THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 822/13

Reportable

In the matter between:

SITHEMBILE VALENCIA MKHIZE **APPELLANT**

In re:

KZP Case Number 2367/2010

ZWELIBHEKILE SIBUSISO MBUYAZI Applicant

and

THE PREMIER OF THE PROVINCE OF KWAZULU-NATAL First Respondent

MKHABYISENI MBUYAZI Second Respondent

THE uMNDENI WENKOSI OF THE LATE INKOSI MTHOLENI MBUYAZI Third Respondent

AND

KZP Case Number 10169/2011

ZWELIBHEKILE SIBUSISO MBUYAZI *N.O.* (MBUYAZI COMMUNITY DEVELOPMENT TRUST) First Applicant

ZWELIBHEKILE SIBUSISO MBUYAZI *N.O.* (MBUYAZI COMMUNITY PUBLIC BENEFIT TRUST) Second Applicant

ZWELIBHEKILE SIBUSISO MBUYAZI Third Applicant

and

MINIAS MAFULEKA *N.O.*
(MBUYAZI COMMUNITY
DEVELOPMENT TRUST) **FIRST RESPONDENT**

THANDIWE VIRGINIA MAFULEKA *N.O.*
(MBUYAZI COMMUNITY
DEVELOPMENT **SECOND AND FURTHER**
TRUST) AND OTHERS **TWENTY RESPONDENTS**

Neutral citation: *Mkhize: In re Mbuyazi v The Premier of the Province of Kwazulu-Natal and Mbuyazi v Mbonambi Community Development Trust* (822/2013) [2014] ZASCA 204 (28 November 2014)

Coram: Mpati P and Swain JA and Fourie AJA

Heard: 07 November 2014

Delivered 28 November 2014

Summary: Practice and procedure – deposed Inkosi (Traditional Leader) - claim for reinstatement and for loss of salary – deposed Inkosi since deceased – application by executrix to be substituted for deceased Inkosi in reinstatement claim unsuccessful as claim terminated upon his death – substitution application granted in claim for loss of salary, it being in effect damages claim.

ORDER

On appeal from: Kwazulu-Natal High Court, Pietermaritzburg (Booyens AJ sitting as court of appeal):

1 The appeal is upheld in part.

2 Save for that part of the order dismissing the appellant's application to be substituted for the deceased in her capacity as guardian of Phathokuhle, the order of the court below is set aside and for it is substituted the following:

'(a) The applicant, Sithembile Valencia Mkhize, in her capacity as executrix of the estate of the late Zwelibhekile Sibusiso Mbuyazi, is hereby substituted as applicant in the deceased's damages claim and in his funding application.

(b) The first and second respondents are ordered to pay the applicant's costs in both applications, jointly and severally, the one paying the other to be absolved.

(c) The first and second respondents' applications for the discharge of the rule *nisi* and for the rescission of the orders granted on 7 June 2011 are both dismissed, with costs.'

3 The first and second respondents are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.

JUDGMENT

Mpati P (Swain JA Fourie AJA concurring):

[1] The appellant is the executrix in the estate of her late husband, the late Zwelibhekile Sibusiso Mbuyazi (the deceased), who died on 7 July 2012. She is

also the mother and guardian of the deceased's minor son, Phathokuhle. This appeal, with leave of the court below (Booyens AJ, in the Pietermaritzburg High Court), arose from a decision of that court dismissing the appellant's application in which she sought, in her capacity as executrix in the estate of the deceased, to be substituted as applicant in certain applications launched by the deceased during his lifetime and which had not been finalised at the time of his death. The appellant had also sought to be substituted as applicant in those applications in her capacity as mother and legal guardian of Phathokuhle. A narrative relating to the circumstances that led to the appellant's applications follows.

[2] The deceased was the eldest son of the late Inkosi Mtholeni Mthiyane Mbuyazi (Inkosi Mbuyazi), who died on 22 June 2005. At the time of his demise Inkosi Mbuyazi had been the traditional leader of the Mbuyazi Traditional Community of the KwaMbuyazi area of KwaZulu-Natal (the Mbuyazi Community). During August 2006 the umndeni wenkosi of the late Inkosi Mbuyazi, consisting of members of the Royal Family (third respondent), identified the deceased as the next Inkosi of the Mbuyazi Community.[1] It appears that the deceased subsequently received written communication from the office of the first respondent, the Premier of the Province of KwaZulu-Natal (the Premier), advising him that he had been recognised as the Inkosi of the Mbuyazi Community.[2] It is not in dispute that the deceased took over as *de facto* Inkosi from approximately September 2006. During February 2007 he was asked by the Department to provide his bank account details and he thereafter received a monthly salary as Inkosi.

[1] See Section 19 of the KwaZulu-Natal Traditional Leadership and Government Act No 5 of 2005, quoted in paragraph 13.
[2] Paragraph 13

[3] At a family meeting held on 8 January 2010 a certain official of the KwaZulu-Natal Department of Co-operative Governance and Traditional Affairs (Department) advised the deceased that a cabinet resolution had been taken on 2 December 2009 to remove him as Inkosi. This followed some investigation that had been conducted by a Professor Mathenjwa into the question whether the deceased had been correctly appointed as Inkosi. A notice of the deceased's removal as Inkosi was published in an *Extraordinary Provincial Gazette* on 13 January 2010. On 4 February 2010 officials of the Department made a public announcement that the second respondent, Mkhanyiseni Mbuyazi, the deceased's younger brother, was the Inkosi of the Mbuyazi Community.

[4] On 29 March 2010 the deceased launched an urgent application seeking orders in two parts. In Part A the following interdictory relief was sought:

'1 That a *rule nisi* do issue calling upon the first, second and third respondents, and any other interested persons, to show cause, if any, to this Honourable Court on the day of 29 July 2010 at 09:30 or so soon thereafter as the matter may be heard why an order should not be granted in the following terms:

(a) That pending the final determination of an application for the review of the decision to withdraw the recognition of the Second Respondent as Inkosi of the [Mbuyazi] Community and to reinstate the applicant as Inkosi:
    (i) the appointment of, or reference to, the Second Respondent as Inkosi of the [Mbuyazi] Community be and is hereby suspended; and
    (ii) the appointment of the Applicant as Inkosi of the [Mbuyazi] Community is restored.

2 That paragraph 1 hereof shall operate as an interim order, with immediate effect, pending the return date of the *rule nisi*.

. . . .'

In Part B, which was headed 'MAIN REVIEW APPLICATION', the deceased sought an order declaring him to be the Inkosi of the Mbuyazi Community; that the decision of the Premier to withdraw his recognition as Inkosi published on 13 January 2010 be reviewed and set aside; and directing the Premier 'to do all things necessary and publish all notices to withdraw the appointment of the Second Respondent or any other person other than the applicant as Inkosi of the [Mbuyazi] Community' and to reinstate his appointment.

[5] In an answering affidavit deposed to on 3 May 2010 the Premier indicated that he would abide the decision of the court below. He also submitted that the dispute as to who was entitled to be the Inkosi of the Mbuyazi Community was primarily between the deceased and second respondent and that the third respondent also had an interest in the proceedings by virtue of the role it plays under the applicable legislation. On the same day the Premier delivered a record, which was supplemented on 11 June 2010. On or about 13 July 2010 the deceased filed a supplementary affidavit in terms of Uniform Rule 53(4), together with a notice of amendment, in terms of which he amended Part B of his notice of motion, seeking the following additional order:

'4 That the first respondent is directed to:

(a) immediately reinstate the payment of a salary to the applicant as Inkosi of the Mbuyazi Traditional Community; and
(b) immediately pay a gross salary of R96 126, from which income tax should be deducted and paid to the Receiver of Revenue, to the applicant as arrear salary as Inkosi of the Mbuyazi clan for the months of February to September 2010 inclusive, together with interest at the rate of 15.5% per annum on all arrear net salary amounts.'

[6] The order sought by the deceased in Part A of his notice of motion was granted by Madondo J on 11 May 2010. Despite his indication that he would abide the decision of the court, the Premier gave notice, on 21 May 2010, to anticipate the *rule*. Further, he sought leave to oppose the deceased's application. On 26 May 2010 Koen J granted leave to the Premier as prayed. The interim order was varied by the deletion of paragraph 2 thereof and the following order was made in its stead:

'4 Pending the final determination of the application for the said review and to operate as an interim order forthwith:-

4.1 First Respondent is granted leave and directed to appoint an appropriate person to function in the interim as Ibambabukhosi (which person shall not be the Applicant or the Second Respondent) until such time as an Inkosi has been recognised and appointed as contemplated in terms of section 3 of the KwaZulu-Natal Traditional Leadership and Governance Act No. 5 of 2005.

4.2 Applicant and Second Respondent are interdicted and restrained from attempting to, or taking office, as the Inkosi of the [Mbuyazi] Community.

. . . .'

[7] The deceased's review application, which was now opposed by the Premier and the second respondent, was argued before Van Zyl J on 23 September 2010. In a judgment delivered on 7 June 2011 the learned judge highlighted certain material disputes of fact, which, he held, 'do not lend themselves to meaningful formulation for purposes of a referral of specified issues for the hearing of oral evidence'. He concluded that 'the interests of the parties and particularly those of the [Mbuyazi] Community would best be served by referring the matter to trial'. The learned judge made such an order and directed that the interim arrangements as per the order of 11 May 2010,

modified by the subsequent order of 26 May 2010 shall remain in force pending the final determination of the matter.

[8] On 26 October 2011 the deceased instituted further motion proceedings in which he cited as respondents the trustees of the Mbonambi Community Development Trust and of the Mbonambi Community Public Benefit Trust, as well as other entities, including the first and second respondents, seeking an order, inter alia, that all his taxed attorney and own client costs be paid by the first-mentioned trust. (I shall, for convenience, refer to it as 'the funding application'.) The reason for seeking this order was given in the founding affidavit as insufficient resources properly to pursue the litigation. The funding application was opposed by the Premier and the second respondent. However, as at the date of the demise of the deceased both the funding and the review applications (the latter having been referred to trial) had not been finalised.

[9] On 25 October 2012 (following the death of the deceased on 7 July 2012) the second respondent brought an application seeking an order discharging the *rule* issued by Madondo J on 11 May 2010 and modified by Koen J on 26 May 2010 and dismissing the deceased's review application. And further –

'3 That the First Respondent's decision to withdraw recognition of the late Applicant as Inkosi of the [Mbuyazi] Community which was published in the Extraordinary Provincial Gazette on 13 January 2010 be and is hereby confirmed.

4 That the interim appointment of Hlompile Mbonambi as Ibamba Bukhosi be and is hereby terminated.

5 that the Second Respondent's appointment as Inkosi of the [Mbuyazi] Community by the First Respondent be and is hereby confirmed.

6 That the application brought by the late Applicant be and is hereby dismissed with costs.'

The basis upon which this order was sought was that the interdict had in fact been granted in favour of the deceased and that, therefore, 'there is no legal basis upon which the Executor or any heir . . . can lay claim to the chieftainship in the absence of a Declaratory Order confirming [the deceased] as the rightful Inkosi'. On 9 November 2012 the Premier joined the fray and applied, by way of an interlocutory application, for rescission of the orders granted by Van Zyl J on 7 June 2011, in addition to an order discharging the *rule*, with costs. The grounds for the orders sought were that the rights of the deceased to be recognised as Inkosi were personal to him; that to be recognised as Inkosi he must be alive; and that these rights were not transmissible to his heirs or anyone else.

[10] The appellant responded by filing what is headed 'Notice of Application and Counter-application' on 19 November 2012 seeking the order referred to in paragraph 1 above, which was dismissed by the court below as mentioned above. To the order sought by the deceased in the amended notice of motion in the review application, the appellant added the following prayers:

'4 That the first respondent is directed to pay the first applicant, in her capacity as the executrix of the estate of the late Zwelibhekile Sibusiso Mbuyazi:

(a) . . . ;
(b) the further amounts which the deceased was entitled to as salary from November 2010 until 7 July 2012, from which income tax should be deducted and paid to the Receiver of Revenue, together with interest at the rate of 15.5% per annum, and an account of how such amount has been computed.

5 That uMndeni weNkosi of the [deceased] are directed to meet and identify a successor and, if necessary, Ibambabukhosi, to the late Inkosi.

. . . .'

The Premier once again opposed the appellant's counter-application on the grounds that the deceased's review application 'is now terminated, it having ceased upon the death of the deceased' and that the appellant 'has no legal interest or standing to continue with the review'.

[11] As has been alluded to above, the court below dismissed the appellant's applications to be substituted for the deceased as applicant in both the funding and review applications. It also dismissed both the funding and review applications brought by the deceased, but made no order as to costs. In dismissing the funding application the court below held that it (the application) depends on whether the appellant can successfully be substituted for the deposed Inkosi [deceased] as an applicant for review. In that regard the court reasoned as follows:

'The right that the deposed Inkosi alleged that he was entitled to was the right to be the Inkosi, this right however is a purely personal right of his. He cannot in any way deal with this right by transferring it in any way whatsoever.'[3]

As to the application for the appellant's substitution in her capacity as mother and natural guardian of the deceased's minor son, Phathokuhle, the court held that in view of the fact that the deceased's right to set aside the Premier's decision was a personal right, and that right 'died' with the deceased, the application cannot succeed. In respect of the claim for arrear salary the court said:

'Had the deposed chief been alive and still the chief, he would *ex contractu* have been entitled to receive a salary to the date of his death. In my view the executrix faced the same stumbling block that she faces in her claim on behalf of her minor child. The right to challenge the decision of the Premier was a right personal to the deposed chief. That right, as I have stated earlier, died with the chief. It would then follow that the claim as presently

[3] Paragraph 13.

formulated cannot stand. I express no view as to whether the executrix could in her capacity as executrix institute a separate action for payment of the salary that the deceased would have received.'[4]

[12] I propose to consider first the appellant's application to be substituted as applicant in the review application. I agree with the finding of the court below that the deceased's claim, in the review application, that the Premier's withdrawal of his recognition as Inkosi of the Mbuyazi Community be set aside; that the Premier be directed to do all things necessary to withdraw the appointment of the second respondent as Inkosi of the Mbuyazi Community and to reinstate him (the deceased) as such, was personal to him and therefore not transmissible to anyone else. He was the only one, were he to be successful, who could be reinstated as Inkosi. However, since he has died, an order setting aside the Premier's withdrawal of the deceased's recognition as Inkosi and directing the Premier to reinstate him as Inkosi can no longer be made. That claim, therefore, could no longer be pursued after the death of the deceased. It terminated upon his death. (See the relevant authorities referred to by Holmes JA in *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 607A-B.) In my view, the claim for reinstatement could not be ceded, even after *litis contestatio*, and is thus not transmissible to the deceased's heirs. It follows that the appellant cannot be substituted as applicant in the review application proper.

[13] The same considerations apply in respect of the appellant's application to be substituted for the deceased in her capacity as mother and natural guardian of Phathokuhle. It is so that Phathokuhle may well have had a claim, upon the death of the deceased while still Inkosi, to succeed his late father, but would

[4] Paragraph 21.

not, on the case as presented on the papers as they stand, have been able to obtain an order directing the Premier to appoint him as Inkosi. This is because whenever the position of an Inkosi is to be filled certain procedures must be followed. Section 19 of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (the Act) reads:

'(1) Whenever the position of an *Inkosi* is to be filled, the following process must be followed -

(*a*) *Umndeni wenkosi* must, within a reasonable time after the need arises for the position of an *Inkosi* to be filled, and with due regard to applicable customary law and section 3 –

(i) Identify a person who qualifies in terms of customary law to assume the position of an *Inkosi* after taking into account whether any of the grounds referred to in section 21(1)(*a*), (*b*) or (*d*) apply to that person;

(ii) Provide the Premier with the reasons for the identification of that person as an *Inkosi*; and

(iii) The Premier must, subject to subsection (3) of this section and section 3, recognise a person so identified in terms of subsection (1)(*a*)(i) as *Inkosi*: Provided that if the reason for the vacancy is the death of the recognised *Inkosi, Umndeni wenkosi* must, before identifying the person to be recognised as *Inkosi,* consider the content of the testamentary succession document referred to in section 19A.

(2) The recognition of a person as an *Inkosi* in terms of subsection (1)(*a*)(iii) must be done by way of –

(*a*) a notice in the *Gazette* recognising the person identified as an *Inkosi*; and

(*b*) the issuing of a certificate of recognition to the identified person.

(3) The Premier must inform the Provincial House of Traditional Leaders of the recognition or appointment of an *Inkosi*.

. . . .'

It was with this process in mind that the appellant sought to add prayer 5[5] to the notice of motion in the review application.

[14] It must be stressed, however, that it does not follow from the finding that the deceased's claim for his reinstatement as Inkosi was not transmissible upon his death, that Phathokuhle has no claim to the position of Inkosi of the Mbuyazi Community. Section 19(1)(*a*)(i) of the Act enjoins the umndeni wenkosi (royal family) to identify a person 'who qualifies in terms of customary law to assume the position of an Inkosi . . . '. In *Umndeni (Clan) of Amantungwa & others v MEC, Housing and Traditional Affairs, KwaZulu-Natal & another* [2011] 2 All SA 548 (SCA) this court expressed itself thus:

'Langalibalele Mathenjwa, an erstwhile professor and Acting Head of Department of the University of Zululand, in the department of IsiZulu Namagugu, where he "dealt with teaching and resource into the Zulu heritage" and presently Provincial Manager of the South African Heritage Resources Agency, set out "the Zulu laws of hereditary succession" as follows in an affidavit annexed to the respondents' answering affidavit:

"The successor of a deceased Inkosi is appointed on the basis of the Zulu laws of hereditary succession, from within the Royal or Ruling House. That is, the [successor to] the chieftainship is the heir of a deceased chief. In this way succession is retained within the Royal House. In essence the successor to a deceased chief will be the eldest son from *indlunkulu*. (This means the first or the great house.) If the eldest son is dead or cannot take up the position, then the eldest son's senior male descendant: failing which the second son of the *indlunkulu*, failing him the senior male and so on through the sons of the *indlunkulu* and their descendants. Thereafter the eldest son of the house first affiliated to the *indlunkulu*, failing which the senior male descendant through such house and their descendants in order of seniority, and so on."

This custom of hereditary succession has not been disputed by the appellants. It must, therefore, be accepted as correct.'[6]

[5] Quoted in para 10 above.
[6] Para 21.

[15] Thus, under Zulu laws of hereditary succession Phathokuhle would be next in line for the position of Inkosi, were it to be proved that the deceased had been wrongfully removed as Inkosi. But s 3 of the Act obliges a traditional community to 'transform and adapt customary law and custom so as to comply with the principles enshrined in the Constitution . . . ' by, in particular, preventing unfair discrimination, promoting equality and seeking to progressively advance gender representation in the succession to traditional leadership positions. Phathokuhle is therefore not necessarily guaranteed, by reason only of his being the deceased's eldest son, to succeed the deceased as Inkosi (assuming it could be established that the deceased was wrongfully and unlawfully removed as Inkosi). That will depend on development, if any, within the Mbuyazi Community.[7] But, as eldest son, he would at least have a right to be considered when umndeni wenkosi goes into the process of identifying a person who qualifies in terms of customary law to assume the position of Inkosi (s 19(1)(*a*) of the Act). The question whether or not the deceased was wrongfully removed is not before us.

[16] I come now to the question whether the appellant should be substituted, in her capacity as executrix in the deceased's estate, as applicant in the monetary compensation part of the deceased's claim. I can conceive of no reason why she should not be so substituted. It is true that the claim for payment of arrear salary is included in the review application, but that does not detract from the fact that it is a claim separate from the one for reinstatement of the deceased as Inkosi. It is in effect a damages claim founded on an alleged wrong (wrongful removal of the deceased as an Inkosi, with the consequent loss of salary) which caused a diminution in the patrimony of the deceased's estate. It is therefore transmissible to the deceased's heirs (see *Hoffa, N.O. v S AMutual*

[7] See *Shilubana & others v Nwamitwa* 2009 (2) SA 66 (CC) para 49.

Fire & General Insurance Co. Ltd 1965 (2) SA 944 (C) at 953D, cited with approval in *Ngubane*, supra, at 606G-H). The appellant could even have instituted this claim after the death of the deceased if the deceased had not himself filed the claim before his demise. Her application is for her to be substituted as applicant in place of the deceased so as to act as a representative of the deceased in a claim which accrued to him while he was alive. (Cf *Hoffa*, supra.) And, as executrix in the estate of the deceased, she is the only person who can represent the deceased for purposes of his claim (*Pentz v Gross & others* 1996 (2) SA 518 (C) at 523A-D). It seems to me, therefore, that the question whether or not *litis contestatio* had been reached, which was raised by counsel for the respondents, does not arise. The appeal must accordingly succeed on this part of the appellant's counter-application.

[17] The issue of convenience also comes into play. For the appellant to succeed in the deceased's damages claim she will have to prove that the deceased was wrongfully and unlawfully removed as Inkosi. As has been mentioned above, the disputes relating to this and other issues have already been referred to trial by Van Zyl J. It is therefore convenient, and in fact to the advantage of all involved, that the matter proceeds as directed by Van Zyl J, so that the important question of the rightful successor to late Inkosi Mbuyazi and/or the deceased may be settled as soon as possible.

[18] There remains the appellant's application to be substituted for the deceased in the funding application. In view of my conclusion that the appeal should succeed, albeit partly, it should follow that the appellant's appeal should also succeed in respect of this application. The deceased's application for funding has already been argued before Henriques J and judgment was reserved.

At the time that judgment was handed down by the court below, the reserved judgment had not as yet been delivered (see the judgment of the court below at paras 8 & 9). That application should now be finalised with the executrix substituted for the deceased. Although the appellant has been partly successful, she should, in my view, be awarded all her costs.

[19] In the result, the following order shall issue:

1 The appeal is upheld in part.

2 Save for that part of the order dismissing the appellant's application to be substituted for the deceased in her capacity as guardian of Phathokuhle, the order of the court below is set aside and for it is substituted the following:

'(a) The applicant, Sithembele Valencia Mkhize, in her capacity as executrix of the estate of the late Zwelibhekile Sibusiso Mbuyazi, is hereby substituted as applicant in the deceased's damages claim and in his funding application.

(b) The first and second respondents are ordered to pay the applicant's costs in both applications, jointly and severally, the one paying the other to be absolved.

(c) The first and second respondents' applications for the discharge of the rule *nisi* and for the rescission of the orders granted on 7 June 2011 are both dismissed, with costs.'

3 The first and second respondents are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved.

L MPATI
PRESIDENT

APPEARANCES

For Appellant:	G D Goddard Instructed by: Schreiber Smith Inc, Empangeni McIntyre & van der Post, Bloemfontein
For First Respondent:	A J Dickson SC Instructed by: PKX Attorneys, Pietermaritzburg Lovius Block, Bloemfontein
For Second and Third Respondents:	C van der Merwe Instructed by: Pretorius, Mdletshe & Partners Inc, Kwadukuza (Stranger) Phatshoane Henney, Bloemfontein