- [45] It was submitted by counsel for the 4th and 5th respondents’ that if Felani and the Royal family were aware that the fourth respondent was not the rightful heir, they should

have either lodged an objection to the Royal family or made representation to the third respondent.

[46] I am of the view that in the absence of Felani and his sister any election, or identification of Themba, was on its own a material irregularity. Felani was neither consulted nor formally given an opportunity, to either be present at the proceedings of the commission or to make any written submissions before the final decision was taken.

[47] Section 6(2) (b) of PAJA[16] provides as follows:

“6(1)...

(2)A court or tribunal has the power to judicially review an administrative action if-

(a) ...

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with.”

[48] The impugned decision contravened a fundamental requirement of section 11 of the National Act. The provision of the national Act is clearly a mandatory requirement.

[49] The court a quo erred in not finding that the impugned decision contravened a fundamental requirement of section 11 of the National Act.

[50] The Third respondent was required to apply its mind to the claim and ought to have utilized the opportunity to call for Felani and the Royal family to present their side of the story in line with the audi alteram parte rule.

[51] In my view it was procedurally unfair that Felani was neither, consulted nor given an opportunity to make any submissions before the final decision was taken accordingly section 6(2)(c) of PAJA was vitiated.

[52] The decision by the Commission was influenced by error of law, namely the relevant customary law of the Zulu nation having applied an incorrect succession criteria that recognised a male born of a minor house, Themba, instead of the eldest son born of the indlukulu which is the first appellant and this violates section 6 (1)(d) of the PAJA.

[53] The court a quo erred in not finding that the ama Zulu customs and traditions as practiced and lived currently, have not evidently being modified and changed to accommodate the situation of a son born within a multiple homestead and/or a polygamous setting, as is the case in this matter, to succeed before the heir of the Great house. The so-called principle of “moving-on”[17] has not festered and the real living customs of the ama Yende cannot be reasonably distinct from ama Zulu. There was no evidence

credible enough nor has the Commission suggested that the great house first principle has been nullified.

[54] The court a quo failed to recognise the fact that the Commissions’ own doubts regarding the absence of the first appellant and his sisters, who are the core of the Royal family, was a real concern.

[55] The court a quo erred in not finding that the nomination must have failed and ought not to be deemed compliant for lack of sanctioning by the Royal family, which is clearly the core customary structure made up of the immediate relatives of the ruling family.

Conclusion

[56] I am of the view that the application for review ought to have been granted as contemplated in the PAJA.

Order

[57] In the result the following order is made:

- (a) The appeal is upheld.
- (b) The judgment and order of the Court a quo under case number 80576/2014 handed down on 10 March 2017 is set aside.
- (c) The decision of the first respondent dated 23 October 2012 recognising the fourth respondent as senior traditional leader or Inkosi of the Yende aso Genyaneni, is unlawful, reviewed and is set aside.
- (d) The second appellant is directed to constitute and hold a meeting of the Royal family of ama Yende aso Genyaneni, within 15 days hereof and must act in accordance with the provisions of section 11 of the National Act, and
- (e) The first, second, third and fifth respondent are directed to pay the costs of this appeal, including the costs of counsel. The said costs, to include the costs of the application and of the appeal.

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

I agree,

L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

S POTTERILL

I agree, and it is so ordered.

MATTER HEARD:

5 JUNE 2019

Judgment

delivered:

26 JUNE 2019

COUNSEL FOR 1ST AND 2ND APPELLANT: Adv MATHAPUNA

Instructed by:

NDOBELA LAMOLA INC

ATTORNEYS

COUNSEL FOR 4TH AND 5TH RESPONDENT: Adv MS PHASWANE

Instructed by:

MSSRS MKETSU AND

ASSOCIATES INC ATT

[1] Volume 1 page 47 (Record)

[2] Volume 1, page 34 (record)

[3] Volume 1, page 39. (Record)

[4] Olume 1 page 21 (record)

[5] Volume 3 page 297 (Record).

[6] Volume 3 page 298-300 (Record).

[7] Volume 1 page 39 (Record)

[8] See Olivier Indigenous law 1995 at p 148.

[9] See Bekker Seymours Customary Law in Southern Africa 273 and Umndeni of Ama Ndlungwa v The MEC for Housing and Traditional Affairs in KZN 2010 JDR 1408 (SCA).

[10] See Mhlongo v Mhlongo 1919 AD 470 at 471

[11] Tinyiko L Shilubana and Others v Sidwell Nivamitwa and Others [2008] ZACCT 03/07 (4 June 2008)

[12] Alexkor Ltd and Another v Richterveld Community and Others [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003(12) BCLR 1301(CC). See also Bapedi Marota Mamone v Commision on Traditional Leadership Disputes and Claims and Other (CCT) 67/14 [2014] ZACC36 ; 2015(3) BCLR 268 (CC).

[13] Act 23 of 2009.

[14] Record Vol 3 p 265

[15] See Affidavit of FY Joston Record Volume 1 page 54

[16] Act 3 of 2000

[17] As stated by the Court a quo in the judgment page 301-329.

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