THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 563/2017

In the matter between:

NETSHIMBUPFE FUNDZANI ERNEST	**FIRST APPELLANT**
MEMBERS OF NETSHIMBUPFE ROYAL FAMILY	**SECOND APPELLANT**
And	
MULAUDZI VHANGANI CARTHCART	**FIRST RESPONDENT**
CHAIRPERSON OF THE HOUSE OF TRADITIONAL LEADERS	**SECOND RESPONDENT**
MEC COGHSTA, LIMPOPO PROVINCE	**THIRD RESPONDENT**
THE PREMIER, LIMPOPO PROVINCE	**FOURTH RESPONDENT**
NETSHIMBUPFE MULATEDZI	**FIFTH RESPONDENT**

Neutral Citation*:* *Netshimbupfe and another v Mulaudzi and others* (563/17) [2018] ZASCA 98 (4 June 2018)

Coram: Seriti, Dambuza, Mathopo and Van der Merwe JJA and Mothle AJA

Heard: 21 May 2018

Delivered: 4 June 2018

Summary: Customary law – s 12(2) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 – review of the identification of traditional leader – dispute over traditional leadership succession – premier seized with request for recognition – whether appeal is not premature – dispute should be referred to premier – appeal dismissed with costs.

ORDER

On appeal from: The Gauteng Division of the High Court functioning as the Limpopo Division of the High Court, Polokwane (Muller, Phatudi and Kganyago JJ sitting as a full court of appeal):

The appeal is dismissed with costs.

JUDGMENT

Mothle AJA (Seriti and Mathopo JJA concurring):

[1] Disputes over traditional leadership are legendary and pre-date the Constitution of the Republic of South Africa, 1996 (the Constitution). This appeal, with leave of this Court, was against the decision of the full court of the Gauteng Division of the High Court functioning as the Limpopo Division of the High Court, Polokwane (the full court). It concerned a dispute between two cousins over succession to the position of the senior traditional leadership of the Tshimbupfe Traditional Community, in Limpopo.

[2] The nub of the dispute was that first appellant was identified for the position of senior traditional leader at a royal family meeting while the fifth respondent was identified for the same position at a meeting of the royal council. Prior to the institution of these proceedings, the first appellant and the fifth respondent had separately approached the Premier to be recognised as senior traditional leader. At the time of the hearing of this appeal, the Premier was therefore still seized with the separate applications seeking recognition for the position of senior traditional leadership.

[3] The issue before this Court was thus whether the review application was premature and should have been left to the Premier to deal with it in

terms of s 12(2) of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 (the Limpopo Act).

[4] The factual matrix from which the dispute arose was common cause. For some time prior to 1990, the traditional community of Tshimbupfe was under the leadership of senior traditional leader, Tshivhase. The first appellant and the fifth respondent, Tshivhase's grandchildren, are the sons of Tshisevhe and Munyadziwa respectively, two of Tshivhase's sons. Consequent to Tshivhase's death, Tshisevhe was appointed to succeed him. The erstwhile government of the Republic of Venda appointed a commission[1] which, after an investigation, recommended the removal of Tshisevhe and the appointment of Munyadziwa as senior traditional leader. Tshisevhe and his other half-brother, Tshifiwa Milton Netshimbupfe, separately launched urgent applications within successive days, in the then Supreme Court of Venda, unsuccessfully seeking to interdict the coronation of Munyadziwa. Neither of the two unsuccessful applications was appealed to this Court. On 21 December 1991 Munyadziwa was recognised and remained on the throne as senior traditional leader until his death in June 2013. The two cousins were each separately identified for recognition as senior traditional leader for the Tshimbupfe Traditional Community. This dual identification resulted in a dispute which became the subject of the review application and eventually this appeal.

[5] The first appellant's first review application was launched In July 2014, when he unsuccessfully approached the High Court in an attempt to overturn, after 23 years, the deposing of his father, Tshisevhe. The notice of motion in that application had as an alternative relief, a prayer that the decision of the royal council to identify the fifth respondent as successor to Munyadziwa, was *ultra vires* and stood to be reviewed and set aside. Mindful of the difficulties inherent in attempting to overturn the decisions of the then Supreme Court of Venda that sealed his father's fate, the first appellant abandoned the idea of contesting the deposing of his father. Instead, he once again in September

[1] The Mushasha Commission, chaired by Adv. Mushasha.

2014, approached the High Court, this time supported by the royal family as second applicant, seeking an order only in terms of the alternative relief. Although the applicants retained the same founding affidavit in the July 14 application, which still dealt with the deposing of Tshisevhe, in September 2014 they focused on the events after the death of Munyadziwa in June 2013. The application was thus based on the identification of Munyadziwa's successor.

[6] The High Court dismissed the application on the basis that the identification of the first appellant was not in accordance with custom. It found and concluded that the first appellant was not the eldest son of the deceased senior traditional leader and could therefore not succeed in terms of custom. On appeal, the full court dismissed the application, having found that the identification of the fifth respondent by the royal family in the absence of the Khadzi and Ndumi was not in accordance with customary law. The full court did not declare that the royal council's identification was unlawful and invalid. That was in fact the relief sought by the appellants. The full court instead held the view that the dispute should be referred to the Premier to be dealt with in terms of s 12(2) of the Limpopo Act. The appellants sought and obtained leave to appeal to the Supreme Court of Appeal. It is against this background that this matter came before this Court.

[7] Chapter 12 the Constitution recognises the institution, status and role of traditional leadership according to customary law. Section 211(3) of the Constitution provides:

'(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.'

[8] Section 212 of the Constitution provides for enactment of national legislation to provide for a role for traditional leadership as an institution at local level on matters affecting local communities. In 2003, Parliament passed national legislation; the Traditional Leadership and Governance Framework Act 41 of 2003 which was amended by Act 23 of 2009 *('*the Framework Act*').* This Act was followed by the Limpopo Act. Section 12 of the Limpopo Act,

which mirrors s 11 of the Framework Act, provides for the recognition of senior traditional leader, headman or headwoman. In terms of s 12(1) of the Limpopo Act, there are two stages involved in the process of assuming traditional leadership. The first stage is the identification stage where the royal family must, whenever a position is to be filled, identify a person for that leadership role in terms of customary law and custom. The second stage is the recognition stage where the royal family submits the particulars of the identified person to the Premier of that province. Subject to s 12(2), the Premier would effect recognition by publishing the name of that person by notice in a Gazette, issue a recognition certificate and formally notify the provincial and local houses of traditional leaders of that recognition.

[9] Section 12(2) does not necessarily deal with a resolution of a dispute. It deals with situations where there is evidence or allegations that the identification process in s 12(1)(*a*) was not done in accordance with customary laws, custom or processes. It is apposite to refer to the full text:

'(2) Where there is evidence of an allegation that the identification of a person referred to in subsection (1) (as senior traditional leader, headman or headwoman) was not done in accordance with customary law, custom 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.'

[10] The dispute in this case arose as a result of two institutions of traditional customary law, the royal family and the royal council, each identifying a person for recognition. Ordinarily this dispute would be resolved in terms of s 21 of the Framework Act[2]. The Limpopo Act does not have a provision for resolution of disputes of this kind. However, the dispute in this case emanates from the identification process envisaged in s 11 of the Framework Act and s 12 of the Limpopo Act.

[2] Section 21 of the Framework Act deals with resolution of disputes or claims between institutions of traditional leadership where customary law is involved.

[11] This dispute raised a number of questions on the facts which, in the nature of the respondent's contentions, the answers thereto required the application of customary law. First, it was not common cause in the affidavits as to who constituted the royal family and the royal council and who was entitled to attend the meeting when a senior traditional leader is identified. Section 1 of the Limpopo Act defines the 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.' This definition includes a broad constituency that make up the royal family, but did not assist this case in terms of which particular persons should be included and who among them would be entitled to be present when a traditional leader is identified. The provisions of the legislative framework do not make reference to a *royal council*. Section 1 of both the Framework Act and the Limpopo Act recognises and defines *traditional council* and makes no reference to royal council. It is not clear whether royal council as cited in these proceedings would be another name for traditional council or if it refers to another structure that is different.

[12] At the hearing of the appeal in this Court, counsel for appellants raised mainly three points for argument. The first was that the full court erred in not making a declaration of unlawfulness and invalidity and also not providing just and equitable remedy as part of its order. Secondly, that by approaching court, the appellants were giving expression to their Constitutional right of access to court which cannot be denied by being referred to the Premier. They further submitted that appellants exercised a choice in approaching the court and not the Premier. Thirdly, that the application is based on Constitutional legality and not on the Promotion of Administrative Justice Act 3 of 2000 (the PAJA). Section 7(2) of the PAJA provides for the need to exhaust internal remedies before approaching a court, an approach which the appellants argued did not apply to this case. I now turn to deal with each of these three arguments.

[13] With regard to the first argument, we were urged to make a finding of invalidity and grant just and equitable relieve because the full court declined to do so. It is correct that once a court makes a finding of invalidity, it must provide just and equitable relief. After finding that the identification process of the fifth respondent was not in accordance with customary law, due to the absence of Ndumi and Khadzi, the full court seemingly stopped short of making a declaration of invalidity in the court order. In *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (1) SA 604 (CC) para 56, the Constitutional Court held: 'once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under s 172(1)(B).' It seems that the appellants' contention that the review in this case was not brought in terms of the PAJA, is contradicted by their reliance on the review ground of exercising power *ultra vires.* This ground of review is not the same as that of Constitutional legality, as *ultra vires* as a ground of review for administrative action is provided for in s 6 of the PAJA. However one must assume therefore that *Allpay* would be applicable in this case.

[14] In its judgment, the full court did not provide reasons for not making a declaration of invalidity and for excluding a just and equitable relief from the order. When the full court inquired from both counsel to explain the consequences of both Khadzi and Ndumi's failure to attend the meeting of the royal council, it was aware of the importance of the role that these two persons play in the selection of a traditional leader in terms of Venda customary law. The respondents had contended that Khadzi and Ndumi had refused to attend the meeting of the royal council, but attended that of the royal family.

[15] Section 12(1)(a) of the Limpopo Act provides that it is the royal family that identifies a person for recognition as traditional leader. If the full court intended to deal with the merits, which for reasons appearing below the full

court should not have, then the full court erred in failing to state any legal basis or rule of customary law which would support the contention that the presence of Khadzi and Ndumi at the royal council meeting would clothe that structure with powers to identify a person for recognition. That too would be problematic even if the royal council and the royal family consisted of the same members. However the essence of the respondents' contention was to put the composition of both royal structures at the centre of the dispute. The question was which persons should have populated each structure and who of these were entitled to be present when a traditional leader was identified? The response required a factual inquiry, whose answer should have been sought from customary law. The full court did not deal with these contentions and in particular this question.

[16] Section 211(3) of the Constitution obligates the courts to apply customary law, when it is applicable. The full court thus erred in not applying customary law as it was applicable. It should have referred the matter forthwith to the Premier, without making any finding. The Premier has statutory access to the sources of customary law. It was wrong for the full court to make a finding which was not supported by evidence from customary law. There was thus no basis to grant a declaration of invalidity and consequently a just and equitable relief.

[17] The second and third arguments overlap and will be dealt with together. There is no provision in the Framework Act and the Limpopo Act which denies parties access to court. Section 12(2) of the Limpopo Act, obligates and empowers the Premier to ensure that the parties comply with customary law in identifying a person for recognition as traditional leader. The procedure that the Premier must follow is spelled out in s 12(2)(a) to (c). In terms of this provision the Premier is empowered to consult institutions of customary law. These in the main, would be, in his discretion, the provincial and local houses of traditional leaders that she or he can turn to only for their recommendations. Where he or she refuses to grant recognition, the Premier is obligated to refer the matter back to the royal family for reconsideration.

These customary institutions would ordinarily be the source of reference for customary law and custom.

[18] 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 in legislation, before approaching the courts. These statutory processes are the route to access the internal system of customary law and its 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).

[19] In *Emmanuel Segwagwa Mamogale v Premier, Northwest Province and others, an unreported decision of the High Court, Bophuthatswana Provincial Division under case number 227/2006,* Mogoeng JP, as he then was, after examining the meaning of 'internal remedy' with reference to s 21(1)(a) of the Framework Act, concluded that the word 'internal' is in relation to 'within the royal family'. At para 19 he wrote: 'On the contrary, a Premier, who has already pronounced himself on a matter, cannot be summoned to a meeting of the Royal Family or of the tribe for the purpose of attempting to find any internal solution envisaged by s 21(1)(a). Accordingly, once the Premier takes a decision, the dispute loses every semblance of being internal. It follows that s 7(2) of PAJA does not apply to this case.'

[20] The Constitutional Court in *Tshivhulana Royal Faimly v Netshivhulana* [2016] ZACC 47; 2017 (6) BCLR 800 (CC) also dealt with the provisions of s 21 of the Framework Act and accepted that the Act envisages exhausting of remedies, internal to customary law. The Constitutional Court in para 32 held:

'[32] The dispute may be referred from one level to the next only if it is unresolved. When a definitive decision is taken at any level, the aggrieved party does not have

any further internal recourse. This is so because none of the levels is a review or appeal level. A decision at any level gives the aggrieved party the right to exit the internal structure and approach a court for appropriate relief.'

[21] The notion that customary institutions must take precedence in the resolution of disputes concerning customary law, does not mean that the jurisdiction of the courts is ousted or a party to such a dispute is denied access to court to seek appropriate relief. On the contrary, the Constitution recognises that parties may approach the courts and as such, it obligates the courts, in such instance, to apply customary law.[3] In this instance, until the Premier has made a decision in terms of s 12(2) of Limpopo Act, it would be premature for parties to approach court for a resolution of the dispute before exhausting the statutory prescribed dispute resolution mechanism, internal to customary law, custom and processes.

[22] The courts of law are in the first instance obligated to enforce compliance with the statutory provisions. Where the Premier neglects or fails to act in terms of s 12(2) of the Limpopo Act, it will be open to any party whose rights or interests are adversely affected by such neglect or failure, to approach court for relief either in a form of *mandamus* application or a review on the ground of failure to take a decision or any other appropriate relief. That is the exit point of the internal remedy the Constitutional Court alluded to in *Tshivhulana.* In such instance, the court will intervene. Where however the statute as in this case, specifically empowers the Premier to execute specified functions in implementing s 12(2) of the Limpopo Act, the courts should be slow in conducting parallel processes of inquiry with the Premier before he or she takes a decision. The Premier, though acting as an organ of state in performing executive functions, is obligated to ensure compliance with customary law, a system of law that has its own internal rules, procedures and processes.

[3] Section 211(3) of the Constitution.

[23] What distinguished this case from the others that served in this and other courts was that this case was launched after the Premier had been approached for recognition of the person identified in terms of s 12(1) but has not yet made a definitive decision. The Premier has not had an opportunity to use his or her discretion in consulting the provincial and local houses of traditional leaders or cause this dispute to be referred to the royal family as envisaged in s 12(2)(a) or (b) and (c) of the Limpopo Act. This review application effectively invited the High Court, the full court and this Court on appeal, to encroach, in breach of the doctrine of separation of powers, onto the terrain of the exercise of the Premier's statutory executive authority and functions. It is impermissible for courts to intrude in the domain of other branches of government. Moseneke DCJ in *International Trade Administration Commission v SCAW SA* 2012 (4) SA 618 (CC) para 95 wrote:

'[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their own preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.'

[24] When the first applicant and the fifth respondent approached the Premier for recognition, that fact alone raised evidence of non-compliance with the customary law and custom by one or both of them in the process of identification. The provisions of s 12(2) of the Limpopo Act were thus activated. The matter was clearly within the purview of the Premier's powers and functions. For reasons stated in this judgment, it is my view that both the High Court and the full court erred in prematurely making findings on the merits. These findings and comments usurped the exercise of executive functions intended for the Premier, in terms of s 12(2) of the Limpopo Act. The appellants should have waited until the Premier had decided, before approaching court.

[25] The appeal should thus be dismissed and the dispute be referred to the Premier of the Limpopo province, who should not consider himself or herself bound by the findings or comments by the High Court and full court on the merits of this case, thus far.

[26] In the result the appeal is dismissed with costs.

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SP Mothle
Acting Judge of Appeal

Dambuza and Van der Merwe JJA

[27] We have had the benefit of reading the judgment of Mothle AJA. We agree with his conclusion that the appeal must fail. However, we reach that conclusion along a somewhat different route, hence this judgment.

[28] The relevant provisions of s 11 of the Traditional Leadership and Governance Framework Act 41 of 2003 are identical to those of the Limpopo Traditional Leadership and Institutions Act 6 of 2005 (the Limpopo Act) and for convenience we refer to the latter. Section 12(1) of the Limpopo Act provides, in essence, that the identification of a senior traditional leader must be made (i) by the royal family concerned and (ii) in terms of the applicable customary law. The appellants contended that the identification of the fifth respondent had not been made by the royal family and had not been made in terms of customary law because it had taken place in the absence of the khadzi (a sister of the late Khosi Munyadziwa) and the ndumi (the younger brother of the late Khosi).

[29] The royal family is defined in the Limpopo Act as ‘the core customary institution or structure consisting of immediate relatives of the ruling family within a traditional community, which have been identified in terms of custom,

and includes, where applicable, other family members who are close relatives of the ruling family'. The fifth respondent was identified as the senior traditional leader by a structure that is referred to by the respondents as the 'royal council'. It appears from the evidence of the respondents that the royal council was put in place by Khosi Munyadziwa on 3 February 2013. It consisted of himself as chairman, a deputy chairman, a secretary, a deputy secretary, a treasurer and eight additional members. The full court did not decide whether the royal council is the same as the royal family.

[30] In respect of the absence of the khadzi and the ndumi at the identification, the full court expressed itself as follows:

'[19] It is common cause between the parties that in terms of the custom of the Tshimbupfe community a successor must be identified by the khadzi and the ndumi. They are members of the royal family. They play an important role in the identification of a successor. It is, *inter alia,* their duty to be present at a specially convened meeting of the royal family to identify a successor of a khosi that has passed on, even where it is obvious who the successor is. The identification of the successor by the khadzi and the ndumi is an indispensable part of the identification process to be valid. Neither the khadzi nor the ndumi attended the meeting where the fifth respondent was identified as the successor to the deceased khosi. However, they were present at a meeting where the first applicant was identified as successor.

. . . .

[22] Of course, custom may be proved by a party who is relying on a particular custom, if the rules of the custom are not readily ascertainable with sufficient certainty so that judicial notice may be taken thereof. *In casu*, the parties are in agreement that it is the custom that the khadzi and ndumi must be present at a meeting of the royal family convened to identify a successor to a traditional leader. That being the custom, the identification of the fifth respondent at a meeting of the royal family without the khadzi and ndumi being present and without their identification of the fifth respondent for whatever reason, is not in accordance with the custom of the community.'

Thus, the full court made a firm finding that the identification of the fifth respondent had not taken place in accordance with the custom of the

community concerned. For the reasons that follow, the full court should have refrained from entering into the merits of the matter.

[31] As stated, in terms of s 12(1) of the Limpopo Act identification of a senior traditional leader, headman or a head woman is a matter left to the authority of the royal family. Once the relevant royal family has informed the Premier, the latter must recognise the person so identified, as set out in the majority judgment. But the Premier's authority to recognise the person identified by the royal family under s 12(1) is subject to subsection 12 (2). That section provides that:

'(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.'

[32] Therefore the Premier is obliged to recognise the identified person if there is no evidence or allegation that the person was identified other than in terms of customary law. If there is such a problem with the person's identification, the Premier must deal with the matter as provided in s 12(2) *(a)* or *(b)* and *(c)*. This is in keeping with the inherent flexibility in the system of customary law which stresses the importance of the consensus-seeking procedures of family and clan meetings in dispute resolution.

[33] This accords with the common law doctrine of ripeness. Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) at 585 describes the doctrine in the following terms:

'The idea behind the requirement of ripeness is that the complainant should not go to court before the offending action or decision is final, or at least ripe for adjudication. It is the opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in

wasting the courts' time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made.'
See also Lawrence Baxter *Administrative Law* (1984) at 719-720 and *Ferreira v Levin NO and others* 1996 (1) SA 984 (CC) para 199.

[34] In this case, when the court challenge was brought, the process provided for under s 12 had not yet been finalised. The matter was therefore not ripe for court adjudication. On this narrow basis we agree with the order proposed in the majority judgment.

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N Dambuza
Judge of Appeal

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C H G van der Merwe
Judge of Appeal

APPEARANCES:

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