THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 1176/2021

In the matter between:

MAXWELE ROYAL FAMILY	**FIRST APPELLANT**
ASIPHE SOLANGA MAXWELE	**SECOND APPELLANT**
and	
THE PREMIER OF THE EASTERN CAPE PROVINCE	**FIRST RESPONDENT**
MEC FOR THE DEPARTMENT OF CO-OPERATIVE AND TRADITIONAL AFFAIRS	**SECOND RESPONDENT**
BAXOLELE MAXWELE	**THIRD RESPONDENT**
SANGONI ROYAL FAMILY	**FOURTH RESPONDENT**

Neutral citation: *Maxwele Royal Family & Another v The Premier of the Eastern Cape Province and Others* (Case no 1176/2021) [2023] ZASCA 73 (24 May 2023)

Coram: DAMBUZA AP, NICHOLLS and GOOSEN JJA and NHLANGULELA and MALI AJJA

Heard: 9 March 2023

Delivered: 24 May 2023

Summary: Administrative law – review of appointment of a headman/headwoman – validity of the appointment in dispute – decision to appoint the third respondent set aside.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Notyesi AJ, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel where so employed; such costs to be paid by the respondents jointly and severally, the one paying the others to be absolved.

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

'(a) The second respondent's decision to appoint the third respondent as acting headman of Zimbane Administrative Area, Mthatha is hereby declared unlawful and accordingly reviewed and set aside.

(b) The respondents are ordered to pay the costs of the application jointly and severally, the one paying, the others to be absolved.'

JUDGMENT

Nhlangulela AJA (Dambuza AP, Nicholls and Goosen JJA and Mali AJA concurring):

The parties

[1] The first appellant is the Maxwele Royal Family (the MRF), which is described as 'a core customary institution or structure comprising immediate relatives of the ruling family and other family members who are close relatives of the ruling family'. It exercises authority within Khwenxurha Location, Zimbane in Mthatha (Zimbane). The second appellant is Asiphe Solanga Maxwele (Asiphe), an adult male and a member of the first appellant.[1] He resides

[1] First names are used because some of the persons referred to in this judgment share the same surname. No disrespect is intended.

at Zimbane. The first respondent is the Premier of the Eastern Cape Province (the Premier) who is responsible for recognising chiefs and headmen/headwomen who have been identified to serve in traditional communities of the province of the Eastern Cape. The second respondent is the Member of the Executive Council for the Department of Co-operative and Traditional Affairs (the MEC). The third respondent is Baxolele Maxwele (Baxolele), an adult male of Khwenxurha. The fourth respondent is the Sangoni Royal Family (the SRF). It is composed of members of Sangoni Royal House. It exercises authority in the Qokolweni Administrative Area, Mthatha. Its senior member (Chief Sangoni) presides over the Qokolweni-Zimbane Traditional Council, a structure that was established in terms of s 6 of the Traditional Leadership and Governance Act 4 of 2005 (the EC Act of 2005).

Introduction

[2] This appeal arises from the judgment of the Eastern Cape Division of the High Court, Mthatha (the high court) which dismissed with costs an application to review the decisions made by the MEC. In terms of the impugned decisions, Baxolele was appointed as the acting headman of Zimbane. The matter comes to this Court on appeal with the leave of the high court. The appeal turns on the crisp question of whether the identification, recognition and appointment of Baxolele as acting headman of Zimbane was lawful.

Background

[3] Until 2008, the late Mr Mzimtsha Maxwele (Mzimtsha) was the headman of Zimbane. At the time of his death, Mzimtsha had one wife, Mrs Nomthandazo Maxwele (Mrs Maxwele). The two of them had one minor child, namely, the second appellant, Asiphe. Subsequent to the death of Mzimtsha, the MRF identified Asiphe as the successor to the headmanship, in terms of s 18 of the EC

Act of 2005[2]. Mrs Maxwele was identified and duly assumed the position of regent in accordance with the provisions of s 21 of the EC Act of 2005[3] as Asiphe was 19 years old at the time. This state of affairs endured until 20 August 2020 when the MEC appointed the third respondent as acting headman of Zimbane under Qokolweni Traditional Council, effectively the same position in which Mrs Maxwele was a regent at the time. On 26 January 2017, whilst the regent was still in office, the MEC instructed the SRF to identify an acting headman to replace the regent. Accordingly, Baxolele was recognised and appointed by the Premier.[4] At the same time, the SRF advised Mrs Maxwele that she was removed from headwomanship with immediate effect for the reason that her term as acting headwoman had expired.

[4] The appellants brought an application to review and set aside the decisions of the MEC. The application was opposed. Ms Ntombekhaya D. Maxwele (Ms Maxwele), the chairperson of the MRF, deposed to the founding affidavit. She

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[2] The provisions of s 18 of the EC Act of 2005 read as follows:
'(1) Whenever the position of an iNkosi or iNkosana is to be filled -
(a) the royal family concerned must subject to such conditions and procedure as prescribed, within sixty days after the position becomes vacant, and with due regard to applicable customary law: -
(i) identify a person who qualifies in terms of customary law to assume the position in question, after taking into account whether any of the grounds referred to in section 6(3) apply to that person; and
(ii) through the relevant customary structure, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of that person; and
(b) the Premier must, subject to subsection (5), by the notice in the *Gazette*, recognise the person so identified by the royal family as an iNkosi or iNkosana, as the case may be.
(2) Before a notice recognising an iNkosi or iNkosana is published in the *Gazette*, the Premier must inform the Provincial House of Traditional Leaders of such recognition.
(3) The Premier must, within a period of thirty days after the date of publication of the notice recognising an iNkosi or iNkosana issue to the person who is identified in terms of paragraph (a)(i), a certificate of recognition.'

[3] The provisions of s 21 of the EC Act of 2005 read as follows:
'Recognition of regents -
(1) Where a royal family has identified the successor to the position of iKumkani, iNkosi or iNkosana who is a minor in terms of applicable customary law or customs and advised the Premier, the Premier must: -
(a) within a reasonable time, by notice in the *Gazette*, recognize the person so identified by the royal family as a regent;
…

(3) The Premier must review the recognition of a regent -
(a) at least once every three years, and
(b) immediately after the successor has attained the age of majority.'

[4] The provisions of s 18 of the EC Act of 2005 were replaced by s 23 of the EC Act of 2017 in identical terms.

traced the history of Maxwele Royal House. It was common cause that until his death, Mzimtsha was the hereditary headman of Zimbane and that Mrs Mawele was appointed as Regent because of Asiphe's minority status.

[5] On 26 January 2017, whilst the regent was still in office, the MEC addressed a letter to the SRF instructing it to identify an acting headman to replace the Regent. On the same day the MEC advised Mrs Maxwele that the term of her regency had expired and gave her 30 days to vacate the office. The MEC explained that the reason for the termination of her regency was the expiry of the three-year term of Regency as prescribed under ss 22(1)*(a)* and *(b)* of the EC Act of 2005[5]. There were also allegations made that she had caused instability within the Zimbane community. That conduct, it was contended, disqualified her from continuing to act as a headwoman. On 8 January 2019, the MEC addressed a letter to Mrs Maxwele confirming that she was removed from office. Baxolele was identified as Acting Headman and his appointment as such with effect from 12 June 2020 was confirmed by the MEC on 20 August 2020. Mrs Maxwele retorted that the termination of her appointment and the recognition of Baxolele as a new acting headman violated the provisions of ss 26(1)(*a*) and (*b*) of the EC Act of 2017.

[6] Aggrieved by the decisions of the respondents, the appellants launched the review proceedings seeking an order that the decision of the Premier and MEC to appoint Baxolele be reviewed and set aside (Case no 2990/2020). It also appears from the record that further application proceedings had been launched by the

[5] Subsections 22 (1)*(a)* and *(b)* of the EC Act of 2005, reading in identical terms as ss 26(1)*(a)* and *(b)* of the EC Act of 2017, which read as follows:
'Persons acting as iKumkani, iNkosi or iNkosana –
(1) A royal family may identify a suitable person to act as iKumkani, iNkosi or iNkosana as the case may be, where: —
(a) a successor to the position of a traditional leader has not been identified by the royal family concerned;
(b) the identification of a successor to the position of iKumkani, iNkosi or iNkosana is being considered and not yet resolved;…'.

appellants under case no 1234/2020. In that application the appellants sought an order to compel the Premier and MEC to recognise Asiphe as the headman so that he would commence his official duties as he had since attained the age of majority. Apart from the order that was granted in case no 1234/2020, there are no further details of that application in the record.

[7] In the review application to which this appeal relates, the respondents challenged Ms Maxwele's authority to depose to the founding affidavit on the basis that the MRF was not a valid legal entity. Baxolele and the SRF contended that the Qokolweni-Zimbane Traditional Council should have been joined in the review application. They also asserted that the review application was premature to the extent that the appellants had failed to refer the dispute(s) to mediation as envisaged in the provisions of Rule 41A of the uniform rules of the high court. In addition, they took issue with the appellants' failure to file the record of the impugned decisions. They also maintained that there was an irresolvable dispute of facts that must have been foreseen by the appellants.

[8] In justifying his appointment as acting headman, Baxolele asserted that in Zimbane, the electoral system, as opposed to the hereditary system, had always been applied in appointing headmen. He refuted the allegation made by Ms Maxwele that Asiphe's position as an eldest male issue in Maxwele Royal House was the qualifying factor for his appointment as the headman.

In the high court

[9] The high court dismissed the review application on four principal bases, namely that:

(a) Ms Maxwele had neither the *locus standi* to bring the application, nor the authority to depose to an affidavit on behalf of the MRF;

(b) the establishment of the MRF was invalid to the extent that its members constituting were not of royal blood;
(c) there was no resolution in terms of which Asiphe was identified as the headman; and
(d) in Zimbane, the procedure for appointment of a headman is the public ballot system, rather than the hereditary system.

[10] The court found that the MRF is not a royal family because Zimbane is an administrative area and not a traditional community recognised in terms of s 2 of the Traditional Leadership and Governance Framework Act 41 of 2003 (the Framework Act)[6]. For that reason, it was not qualified to identify a headman. It held that the SRF, as the royal family with authority over the entire Qokolweni-Zimbane traditional community, held the authority to identify headmen for all the communities within its jurisdiction, including Zimbane. The court upheld the respondents' contention that the first appellant was not a legal entity.

In this Court

[11] For the reasons that follow, the judgment of the high court cannot stand. First, it was not in dispute that the demise of Mzimtsha in 2008 led to the identification of Asiphe as the successor in terms of s18 of the EC Act of 2005 and the processes provided for therein. Mrs Maxwele's regency was founded on this identification. Further, the MEC was involved in the 2008 process, which, in essence, meant that he accepted the underlying reason for the regency. Had it not been for the fact of the minority status of Asiphe, the Premier would have been compelled in terms of the provisions of s 18(2) of the EC Act of 2005 to inform the Provincial House of Traditional Leaders of such identification and then

[6] Section 2(1) of the Framework Act reads:
'(1) A community may be recognised as a traditional community if it –
(a) is subject to a system of traditional leadership in terms of that community's customs; and
(b) observes a system of customary law.'

publish, in the Gazette, a notice recognising such identification. Thereafter, in terms of s 18(3) of the EC Act of 2005, the Premier would have been compelled to issue a certificate of recognition in favour of Asiphe.

[12] In the record, Asiphe's date of birth appears as 13 July 1989. He had, therefore, long attained majority when the MEC instructed the SRF to identify an acting headman and when Baxolele was recognised as such. If the term for Mrs Maxwele's regency had expired, the Premier and MEC could not simply ignore the identification of Asiphe which remained extant. Both the identification of an acting headman and the recognition of Baxolele as such had no lawful basis.

[13] Counsel for the Premier and MEC conceded that the appointment of Mrs Maxwele as regent proceeded on the basis of an acceptance of the recognition of Asiphe as the successor to headmanship. The consequence of such acceptance is that there existed an administrative decision or act which preceded the appointment of the regent. Counsel conceded that in the absence of such administrative conduct being set aside both the MEC and Premier could not lawfully recognise another identified headman nor purport to appoint such person to the position of headman or acting headman. Counsel accordingly conceded, correctly so, that the decision to appoint Baxolele must be set aside.

[14] At the hearing of this appeal, our attention was drawn to the fact that the review in this case served before same judge who, on the same day, granted the order in case no 1234/2020 in terms of which the Premier and MEC were compelled to consider and decide Asiphe's recognition as the headman of Zimbane. It was not in dispute before us that the order in case no 1234/2020 compelled the Premier and MEC to consider and decide Asiphe's recognition as the headman of Zimbane. The context in which the order in case no 1234/2020 was granted is not apparent from the record. However, the fact that a full-scale

hearing of the review application proceeded before the same judge who had just granted the order compelling a decision on Asiphe's nomination is surprising. The reasons for rejecting Asiphe's nomination by the same court in the review application are perplexing, given that the order in case no 1234/2020 entailed a positive finding on issues regarding the status of the MRF and Ms Maxwele's *locus standi* and authority to participate in the review proceedings.

[15] A further issue that requires comment by this Court is the reference in the record, especially in the correspondence by the MEC to the 'appointment' of the third respondent. It is important to highlight that there is no provision in the EC Acts 2005 and 2017, for *appointment* of a headman by government functionaries. The relevant legislation provides for *recognition* of the headman by the *Premier*, rather than the MEC.[7]

Conclusion

[16] To conclude, the MEC's (and the Premier's) decisions to recognise the identification, and appoint Baxolele in the face of the identification of the second appellant in 2008, which resulted in Mrs Maxwele's regency, is unlawful. In addition, the order of the high court in case no 1234/2020, in effect, disposed of the preliminary issues raised in the review application. The order of the high court must be set aside. There is no reason why costs should not follow the result.

Order

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

[7] Sections 9, 11, 13, and 14 of the Framework Act; see also s 3 of the Traditional and Khoi-San Leadership Act 3 of 2019 and relevant provincial legislation, in this instance, ss 18 & 21 of EC Act of 2005 and s 23 of the EC Act of 2017.

1 The appeal is upheld with costs, including the costs of two counsel where so employed; such costs to be paid by the respondents jointly and severally, the one paying the others to be absolved.

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

'(a) The second respondent's decision to appoint the third respondent as acting headman of Zimbane Administrative Area, Mthatha is hereby declared unlawful and accordingly reviewed and set aside.

(b) The respondents are ordered to pay the costs of the application jointly and severally, the one paying, the others to be absolved.'

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ZM NHLANGULELA

ACTING JUDGE OF APPEAL

Appearances

For appellants:	ZZ Matebese SC with Z Badli
Instructed by:	A S Zono & Associates, Mthatha
	Honey Attorneys, Bloemfontein
For first and second respondent:	M Gwala SC with LX Mpiti
Instructed by:	State Attorney, Mthatha
	State Attorney, Bloemfontein
For third respondent:	S Sintwa
Instructed by:	Chris Bodlani Attorneys, Mthatha
	Webbers Attorneys, Bloemfontein
For fourth respondent:	M Sishuba with N Mdunyelwa
Instructed by:	Potelwa & Co, Mthatha
	Ponoane Attorneys, Bloemfontein.