



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 961/2020

In the matter between:

WEZIZWE FEZIWE SIGCAU

FIRST APPELLANT

**LOMBEKISO MAKHOSATSINI
MASOBHUZA SIGCAU**

SECOND APPELLANT

and

**THE PRESIDENT OF THE
REPUBLIC OF SOUTH AFRICA**

FIRST RESPONDENT

**THE COMMISSION ON
TRADITIONAL LEADERSHIP
DISPUTES AND CLAIMS**

SECOND RESPONDENT

**CHAIRPERSON OF THE COMMISSION
ON TRADITIONAL LEADERSHIP
DISPUTES AND CLAIMS**

THIRD RESPONDENT

ZANOZUKO TYELOVUYO SIGCAU

FOURTH RESPONDENT

**MINISTER OF COOPERATIVE
GOVERNANCE AND TRADITIONAL
AFFAIRS**

FIFTH RESPONDENT

PREMIER: EASTERN CAPE PROVINCE

SIXTH RESPONDENT

**NATIONAL HOUSE OF
TRADITIONAL LEADERS**

SEVENTH RESPONDENT

**EASTERN CAPE HOUSE OF
TRADITIONAL LEADERS**

EIGHTH RESPONDENT

**IKUMKANI YAMAMPONDO
ASENYANDENI**

NINTH RESPONDENT

Neutral citation: *Wezizwe Feziwe Sigcau and Another v The President of the Republic of South Africa and Others* (961/2020) [2022] ZASCA 121 (14 September 2022)

Coram: Maya P, Dambuza, Makgoka and Gorven JJA and Makaula AJA

Heard: 04 May 2022

Delivered: 14 September 2022

Summary: Administrative Law – Review of determination of successor to the royal throne under the Traditional Leadership and Governance Framework Act 41 of 2003 – failure to exercise statutory authority to investigate a contested traditional leadership position.

Customary Law – Proper approach to investigate contested traditional leadership positions – Evidence of customary norms and past practices essential in such enquiry – genealogy not an exclusive consideration as fitness to govern and public participation also relevant factors.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mothle J) sitting as the court of first instance.

- 1 The appeal is upheld with costs, to be paid by the first, second, third and fifth respondents, the one paying, the others to be absolved, including costs of two counsel.
- 2 The order of the high court is set aside and substituted with the following:
‘1. The determination of the Commission on Traditional Leadership Disputes and Claims that Zanozuko Tyelovuyo Sigcau is the rightful successor to the throne of amaMpondo aseQaukeni is reviewed and set aside.
2. The report of the President on the appointment of Zanozuko Tyelovuyo Sigcau as the King of amaMpondo aseQaukeni in terms of section 9(2)(a) and (b) of the Traditional Leadership and Governance Framework Act 41 of 2003, and the notice of the President which published that report in the *Government Gazette* (Notice 1315 of GG 42068 dated 30 November 2018), are reviewed and set aside.
3. It is declared that the Queen or King of amaMpondo aseQaukeni is to be identified in terms of the process set out in section 8 of the Traditional and Khoi-San Leadership Act 3 of 2019, or, if that provision is not in force when the Queen or King is required to be identified, then in accordance with the applicable law in force at the time governing the identification of the Queen or King.
4. The first, second, third and fifth respondents are ordered to pay the applicants’ costs, the one paying, the others to be absolved, including costs of two counsel.’

JUDGMENT

Makaula AJA (Maya P and Dambuza, Makgoka and Gorven JJA concurring)

Introduction

[1] This appeal concerns an application to review and set aside a determination by the second respondent, the Commission on Traditional Leadership Disputes and Claims (the Commission) on 9 February 2010. The application was refused by the Gauteng Division of the High Court, Pretoria (the high court). The Commission had determined that the fourth respondent, Zanozuko Tyelovuyo Sigcau (Zanozuko),¹ is the rightful successor to the throne of the nation of amaMpondo aseQaukeni. The high court also refused to set aside the recognition of Zanozuko by the first respondent, the President of the Republic of South Africa (the President), as the king of the amaMpondo aseQaukeni pursuant to the Commission's determination. It is common cause that both the decisions of the Commission and of the President are administrative actions and therefore reviewable under the Promotion of Administrative Justice Act² (PAJA). The appeal is with the leave of the high court, and was opposed by the first, second, third and fifth respondents.

¹ Because the dispute involves members of the same family, a number of who carry the surname 'Sigcau' they will simply be referred to in this judgment by their first names rather than 'Mr or Ms Sigcau'. The use of first names is for convenience only and no disrespect is intended. Sigcau was also the name of one of the disputants' forefathers (King Sigcau), from whom the surname Sigcau is drawn.

Subsequent to the hearing of this appeal, Zanozuko died on 01 June 2022.

² The Promotion of Administrative Justice Act 3 of 2022.

Background facts

[2] The Commission was established in terms of the Traditional Leadership and Governance Framework Act³ (the Framework Act) which has since been repealed and replaced by the Traditional and Khoi-San Leadership Act⁴ (TKLA). The functions of the Commission are encapsulated in s 25 of the Framework Act, which I shall deal with below. In 2008, the Commission, acting in terms of the provisions of the Framework Act, concluded that the kingship of amaMpondo aseQaukeni exists under the lineage of king Faku who was the last leader to rule over a united amaMpondo community.

[3] The history of amaMpondo, in relation to this kingship, is set out in numerous judgments of the high court, this Court and the Constitutional Court.⁵ I shall therefore not delve much into the background facts, except those relevant for present purposes.

[4] The kingship of amaMpondo dates back from the time of Faku who led the amaMpondo community from 1824-1867. At some stage amaMpondo separated into amaMpondo aseNyandeni (Western Pondoland), and amaMpondo aseQaukeni (Eastern Pondoland). The dispute in these proceeding relates to succession to the kingship throne of amaMpondo aseQaukeni to whom I shall simply refer as amaMpondo.⁶

[5] Faku was succeeded by his son Mqikela who, in turn, was succeeded by Sigcau.⁷ Marhelane succeeded Sigcau and died in 1921. Mandlonke, Marhelane's

³ Traditional Leadership and Governance Framework Act 41 of 2003.

⁴ Traditional and Khoi-San Leadership Act 3 of 2019.

⁵ *Minister of Cooperative Governance and Others v Sigcau and Others* [2016] 3 All SA 588 (GP); *Sigcau v Republic of South Africa and Others* [2013] ZACC 18; 2013 (9) BCLR 1091 (CC) (*Sigcau I*); *Sigcau and Another v Minister of Cooperative Governance and Traditional Affairs and Others* [2018] ZACC 28; 2018 (12) BCLR 1525 (CC) (*Sigcau II*).

⁶ This is done for convenience only and is not intended to detract from amaMpondo aseQaukeni.

⁷ Sigcau was his first name which was later used by his descendants as the surname of the lineage.

son, succeeded him as king.⁸ The current dispute about the rightful king or queen of amaMpondo has its genesis in the death of Mandlonke in 1937.

[6] When Mandlonke died, a succession dispute ensued between his brothers Nelson, the son of iQadi to the right-hand house, and Botha, the son of the right-hand house of Marhelane.⁹ At the time of his death, Mandlonke had no male child from either of his two wives, MaMpofane and MaGingqi. At that time MaMpofane was pregnant. When she gave birth to a baby girl, a search party was dispatched to scout for a male child sired by Mandlonke out of wedlock. None was found.

[7] Members of the royal family who favoured Nelson arranged that he must *ngena* MaGingqi so as to bear a seed for Mandlonke. The Commission found as follows about the custom of *ukungena* amongst amaMpondo:

‘(c) The procedure for the custom of *ukungena* is:

- (i) the elders of the house meet and decide on who should *ngena* the widow;
- (ii) the person who is so chosen then introduces himself to the family through the ritual *isifingo* which is in the form of cattle.
- (iii) a beast is slaughtered and a celebration is held.

(d) The consequences of *ukungena* are the following:

- (i) the union does not result in a marriage. The parties thereto do not regard each other as husband and wife. The woman remains the wife of the deceased;
- (ii) the children born of the union sociologically belong to the deceased.
- (iii) In the event of the death of a husband to the union, *ukuzila*, the ritual performed for the surviving spouse does not apply to the *ukungena* union, for example, the cleansing rituals or wearing of mourning attire.’

⁸ From Faku to Mandlonke the succession was genealogical among the males of the family i.e. from father to son.

⁹ There is consensus amongst the parties as to the ranking of the king’s wives. The Great Wife is born of a royal family and her lobolo is paid by the amaMpondo nation. The second wife is the right-hand wife. The third wife is an iQadi attached to the Great house, with the fourth wife being iQadi to the right-hand house. The rest of the wives follow suit, for example, the fifth wife would be the second iQadi to the Great house. However, there is a dispute as to whether a son from the right-hand house can succeed as king.

[8] The dispute about the rightful successor to Mandlonke's throne has its roots in MaGingqi's status as Mandlonke's wife.¹⁰ According to Zanozuko, MaGingqi had been Mandlonke's great wife and when Mandlonke died, Nelson and MaGingqi entered into an *ukungena* customary relationship. Zanozuko asserted that because MaGingqi had been the Great Wife, the offspring from the *ukungena* union between her and Nelson was the rightful heir to the throne. Zwelidumile, Zanozuko's father, was born of the *ukungena* custom between MaGingqi and Nelson, and as a descendant of the Great House he (Zanozuko) and his father Zwelidumile, were the rightful heirs to Mandlonke's throne. Zanozuko also contended that the majority of the royal family favoured his grandfather, Nelson, over Botha. According to him, in terms of the amaMpondo custom the son of the right-hand house, such as his competitor, Justice Sigcau (Mpondombini), who is the father of the first appellant, Wezizwe Feziwe Sigcau, never succeeded to the throne. In a nutshell, Zanozuko's contention was that indeed Nelson '*ngena*-ed' MaGingqi and she gave birth to Zanozuko's father, Zwelidumile in 1947. This was the basis for Zanozuko's claim to the throne.

[9] Mpondombini disputed this, contending that MaGingqi was the right-hand wife to Mandlonke. According to him, after Mandlonke's death MaGingqi entered into a marriage union with Nelson. In terms of custom when the king died without a male issue in the great house, the throne went to the right-hand house. Consequently Botha, as the descendant of the right-hand house, and his son Mpondombini, were therefore the rightful heirs to the throne. Mpondombini contended that no *ukungena* union was ever entered into between Nelson and MaGingqi. The versions of the claimants to the throne were mutually destructive

¹⁰ The dispute is about whether MaGingqi was the Great Wife of Mandlonke. However, the Commission found that the probability was that MaGingqi was the Great Wife of Mandlonke. It based that finding on the report of Victor Poto, who was the paramount chief of amaMpondo aseNyandeni, that neither Nelson nor Botha should *ngena* her because a child born of that union would be regarded as the child of Mandlonke and therefore would succeed as *iKumkani*.

on the issue of *ukungena* between Nelson and MaGingqi. The royal family tried in vain to resolve the impasse.

[10] When no male child fathered by Mandlonke was found and the succession dispute remained unresolved, Botha resorted to the magistrate of Lusikisiki. The purpose was to seek the intervention of the Governor-General, who, at the time, represented the Government of the day. As a result, the Government appointed a Commission of Enquiry in 1938 (1938 Commission). That Commission recommended that Botha be appointed as the paramount chief of amaMpondo in terms of s 23 of the Native Administration Act (the NAA).¹¹

[11] Nelson was not satisfied with the outcome of the 1938 Commission. He launched an application in the Cape Provincial Division (the CPD) in 1942, challenging the appointment of Botha. The CPD dismissed his application. He appealed to this Court, which, in turn, dismissed the appeal. Botha ruled as the paramount chief of amaMpondo aseQaukeni until his death in 1978. On 10 December 1978, shortly after the burial of Botha, a public meeting (*imbizo*) of amaMpondo was called with a view of appointing his successor. Nelson, the biological father and grandfather to Zwelidumile and Zanozuko respectively, moved a motion that Botha's son, Mpondombini should succeed Botha. The motion carried the day and Mpondombini was installed as *iKumkani*. This was a clear indication that Mpondombini did not automatically take over from his father purely on the basis of genealogy.

[12] A while after Mpondombini was installed, Zwelidumile laid a claim to the throne alleging that, as the sociological son to Mandlonke, he was, in terms of custom, the heir to the throne. The Prime Minister of the then Transkei, Mr Kaizer

¹¹ The Native Administration Act 38 of 1927.

Matanzima, issued a directive that amaMpondo should vote on the issue. Zwelidumile launched an urgent application in court. He sought to interdict that instruction, alleging that succession to amaMpondo kingship could not be determined by vote. The application was dismissed by the then Transkei High Court. Mpondombini did likewise, but he was also unsuccessful in court. A vote was held and Mpondombini won and was installed as *iKumkani*.

[13] In 2006, Zanozuko lodged the dispute with the Commission contending that he was the rightful king of amaMpondo. Mpondombini opposed the claim. The Commission, as aforesaid, upheld Zanozuko's claim and recommended that the President recognise him as the rightful king of amaMpondo. The Commission found that, like all other African communities, the customary law of amaMpondo was governed by the principle of male primogeniture in terms of which a female could not succeed as a queen and the status of a wife within the polygamous marriage determined succession to the throne.

[14] In the Commission's 2008 report which dealt with determination of kingships, it determined that according to amaMpondo custom the first-born son of the great house succeeded his father and the son of the Iqadi house succeeded only if there was no male issue in the great house. That same reasoning found its way into the Commission's 2010 report. The 2010 Commission was critical of the findings by the 1938 Commission. It remarked that '(i)t appears that in its recommendations, the 1938 Commission placed more emphasis on the perceived character flaws of Nelson as opposed to custom. This was not in line with the customary law and customs of amaMpondo'.

[15] As aforesaid, in 2010 the Commission declared that Zanozuko was the rightful successor to the throne of the amaMpondo and the rightful king of that kingdom. The reasoning of the Commission was that the appointment of Botha

Sigcau to the position of paramount chief in 1938, and his succession by Mpondombini was irregular and not in accordance with the customary law and customs of amaMpondo and the Framework Act. It is the 2010 determination and the consequent recognition of Zanozuko by the President as the king, which the appellants sought to review and set aside.

Legislative Framework impacting on traditional leadership

[16] The Commission was established in terms of s 22(1) of the Framework Act. It was constituted in order to deal with the iniquities of the colonial government in disturbing and dismantling the customs and traditions of the various indigenous communities concerning their institutions of traditional leadership. The preamble to the Framework Act dealt with the objectives which were to (a) set out a national framework and norms and standards that would define the place and role of traditional leadership with the new system of democratic governance; (b) transform the institution in line with constitutional imperatives; and (c) restore the integrity and legitimacy of the institution of traditional leadership in line with customary law and practice.

[17] In terms of s 25(2) of the Framework Act, the Commission was tasked to ‘investigate, either on request or of its own accord, various disputes, including where there was doubt as to whether kingship was established in accordance with customary law and customs and where the title or right of the incumbent was contested. Section 25(3)(a) provided that when considering the claim or dispute, the Commission had to consider and apply customary law and the customs of the relevant traditional community as they were when the events occurred which gave rise to the dispute or claim. In relation to investigation and determination of kingships, s 25(3)(b) provided that the Commission had to be guided by the criteria set out in s 9(1)(b) and such other customary norms and criteria as were relevant to the establishment of kingships. Section 9 stipulated that whenever a

position of king or queen was to be filled, the royal family had to identify the person who ‘qualified in terms of customary law to assume the position of king or queen’.¹² Section 25(4) empowered the Commission to retrospectively deal with all disputes and claims pertaining to traditional leadership dating back to 1 September 1927 subject to s 25(2)(a)(vi).¹³

[18] A brief background to the events that necessitated the establishment of the Commission are the following. On 1 September 1927 the NAA was promulgated. It is through the NAA that the successive colonial governments eroded the integrity and legitimacy of the institution of the traditional leadership. In *Western Cape Provincial Government and Others: in re DVB Behuising (Pty) Ltd v North West Provincial Government*¹⁴ Ngcobo J, dealing with the NAA, said the following:

‘The Native Administration Act 38 of 1927 appointed the Governor-General (later referred to as the State President) as “supreme chief” of all Africans. It gave him power to govern Africans by proclamation. The powers given to him were virtually absolute.’

[19] Jafta J in his dissent in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims and Others*,¹⁵ dealing with a dispute regarding kingship, had the following to say about the NAA:

‘The de-legitimisation of traditional leadership continued under the Native Administration Act which was amended and given new title on a number of occasions. The treatment of traditional leaders under that Act was described by Professor Bennett in these terms:

“Those [traditional leaders] who opposed the government, no matter what traditional legitimacy they might have enjoyed could be ousted from office or passed over in matters of succession. Hence,

¹² Section 9(1)(b) of the Framework Act dealt with what the President ought to do in recognising a person so considered as king or queen. This provision is not relevant for purposes hereof.

¹³ This section provided that the Commission had authority to investigate, either on request or of its own accord – where good grounds existed, any other matter relevant to the matters listed in this paragraph, including the consideration of events that may have arisen before 1 September 1927.

¹⁴ *Western Cape Provincial Government and others: in re: DVB Behuising (Pty) Ltd v North West Provincial Government* [2002] ZACC 2, 2001(1) SA 500 (CC) para 41.

¹⁵ *Bapedi Marota Mamone v Commission of Traditional Leadership Disputes and Claims and Others* [2014] ZACC 36; 2015 (3) BCLR 268 (CC) para 9. This aspect of his judgment was uncontroversial.

although the Department of Native Affairs was generally prepared to make appointments from the ruling families, where necessary it could depart from the established order of succession by choosing uncles or younger brothers or by promoting subordinate headmen. The outcome was a compliant cadre of “traditional” leaders who provided the personnel needed to realise an increasingly unpopular state policy”.’ (Footnote excluded.)

[20] This excerpt pointedly indicates how the institution of traditional leadership was willy-nilly disrupted by the government of the day, particularly by the promulgation and application of the NAA. Jafta J succinctly captured the effects and consequences of the NAA by stating:

‘Many traditional leaders who were opposed to discriminatory policies of those governments were deposed and replaced with more pliable candidates who were appointed contrary to customary law and customs of the communities over which they were imposed. The Native Administration Act was one of the most comprehensive and potent tools used to advance apartheid policies. It was invoked to spearhead an onslaught on any traditional leadership which resisted implementation of those policies. Many traditional leaders were removed from office and others were demoted. The result was that a number of traditional leadership institutions were established and people who did not qualify under customary law were appointed as traditional leaders. These traditional leaders were willing to implement the policies of the government that appointed them, even if the communities they were supposed to lead rejected those policies. This destroyed the legitimacy of traditional leadership and the confidence that many communities had in the traditional institutions.’¹⁶

Litigation history

[21] Following the Commission’s 2010 determination, Mpondombini launched the review application in the high court, seeking, in Part ‘A’ thereof, an order interdicting his removal from the throne (and, accordingly, Zanozuko’s recognition as the rightful king). In Part ‘B’ he sought a review and setting aside of the Commission’s 2010 determination that Zanozuko was the rightful king. It transpired that the President had already appointed Zanozuko by a notice in a

¹⁶ *Ibid* para 21 and 22.

Government Gazette of 30 November 2010.¹⁷ Mpondombini then brought another application seeking an order setting aside the recognition. That application was dismissed by the high court in March 2012. Both the high court and this Court dismissed Mpondombini's applications for leave to appeal against that order. On 13 June 2013, the Constitutional Court granted him leave to appeal in *Sigcau I*¹⁸ and it set aside the high court's dismissal of his review application on the basis that in recognising Zanozuko the President had applied the provisions of the 2009 Act¹⁹ instead of the Framework Act.

[22] A further dispute arose. The President sought declaratory relief in the high court to clarify whether, after the setting aside of Zanozuko's recognition, the correct procedure was to implement the Commission's 2010 findings or to consult with the royal family, before recognising Zanozuko. Mpondombini opposed the application, contending that the royal family had to make a fresh determination as to the rightful heir to the throne. The high court ruled in favour of the President, essentially finding that the President should proceed with the recognition on the strength of the Commission's recommendation. However, it granted leave to appeal to this Court which, in turn, confirmed the high court's order.

[23] The Constitutional Court in *Sigcau II*²⁰ granted leave to appeal to it but dismissed Mpondombini's appeal. As a result of that ruling, the President recognised Zanozuko as the king of amaMpondo on 28 November 2018. As a consequence of such recognition Wezizwe and her mother, the second appellant Lombekiso Sigcau, were substituted for Mpondombini who passed away on 27 March 2013. They resuscitated Part 'B' of Mpondombini's 2010 application, in which he sought a review of the Commission's 2010 determination. The

¹⁷ Notice 1315 of GG 42068 dated 30 November 2018.

¹⁸ See fn 5.

¹⁹ The Traditional Leadership and Governance Framework Amendment Act 23 of 2009.

²⁰ See fn 5.

appellants further sought leave to introduce the expert affidavit of Dr Aninka Claassens in the review proceedings. The review application served before the high court, which condoned the late prosecution thereof, admitted the affidavit of Dr Annika Claassens, and dismissed the review application.

Undue Delay

[24] On appeal the respondents insist that the appellants' delay in prosecuting the review of the 2010 determination was grossly unreasonable given that it was instituted in November 2010 and only prosecuted eight years after it was instituted, and five years after the Constitutional Court had finalised the setting aside of Zanozuko's recognition as the king.

[25] The respondents further contend that although the PAJA does not lay down a time-period for the prosecution of review proceedings, it is axiomatic that the proceedings must be prosecuted without undue delay in terms of s 7 thereof. In this case the resulting prejudice they suffer is compelling in that some of the commissioners are now deceased, others who were appointed on contract have returned to their lives, and the Commission is no longer in existence. They ask for the dismissal of the appeal based on what they say is a palpable and inexcusable delay by the appellants.

[26] The appellants assert that there has been no undue delay in that the court's declarator on the President's recognition of Zanozuko in *Sigcau I* was handed down in 2013, followed, for a period of five years, by the litigation initiated by the President for clarification, which culminated in the judgment in *Sigcau II* in 2018. For the five-year period the appellant did not pursue the review application because of legal advice. In any event, had they succeeded in *Sigcau II*, there would have been no need for the review application, so the argument by the appellants goes.

[27] The issue of kingship of amaMpondo has remained lingering for a number of years. From the death of Mandlonke in November 1937 through to the death of Mpondombini, and the enthronement of Zanozuko, it kept on rearing its head, so to speak. It remains a contentious issue despite Zanozuko's death because the kingship remains in his house. It needs to be resolved once and for all. It is in the interests of amaMpondo that finality and certainty be brought to bear in this regard. I agree with the ruling by the high court that 'any prejudice suffered by the respondents as a result of the delay is outweighed by the need to bring this matter to finality'. It was not in dispute that the Commission's recommendation could have been considered and an order granted in *Sigcau I*.

The challenge to the Commission's 2010 determination

[28] The appellant's challenge is premised on four grounds of review, which are that the Commission:

- (a) misunderstood the nature of customary law;
- (b) failed to consider the import of the appointment of Mpondombini in 1979;
- (c) failed to consider the views of the amaMpondo as expressed in 2008; and
- (d) incorrectly determined that Botha was not the legitimate successor in 1938.

The customary law of amaMpondo

[29] The appellants argue that the Commission made an error of law in that, in its process, it made use of rigid rules of genealogical succession. It failed to investigate and apply the relevant customary law at the time of the dispute. They assert that in its 2008 report,²¹ the Commission failed to consider the attributes of the incumbent to be a 'fit and proper' person or the preference of the community in relation to the person laying claim to kingship or queenship. And the 2010

²¹ In which it considered claims by both amaMpondo aseQaukeni and amaMpondo aseNyandeni for recognition of two separate kingships. In the 2008 report the Commission recognized a single amaMpondo kingship under the lineage of Mqikela, a determination which was never challenged. And in the second phase it considered the rightful claimant to leadership of the separate kingdoms.

report reveals that the Commission centred its inquiry on genealogy as the absolute requirement for these leadership positions. Furthermore, the appellants maintain that, the Commission paid no regard to the question of public participation in the process of determination of a king or queen. The contention by the appellants is that the Commission ignored the fact that community preference and fitness for office was the basis for the appointment of Botha rather than Nelson in 1939. It also failed to consider that amaMpondo preferred Mpondombini to Zwelidumile in 1979, the fitness of Zanozuko to govern and community participation in its 2010 report.

[30] The appellants further make the point that, in its 2010 report, the Commission adopted an adversarial, trial like fact-finding process and did not, on its own, investigate the issues before it. It confined its task to consideration of the evidence and arguments presented to it by both claimants to the throne. The appellants bemoan the absence of wide, all-encompassing investigations on the living customary law of amaMpondo in the Commission's proceedings.

[31] The respondents argue that the Commission heard extensive evidence from Mpondombini's witnesses. They retort that the Commission had no duty to 'patch-up' the evidence provided by Mpondombini. Having heard evidence from members of the community called by Mpondombini, the Commission could rely on the expertise of its members in assessing, understanding and contextualising the evidence, as the members of the Commission were customary law experts themselves.

[32] It is now common cause between the parties that the amaMpondo customary law on their traditional leadership is not premised on inflexible

genealogical rules. It is malleable.²² The 2008 determination which came to the same conclusion on the nature of the amaMpondo customary law was preceded by wide-ranging investigations by the Commission. In those proceedings the Commission extended open invitations to members of the community to give evidence.

[33] I agree that the Commission misunderstood its function in the 2010 process, in confining itself to the evidence led on behalf of the disputants to the throne. It also ignored relevant evidence on how amaMpondo had chosen their leaders at various times in the past. As it was submitted on behalf of the respondents, on the evidence before the Commission, amaMpondo customary law incorporated indigenous political processes where the public or community participated in choosing between eligible candidates, based on both the strength of their familial claim and their ability to lead. Its findings belied its claim that it took all relevant factors into account. Considerations of public participation and acceptability or fitness for office were ignored.

[34] A clear example of the Commission's misconception of relevant principles was its view that the 1938 Commission was wrong in considering the character flaws of a potential successor. The Commission remarked that such consideration was 'not in line with customary law and customs of amaMpondo'. Clearly, the Commission erred in this regard. This Court, in *Yende and Another v Yende and Another*,²³ said the following:

'The full court correctly found that the customary rules of succession of traditional leadership which were accepted by the Commission and the Premier have not been shown to be the actual living customary law rules of succession of the broader amaZulu or amaYende. This

²² In its supplementary affidavit, the Commission said the following 'the Commission appreciated that customary law cannot be applied as "a fixed body of ossified rules", or in the same way as common law. . . The Commission clearly understood his duty to discern the living law of amaMpondo. ... Of course it must.'

²³ *Yende and Another v Yende and Another* [2020] ZASCA 179.

shortcoming fatally tainted the entire process and this rendered Themba's appointment unlawful.'²⁴

Similarly, in this matter, the failure by the Commission to take into account the interests of the community and the fitness of the candidate stands to be reviewed.

[35] It is undoubtedly so that the Commission's 2010 hearing was adversarial. All that it did was to listen to the competing claims of Mpondombini and Zanozuko. It merely decided on the basis of that evidence. When the hearing took place, certainly the amaMpondo customary law and customs had evolved. It was incumbent on the Commission to investigate these factors by calling more members of the royal family, an *imbizo*, or experts, or all of them, to widen the base from which the salient principles of the living customary law of amaMpondo on traditional leadership could be determined. As Van der Westhuizen J held in *Shilubana*:²⁵

'... the practice of a particular community is relevant when determining the content of a customary-law norm. As this court held in *Richtersveld*, the content of customary law must be determined with preference to both the history and the usage of the community concerned. "Living" customary law is not always easy to establish and it may sometimes not be possible to determine a new position with clarity. Where there is, however, a dispute over the law of a community, parties should strive to place evidence of the present practice of that community before the courts, and courts have a duty to examine the law in the context of a community and to acknowledge developments if they have occurred.' (Footnote omitted.)

[36] Curiously, as explained in its 2008 report, the methodology used by the Commission in discharging its function of investigating both paramountcies of amaMpondo²⁶ comprised two stage hearings. During both stages it held public hearings in which selected members of the royal houses and others appointed by them testified under oath. Those members also referred the members of the

²⁴ Ibid para 28.

²⁵ *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 para 46.

²⁶ That is, amaMpondo aseQaukeni and amaMpondo aseNyandeni.

Commission to supplementary research material. Thereafter, the commissioners asked questions. Interested parties were afforded the opportunity to challenge the versions provided by the members of the royal houses. Members of the public were permitted to pose questions to the presenters and to make comments. As already explained, and in stark contrast with this procedure, in its investigative function during 2009 and 2010, the Commission confined itself to the evidence tendered by the claimants to the throne. In my view, the process in which the Commission engaged during 2009 to 2010, which was essentially receiving such evidence as the parties chose to tender, was not proper. An investigation as envisaged in s 25(2) of the Framework Act entailed the Commission listening to tendered evidence, initiating active searches for further evidence, and inviting input from relevant persons other than the contenders to the throne.

Failure to consider the appointment of Mpondombini in 1979

[37] The appellants assail the report of the Commission and the judgment of the high court on the ground that neither considered the relevant evidence on the appointment of Mpondombini to the leadership of amaMpondo in 1979. There is merit in this argument. Mpondombini's ascendance to the throne was not confined to kinship with his predecessor. It was also based on a choice made by the community in an election.

[38] As stated above, Mpondombini's ascendancy to the throne was contested by Zwelidumile, to the extent that the issue was resolved by the intervention of the leader of the then Transkei Government who referred the matter to a vote. Mpondombini was crowned because he won the election. This is a factor to which both the Commission and the high court should have had regard. Instead, the Commission pinned its assessment of Mpondombini's suitability for the throne in 1979 to its view that the 1938 Commission was wrong in determining that Botha should succeed. In its answering affidavit the Commission insisted that

‘Nelson should have been the king, therefore Zwelidumile should have been king therefore Zanozuko must be king’. The high court accepted this as a fact. It reasoned that ‘(t)he Commission made a determination by concluding that Zanozuko was genealogically entitled as king in the house of his customary grandfather, Mandlonke’.

[39] Importantly, Mpondombini’s succession to the throne had been supported by other traditional leaders of the amaMpondo nation (who had served under Botha), including Nelson. The evidence before the Commission was that Mpondombini was supported by 25 senior traditional leaders compared to the three who supported Zanozuko. These leaders had moved for the appointment of Mpondombini to the throne even before the government’s intervention, and even though such ascendancy to the throne would not be founded purely on genealogy. In addition, while both Mpondombini and Zwelidumile were opposed to the idea of an election, and Mpondombini was unsuccessful in his bid to interdict the process, amaMpondo heeded the call to vote on the issue. Even though none of these factors is, on its own, decisive, the Commission should have considered all these events. When considered carefully they dispel the sentiment that Mpondombini’s appointment primarily entrenched distortions that were occasioned by the NAA and the 1938 Commission. It is so that the election was facilitated by the Government of the Transkei homeland. But amaMpondo embraced the process and it resulted in a solution for their problem. The events demonstrate their acceptance of the departure from the tradition of genealogy as the sole determinant for their leadership positions.

[40] Against the evidence of various methods that were used to identify appropriate traditional leaders in the past, the Commission listed the issues it was called to determine in its 2010 report as the following: (a) the identification of Mandlonke’s successor in light of his death without a male issue; (b) whether

MaGingqi was Mandlonke's great wife; (c) whether Botha's appointment accorded with the customary law and customs of amaMpondo; (d) whether Nelson and MaGingqi entered into an *ukungena* union; and (e) whether the claimant (Mpondombini) was the rightful heir to the throne of amaMpondo. In essence, all of these related to only the genealogical aspect of the inquiry.

[41] The Commission failed to consider that the customs and practices of amaMpondo at various times adapted to change in order to promote equality, non-sexism, and respect for communality and public participation in structures of governance, consistent with the principle that leadership derives its mandate from the people. Professor Mohlomi Moleleki correctly asserted in the Commission's answering affidavit that the institution of traditional leadership and our country's present democratic order are not mutually exclusive, and democracy serves to enhance rather than detract from the legitimacy of the institution. Most importantly, custom must accord with the Constitution.

[42] Lastly on this issue, in its judgment the high court could not find any evidence of a practice or custom of public consultation for determination of traditional leadership succession in the customary laws and custom of amaMpondo. Furthermore, no evidence was presented to the high court as to what form that consultation would take. However, as already demonstrated the evidence that was presented by Mpondombini was never contested by Zanozuko. In any event, the Commission's own investigations as set out in its 2008 report and determination support the principle of public consultation as one of the procedures for resolving traditional leadership disputes.

Botha's appointment in 1978

[43] I agree with the appellants' contentions that the Commission erred in finding that Botha, as the son to the right-hand house, could never be an heir to his father's throne. It also erred in its conclusion that, but for the interference of the colonial government, Nelson would have been appointed as king.

[44] On the evidence before the Commission, the dispute between Botha and Nelson was resolved through a political process. Mr Victor Poto (Mr Poto) was called upon to arbitrate the dispute. As the paramount chief of amaMpondo aseNyandeni and an elder of amaMpondo generally, Mr Poto was invited by amaMpondo aseQaukeni to assist in resolving the dispute between Botha and Nelson. He testified that because Mandlonke had no male issue when he died, his house died with him in terms of custom. They, as amaMpondo aseNyandeni, decided that Botha should ascend to the throne as he was the chief who was fit to succeed Mandlonke. That decision was taken prior to the establishment of the 1938 Commission. Mr Poto's intervention was a significant contribution to the appointment of Botha to the throne. Therefore, the Commission's conclusion that the son of the right-hand house can never inherit was not a correct reflection on how amaMpondo approached their affairs in this regard.

[45] The respondents took issue with Mr Poto's credibility, citing a contradiction between his evidence before the CPD, the 1938 Commission and what he wrote in a book he authored on the history of amaMpondo. In the CPD, the issue was about the rightful heir to the estate of Mandlonke. In his book,²⁷ Mr Poto wrote that the son of the right-hand house was ineligible to take over as the heir to the throne. However, before the Commission and in the CPD, he acknowledged these remarks as erroneous and corrected himself by testifying that

²⁷ VP Ndamase *Ama-Mpondo: Ibali neNtlalo* (1926).

a son of the right-hand house in fact qualified as an heir to his father. His explanation was that the view expressed in his book was criticised and disputed by many people who read the book. He ascribed that view to his uncle Mangala who had assisted in its writing.

[46] Whatever the case is about the different views expressed by Mr Poto, what is indisputable is that the matter of a son born of the right-hand house (*ukunene*) succeeding his father to a kingship throne is not unknown in the amaMpondo customs. Mr Poto himself succeed to the throne despite being born of the right-hand house. The criticism levelled against him, that he changed his view because he is born of a right-hand house, and because he was a friend of the Transkei government of the day, does not change the fact that his intervention found support with amaMpondo.

[47] In this context, the respondent's reliance on the remarks made by the CPD, that 'other things being equal the eldest son of the right-hand house is not usually considered in these matters' does not take the matter any further. What bears more weight is that both the CPD and this Court on appeal held that Botha, the son born of a right-hand house, qualified as the heir to the throne of amaMpondo.

[48] Dr Claassens' opinion was criticised, in the main, on the basis that she was not an expert in the amaMpondo customary law, that her expert evidence was in fact a legal opinion based on the research of others rather than empirical evidence of her own on the living customs of amaMpondo. In addition, that her expert opinion was of a rather extreme, free-wheeling approach to customary law in which principles and practices meant little and were often presented only as politically motivated *ex post facto* justifications for decisions. The respondents also contend that her opinions were drawn from research and writings of other experts. It is submitted that her approach to what constitutes customary law was

inconsistent with the approach espoused by the Constitutional Court in *Shilubana* to the effect that '[c]ustomary law is a body of rules and norms that has developed over centuries'.²⁸

[49] In large measure, Dr Claassens' opinion confirmed the need to take into account other considerations. The version of the Commission, on its own, showed that it did not regard suitability for office and popular acceptability as part of the relevant considerations for determination of an heir to the throne. In its analysis of the issues and the evidence, the Commission never referred to Nelson's nomination of Mpondombini and the support the nomination enjoyed among amaMpondo at an *imbizo* held subsequent to Sigcau's passing. Neither did it refer to the referendum held in 1979 when Zwelidumile's supporters were not satisfied with Mpondombini's nomination. It also did not refer to the fact that Mpondombini enjoyed the support of 25 traditional leaders as against the three who supported Zwelidumile.

[50] Furthermore, as already shown, the Commission disregarded the evidence and showed no interest to inquire into the suitability for office and popular acceptability aspects of those that contested the throne. This was in stark contrast to the approach which this Court had held should be adopted by a commission that is conducting an investigation. In *Public Protector v Mail and Guardian*²⁹ this Court stressed the importance of conducting an investigation 'with an open and enquiring mind'.³⁰ The process followed by the Commission in discharging its duties under the Framework Act was therefore fatally flawed.

²⁸ Footnote 25 para 44.

²⁹ *Public Protector v Mail and Guardian* [2011] ZASCA 108; 2011 (4) SA 420 (SCA).

³⁰ *Ibid* para 21.

Remedy

[51] In the notice of motion Mpondombini sought an order for a review and setting aside of his removal from the throne and Zanozuko's appointment or recognition as the rightful king of amaMpondo aseQaukeni. Both Mpondombini and Zanozuko have since passed away (although Zanozuko was still alive when the appeal was heard). This necessitates a fresh process to identify a queen or king of amaMpondo. And, as already stated, the Framework Act has since been replaced by the TKLA. The approach in the legislation governing such an appointment at the time must govern this new process. At the hearing of the appeal counsel for the appellants (Mpondombini's successors in title) advised that the appellants now seek the review and setting aside of the Commission's determination that Zanozuko was the rightful king of amaMpondo along with the subsequent decisions and actions of the President which were based on that determination. As is clear from what has been said above, this is appropriate in the circumstances.

[52] Neither party contended that costs should not follow the result. The appellants had three counsel representing them. However, I am of the view that costs of two counsel will suffice.

[53] Consequently I make the following order:

1 The appeal is upheld with costs, to be paid by the first, second, third and fifth respondents, the one paying, the others to be absolved, including costs of two counsel.

2 The order of the high court is set aside and substituted with the following:
 '1. The determination of the Commission on Traditional Leadership Disputes and Claims that Zanozuko Tyelovuyo Sigcau is the rightful successor to the throne of amaMpondo aseQaukeni is reviewed and set aside.

2. The report of the President on the appointment of Zanozuko Tyelovuyo Sigcau as the King of amaMpondo aseQaukeni in terms of section 9(2)(a) and (b) of the Traditional Leadership and Governance Framework Act 41 of 2003, and the notice of the President which published that report in the *Government Gazette* (Notice 1315 of GG 42068 dated 30 November 2018), are reviewed and set aside.
3. It is declared that the Queen or King of amaMpondo aseQaukeni is to be identified in terms of the process set out in section 8 of the Traditional and Khoi-San Leadership Act 3 of 2019, or, if that provision is not in force when the Queen or King is required to be identified, then in accordance with the applicable law in force at the time governing the identification of the Queen or King.
4. The first, second, third and fifth respondents are ordered to pay the applicants' costs, the one paying, the others to be absolved, including costs of two counsel.'

M MAKAULA
ACTING JUDGE OF APPEAL

APPEARANCES

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