THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No.: 658/2017

In the matter between:

LUDIDI LUDIDI	**APPELLANT**
and	
NOLITHA LUDIDI	**FIRST RESPONDENT**
THE PREMIER FOR PROVINCE OF THE EASTERN CAPE	**SECOND RESPONDENT**
EASTERN CAPE HOUSE OF TRADITIONAL LEADERS	**THIRD RESPONDENT**
HLUBI ROYAL FAMILY	**FOURTH RESPONDENT**
MANCAPHAYI ROYAL FAMILY	**FIFTH RESPONDENT**
HLUBI TRADITIONAL COUNCIL	**SIXTH RESPONDENT**
THE MEMBER OF THE EXECUTIVE COUNCIL FOR CO-OPERATION GOVERNANCE AND TRADITIONAL AFFAIRS, PROVINCE OF THE EASTERN CAPE	**SEVENTH RESPONDENT**
THE MINISTER OF CORPORATE GOVERNANCE AND TRADITIONAL AFFAIRS	**EIGHTH RESPONDENT**

Neutral citation: *Ludidi v Ludidi & others* (658/2017) [2018] ZASCA 104 (23 July 2018)
Coram: Maya P, Dambuza, Mathopo and Mocumie JJA and Rogers AJA
Heard: 6 March 2018
Delivered: 23 July 2018

Summary: Customary law – recognition of a traditional leader – regulated by the Traditional Leadership and Governance Framework Act 41 of 2003 read with provincial legislation, in this instance the Traditional Leadership and Governance Act, 2005 (Eastern Cape) (Act 4 of 2005) – right to identify the traditional leader vests solely in the royal family – Premier's failure to comply with s 18(2) of the provincial legislation does not render the recognition process a nullity.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Mthatha (Pakade J sitting as a court of first instance):

The appeal is dismissed with no order as to costs.

JUDGMENT

Maya P (Dambuza, Mathopo and Mocumie JJA and Rogers AJA concurring):

[1] This appeal concerns the right to succeed as Inkosi (Chief)[1] of the amaHlubi tribe in Qumbu, Eastern Cape. The main protagonists, the appellant Mr Ludidi Ludidi, and the first respondent, Ms Nolitha Ludidi, are first cousins. They are respectively born of the sons of the late Chief Dyubhele Joubert Ludidi, namely the late Messrs Manzezulu and Manzodidi Charles Ludidi, who were also chiefs of the tribe during their lifetimes.[2]

[2] Mr Ludidi challenges Ms Ludidi's recognition as the Chief of the amaHlubi (the decision) by the seventh respondent, the Member of the Executive Council for Co-operation, Governance and Traditional Affairs, Province of the Eastern Cape (the MEC), pursuant to her identification as such by the fourth respondent, the Hlubi Royal Family. The Eastern Cape Local Division, Mthatha (Pakade J), dismissed his review application. In those proceedings he sought an order (a) reviewing and setting aside the decision; (b) directing the MEC to recognise him as the Chief of amaHlubi,

[1] Defined as a senior traditional leader in s 1 of the Traditional Leadership and Governance Framework Act 41 of 2003.
[2] The legitimacy of Chief Manzezulu's chieftainship is an issue of dispute as explained later in the judgment.

alternatively remitting the matter back to the third respondent, the Eastern Cape House of Traditional Leaders (the House) for investigation and recommendation; and; (c) ancillary relief. The appeal is with the leave of the court a quo. Only the second respondent, the Premier of the Eastern Cape Province (the Premier), the Hlubi Royal Family, and the MEC oppose the proceedings.

[3] It should be stated at the outset that the parties' affidavits were riddled with disputes of fact. But a significant portion of the material background evidence was undisputed and may be summarised as follows. According to the custom and practice of the amaHlubi, the eldest child from the great or senior house of the royal family ie born of the great or senior wife, inherits a vacant chieftainship of the tribe. In the event that the chief and the great wife die childless, a child born of the chief's 'right hand' wife ie a lower ranking wife where the chief had more than one wife, assumes the chieftainship. Otherwise the chief's surviving brothers, in order of seniority, assisted by the royal family and the tribe, reconstitute the great house by marrying a royal wife and assuming the chieftainship.

[4] In recent times, this custom has been practised within statutory prescripts in terms of which a chief's appointment is confirmed. At the time of Chief Dyubhele's death, the nomination and appointment of chiefs in his area of jurisdiction,[3] the extent of their powers and functions, the determination of their remuneration by the government and other related matters, were regulated by the Transkei Constitution Act 48 of 1963 and the Transkei Authorities Act 4 of 1965.

[5] In line with the relevant custom and law, after Chief Dyubhele's death, the

[3] Which fell under the Transkei homeland.

Hlubi Royal Family and the sixth respondent, the Hlubi Traditional Council (the Traditional Council), identified and had his eldest son, Manzodidi, installed as the new chief. The Hlubi Royal Family also arranged a marriage for him to reconstitute the great house at Nobamba Administrative Area, the royal family's seat. To that end, it found him a wife, Princess Nozizwe Mafaku Sigcawu (Mafaku), the daughter of Chief Nelson Sigcawu of Eastern Pondoland, for whom it paid lobola and arranged a traditional wedding ceremony. It is from that union, consummated in 1965, that Ms Ludidi, an only child and the sole surviving member of that great house, was born. Chief Manzodidi died in November 1978. He was survived by his wife, his then 12 year-old daughter and his brother, Manzezulu. The latter succeeded him as the Chief of the amaHlubi in 1979 and ruled as such until his death in 2012.

[6] With the advent of democracy in South Africa and the abolition of its homelands, including Transkei, a new statutory dispensation had come into force by the time Chief Manzezulu died in October 2012. The Transkeian legislation had been repealed and the recognition of traditional leaders countrywide was now regulated by the Traditional Leadership and Governance Framework Act 41 of 2003 (the National Act), read with the Traditional Leadership and Governance Act, 2005 (Eastern Cape) (Act 4 of 2005) (the Provincial Act) in the parties' area of jurisdiction.[4]

[7] Acting in terms of the Provincial Act, the Hlubi Royal Family identified Ms Ludidi for recognition as the Chief of the amaHlubi by the Premier. The fifth respondent, the Mancaphayi Royal Family, identified Mr Ludidi for the same position. When presented with the conflicting decisions the MEC, to whom the

[4] These are post-democracy national and provincial statutes intended mainly to establish a statutory framework and norms and standards for traditional leadership and governance that conform to constitutional imperatives.

Premier had delegated the function,[5] did not recognise either of the candidates. Instead, he referred the dispute to the House for its recommendation. That did not yield the desired result. The MEC's attempts to engage the two royal families to resolve the impasse were equally unsuccessful. Ultimately, the MEC referred the matter back to the Hlubi Royal family for its decision.[6]

[8] After a meeting of the representatives of the Hlubi Royal Family and the Mancaphayi Royal Family held in late June 2013, it was conveyed to the MEC on their behalf by the chairperson of the Hlubi Royal Family that Ms Ludidi had been identified as the next Chief of the amaHlubi. (Incidentally, it was also agreed at that meeting that to address the appellant's concern that no one in his father's household earned a living, he would be appointed as the secretary of the sixth respondent from which he would earn a salary to support his family.) Thereafter, on 15 July 2015, the MEC recognised Ms Ludidi as such chief and issued a recognition certificate to that effect. He further published the notice of recognition in the *Government Gazette* in terms of s 18(1)(*b*) of the Provincial Act.[7] However, he did not inform the House of the recognition before it was so published as required by s 18(2) of the Provincial Act.

[9] The manner in which the main basis of Mr Ludidi's review proceedings were couched in his papers is rather confusing. He alleged 'a firm, reasonable, genuine and bona fide substantive legitimate expectation' that he would inherit the chieftainship as the eldest son of the queen of the amaHlubi and Chief Manzezulu, who was a permanent chief and had introduced him to the Traditional Council as his successor

[5] In terms of s 34(1) of the Provincial Act, which empowers the Premier 'subject to such conditions as he or she may determine in writing, [to] delegate any powers conferred on him or her by this Act, except the power to make regulations, to a Member of the Executive Council of the Province'.
[6] In terms of s 18(4)(*c*) of the Provincial Act.
[7] Which stipulates that '[w]henever the position of an iNkosi or iNkosana is to be filled …[t]he Premier must, subject to subsection (5), by notice in the *Gazette*, recognize the person so identified by the royal family as an iNkosi or iNkosana,

based on 'a well-established traditional custom and practice'. Then he asserted that his claim to the chieftainship had nothing to do with custom and was based strictly on the law in terms of which his late father was appointed, ie s 66(1)(*c*) of the Republic of Transkei Constitution Act 15 of 1976. (The latter Act replaced the Transkei Constitution Act 48 of 1963 when the Transkei homeland attained sovereignty in 1976 and was in operation when Chief Manzodidi died.) He also challenged the legitimacy of the Hlubi Royal Family and its right to identify Ms Ludidi as the next chief and the process followed by the MEC in effecting the recognition.

[10] The respondents' answering affidavit was made by the MEC, supported by members of the Hlubi Royal Family of Nobamba Administrative Area, Mr Sikho Ludidi, a Hlubi prince and the chairperson of the Hlubi Royal Family and Mr Ndlelantle Ludidi, a headman of the amaHlubi of that area and a member of the Hlubi Tribal Authority and currently, the Traditional Council which he chairs. They disputed the appellant's claim to the chieftainship on various fronts.

[11] First, they impugned the legitimacy of Chief Manzezulu's chieftainship. According to them, his appointment was invalid as it was neither approved by the royal family, the tribal authority and the tribe itself. Nor was it sanctioned by the State President as was required by the law applicable at the time. In their view, it was unnecessary to reconstitute the great house after Chief Manzodidi's death because he was survived by his heir, Ms Ludidi. So, they contended, Mafaku should have assumed the chieftainship, albeit as her daughter's regent as she in fact sought to do, until Ms Ludidi attained majority. But her attempts to contest Chief Manzezulu's claim to the chieftainship, by demanding a right to succeed her late husband, were thwarted by Chief Manzezulu's trickery and she was forced to withdraw her claim.[8] It

---

as the case may be'. In this instance, the Premier delegated the duty to the MEC in terms of s 34 of the Provincial Act.

[8] Her claim was formally lodged with the relevant authorities, including the Magistrate, Qumbu and it is documented in

was alleged that Mafaku was lured by Chief Manzezulu's agents to a certain house on the false pretext that she would be meeting her father. There, she was forced to sign a letter in which she purportedly surrendered her claim to the chieftainship. Her subsequent formal appeal to the local magistrate to reinstate her claim, in which she was supported by her father, was not brought to the attention of the royal family and the tribe at large.

[12] Thus, Chief Manzezulu was surreptitiously designated as the Chief of the amaHlubi with the assistance of a few members of his coterie with whom he falsely persuaded the magistrate that he had been unanimously nominated as Chief Manzodidi's successor. And, as mentioned above, the respondents contended that not all the legal requirements for his chieftainship were fulfilled as the State President did not confirm the appointment, thus rendering it invalid.[9] However, the invalid designation was not challenged thereafter. There were two reasons for this: to avoid fracturing the tribe and endangering the lives of Mafaku and Ms Ludidi as Chief Manzezulu had vowed to do anything to ensure that a woman did not lead the tribe and assume the chieftainship himself.

[13] The respondents contended that apart from Chief Manzezulu's defective title to the chieftainship, he had no legal right to identify his successor by anointing his son as the appellant claimed, even if he was a legitimate chief. This was so because that power vested solely in the Hlubi Royal Family, which had never conducted itself in

---

official records as was her subsequent withdrawal and reinstatement thereof.

[9] In terms of s 45 of the repealed Transkei Constitution Act 48 of 1963 which provided:

'(1) After the Constitution of the first Cabinet of the Transkei the function of designating paramount chiefs, chiefs and acting chiefs in respect of any region according to Bantu law and custom shall, subject to the provisions of sub-section (2), vest in the regional authority concerned subject to confirmation by the State President who may in his discretion confirm any such designation or refer it back to the regional authority concerned or further consideration.

(2) The creation of any paramount chieftainship or chieftainship shall be confirmed by the President except after consideration of a recommendation of the Legislative Assembly.'

any manner that would reasonably have laid a basis for the legitimate expectation asserted by the appellant.

[14] Another matter of contention was which of the two respondent royal families, ie the Hlubi Royal Family and the Mancaphayi Royal Family, is the rightful royal family of the amaHlubi vested with the right to identify their chief. It was common cause that the dispute around Chief Manzezulu's successor split the royal family into two factions. The appellant claimed that the Mancaphayi Royal Family was the only legitimate leadership structure of the amaHlubi which had always administered their affairs. The Hlubi Royal Family was a recently established structure, formed by his detractors only after his father's death 'merely to deal with the succession of chieftainship' of the amaHlubi. There 'was no formal structure known as the Hlubi Royal Family because the affairs of the royal family and the amaHlubi tribe were conducted by the Hlubi Tribal Authority',[10] and then the Traditional Council upon the promulgation of the Provincial Act, in terms of which traditional councils replaced tribal authorities.[11] But, in the same breath, he referred to the Hlubi Royal Family which, he stated, appointed his father as the Chief of the amaHlubi and made no mention of the existence of the Mancaphayi Royal Family at the time.

[15] According to the respondents, the Hlubi Royal Family has existed since time immemorial as the custodian of the royal family's lineage and the customs of the amaHlubi in Qumbu. It has always enjoyed the right to identify the tribe's chief. Moreover, the provincial government has, from the beginning, dealt only with the Hlubi Royal Family and the Hlubi Tribal Authority and later, the Traditional Council, in relation to the affairs of the amaHlubi. The provincial government was unaware

---

[10] Established by the Transkei Authorities Act.

[11] In terms of s 28(4) of the National Act which provides that '[a] tribal authority that, immediately before the commencement of this Act, had been established and was still recognised as such, is deemed to be a traditional council

of the existence of the Mancaphayi Royal Family until the dispute over the chieftainship rose.

[16] The court a quo was not persuaded by Mr Ludidi's contentions and decided the case on the respondents' version. It found that the Hlubi Royal Family, which had identified even Chiefs Dyubhele and Manzodidi, was the rightful royal family. In the court's view, the chieftainship remained in Chief Manzodidi's house even after his death as 'he left an issue' ie Ms Ludidi. In that case, Chief Manzezulu, 'who was an illegitimate chief', ruled merely as the regent of that issue, Ms Ludidi, until she came of age. The court concluded that Mr Ludidi's claim to a legitimate expectation of assuming the chieftainship after his father's death therefore had no basis and that he had no legal right to the chieftainship.

[17] Several grounds of appeal were raised in the appellant's notice of appeal and heads of argument. However, the issues which crystallised in argument before us were whether (a) the appellant's expectation – that he had an automatic right to the chieftainship of the amaHlubi upon his father's death based on the validity of the latter's appointment under the Transkei Constitution Act as the permanent Chief of the amaHlubi – was legitimate; (b) the MEC arbitrarily recognised Ms Ludidi as the Chief of the amaHlubi in disregard of evidence that she was identified by only one faction of the fractured royal family and the opposing faction's recommendation; (c) the MEC was obliged to afford the appellant a hearing before recognising Ms Ludidi; and (d) the MEC's failure to inform the House of Ms Ludidi's recognition before its publication in the *Gazette* nullified the recognition.

[18] The appellant's counsel rightly conceded at the outset that the court a quo was right to decide the various material disputes of fact on the respondents' version, on an

---

contemplated in section 3 and must perform the functions referred to in section 4 . . .'.

application of the trite principle set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[12] The appellant's counsel further conceded, correctly in my view, that on an application of this principle, it was clear that the Mancaphayi Royal Family was a recent splinter of the Hlubi Royal Family, formed by the latter's erstwhile members who were not direct descendants of Chief Dyubhele and were opposed to having a female chief. These concessions are devastating to the appellant's case as will appear in the discussion which follows.

[19] Regarding issue (a), it seems to me unnecessary to resolve the dispute relating to the validity of Chief Manzezulu's appointment as the Chief of the amaHlubi in light of the view I take of the real issues in this matter. I will therefore assume without deciding, that Chief Manzezulu was a lawfully appointed permanent Chief of the amaHlubi and that he indeed 'identified' the appellant as his successor to the chieftainship by introducing him as such to the Hlubi Tribal Authority and the tribe.

[20] It is well to bear in mind that whatever relevance s 66 of the Transkei Constitution Act,[13] on which the appellant relied, may have had for that 'identification' no longer obtains as that piece of legislation no longer exists. The issue must be determined in accordance with the relevant law in force in October

---

[12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-636C.

[13] Which read:

'(1) Subject to the provisions of subsection (2) the power-

(a) to designate or appoint any person as paramount chief, chief or sub-chief, whether in a permanent or in an acting capacity, or

(b) to institute any paramount chieftainship in addition to the chieftainships mentioned in Schedule 10, or

(c) to institute any other chieftainship of whatever class or status, shall continue to vest in the regional authority concerned subject to the confirmation of such designation, appointment of institution by the President at his discretion.

(2) The President-

(a) may refer back to a regional authority any designation or appointment made by such authority under sub-section (1); and

(b) shall not confirm the institution of any new chieftainship of whatever class or status except upon the recommendation of the National Assembly.

(3) The appointment in his office of every person who at the commencement of this Act is a paramount chief, chief or sub-chief (whether in a permanent or an acting capacity) shall be deemed to have been confirmed by the President in terms of subsection (1).'

2012 when Chief Manzezulu died and the chieftainship vacancy arose. This is what the Legislature contemplated in s 28(1) of the National Act which reads:

'(1) Any traditional leader who was appointed as such in terms of applicable provincial legislation and was still recognised as a traditional leader immediately before the commencement of this Act, is deemed to have been recognised as such in terms of section 9 or 11, subject to a decision of the Commission in terms of section 26.'

[21] The foremost question which arises is who has the right to choose a Chief of the amaHlubi? In terms of s 11 of the National Act:

'(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 reasons 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, headman or headwoman, as the case may be.

(2)*(a)* The provincial legislation referred to in subsection (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 of recognition to be issued to the identified person; and

(iii) the relevant provincial house of traditional leaders to be informed of the recognition of a senior traditional leader, headman or headwoman.'

A 'senior traditional leader' is defined in s 1 of the same Act as 'a traditional leader of a specific traditional community who exercises authority over a number of headmen or headwomen in accordance with customary law, or within whose area of

jurisdiction a number of headmen or headwomen exercise authority'.

[22] The Provincial Act is the provincial legislation envisaged in s 11(2) above. Section 18 thereof provides, in relevant part:

'(1) Whenever the position of an iNkosi or iNkosana is to be filled–

(a) the royal family concerned must subject to such conditions and procedure as prescribed, within sixty days after the position becomes vacant, 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 6(3) apply to that person; and

(ii) through the relevant customary structure, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and

(a) the Premier must, subject to subsection (5), by notice in the *Gazette*, recognize the person so identified by the royal family as an iNkosi or iNkosana, as the case may be.'

The 'royal family' is defined in s 1 of the Provincial Act 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'.

[23] There is no question on the respondent's evidence, the appellant's contradictory version in this regard as described above and his counsel's concession, read against these statutory provisions, that the Hlubi Royal Family is a 'royal family' as envisaged in the statutory definition. It comprises Chief Dyubhele's direct descendants, ie the immediate relatives of the ruling family, who have maintained its leadership structures and seat and retained the kernel of the historical royal family. It remains the custodian of the customs of the amaHlubi and their royal family's lineage and is the sole repository of the right to identify the Chief of the amaHlubi. And it is significant that when it exercises this right, it does not consider only that the

candidate is the eldest

child in the great house. It vets the potential candidate against the relevant customary law. It must also ascertain whether he or she (a) has not been convicted of an offence with a sentence of imprisonment for more than 12 months without the option of a fine; (b) does not suffer from a physical incapacity or mental infirmity which, based on acceptable medical evidence, makes it impossible for him or her to function as such; and (c) has not committed a transgression of a customary rule or principle, as contemplated in s 12(1)*(a*), *(b) and (d)* of the National Act. The identification is not a predetermined conclusion as the appellant described.

[24] It follows therefore that Chief Manzezulu had no right whatsoever to identify his successor.[14] In that case the appellant's expectation had no valid basis as it did not meet the trite requirements. To qualify as a legitimate expectation, the underlying representation, which must have been induced by the decision-maker, must be clear, unambiguous, reasonable, competent and lawful for the decision-maker to make.[15] There is not a whit of evidence that the 'decision-maker' here, ie the Hlubi Royal Family, ever made any representation to the appellant that he would become the Chief of the amaHlubi when his father died. Nor would it have been legally permissible for it to do so, even on the assumption that Chief Manzezulu made the representation on its behalf, before the vacancy arose.

[25] But that said, the enquiry does not end there. The consequences of the dissension within the royal family regarding who should be identified as the tribe's

[14] It should also be mentioned though, for what that may be worth, that even under the provisions of the repealed Transkei Constitution Act, the power to designate or appoint a chief, vested in the regional authority. So Chief Manzezulu's 'identification' of his son as his successor would have held no water even under that dispensation.
[15] See *National Director of Public Prosecutions v Phillips & others* 2002 (4) SA 60 (W) para 28; 2001 (2) SACR 542 (W); 2002 (1) BCLR 41 (W); *South African Veterinary Council & another v Szymanski* 2003 (4) SA 42 (SCA) para 19; 2003 (4) BCLR 378 (SCA); confirmed in *Minister of Home Affairs & others v Saidi & others* [2017] ZASCA 40; 2017

chief, as arose here, must still be determined. In this regard, s 18(4) of the Provincial Act provides:

'Where the Premier has received evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with the provisions of this Act, customary law or custom the Premier –

(a) may refer the matter to the Provincial House of Traditional Leaders for its recommendation; 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.'

[26] The MEC followed precisely these prescripts upon receiving the conflicting recommendations by remitting the matter to the royal family for reconsideration, despite his misgivings about the standing of the Mancaphayi Royal Family in the matter. And, as indicated above, it was not disputed that the two warring factions duly met and that following their deliberations, the MEC was informed on their behalf that the Hlubi Royal Family identified Ms Ludidi as the next Chief of the amaHlubi. It is therefore incorrect that the MEC paid no heed to the conflicting views regarding the identified candidate within the royal family. The seeming dispute of fact on the papers as to whether the recommendation made to the MEC following this meeting represented an agreed compromise is more apparent than real. The averments of the Hlubi Royal Family in this respect cannot be dismissed out of hand on the papers and must be accepted as correct in adjudicating the appeal.

[27] There was no need for the MEC to grant the appellant any hearing as he had been amply heard by the royal family up to the last meeting, which was attended by members of his proponents, the Mancaphayi Royal Family. The legislation envisages

---

(4) SA 435 (SCA) para 35; [2017] 2 All SA 755 (SCA).

that it is in the context of the deliberations of the royal family that differing views, including those of competing candidates, will be heard. In any event, his views on the chieftainship were placed before and considered by the MEC. It must be accepted in the circumstances, therefore, that the identification of Ms Ludidi was lawfully made by the royal family as envisaged in ss 1 and 18 of the Provincial Act.

[28] The final question is whether the MEC's failure to inform the House about the recognition before the relevant notice was published in the *Gazette*, in breach of s 18(2) of the Provincial Act, nullified the recognition process. The appellant's counsel did not pursue this ground with any vigour and conceded that it was not the appellant's strongest point. The concession was, in my view, well made.

[29] In terms of s 18(2), which is couched in peremptory terms, '[b]efore a notice recognizing an Inkosi or Inkosana is published in the *Gazette*, the Premier must inform the Provincial House of Traditional Leaders of such recognition'. It is so that the disregard of peremptory provisions of a statute is fatal to the validity of the proceeding affected.[16] But, as this court explained in *Nkisimane & others v Santam Insurance Co Ltd*:[17]

'[S]tatutory requirements are often categorized as "peremptory" or "directory". They are well-known, concise, and convenient labels to use for the purpose of differentiating between the two categories. But the earlier clear-cut distinction between them (the former requiring exact compliance and the latter merely substantial compliance) now seems to have become somewhat blurred. Care must therefore be exercised not to infer merely from the use of such labels what degree of compliance is necessary and what the consequences are of non or defective compliance. These must ultimately depend upon the proper construction of the statutory provision in question, or, in other words, upon the intention of the lawgiver as ascertained from the language, scope and

[16] *Schierhout v Minister of Justice* 1926 AD 99 at 110.
[17] *Nkisimane & others v Santam Insurance Co Ltd* 1978 (2) SA 430 (A) at 433H-434A. See also, *Swart v Smuts* 1971 (1) SA 819 (A) at 829C-G; *Lupacchini NO & another v Minister of Safety and Security* [2010] ZASCA 108; 2010 (6) SA 457 (SCA); *Hubbard v Cool Ideas 1186 CC* [2013] ZASCA 71; 2013 (5) SA 112 (SCA); [2013] 3 All SA 387 (SCA)

purpose of

para 10.

the enactment as a whole and the statutory requirement in particular.'

[30] The subject-matter of the prohibition, its purpose in the context of the legislation, the remedies provided in the event of any breach of the prohibition, the nature of the mischief it was designed to remedy or avoid and any cognisable impropriety or inconvenience which may flow from invalidity are all factors which must be considered when the question is whether it was truly intended that anything done contrary to the provision in question was necessarily to be visited with nullity.[18] In sum, the consequence of the MEC's omission depends upon the proper construction of s 18(2), ie considering its words in light of their context and with reference to the apparent purpose to which it is directed and any relevant background material.[19] And the vital question to ask in that exercise is whether the Legislature intended the breach to nullify the entire recognition process.[20]

[31] It is clear from the plain wording of s 18(2) that the House plays no role in the identification and recognition of a chief. All that is envisaged by these provisions is that it will be informed of the result of the process before such result is announced to the public. No provision is made for the MEC to await further input from the House before proceeding to publish his or her decision. Thus, the prohibition has nothing to do with the decision itself but is merely directed at the publication of such decision before the House has been informed thereof. The object of the provisions is simple. The newly appointed chief becomes a member of and sits in the House as a traditional leader. It is a matter of common sense that it would be improper for the House to learn

[18] *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd* 1978 (2) SA 872 (A) at 885D-G.
[19] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SCA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) paras 10-12.
[20] *Nokeng Tsa Taemane Local Municipality v Dinokeng Property Owners Association & others* 2010 ZASCA 128; [2011] 2 All SA 46 (SCA) para 14.

of a new addition to its membership from a public announcement. The requirement of prior notification to the House is in the nature of courtesy to that body. It can hardly be concluded in the circumstances that the Legislature intended to unravel the entire recognition process by reason of a mere failure to observe the contemplated administrative formality. That would undoubtedly bear a disproportionate, inequitable and impractical result.[21]

[32] The appeal must accordingly fail. But I am not inclined to make a costs order in favour of the successful respondents having regard to the nature of the right asserted by the appellant in the matter.[22]

[33] The following order is made:

The appeal is dismissed with no order as to costs.

_____

M M L MAYA

PRESIDENT OF THE SUPREME COURT OF APPEAL

[21] See *Pottie v Kotze* 1954 (3) SA 719 (A) at 727F-H.
[22] *Biowatch Trust v Registrar Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) paras 23-24.

APPEARANCES:

For Appellant:	Adv. N Dukada SC with Adv. L Sambudla Instructed by: Babe & Talapile Inc, Mthatha c/o Matsepes Inc, Bloemfontein
For Second, Seventh & Eight Respondents:	Adv. A M Bodlani Instructed by: State Attorney, Mthatha
For Fourth Respondent:	Adv. A M Bodlani Instructed by: SS Nkonyeni Attorneys, Mthatha