THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 948/17

In the matter between:

MASINDI CLEMENTINE MPHEPHU	**APPELLANT**
and	
REGENT TONI PETER MPHEPHU-RAMABULANA	**FIRST RESPONDENT**
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	**SECOND RESPONDENT**
THE MINISTER OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**THIRD RESPONDENT**
PREMIER: LIMPOPO PROVINCE	**FOURTH RESPONDENT**
NATIONAL HOUSE OF TRADITIONAL LEADERS	**FIFTH RESPONDENT**
LIMPOPO HOUSE OF TRADITIONAL LEADERS	**SIXTH RESPONDENT**
COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	**SEVENTH RESPONDENT**
MPHEPHU-RAMABULANA ROYAL FAMILY COUNCIL	**EIGHTH RESPONDENT**

Neutral Citation: *Mphephu v Mphephu-Ramabulana & others* (948/17) [2019] ZASCA 58 (12 April 2019)

Coram: Maya P, Swain, Mathopo and Mocumie JJA and Mothle AJA

Heard: 30 November 2018

Delivered: 12 April 2019

Summary: Customary law – traditional leadership – points *in limine* – whether first respondent was lawfully identified by Royal Family Council and lawfully recognised by the President as the King of Vhavenda community in terms of the provisions of s 9 of Traditional Leadership and Governance Framework Act 41 of 2003 – the President's decision reviewed and set aside and proceedings referred back to the high court for further hearing on the merits.

ORDER

On appeal from: Limpopo Division of the High Court, Thohoyandou (Makgoba JP sitting as court of first instance):

1 The appeal is upheld with no order as to costs.

2 The matter is referred back to the Limpopo Division of the High Court, Thohoyandou for further adjudication on the merits before another judge.

3 The order of the high court is set aside and replaced with the following:

'(a) It is declared that the decision of the eighth respondent of 14 August 2010 to identify the first respondent as a suitable person to be appointed as the King of the Vhavenda Traditional Community is unlawful, unconstitutional and invalid and is reviewed and set aside.

(b) It is declared that the decision of the second respondent dated 14 September 2012 to recognise the first respondent as the King of the Vhavenda Traditional Community published in Traditional Leadership and Governance Framework Act 41 of 2003: Recognition of Mr Toni Peter Mphephu (Ramabulana) as King of Vhavenda Community GNR 766, *GG*, 35705, 21 September 2012 is unlawful, unconstitutional and invalid and is reviewed and set aside.

(c) It declared that the decisions of the eight respondent to identify, and that of the second respondent to recognise the first respondent as King of Vhavenda are based on a criteria that promotes gender discrimination, and are reviewed and set aside in that the discrimination impedes compliance with the provisions of s 2A(4)(*c*) of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009, to progressively advance gender representation in the succession to the position of King or Queen of Vhavenda.

(d) The second and the fourth respondents are directed to refer the following issues of customary laws and custom to the fifth and sixth respondents respectively for opinion and advice to be submitted to the high court:

(i) What measures are in place, or have to be in place, for the adaptation and transformation of the principle of primogeniture by the traditional communities

within the context of s 2A(4*)(c)* of the Traditional leadership and Governance Framework Amendment Act 23 of 2009;

(ii) Whether a child born before the parent is recognised as a traditional leader, qualifies to be the successor of the parent to that position of traditional leadership; and

(iii) Whether in the Vhavenda custom, the *Ndumi* qualifies to be identified and recognised as a successor to a position of traditional leadership.

(e) The cost order is costs in the cause.

(f) The withdrawal of the certificate of recognition of the first respondent as King of Vhavenda, shall be stayed pending the final determination of the proceedings.'

JUDGMENT

Mothle AJA (Maya P, Swain, Mathopo and Mocumie JJA concurring):

[1] In December 2012, the appellant, Ms Masindi Clementine Mphephu, instituted review proceedings in the Limpopo Division of the High Court, Thohoyandou (the high court), against the first respondent, cited as Regent Toni Peter Mphephu-Ramabulana; the second respondent, the President of the Republic of South Africa; the third respondent, the Minister of Cooperative Governance and Traditional Affairs; the fourth respondent, the Premier: Limpopo Province; the fifth respondent, National House of Traditional Leaders; the sixth respondent, the Limpopo House of Traditional Leaders; the seventh respondent, the Commission on Traditional Leadership Disputes and Claims and the eighth respondent, Mphephu-Ramabulana Royal Family Council. The appellant sought relief to have the identification and recognition of the first respondent as the King of Vhavenda, reviewed and set aside. Her founding and replying affidavits were deposed to by her uncle, Mr Mbulaheni Charles Mphephu, as the second applicant. Only the first, second, third, seventh and eighth respondents opposed the application. The fourth, fifth and sixth respondents did not participate in the proceedings.

[2] At the commencement of the proceedings before the high court, the appellant and the respondents raised several points *in limine*. They agreed to a separate determination of the points in *limine* and the agreement was made an order of court on 31 August 2015. The agreement isolated fourteen issues for separate adjudication. The high court upheld some of the points *in limine* and dismissed the application as well as the application for leave to appeal. The appeal is before this court with its leave.

[3] On 26 February 1994, Mr Dimbanyika Mphephu, the appellant's father, was installed to succeed his deceased father, Paramount Chief Patrick Ramabulana, as the chief of the Mphephu-Ramabulana Tribal community.

The appellant was three years old at that time. Upon ascending the throne, Chief Dimbanyika appointed his half-brother, the first respondent, as his *Ndumi.*[1] He ruled for only three years before his death in 1997. After his passing, on 11 January 1998 the eighth respondent identified the first respondent to take over the chieftaincy.[2]

[4] In 2003 the first respondent approached the high court for his recognition as the king of Vhavenda. The application was dismissed by Lukoto J. In the same year and acting in terms of s 212 of the Constitution,[3] the legislature enacted the Traditional Leadership and Governance Framework Act 41 of 2003, which would come into operation on 24 September 2004. The Act was later amended under the same title, by the Traditional Leadership and Governance Framework Amendment Act 23 of 2009. Since the issues raised in this appeal cover the period between 1998 and 2012, reference will be made interchangeably to both Acts. To distinguish them, the 2003 Act will be referred to as '*the Original Act*' and the 2009 Act as '*the Amended Act*'. Where applicable, both Acts will be referred to jointly as the Framework Act.

[5] The Framework Act established a Commission to deal with traditional leadership disputes and claims. Thus, the citation of the Commission as the seventh respondent needs to be clarified. In this judgment, reference is made to two Commissions. Chapter 6 of the Original Act provides for traditional leadership dispute resolution and the establishment of a Commission on Traditional Leadership Disputes and Claims (the old Commission). The old Commission had the power or authority to investigate, *mero motu* or on receipt of a claim, and decide on leadership disputes and claims in respect of the Kingship/Queenship. It had a lifespan of five years, from 2004 to 2009, within which to complete its mandate. In January 2010 the Commission

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[1] *Ndumi*, in terms of Vhavenda custom, is a male person appointed by the royal family as one of the assistants to the reigning King or Queen. One of the points of dispute between the parties is whether a *Ndumi* could be a successor to the Throne.

[2] The question whether King Ramabulana was identified to succeed as senior traditional leader or as regent is one of the issues in this case.

[3] The Constitution of the Republic of South Africa Act 108 of 1996.

completed its mandate and its term of office expired. In anticipation of the expiry of the old Commission's term of office in January 2010, Parliament in 2009 amended the Original Act in order to, amongst others, establish a successor Commission (the new Commission). The new Commission had ameliorated powers or authority, only in case of a claim, to investigate and only recommend, on matters relating to leadership dispute resolution and claims. It also had a lifespan of five years scheduled to end in 2016, which after an extension of a year, expired on 31 December 2017. Therefore as at the hearing of this appeal in November 2018, the terms of office of both Commissions had expired.

[6] In 2005, the first respondent lodged a claim with the old Commission for the establishment of a Kingship/Queenship of the Vhavenda, to vest in the Mphephu-Ramabulana Royal Family. In addition, he also lodged a claim to be recognised as the incumbent to that throne. Three other Vhavenda communities, namely the Ravhura, the Tshivhase and the Mphaphuli also lodged claims for the Kingship/Queenship. The old Commission investigated the claims for Kingship/Queenship. In January 2010, it issued a determination that it recognised a single Vhavenda Kingship/Queenship (the Throne) which would vest solely in the Mphephu-Ramabulana Royal Family. The old Commission did not pronounce on the incumbency to the Throne, ie it did not determine or announce who in the Mphephu-Ramabulana Royal Family should be the King/Queen.

[7] The determinations of the old Commission on the vesting of the Kingship/Queenship to various South African communities, including the Vhavenda, were formally announced by the second respondent in a public statement dated 29 July 2010. In the same statement, the second respondent stated that for the Vhavenda and Ama-Ndebele Kingships/Queenships, 'the Commission must still decide who the two rightful incumbents are'. And further that 'the incumbents will be determined by a new Commission which will be established soon'. On 14 August 2010, the eighth respondent identified the first respondent as the king of the Vhavenda and submitted a request to

the second respondent, through the third and fourth respondents, for his recognition as such.

[8] The other Vhavenda communities that contested the Throne, instituted court proceedings to dispute the old Commission's award of the Throne to the Mphephu-Ramabulana Royal Family. Consequently, the second respondent delayed the requested recognition of the first respondent as the King of Vhavenda.

[9] The proceedings were dismissed by Legodi J on 6 September 2012. On 21 September 2012, the second respondent published in the Government Gazette (Traditional Leadership and Governance Framework Act 41 of 2003: Recognition of Mr Toni Peter Mphephu (Ramabulana) as a King of Vhavenda Community GNR 766, *GG* 35705, 21 September 2012) the recognition of the first respondent as the King of the Vhavenda. It is this decision which prompted the appellant to institute the review proceedings.

Points *in Limine*

[10] The following are the points *in limine* as they appear in the judgment of the high court:

'1 Whether the applicants are precluded from approaching the Court for relief, for failure to:

1.1 follow the dispute resolution process under section 21 of the Traditional Leadership and Governance Framework Act 41 of 2003 (as amended) ("the Act");

1.2 lodge a dispute with the Commission over the First Respondent's title under section 25(2) (a) or (b) of the Act;

1.3 produce evidence and make allegations to the President under section 9(3) of the Act.

2 Whether the Court lacks jurisdiction to hear the review, in that it concerns matters that can only properly be determined by a specialist Commission.

3 Whether the Court ought to decline to consider this review application out of deference to the executive and the Commission.

4 Whether the application falls to be dismissed for want of a pre-existing jurisdictional fact, in that the applicants have not asked that the recognition by then-Premier of the

Limpopo Province be set aside or that the First Respondent be removed from his position of incumbency.

5 Whether the applicants' claim has prescribed under section 25(5) of the amended Act.

6 Whether the applicants' claim has prescribed under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

7 Whether an investigation of the incumbent of the Vhavenda kingship or queenship is pending before the Seventh Respondent (the Commission on Traditional Leadership Disputes and Claims) in terms of section 25(4) and / or section 28(11) (b) of the Act, for the purposes of the making of a recommendation to the Second Respondent (the President) or for the purposes of a final determination.

8 Whether the Second Respondent and / or the Seventh Respondent are estopped from denying that a determination of the incumbent of the Vhavenda kingship or queenship is pending before the Seventh Respondent as a result of the President's public statement of 29 July 2010.

9 Whether the applicants have a legitimate expectation that the Seventh Respondent shall investigate and determine the incumbent of the Vhavenda kingship or queenship, and if so, whether such legitimate expectation entitles the applicants-

9.1 to a determination of the incumbent by the Seventh Respondent; or

9.2 to a hearing by the Second Respondent before the taking of a decision to recognise the incumbent of the Vhavenda kingship or queenship.

10 Whether the Second Respondent's decision to recognise the First Respondent as King of the Vhavenda under section 9 of the Act constitutes administrative action reviewable under PAJA or executive action reviewable under the principle of legality.

11 Whether the aforesaid Second Respondent's decision is reviewable and unlawful, and falls to be set aside, on the grounds of review set out in paragraphs 85.1, 85.1.1, 85.2 and 85.6 of the founding affidavit and paragraphs 19-23, 24.1.6 and 24.3 of the supplementary founding affidavit (dated 8 April 2013), including, without detracting from the generality of any of the foregoing, the questions whether-

11.1 the President ought to have known that there was evidence or at least allegations that the first respondent was not identified according to customary law, and that this requires investigation, as a result of the judgment of Legodi J (which notes that the first respondent's claim to title is disputed);

11.2 the President failed to elicit any recommendation from the Minister as required by section 9(1) (b) of the TLGFA.

12 Whether the decision of the Second Respondent to recognise the First Respondent as King of the Vhavenda and / or the decision of the Eighth Respondent to identify the First Respondent as a King of the Vhavenda is reviewable and unlawful, and falls to be set aside, for having been taken under the old (pre-amended) Traditional Leadership and Governance Framework Act 41 of 2003.

13 Whether, and without conceding that the Eighth Respondent constitutes or legitimately represents "the royal family" as contemplated in section 9 of the Act, the decision of the Eighth Respondent to identify the First Respondent as King of the Vhavenda constitutes administrative action reviewable under PAJA and / or the principle of legality.

14 Whether the decision of the Eighth Respondent is reviewable and unlawful, and falls to be set aside, for the failure to take into account the rights enshrined in the Bill of Rights (including the right to equality), and its obligation to develop customary law in line with the Constitution when it identifies the king or queen of the Vhavenda.'

[11] There is a fair amount of duplication in the questions raised as points *in limine*, listed above. Consequently, I deal with some of them jointly to avoid repetition.

Prescription

[12] The respondents contended that consequent to the expiry of the terms of office of the Commission, the appellant was no longer in a position to lodge a claim with any of the two Commissions and that her claim had thus prescribed. It is correct that in so far as lodging a claim or declaring a leadership dispute with the Commission in terms of ss 21 and 25 of the Framework Act is concerned, that claim has prescribed. The high court ruling was correct. However the effect of that prescription did not close the door on the lodging of a claim or declaring a leadership dispute. The appellant still had a remedy in terms of s 9(3) of the Framework Act, which she did not avail herself to. I return to this aspect later in this judgment.

Jurisdiction

[13] The respondents contended in the high court and before us that the court lacked jurisdiction to hear the review as it concerned a matter that could only properly be considered by the specialist Commission. The high court ruled that it lacked jurisdiction as the dispute was not lodged with the Commission in terms of s 21 of the Framework Act, which provides for lodging of claims, declaring of disputes over the traditional leadership positions as well as the resolution of such claims and disputes by the Commission.

[14] This matter indeed concerns customary law and customs, a body of laws recognised by the Constitution.[4] The Commission, with its special knowledge of customary law, was designed mainly to deal with the distortions in traditional leadership, lineages and disputes as a result of interference by the apartheid regime. But, as pointed out by the appellant, the respondents' argument confuses judicial deference, which a court may appropriately exercise in judicial review proceedings,[5] and the justiciability of the appellant's application. The jurisdiction of the courts is not dependent on whether or not a person has lodged a claim or declared a leadership dispute with the Commission. The exercise of judicial deference is unwarranted in this instance. The courts are vested with authority to adjudicate customary law issues in appropriate cases and to that end s 211 of the Constitution obliges them to apply and give effect to customary law where it is implicated. Moreover, the separated issues do not concern disputed aspects of the Venda customary law that require the Commission's expertise. It is trite that courts in exercising their jurisdiction, strive not to intrude into the domain of other branches of the State. To do so would upset the balance of power and offend the doctrine of separation of powers.[6]

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[4] Section 211 of the Constitution.

[5] To avoid intruding into the domain of other branches of the State and upsetting the balance of power as entailed in the doctrine of separation of powers. See *International Trade Administration Commission v SCAW South Africa* [2010] ZACC 6; 2010 (5) BCLR 457 (CC), 2012 (4) SA 618 (CC) para 95.

[6] Footnote 5 para 95.

[15] The procedures outlined in ss 9(3) and 21 of the Framework Act are designed such that by the time the dispute is raised in the courts, the customary institutions or structures; specialist entities on customary laws and custom, shall have had the opportunity, as a matter of precedence, to pronounce their views on the customary laws and custom rules applicable. Their views as custodians of that system of laws constitute a part of the record of the decision, essential for any court seized with a review of a decision concerning customary laws and custom. The high court therefore erred in its finding that it lacked the jurisdiction to adjudicate this case.

Reviewability

[16] The scheme of the Framework Act governs the taking of decisions by the second, third and fourth respondents, the Commission, Members of the Executive Council for Traditional Affairs (MECs) and Traditional Councils. All these officials and entities are organs of state,[7] exercising public power or performing public functions in terms of the Framework Act, which may adversely affect the rights of persons where it has direct legal effect in the manner envisaged in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Their decisions are of an administrative nature, made under empowering legislative provisions, which include the Framework Act and thus constitute administrative action, which is reviewable under PAJA.[8]

[17] The royal family stands on a different footing. It is not an organ of state, but an institution of customary law, exercising its powers in terms of customary law, custom and processes. The genesis of the process leading to the recognition of a traditional leader lies with a royal family. In performing that function, the royal family initiates a process of identification of a person, which process leads to the exercise of public power and performing a public function of the recognition of that person, by the President or the Premier, in terms of the Framework Act. The identification of a traditional leader or successor to a traditional leader is, as the high court correctly observed, only the initial part of

[7] Section 239 of the Constitution.
[8] Section 1 of the Promotion of Administrative Justice Act 3 of 2000.

an administrative action, which would only become ripe for review after the organ of state has taken the decision.[9] It is after that stage that an aggrieved party whose rights have been adversely affected, may exit the process[10] and approach a court for appropriate relief. Pending the decision to recognise, the President or the Premier is obligated by the Framework Act[11] to ensure that the identification process complied with customary laws, custom and processes. These are the internal processes to the Framework Act, provided for in Chapter 6, which must be followed before a review of the decision is referred to court.

[18] A decision of the President or the Premier is thus reviewable in terms of the Framework Act. Section 6(1) of PAJA provides that such review proceedings may be instituted in a court or tribunal. Section 1 of PAJA defines 'court' as including the Constitutional Court in certain circumstances, the High Court or to a limited extent, the Magistrate's Court as courts of first instance where the proceedings may be instituted. PAJA therefore grants the courts jurisdiction to adjudicate the review of an administrative action taken in terms of the Framework Act. In terms of s 8 of PAJA, the court may, after review, grant any order that is just and equitable as an appropriate relief.[12]

Failure to lodge a claim, legitimate expectation and estoppel

[19] It is common cause that the appellant neither lodged a claim nor declared a dispute with either the old or new Commission or in terms of any provision of the Framework Act. She had the opportunity to declare a dispute during the public investigation of the claim for the establishment of the Throne by the old Commission between November 2005 and December 2008. It was submitted in this Court that she could not do so as she was a minor aged between 14 and 17 at that time. She turned 18 years of age, the statutory age

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[9] See *Netshimbupfe & another v Mulaudzi & others* [2018] ZASCA 98; [2018] 3 All SA 397 (SCA).
[10] *Tshivhulana Royal Family v Netshivhulana* 2017 (6) BCLR 800 (CC) para 32.
[11] Section (3) of the Traditional Leadership and Governance Framework Act 41 of 2003 in the case of the second respondent, and ss 10B(5) and 21 of the Traditional Leadership Governance Framework Act 23 of 2009 in the case of the fourth respondent.
[12] *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* [2013] ZACC 42, 2014 (1) BCLR 1 (CC), 2014 (1) SA 604 (CC) para 25.

of majority, in 2009, as the old Commission was finalising its investigation of the claim for establishment of the Throne. She was therefore a major in January 2010, when the old Commission announced its decision to award the Throne to the Royal Family of Mphephu-Ramabulana, with no decision on the incumbent to that Throne. But she still did not stake her claim for the Throne.

[20] It was the function of the old Commission to *mero motu* or on lodging of a claim or declaring a leadership dispute for incumbency, in terms of s 25 (2*)(a*)(ii) of the Original Act, to conduct an investigation and take a decision in resolving the leadership dispute. Similarly, it was also the function of the new Commission on lodging of a claim or declaring a leadership dispute to investigate and make a recommendation in terms of s 25(2)(*a*)(iii) of the Amended Act. The new Commission did not have the authority to investigate *mero motu* or take a decision after investigation.

[21] The appellant contends that the old Commission was obligated to investigate the claim for the leadership incumbency as lodged by the first respondent. She contended further that she held that view, consequent to the second respondent's public statement, that the new Commission as successor-in-title, was seized with the investigation of the incumbent and would announce its decision. The texts of both s 25(2)(*a*)(ii) (in the Original Act) and s 25(2)(*a*)(iii) of the Amended Act deal with claims for leadership incumbency and are identical. They provide, as one of the functions listed, that the Commission has the authority to investigate a dispute or claim concerning;

'…a traditional leadership position where the title or right of the *incumbent is contested.'* (My emphasis.)

[22] It is plain from the language of s 25(2)(*a*) that the old and the new Commissions were obligated to conduct an investigation of a leadership dispute to the title or right of the incumbency within the context of a disputed or contested leadership claim.[13] As far as the Commission was concerned,

[13] See *Sigcau & another v Minister of Cooperative Governance and Traditional Affairs & others* [2018] ZACC 28; 2018 (12) BCLR 1525 (CC) para 1 (*Sigcau* II).

there is thus no evidence that the claim for incumbency lodged by the first respondent was either contested or disputed. Therefore the contention that the appellant had a legitimate expectation that the old and the new Commissions were seized with the investigation of the first respondent's claim for incumbency, was legally and factually incorrect. The Commission did not have the power to identify a person for recognition as King or Queen. Those powers vest with the royal family, in particular, in terms of the custom of Vhavenda, Khadzi (the sister to the incumbent ruler), would announce her choice of successor. The Commission's power in this context was only to resolve a dispute concerning a contested identification.

[23] If the appellant's version that she believed the Commissions to be seized with an investigation of the leadership incumbency, is to be accepted, then she, with the assistance of her uncle Mr Mbulaheni Charles Mphephu, should have realised in August 2010 when the eighth respondent identified the first respondent for recognition, that the process of appointing a King for Vhavenda in terms of s 9 of the Framework Act had commenced. At that point, she could have inquired from the Commission as to progress in the investigation of the incumbency she erroneously assumed was underway. She had two years to do so before the recognition by the second respondent was gazetted in September 2012. She failed and offered the high court no explanation.

[24] Further, her reliance on the opening remarks by the Chairperson of the old Commission is misplaced. The evidence on record is that reference by the Chairperson at the meeting, to the claims for Kingship/Queenship as well as that of incumbency, was simply to place on record what was claimed. There was no undertaking made in that meeting that the old Commission was or would be conducting an investigation on the question of the leadership incumbency. During the Commission hearings, the first respondent, including the other three claimants for the Kingship/queenship, made presentations in support of their claims for the throne, as well as submissions concerning their own personal claims for incumbency. The submissions did not imply that the

Commission was seized with the question of incumbency. Once the throne was awarded to a particular tribal community, in this instance the Mphephu-Ramabulana Royal Family, the contestations for incumbency could only have arisen if there was a dispute or other claim. There was no contested claim for incumbency in the Royal Family of Mphephu-Ramabulana.

[25] Thus, the public statement by the second respondent that the Commission was investigating the leadership incumbency was based on an assumption that was also legally and factually incorrect. The point *in limine* pertaining to the question of estoppel, that the second respondent is estopped from denying the statement, is equally flawed as it is based on an assumption and statement that was legally incorrect.[14] In addition, and as the first respondent correctly submitted, estoppel should be raised as a defence.[15]

[26] It is further common cause that the appellant did not present any evidence or allegation to the second respondent in terms of s 9(3) of the Framework Act. The section provides that where there is evidence or an allegation that the identification of a person referred to in s 1 (in this case the first respondent) was not done in accordance with customary law, custom or processes, the second respondent may deal with that evidence or allegation as provided for in s 9(3)*(a)* and *(b)* and must do so in *(c)* read with s (4) of both the Acts. Between 14 August 2010, when the eighth respondent identified the first respondent as the incumbent to the Throne, and 21 September 2012 when the second respondent recognised him as the King of Vhavenda, the appellant, then aged above 18 and assisted by her uncle, had ample opportunity to produce evidence or make an allegation to the second respondent in support of her claim. She contends that she was not obligated to do so. Stated otherwise, she contends that she had no obligation to comply with the Framework Act.

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[14] *Provincial Government of the Eastern Cape & others v Contractprops 25 (Pty) Ltd* [2001] 4 All SA 273 (A); 2001 (4) SA 142 (SCA) at 148.
[15] *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) SA 102 (GW) at 107D.

[27] This court in *Netshimbupfe*[16] held that a party seeking the kind of relief such as that sought by the appellant, had to follow the process outlined in the Framework Act. There is no authority to support the contention by the appellant that she can at will ignore the dispute resolution provisions of the Framework Act and directly approach the court. The Framework Act provides for a designed leadership dispute resolution process in terms of customary laws and customs. Apart from the allegation that her uncle unsuccessfully attempted to approach the eighth respondent prior to and during the meeting of 14 August 2010, to which I will later return, the appellant in the high court and this court manifested an intention of non-compliance with the provisions of the Framework Act in prosecuting her claim to ascend the Throne. In particular, in regard to lodging a claim or declaring a dispute with the old or new Commissions, she allowed such to prescribe. The high court was thus correct in concluding that the appellant is non-suited for failure to follow the processes provided for in ss 9, 21 and 25 of the Framework Act. The high court was also correct in dismissing her allegation that she held a legitimate expectation that the leadership incumbency was under investigation by both Commissions. The high court was also correct in dismissing her further claim that the second respondent is estopped from denying the legality of the public statement to the alleged pending investigation.

The principle of primogeniture and the attack on the constitutional validity of ss 2, 2A and 2B of the Framework Act.

[28] The appellant contends, with reference to the minutes of the meeting of the eighth respondent dated 14 August 2010, where the first respondent was identified for recognition as King, that she was not identified to ascend the Throne due to gender discrimination which offends the Bill of Rights in the Constitution. The minutes of the meeting records in part:

'Mr Mphephu explained as to how according to Vhavenda tradition and customary a future king or chief is identified. He did mention the following criteria: that *he* should be from the royal family and dzekiso wife-*he* should not have criminal records-*he* should be discipline(d) (good behaviour). He should respects (respect) elders. He

[16] *Netshimbupfe & another v Carthcart & others* [2018] ZASCA 98; [2018] 3 All SA 397 (SCA) para 17.

should be a good leader. He further mentioned that according to Vhavenda customs a female (makhadzi is the one who must identify the king and supported by all makhotsimunene and other khadzi. *In the Mphephu-Ramabulana family in particular the chief or king must come or must be a man* (*sons*).' (My emphasis.)

[29] This being the first identification of the incumbent to the Throne as King or Queen of Vhavenda, a precedence was declared, that only men would qualify for the position. Apart from the fact that there is no evidence in the minutes that the criteria was declared to prohibit the identification of the appellant, the effect of this criterion is that the appellant, and any other woman who may meet the other criteria to succeed as queen in the Mphephu-Ramabulana Royal Family, would be disqualified by her gender. Therefore contrary to the submission by the eighth respondent, this issue is very much alive as it established a criterion which upholds the principle of primogeniture that offends the right to equality in the Bill of Rights.

[30] Ordinarily, and on this point *in limine*, the criterion that promotes gender discrimination should be declared unconstitutional, invalid and consequently be set aside. However the Constitutional Court, supported by the legislature, are of the view that the proper approach in dealing with amendments or repeal or changes of customary laws and customs, should be in a form of development, implemented progressively by the affected traditional community. The Constitutional Court, in *Shilubana & others v Nwamitwa* 2009 (2) SA 66 (CC), considered the question of a traditional community's authority to develop their customs and traditions so as to promote gender equality in the succession of traditional leadership, in accordance with the Constitution. In outlining the approach to the development of customary law and custom, the Constitutional Court concluded thus:

'[73] ... Section 211(2) specifically provides for the right of traditional authorities to function subject to their own system of customary law, including amendment or repeal of laws. A community must be empowered to itself act so as to bring its customs into line with the norms and values of the Constitution. Any other result would be contrary to section 211(2) and would be disrespectful of the close bonds between a customary community, its leaders and its laws.

[74] It follows that if the traditional authority has only those powers accorded it by the narrow view, it would be contrary to the Constitution and frustrate the achievement of the values in the Bill of Rights. Section 39(2) of the Constitution obliges this Court to develop customary law in accordance with the spirit, purport and the aims of the Bill of Rights. This power should be exercised judiciously and sensitively, in an incremental fashion. As the Supreme Court of Canada has held in relation to common law, "[t]he judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society." The same remarks apply to customary law. It is appropriate for the Court to exercise its section 39(2) powers in a manner that will empower the community itself to continue the development.'

[31] The legislature also provided in s 2A(4) of the Framework Act as follows:

'A kingship or queenship must transform and adapt customary law and custom relevant to the application of this Act so as to comply with the relevant principles contained in the Bill of Rights in the Constitution, in particular by-

(a) preventing unfair discrimination;

(b) promoting equality; and

(c) seeking to progressively advance gender representation in the succession to traditional leadership positions.'

[32] The criteria that only men should succeed to the Throne in the Mphephu-Ramabulana community impedes compliance with the provisions of s 2A(4)(*c*) of the Framework Act. Section 2A(4)(*c*) provides for a progressive transformation and adaptation of the selection criteria in order to ensure that the customary law and custom complies with the provisions of the Bill of Rights on gender equality. The Vhavenda traditional communities have an obligation to develop the criteria for identification of a King or Queen to bring it in line with the Bill of Rights. In this case, s 9 of the Framework Act obliged the second respondent to effect recognition of an identified person as King on the recommendation of the third respondent. Thus the second, third and eighth respondents failed to consider this issue in terms of s 6(2*)(e*)(iii*)* of PAJA when effecting the identification and recognition respectively of the first respondent as King of Vhavenda. The decisions to identify and recognise the

first respondent should thus be reviewed and set aside, as the criteria impedes compliance with s 2A(4*)(c)* of the Amended Act. The high court erred in dismissing this point *in limine*.

Declaration of invalidity

[33] The appellant contends that ss 2A(4) and 2B(4) of the Amended Act should be declared constitutionally invalid. These sections in the Framework Act provide for the progressive transformation and adaptation of the customary laws and custom, to comply with the relevant principles of the Bill of Rights in the Constitution. Section 2A(4) is quoted and referred to under the discussion of the point *in limine* on primogeniture above.

[34] The appellant contends that the words 'to progressively advance' in those sections should be declared constitutionally invalid, in that they cause the delay of the envisaged transformation and adaptation of the customary laws and customs, in complying with the relevant principles contained in the Bill of Rights. This contention was not supported by any objective facts or evidence in relation to any form or manner of delay on the part of Vhavenda, to transform their customary laws, custom or practices. The primogeniture principle is a criterion that was introduced as one of the other criteria to identify a King/Queen in the Mphephu-Ramabulana Royal Family. There was no evidence of a delay in general in seeking to advance gender representation in the succession to other traditional leadership positions in the custom of Vhavenda. On the contrary, the appellant in the founding affidavit deposed to on her behalf, avers that Makhadzi Phophi Mphephu (a female and sister to the incumbent leader) who at some point acted as regent in the house of Mphephu-Ramabulana, is a senior traditional leader in her own right. Further, and as already stated in this judgment, the Constitutional Court in *Shilubana*[17] held that the development of customary laws and customs should be effected incrementally by the traditional communities affected. Thus the attack of constitutional invalidity on ss 2A and 2B(4*)(c*) of the Framework Act

[17] *Shilubana & others v Nwamitwa* 2009 (2) SA 66 (CC) paras 73 to 75.

has no merit for want of evidence and was correctly dismissed by the high court.

'Notice to recognise' issued in terms of the Original Act

[35] The second respondent took the decision to recognise the first respondent as King of Vhavenda on 21 September 2012, in terms of the provisions of s 9 of the Original Act. The appellant contends that the second respondent in publishing the recognition in terms of the Traditional Leadership and Governance Framework Act 41 of 2003: Recognition of Mr Toni Peter Mphephu (Ramabulana) as King of Vhavenda Community GNR 766, GG 35705, 21 September 2012, relied on the old version of s 9 of the Original Act, which had been changed in the Amended Act to require the second respondent to act on the recommendation of the third respondent. The high court was of the view that the decision was taken correctly in terms of the Original Act, but did not provide reasons therefor.

[36] The crux of the different texts of s 9 is that under the Original Act, the second respondent could act alone to recognise the identified person. Under the Amended Act, the second respondent must act on the recommendation of the third respondent. The notice issued on 21 September 2012 makes no mention that the recognition is on recommendation of the third respondent. This case is the direct opposite of what transpired in *Sigcau,*[18] where the Constitutional Court declared invalid, a notice of recognition issued under the Amended Act instead of the Original Act. The second respondent does not dispute that the notice was issued in terms of s 9 of the Original Act. As at 14 August 2010 when the first respondent was identified and through to 21 September 2012, the Original Act had been amended and the Amended Act was in force. The notice was not in accordance with the Amended Act and was thus invalid. On this ground too, the decision of the second respondent stands to be reviewed and set aside in terms of s 6(2)(*d*) of PAJA, in that the

[18] *Sigcau v President of the Republic of South Africa & others* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC).

action was materially influenced by an error of law. The high court erred in dismissing this point *in limine.*

Composition of the meeting of the eighth respondent on 14 August 2010

[37] The appellant questioned the presence of traditional leaders who were not members of the eighth respondent in the meeting of 14 August 2010. The Framework Act defines a royal family as:

'[T]he 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.'

[38] There were members of the Royal Council present in the meeting. The Royal (Tribal) Council is an administrative structure established in terms of the Framework Act, and some of its members would also be members of a royal family. The persons who serve as both the Royal Family and the Royal Council are entitled to attend and participate in the Royal Family meetings. However, the members of the Royal Council who were not related to the Mphephu-Ramabulana Royal Family, were not entitled to attend the meeting of 14 August 2010. The eighth respondent itself confirmed in its affidavit that the meeting was also attended by other senior traditional leaders who are members of the Royal Council but not of the Mphephu-Ramabulana Royal Family. Thus the decision to identify the King of Vhavenda was not taken by the Royal Family only, as required by customary law, custom and the Framework Act. It was taken by a joint sitting of the Royal Family and the Royal Council. The decision of the meeting was thus not in accordance with the law and stands to be reviewed and set aside in terms of s 6(2)*(a)*(ii) of PAJA. This is so because the decision was taken under a delegation of power which was not authorised by the empowering provision; in terms of s 6(2)*(b)* of PAJA, in that a mandatory material procedure prescribed by an empowering provision was not complied with and in terms of s 6(2)*(e)*(iv) in that the action was taken because of the unauthorised dictates of another person. The high court erred in dismissing this point *in limine.*

Pending disputes of facts

[39] Apart from the points *in limine,* there were other factual disputes between the parties on the merits. These disputes require application of principles of customary laws and custom, without which the adjudication of this case cannot reach finality. Three of these issues are the following.

(1) The issues of *Dzekiso* wife and *the appellant being older than the Throne*

[40] The eighth respondent alleged that the appellant was not considered for identification because she was older than the Throne, in the sense that she was born three years before her father ascended the Throne. The eighth respondent contended that according to its custom, in order for the appellant to qualify as successor to the Throne, she had to be born of an incumbent traditional leader. The appellant admitted that she was born before her father ascended the Throne. The second reason advanced for her exclusion from the identification process was that she was not born of a *Dzekiso* wife. The *Dzekiso* wife is the wife of the traditional leader selected by the royal family, in the Vhavenda custom in the person of *Makhadzi*, to bear an heir to the throne. The appellant's mother was, according to the eighth respondent, not married by custom to bear an heir. The appellant responded that her mother was in fact the *Dzekiso* wife. There is thus a dispute of fact on the question whether or not the appellant's mother was a *Dzekiso* wife, an issue which must be referred to the high court for evidence and adjudication.

(2) Attempt to consult Royal Family

[41] The appellant disputed the eighth respondent's allegation that she did not personally or with the assistance of others, communicate her claim to the eighth respondent before she approached a court. Her uncle, Mr Mbulaheni Charles Mphephu, stated in the replying affidavit that he contacted Makhadzi, Ms Mavis Mphephu, and requested her to raise the issue of the appellant as successor. In response he received intimidating phone calls from someone he identified as the first respondent's spokesperson. He alleged that this person threatened him and the appellant and told them to stop contesting the first respondent's leadership. They both received further threatening messages

which caused them to contact the police VIP protection services. Such conduct, if found to be true, would impugn the credibility and the reliability of the outcome of the meeting. This aspect is also referred to the high court for adjudication, more so it was raised in the replying affidavit, although the respondents did not request to strike it out or obtain leave of the court to respond in supplementary affidavits.

(3) The position of *Ndumi* and Regent

[42] The appellant contended that the first respondent was *Ndumi* to her father and consequently, according to customary law and custom of Vhavenda, he was disqualified to succeed her father as the traditional leader. She further contended that the first respondent ascended the position of senior traditional leader as a regent. In support of that contention, she attached copies of the minutes of a meeting held in 1998, at which the first respondent was allegedly identified by the eighth respondent to be recognised as a regent and not senior traditional leader. These issues require further evidence and adjudication before the high court for a proper determination.

Conclusion

[43] In light of these findings, the decision by the second respondent to recognise the first respondent as King of Vhavenda, is reviewed and set aside and the appeal must succeed. However, it would obviously be premature to consider a just and equitable remedy before the entire review is finalised.[19] The outstanding issues and points *in limine* referred to the high court for evidence and adjudication have a direct bearing on any future identification and recognition of a person, even in an acting capacity, as King or Queen of Vhavenda. Thus, any attempt to appoint anyone to the Throne at this stage of the proceedings, would require a prior resolution of the very same issues pending adjudication in the high court. It would be in the interest of all the parties to have these matters resolved before the next process of identifying and recognising a leader in terms of s 9 of the Framework Act commences. Consequently, the effect of the review and setting aside of the first

[19] Footnote 12 para 56.

respondent's recognition as King of Vhavenda and the withdrawal of his recognition certificate as King will have to be stayed, pending the completion of the proceedings, including any appeal process that might arise therefrom.

[44] The fifth and sixth respondents are the recognised statutory structures, established to advise the President and the Premier in terms of ss 9(3*)(a*) and 11(3)*(a)* of the Framework Act respectively, on matters of customary laws and customs. In the absence of the Commission, they serve as a primary source of knowledge and expertise on the prevailing customary laws and customs. It would therefore be necessary in this case, and to assist the high court, for the second and fourth respondents to be directed to refer the questions of customary laws and custom arising from this case to the fifth and sixth respondents for advice and guidance. These questions would include: (a) what measures have to be taken for the adaptation and transformation of the principle of primogeniture by the traditional communities within the context of s 2A(4)*(c)* of the Amended Act; (b) whether a child born before the parent is recognised as a traditional leader, qualifies to be the successor of the parent to that position of traditional leadership and (c) whether in the Vhavenda custom, the *Ndumi* qualifies to be identified and recognised as a successor to a position of traditional leadership. The response to these questions must then be placed before the high court as part of the evidence in the adjudication of the merits.

Costs

[45] All the parties in this appeal have had a measure of success and failure in regard to their points *in limine*. In view of the referral of this matter back to the high court for adjudication on the merits, it would thus be inappropriate to award any party costs of the appeal. The ruling of the high court in regard to the costs on the points *in limine* should be similarly set aside and the costs awarded by the high court should be costs in the cause.

[46] In the premises the following order would be appropriate at this stage:

1 The appeal is upheld with no order as to costs.

2 The matter is referred back to the Limpopo Division of the High Court, Thohoyandou for further adjudication on the merits before another Judge.

3 The order of the high court is set aside and replaced with the following:

'(a) It is declared that the decision of the eighth respondent of 14 August 2010 to identify the first respondent as a suitable person to be appointed as the King of the Vhavenda Traditional Community is unlawful, unconstitutional and invalid and is reviewed and set aside.

(b) It is declared that the decision of the second respondent dated 14 September 2012 to recognise the first respondent as the King of the Vhavenda Traditional Community published in Traditional Leadership and Governance Framework Act 41 of 2003: Recognition of Mr Toni Peter Mphephu (Ramabulana) as King of Vhavenda Community GNR 766, *GG* 35705, 21 September 2012 is unlawful, unconstitutional and invalid and is reviewed and set aside.

(c) It declared that the decisions of the eight respondent to identify, and that of the second respondent to recognise the first respondent as King of Vhavenda are based on a criteria that promotes gender discrimination, and are reviewed and set aside in that the discrimination impedes compliance with the provisions of s 2A(4)*(c)* of the Traditional Leadership and Governance Framework Amendment Act 23 of 2009, to progressively advance gender representation in the succession to the position of King or Queen of Vhavenda.

(d) The second and the fourth respondents are directed to refer the following issues of customary laws and custom to the fifth and sixth respondents respectively for opinion and advice to be submitted to the high court:

(i) What measures are in place or have to be in place for the adaptation and transformation of the principle of primogeniture by the traditional communities, within the context of s 2A(4)*(c)* of the Traditional leadership and Governance Framework Amendment Act 23 of 2009;

(ii) Whether a child born before the parent is recognised as a traditional leader, qualifies to be the successor of the parent to that position of traditional leadership and

(iii) Whether in the Vhavenda custom, the *Ndumi* qualifies to be identified and recognised as a successor to a position of traditional leadership.

(e) The costs shall be costs in the cause.

(f) The withdrawal of the certificate of recognition of the first respondent as King of Vhavenda, shall be stayed pending the final determination of the proceedings.

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S P Mothle

Acting Judge of Appeal

APPEARANCES:

For Appellant:	A Dodson SC, J Bleazard and M Maenetjie Instructed by: Hammann-Moosa Incorporated C/o Webbers Attorneys, Bloemfontein
For 1st and 8th Respondent:	I A M Semenya and T J Macuaba Instructed by: Nkhume Makhavhu Attorneys C/o Matsepes Attorneys, Bloemfontein
For 2nd, 3rd and 7th Respondent:	N M Arendse SC & Z Z Matebese SC Instructed by: Bhadrish Daya Attorneys C/o MatsepesAttorneys, Bloemfontein