IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 40750/2014

3/6/2016

In the matter between:

THE MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS — First Applicant

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — Second Applicant

THE COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS — Third Applicant

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

01/06/2016 .....

DATE SIGNATURE

and

WEZIZWE FEZIWE SIGCAU — First Respondent

LOMBEKISO MAKHOSATSINI MASOBHUZA — Second Respondent

ZANUZUKO TYELOVUYO SIGCAU Third Respondent

NATIONAL HOUSE OF TRADITIONAL LEADERS Fourth Respondent

HOUSE OF TRADITIONAL LEADERS (EASTERN CAPE) Fifth Respondent

JUDGMENT APPLICATION FOR LEAVE TO APPEAL

MURPHY J

1. This is an application made by the first and second respondents for leave to appeal against the order I granted on 20 November 2015 declaring that the second applicant, the President of the Republic of South Africa, was not required to follow a process of consultation with the royal family of the amaMpondo aseQaukeni before implementing the decision of the third applicant, the Commission on Traditional Leadership Disputes and Claims, recognising the third respondent, Mr Zanuzuko Sigcau, as king of the amaMpondo aseQaukeni. I declared further that that the President was required only to publicise the decision of the Commission and to issue a certificate of recognition to the third respondent as contemplated in section 9(2) of the Traditional Leadership and Governance Framework Act 41 of 2003 ("the Act") in order for the appointment to be effective.

2. The three applicants (the respondents in the application for leave to appeal) oppose the application for leave and at the same time have made application in terms of section 18 of the Superior Courts Act 10 of 2013 for an order directing that the terms of my order of 20 November 2015 shall be immediately operational. The

effect of such an order, were it to be granted, would be to permit the President to proceed with the formal steps to recognise and appoint the third respondent as king, despite any appeal against the order. The first and second respondents oppose the application.

3. Section 17(1)(a) of the Superior Courts Act provides that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have reasonable prospects of success, or there is some other compelling reason why the appeal should be heard.

4. As appears from the main judgment, this matter has a long and contentious history. In April 2008 the Commission determined that the then existing paramountcy of the amaMpondo aseQaukeni would henceforth be recognised as a "kingship" and on 21 January 2010 determined that the third respondent was the rightful king of the amaMpondo aseQaukeni. The decision of the Commission was conveyed to the President in terms of section 26(2) of the Act for implementation. The President made the decision public by means of a notice promulgated in Government Gazette 33732 on 5 November 2010. The late Paramount Chief Justice Sigcau challenged the decision of the Commission in this court. The application was not successful and leave to appeal was refused by both this court and the Supreme Court of Appeal. The Constitutional Court, however, granted leave to appeal and upheld the appeal on the narrow, technical and procedural ground that when the President implemented the decision of the Commission to recognise the third respondent as king, by way of the notice in the Gazette, he acted incorrectly in terms of amendments introduced by the Traditional Leadership and Governance Framework Amendment Act 23 of 2009 ("the Amendment Act"), which were not applicable to the facts of this dispute. The Constitutional Court held that the President's notice had to be set aside as he had purported to exercise powers not conferred upon him by the provisions of the Act before its amendment. He appeared to have made a decision in relation to what was assumed to be a "recommendation" by the Commission, whereas under the old Act the power to make the decision vested in the Commission. The Constitutional Court did not decide whether the President needed

to follow the consultative process contemplated in section 9 and 10 of the Act before implementing the Commission's decision or whether the decision of the Commission should be reviewed and set aside. It set aside the order of this court as well as the notice of the President, but did not set aside the decision of the Commission.

5. The order of the Constitutional Court left some uncertainty about firstly the status of the application by Justice Sigcau to review the decision of the Commission, which was dismissed by this court, and secondly the steps to be taken by the President to implement the Commission's decision. The respondents took the view that the Constitutional Court had vindicated Justice Sigcau's position as king and that the first respondent, his daughter and successor, should be recognised as queen of the amaMpondo aseQaukeni. In *Nxumalo v President of the RSA and others*,[1] the Constitutional Court commented about the effect of its decision in *Sigcau*. It explained that the order of the High Court dismissing the applicant's review application was set aside with the result that the Commission's decision still stood but also that the applicant's review application in respect of the Commission's decision remained undecided and, therefore, pending before the High Court.

6. The process of appointing a king of the amaMpondo aseQaukeni accordingly must be completed under the provisions of the Act as they existed prior to amendment. Section 26(2)(a) of the un-amended Act provides for the implementation of a decision of the Commission regarding the position of a king or queen. It provides that a decision of the Commission must, within two weeks, be conveyed to the President for immediate implementation in accordance with section 9 and 10.

7. According to the applicants all that is required to complete the process of recognising and appointing the third respondent is for the President to immediately implement the decision by publishing a notice in the Gazette and issuing a certificate of recognition in terms of section 9(2) of the Act. They argue that the other provisions

[1] 2014 (12) BCLR 1457 (CC)

of section 9 do not apply. The reference to section 9 in section 26(2), they submitted, should be restricted to section 9(2). The respondents maintained that the President in carrying out his role in implementing the Commission's decision is obliged to carry out a full process in terms of section 9 and 10 of the old Act, which requires the involvement of the royal family in a process of selection and a process of consultation involving the President and the relevant traditional structures. If the President were obliged to follow section 9 to the letter, the royal family would be required to identify the person who qualifies in terms of customary law to be the king or queen and the President would then have to take a decision in relation to the person identified, taking into account the various criteria and considerations mentioned in section 9(1)(b), which are the very same considerations which had to be applied by the Commission under section 25(3)(b) of the old Act when it took its decision.

8. In the main judgment I agreed with the President and the other applicants that the steps envisaged in the other provisions of section 9 and 10 would be superfluous resulting in the decision of the Commission having no consequence. The President would be required to make his decision to recognise a king or queen based on his own assessment of the same factors considered by the Commission. To expect the President to take his own decision on the same subject decided by the Commission would introduce a measure of duplication, a cumbersome process and insensible inefficiency. It would make no sense for the Commission to be empowered to investigate and make a decision on a claim or dispute, only for its findings to be rendered redundant by a fresh process undertaken by the President, which gave precedence to the choice of the royal family above the decision of the Commission. The investigation conducted by the Commission would be rendered futile and its decision valueless. The outcome would be anomalous in that after gathering evidence, hearing all interested parties, and making an impartial decision based on custom, the Commission's decision would simply fall away in the face of a unilateral nomination by the royal family in terms of section 9(1)(a) of the Act. This could never have been the intention of the legislature. Insistence on the President conducting a full process under section 9 of the Act would undermine the legislative purpose in establishing the structural arrangements to deal with traditional leadership claims

and disputes. From a prudential or cost-benefit analysis, there is no sense or value in pursuing a duplicated process. The interpretation urged for by the respondents, in my opinion, would not have sensible or business-like results.

9. In the application for leave to appeal, the first and second respondents argued that another higher court may interpret the ambiguous provisions of section 26(2) of the Act differently, with more fidelity to the language used. The clear language of the section requires the President to act in accordance with all the provisions of section 9 and does not limit the requirement to the ministerial functions of section 9(2). That is indisputable. The interpretation advanced in the main judgment, based on a contextual and purposive approach, departs from the clear language used by the legislature in the interests of achieving a prudential result honouring the structural arrangements established in the statute. An interpretative dispute of this order is quite evidently one upon which judges might reasonably differ. For that reason alone, I am unable to say the appeal has no prospect of success. Moreover, the judgment of the Constitutional Court has left some uncertainty about a matter of great interest, pressing concern and on-going historical significance to the amaMpondo aseQaukeni. The review of the decision of the Commission remains pending and there is contestation in the public domain about whether and how the President may intervene to bring the dispute to finality. That too is compelling reason for a higher court to bring authoritative clarity to the issues.

10. Mr Arendse SC, on behalf of the President, prevailed upon me to keep in mind the fact that the SCA previously refused the respondents leave to appeal. That may be true, but it did so in relation to the application for review of the decision of the Commission and the decision of the High Court, which subsequently has been set aside by the Constitutional Court on grounds that remain opaque. The SCA has never been seized with the interpretative issue that served before me, and which I have resolved by a process of interpretation that other judges might consider too extensive. Consequently, I am persuaded by the first and second respondents both that the appeal has a reasonable prospect of success and that there are other compelling reasons why the appeal should be heard. The parties agreed that if I

were inclined to grant leave, it should be to the SCA. The history and obvious importance of the matter justifies such an order.

11. The first and second respondents have raised other appeal grounds in relation to whether the requirements for a declaratory order have been met, joinder of the royal family and the deeming provisions of the Act. In light of my view concerning the interpretative issue there is no need to deal with them.

12. I turn now to the application in terms of section 18 of the Superior Courts Act for immediate operation of my order pending appeal. Section 18(1) provides that unless the court under exceptional circumstances orders otherwise, the operation of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal. In terms of section 18(3), a court may only order otherwise if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

13. On the assumption that we may well have to do with exceptional circumstances in this case, before I am permitted to depart from the norm that leave to appeal will suspend the operation of my decision of 20 November 2015 pending the appeal, the President and the other applicants must prove on a balance of probabilities that they will suffer irreparable harm if I do not order immediate operation of the order.

14. The applicants rely on two practical considerations which they say will constitute irreparable harm. The first is that the title to the throne will remain disputed until the appeal is finalised. As unsatisfactory as that is, the truth of the matter is that the title to the throne has been in dispute since it was created in 2008. The outstanding substantive and procedural issues in relation to the recognition of the third respondent as king must be resolved authoritatively and finally, and it would be

inappropriate to pre-empt that by means of the main application before me, dealing as it does solely with a declaration of rights in relation to a narrow procedural issue. An order in terms of section 18(3) effectively elevating the third respondent to the position of king, pending the review of the Commission's decision and the appeal against my declaratory order, would be premature. The lingering uncertainty is undoubtedly an administrative and political headache for the applicants, and is deserving of the court's sympathy. It however does not amount to the kind of irreparable harm contemplated by section 18. Appropriate political, financial and administrative measures can be taken dealing with the status quo, while recognising the disputed claim of the third respondent. Although the third respondent may suffer harm from the dispute about his title, he is not party to the section 18 application. The President, the Minister and the Commission, the applicants in the section 18(3) application, will not suffer irreparable harm by the delay in resolving the dispute and the continued contested title. Indeed, greater harm will result if the third respondent is elevated to the throne and another court sets aside the decision of the Commission on review, or directs the President to embark upon further consultation.

15. The applicants, in addition, have put forward evidence that in the absence of the effective leadership of the third respondent, traditional initiation schools have not been properly controlled, and this has resulted in death and injury to initiates. Again, while sharing the applicants' understandable anxiety, the difficulties, abuses and opportunistic practices bedevilling initiation in the Eastern Cape cannot be placed at the door of this dispute. Insufficient nexus has been established factually on the papers to conclude that the unresolved contest to the title of the throne has a bearing on the bad practices in the initiation processes. Other traditional structures can and should be deployed to deal with the problem, and the first and third respondents can use their authority and best efforts to bring better order, in spite of the contest between them. The seriousness of the problem notwithstanding, it too does not amount to irreparable harm to the President, the Minister or the Commission that necessitates an order compelling immediate operation of my declaratory order.

16. In the result, the applicants have failed to establish the conditions precedent for the exercise of my discretion in their favour under section 18(3) of the Superior Courts Act, and hence I lack the jurisdiction to make such an order.

17. I conclude with a note of admonition. It appears from the papers in the main application that the first and second respondents, Ms Wezizwe Sigcau and Ms Lombekiso Sigcau, and their perhaps overly enthusiastic supporters, have relied on the decision of the Constitutional Court regarding the procedural irregularity in implementing the decision of the Commission to assert publicly that the first respondent's claim to the throne has been vindicated. That reliance is naïve, misplaced and unfortunate. The Constitutional Court's decision does not vindicate the first respondent's claim in any way; nor does this judgment. As I stated in my judgment in the main application, the authoritative decision of the Commission is based upon an impressive scholarly endeavour by an acknowledged panel of experts. In their view, the third respondent is the rightful king. There is nothing in this judgment, my judgment in the main application, or the judgment of any other court which may be relied upon to say otherwise. On the contrary, the Constitutional Court in *Nxumalo v President of the RSA and others* in effect held that the decision of the Commission in relation to the third respondent's position as the rightful king of the amaMpondo aseQaukeni remains valid and intact. There is no evidence before me explaining why the first and second respondents have not pursued the application to review the decision of the Commission. Moreover, the main application before me dealt only with the procedure to be followed by the President to finalise the recognition and appointment of the third respondent as king. My judgment makes no pronouncement of any kind on the lawfulness of the decision of the Commission.

18. With regard to the question of costs, the applicants have not sought costs against the respondents in the past. I am thus disinclined to award costs against them in relation to their unsuccessful application in terms of section 18 of the Superior Courts Act. The costs of the application for leave to appeal, as normal, should be costs in the appeal.

19. I accordingly make the following orders:

i) The first and second respondents are granted leave to appeal to the Supreme Court of Appeal against the order of this court dated 20 November 2015.

ii) The application in terms of section 18(3) of the Superior Courts Act 10 of 2013 is dismissed.

iii) The costs of the application for leave to appeal will be costs in the appeal.

iv) There is no order as to costs in the application in terms of section 18(3) of the Superior Courts Act 10 of 2013.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard:	11 May 2016
Counsel for the Applicants:	Adv N Arendse SC, Adv D Borgström
Instructed by:	Bhadrish Daya Attorneys
Counsel for the Respondents:	Adv PM Mtshaulana SC, Adv PG Seleka
Instructed by:	Webber Wentzel Attorneys
Date of Judgment:	3 June 2016