



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 744/2021

In the matter between:

MATODZI ANNAH MAGWALA

APPELLANT

and

CHIEF RUDZANI
HAROLD SINTHUMULE

FIRST RESPONDENT

NYAMUKAMADI
MUKONDI MUKHUBA

SECOND RESPONDENT

THE GOGOBOLE
ROYAL FAMILY

THIRD RESPONDENT

Neutral Citation: *Magwala v Chief Sinthumule and Others* (Case no 744/2021) [2023] ZASCA 62 (05 May 2023)

Coram: MOCUMIE, NICHOLLS, CARELSE and MATOJANE JJA
and NHLANGULELA AJA

Heard: 17 February 2023

Delivered: 05 May 2023

Summary: Application for special leave – referral for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 – Customary Law – traditional leadership – Limpopo Traditional Leadership and Institutions Act 6 of 2005 (Limpopo Act) – Traditional Leadership and

Governance Framework Act 41 of 2003 (Framework Act) – dispute concerning the identification of the headwoman or headman and the legitimate members of the Royal Family – s 21 of the Framework Act – prescribes the procedure to follow for the resolution of a dispute concerning customary law or customs – in terms of s 12 (2)(a),(b) or (c) of the Limpopo Act – disputes to be referred to the Premier.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Phatudi, Kganyago JJ and Makwela AJ, sitting as court of appeal):

- 1 Special leave to appeal is granted.
- 2 The order of the high court is set aside and replaced with the following order:
‘The plaintiffs’ case is dismissed with no order as to costs.’

JUDGMENT

Carelse JA (Mocumie, Nicholls and Matojane JJA and Nhlangulela AJA concurring)

[1] On 7 February 2020, the Limpopo Division, of the High Court, Polokwane, per Muller J (the high court) granted the following order against the applicant, Ms Matodzi Annah Magwala (Ms Magwala), who was the first defendant in the high court:

‘IT IS ORDERED THAT:

1. The First Defendant is directed to immediately stop and refrain from giving out to be a headwoman or performing any function of duty which by law or in terms of custom is performed or reserved for performance by a headwoman of the Gogobole traditional community or to receive any gift whatsoever reserved for a headwoman in terms of custom without being in possession of a valid certificate of recognition issued to her by the Premier.
2. The First Defendant is directed to deliver to the First Applicant, all official stamps, receipt books, records, money, bank account details, books of record of payments in respect of members of the Gogobole community’s condolences for bereavements, and

all other instruments and documents which the first defendant used in the performance of the functions of headwoman **within 10 (ten) days** of the granting of the order.

3. The First Defendant to stop and refrain from granting or according any occupational rights or permissions to occupy any property or stand at Gogobole to anyone, for any purposes whatsoever.

4. The first defendant is directed to pay the costs of the action.’

[2] Aggrieved by the grant of that order, Ms Magwala sought leave to appeal but the high court dismissed her application. Consequently, she approached this Court, which granted her leave to appeal to the full court. The full court, (per Phatudi, Kganyago JJ and Makwela AJ) dismissed her appeal with costs.

[3] On further application to this Court for special leave, two judges of this Court, who considered the application referred it for oral argument in terms of section 17(2)(d) of the Superior Courts Act 10 of 2013 and directed the parties to be prepared, if called upon to do so, to address the Court on the merits.

[4] The primary parties to the dispute are Ms Magwala, the first defendant in the high court; Chief Rudzani Harold Sinthumule, the first plaintiff in the high court (the Chief); Ms Nyamukamadi Mukondi Mukhuba, the second plaintiff in the high court (Ms Mukhuba); and the third plaintiff in the high court, the Gogobole Royal Family (the Royal Family). The Royal Family falls under the jurisdiction of the Sinthumule Traditional Council. In the high court, no relief was sought against the Member of the Executive Council of the Department of Co-operative Governance, Human Settlement and Traditional Affairs in the Limpopo Province (the MEC), the House of Traditional Leaders in the Limpopo Province and the Premier of the Limpopo Province.

[5] It is common cause that the late Mr Nthatheni Petrus Ramabulana was the headman of Gogobole Village and following his death in 1986, the Royal Family identified his daughter, Ms Matamela Ndwammbi Ramabulana (Ms Ndwammbi), as headwoman of Gogobole Village under the Chief. Ms Ndwammbi was married to Mr Tshikumbu Ramadzuwa. She died on 27 May 2008 and is survived by her daughter, Ms Magwala.

[6] According to the particulars of claim, after the death of Ms Ndwammbi, the Royal Family identified Mr Maluta Simon (Mr Maluta) as headman to replace Ms Ndwammbi who died before he was recognised by the Premier. Following his death, the Royal family identified Mr Maluta's minor son, Mr Percy Tshifhiwa Ramabulana (Mr Tshifhiwa) to succeed him. Because he was a minor, Ms Mukhuba was identified as regent to act in his position. It was further alleged in the particulars of claim that Ms Magwala was not identified as the headwoman of Gogobole Village because she was not a descendant of or born of the Ramabulana lineage but a Madzuwa by birth.

[7] Disputing the above, in her plea, Ms Magwala alleged that after Ms Ndwammbi's death, the Royal Family identified Ms Mukhuba as headwoman of the Gogobole Community. She declined the identification because she did not want to be killed. This allegation was not refuted. Ms Magwala alleged that during 2008, the legitimate members of the Royal Family, including and in the presence of Ms Mukhuba identified her as headwoman of the Gogobole Community in accordance with the customs of the Ramabulana of the Gogobole Community. She has carried out the duties and responsibilities of a headwoman openly ever since and has never been removed. In her amended plea, Ms Magwala stated that she was in fact only acting in the position as headwoman.

[8] At the trial, the plaintiffs called Mr Lawrence Makhado Sinthumule (Mr Makhado), Ms Mukhuba and Mr Mbulaheni Ramabulana to testify on their behalf. The first defendant called Mr Takalani Albert Muvha (Mr Muvha) to testify on her behalf. Neither the Chief of Sinthumule nor Ms Magwala testified.

[9] Mr Makhado testified that he was appointed as the Chairman of the Sinthumule Tribal Council. Mr Mbulaheni Ramabulana, was appointed the secretary of the Royal Family. Ms Mukhuba is the only surviving sibling of the late Ms Ndwammbi. Ms Mukhuba, Mr Nnyadzeni Ramabulana and Mr Mbulaheni Ramabulana are the legitimate members of the Royal Family. Before Mr Mbulaheni Ramabulana became a member of the Royal Family, Ms Masindi, Ms Mukhuba and Mr Johannes Ramabulana were members of the Royal Family.

[10] According to Mr Makhado, Mr Mbulaheni Ramabulana and Ms Mukhuba, Ms Magwala was never identified as the headwoman of Gogobole. Mr Makhado denied that a year after the death of Ms Ndwammbi, the Royal Family held a meeting where the Chief and Ms Mukhuba resolved that Ms Magwala should be headwoman. He further denied that Ms Masindi, who was the Khadzi (aunt) at the time and is since deceased, identified Ms Magwala as the next headwoman. However, Ms Mukhuba did not deny attending this meeting in which Ms Magwala was identified as the next headwoman. Ms Mukhuba said that she was forced to place her thumbprint on the documents that identified Ms Magwala as the next headwoman.

[11] Mr Muvha testified that he was the Chairperson of the Royal Family. To the contrary, Mr Makhado and Mr Mbulaheni Ramabulana stated that

Mr Muvha could never have been appointed Chairperson of the Royal Family. According to the both of them, the Muvha family members were not related to the Ramabulana family of Gogobole, therefore they could not be members of the Royal Family. For these reasons the Muvha family were not entitled to participate in the identification of a headman or headwoman of Gogobole.

[12] According to Mr Mbulaheni Ramabulana, Mr Makhado and Ms Mukhuba, the late Mr Maluta was identified as the next headman of Gogobole but died before a certificate of recognition could be issued to him by the Premier of the Province. Corroborating, Mr Makhado and Mr Mbulaheni Ramabulana, Ms Mukhuba stated that Ms Magwala is her niece and could not be identified as the headwoman because Mr Maluta's minor son, Mr Tshifhiwa, was the legitimate successor. Ms Mukhuba denied that she took Ms Magwala to the Chief to introduce her as the next headwoman.

[13] Mr Muvha explained, where two people have been identified as headman or headwoman, as in this case, the procedure that should be followed is that the parties who have been identified should write a letter to the district office, which then sends the letter to the Premier's office to inform him or her of the situation. It will then be for the Premier to investigate and decide who the legitimate headman or headwoman should be in terms of the community's customs and customary law. This was not done. Mr Muvha testified that the Chief refused to submit the documents to the Premier.

[14] It is apparent from the pleadings and the evidence led at the trial that at the core of this matter is whether Ms Magwala was properly identified

as the next headwoman of Gogobole Village in terms of its customs or customary laws. Aligned to this, is who were the legitimate members of the Royal Family, whose function it was to identify the successor to the late headwoman, Ms Ndwammbi.

[15] The high court made certain findings,¹ *inter alia*, that ‘it is accepted, as a fact, that [the] first defendant was identified’ as the headwoman of Gogobole Village but went on to hold that what was disputed was whether Ms Magwala was properly identified in accordance with the customs and customary law of the community, and who the legitimate members of the Royal Family were. Notwithstanding these disputes the high court granted several orders against Ms Magwala.²

[16] The full court found that the identification of Ms Magwala was in dispute.³ That was not the end of the matter. The full court went further

¹ The high court, at paras 9 and 10, stated that:

‘It became common cause during the trial that the Premier has never recognised the first defendant in terms of the Limpopo Act as “regent” “acting traditional leader” or as “headwoman”. *It is also common cause that the first defendant was identified as headwoman. It is, however, disputed that it was done in accordance with customs of the Gogobole Community.* The parties adduced evidence whether the first respondent was properly identified by the Royal Family on the one hand, and who the members of the Royal Family are, on the other.

The parties were informed at the conclusion of the evidence that the matter can be adjudicated on the basis that the court should determine whether the first respondent, on the common cause facts, may perform the duties and responsibilities of headwoman, regent or acting headwoman without first being recognised by the Premier. For purposes of this decision it is *accepted, as a fact, that the first defendant was identified.* Until the decision is set aside it purports to be a decision of the Royal family. The dispute who the members of the Royal Family are, and whether the first defendant was properly identified by a legitimate Royal Family, in terms of custom are customary law disputes which must first be dealt with in terms of the dispute settlement mechanisms provided by Limpopo. It is also common cause that these disputes have not yet reached the Premier for decision.’ (My emphasis.)

² See para 1 above.

³ The full court, at paras 30,31 and 33, held that:

‘The evidence, largely uncontroverted, suggest that at no stage was the Appellant ever identified by Gogobole’s royal family to become a Headwoman. Similarly, there is no evidence that shows that if indeed she was, the Sinthumule Traditional Council was officially notified of her identification.

Moreover, the fact that she admitted in her plea that her deceased mother was married to Tshikumba Ramadzuwa, that unequivocal admission alone, in my view, naturally oust her from the core customary structure of the Gogobole Royal Family. Once ousted by her descent, she cannot in terms of custom be

when it made a finding on the merits of the dispute, that Ms Magwala was not qualified to succeed her mother because of the customs and the relevant customary laws of the community. It accordingly dismissed Ms Magwala's appeal against the high court judgment.

[17] The Constitution of the Republic of South Africa states that the institution, status and roles of traditional leadership, according to law, are recognised.⁴ Numerous pieces of legislation have been passed to strengthen the institution of traditional leadership to ensure that traditional leadership makes an important contribution to the development of society. The Constitution mandates the establishment of houses of traditional leaders either through provincial or national legislation.⁵

[18] The national legislation referred to is the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act). This version of the Framework Act was amended in 2009, under the same title, by the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 (the Framework Amendment Act).⁶ The provincial legislation referred to in the Constitution is the Limpopo Traditional Leadership and Institutions Act 6 of 2005 (the Limpopo Act). Section 12 of the Limpopo

qualified to succeed her married mother, by virtue of her marriage. Her late mother was in fact handed over to Ramadzuwa in marriage. She could, therefore, not rule from foreign soil.

...

It is against this backdrop that the finding by the court a quo of the non-identification of the Appellant by Gogobole's Royal Family, cannot be faulted.'

⁴ Section 211 of the Constitution provides:

- '(1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
- (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
- (3) The courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law.'

⁵ Section 212 of the Constitution.

⁶ The Framework Amendment Act was also amended, under the same title, by the Traditional Leadership and Governance Framework Act 2 of 2019.

Act, which is similar to Section 11 of the Framework Act,⁷ sets out the procedure that should be followed when filling a vacancy of headman or headwoman. These two pieces of legislation are aimed at regulating, legalising, and recognising the institution of traditional leadership where it applies. Section 12 of the Limpopo Act provides:

‘(1) Whenever a position of a senior traditional leader, headman or headwoman is to be filled –

- (a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to the customary law of the traditional community concerned –

⁷ S 11 of the Framework Act provides that:

- ‘(1) Whenever the position of senior traditional leader, headman or headwoman is to be filled –
- (a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to applicable customary law –
 - (i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 12 (1) (a), (b) and (d) apply to that person and
 - (ii) through the relevant customary structure, inform the Premier of the province concerned of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and
 - (b) the Premier concerned must, subject to subsection (3), recognise the person so identified by the royal family in accordance with provincial legislation as senior traditional leader, headman or headwoman, as the case may be.
- (2)(a) The provincial legislation referred to in subsection (1)(b) must at least provide for –
- (i) a notice in the *Provincial Gazette* recognising the person identified as senior traditional leader, headman or headwoman in terms of subsection (1);
 - (ii) a certificate of recognition to be issued to the identified person; and
 - (iii) the relevant house of traditional leaders to be informed of the recognition of a senior traditional leader, headman or headwoman.
- (b) Provincial Legislation may also provide for –
- (i) the election or appointment of a headman or headwoman in terms of customary law and customs; and
 - (ii) consultation by the Premier with the traditional council concerned where the position of a senior traditional leader, headman or headwoman is to be filled.
- (3) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the Premier –
- (a) may refer the matter to the relevant provincial house of traditional leaders for its recommendation; or
 - (b) may refuse to issue a certificate of recognition; and
 - (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.
- (4) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (3) has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.

- (i) identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and
 - (ii) through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of the specific person.
- (b) the Premier must, subject to subsection (2) –
- (i) by notice in the *Gazette* recognise the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, headman or headwoman, as the case may be;
 - (ii) issue a certificate of recognition to the person so recognised; and
 - (iii) inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional leader, headman or headwoman.
- (2) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the Premier –
- (a) may refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations; or
 - (b) may refuse to issue a certificate of recognition; and
 - (c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused.
- (3) Where the matter which has been referred back to the royal family for reconsideration and resolution in terms of subsection (2) has been reconsidered and resolved, the Premier must recognise the person identified by the royal family if the Premier is satisfied that the reconsideration and resolution by the royal family has been done in accordance with customary law.’

[19] Section 21 of the Framework Act provides as follows:

- ‘(1)(a) Whenever a dispute concerning customary law or customs arises within a traditional community or between traditional communities or other customary institutions on a matter arising from the implementation of this Act, members of such a community and traditional leaders within the traditional community

or customary institution concerned must seek to resolve the dispute internally and in accordance with customs before such dispute is or claim may be referred to the Commission.

- (b) If a dispute or claim cannot be resolved in terms of paragraph (a), subsection (2) applies.
- (2)(a) A dispute or claim referred to in subsection (1) that cannot be resolved as provided for in that subsection in that subsection must be referred to the relevant provincial house of traditional leaders, which house must seek to resolve the dispute or claim in accordance with its internal rules or procedures.
- (b) If a provincial house of traditional leaders is unable to resolve a dispute or claim as provided for in paragraph (a), the dispute or claim must be referred to the Premier of the province concerned, who must resolve the dispute or claim after having consulted –
 - (i) the parties to the dispute or claim; and
 - (ii) the provincial house of traditional leaders concerned.
- (c) A dispute or claim that cannot be resolved as provided for in paragraphs (a) and (b) must be referred to the Commission.
- (3) Where a dispute or claim contemplated in subsection (1) has not been resolved as provided for in this section, the dispute or claim must be referred to the Commission.

[20] In *Netshimbupfe and Another v Carthcart and Others (Netshimbupfe)*,⁸ this Court held that:

‘... In terms of s 12(1) of the Limpopo Act, there are two stages involved in the process of assuming traditional leadership. The first stage is the identification stage where the royal family, must whenever a position is to be filled, identify a person for that leadership role in terms of customary law and custom. The second stage is the recognition stage where the royal family submits the particulars of the identified person to the Premier of that province. Subject to s 12(2), the Premier would affect recognition by publishing the name of that person by notice in a Gazette, issue a recognition

⁸ *Netshimbupfe and Another v Carthcart and Others* [2018] ZASCA 98; [2018] 3 All SA 397 (SCA).

certificate and formally notify the provincial and local houses of traditional leaders of that recognition.’⁹

...

‘... Ordinarily this dispute would be resolved in terms of s 21 of the Framework Act. The Limpopo Act does not have a provision for resolution of disputes of this kind. However, the dispute in this case emanates from the identification process envisaged in s 11 of the Framework Act and s 12 of the Limpopo Act.’¹⁰

[21] This Court in *Netshimbupfe*, further held that:

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

“The dispute may be referred from one level to the next only if it is unresolved. When a definitive decision is taken at any level, the aggrieved party does not have any further internal recourse. . . A decision at any level gives the aggrieved party the right to exit the internal structure and approach a court for appropriate relief’.”¹¹

[22] It is evident from the pleadings and the evidence led at the trial that there were factual disputes between the parties on the issue of identification of Ms Magwala, which disputes required the application of customary law and customs of the community. It is common cause that the Premier has not made a decision to recognise Ms Magwala as the headwoman. There is no evidence that the Royal Family has informed the Premier, who is obliged to recognise the identified person if there is no evidence that the person was identified other than in terms of customary law. Once identification is disputed, there are dispute mechanisms which the parties should utilise before approaching the courts.

⁹ Ibid para 8.

¹⁰ Ibid para 10.

¹¹ Ibid para 20.

[23] If there is a problem with identification, the Premier must deal with the matter in terms of ss 12(2)(a), (b) or (c) of the Limpopo Act, which provides:

‘(2) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the Premier-

- (a) may refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations;
- (b) or may refuse to issue a certificate of recognition; and
- (c) must refer the matter back to the royal family for reconsideration and resolution’ where the certificate of recognition was refused.

[24] Surprisingly both the high court and the full court did not have regard to the Constitutional Court’s decision in *Tshivhulana Royal Family v Netshivhulana (Tshivhulana)*,¹² and the decision of this Court in *Netshimbupfe*.¹³ The failure by the full court to apply the principles enunciated in these two judgments warrants special leave. The high court and the full court should not have dealt with the merits of the case. This is a matter that should have been referred to the Premier in terms of s 12 of the Limpopo Act for investigation purposes.

[25] On the issue of costs, the usual rule that costs follow the result does not apply in this case. Both parties were well aware of the decision in *Netshimbupfe* and *Tshivhulana* and neither one of them referred the matter to the Premier. The Gogobole Community has been without a headwoman or headman since the death of Ms Ndwammbi in 2008. In my view, the delay in resolving the disputes can be laid at the door of both parties. For this reason, both parties should bear their own costs.

¹² *Tshivhulana Royal family v Netshivhulana* [2016] ZACC 47; 2017(6) BCLR 800 CC.

¹³ *Netshimbupfe and Another v Carthcart and Others* [2018] ZASCA 98; [2018] 3 All SA 397 (SCA).

[26] In the result, the following order is made:

- 1 Special leave to appeal is granted.
- 2 The order of the high court is set aside and replaced with the following order:

‘The plaintiffs’ case is dismissed with no order as to costs’

Z CARELSE
JUDGE OF APPEAL

Appearances

For appellant: S O Ravele

Instructed by: S O Ravele Attorneys, Louis Tritchardt
Phatshoane Henney Attorneys, Bloemfontein

For respondents: T E Matumba

Instructed by: Timbani Tumba Attorneys Inc., Louis Tritchardt
Rossouws Attorneys, Bloemfontein.