"B1"

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 2367/2010

In the matter between:

ZWELIBHEKILE SIBUSISO MBUYAZI	**APPLICANT**
and	
THE PREMIER OF THE PROVINCE OF KWAZULU-NATAL	**FIRST RESPONDENT**
MKHANYISENI MBUYAZI	**SECOND RESPONDENT**
uMNDENI WENKOSI	**THIRD RESPONDENT**
STHEMBILE VALENCIA MKHIZE N.O.	**FOURTH RESPONDENT**
THE M.E.C. OF THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**FIFTH RESPONDENT**

JUDGMENT

SISHI J

Introduction

[1] The Second Respondent herein (Mkhanyiseni Mbuyazi) brought an urgent applicant on 19 November 2015 wherein he sought an order in the following terms:

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"1. That the order of the above honourable court granted by the **Honourable Justice Van Zyl** on 7 June 2011 be and is hereby rescinded,

2. That the Rule *nisi* granted by this court on 11 May 2010 and subsequently varied by this court on 26 May 2010 be and is hereby discharged."

[2] On 4 February 2016 the Fourth Respondent filed a Notice of Counter Application/Application for Consolidation in the following terms:

"Take notice that Sthembile Valencia Mkhize will apply at the hearing of the interlocutory application brought by the Second Respondent, alternatively on a date to be arranged with the register and a notice to all parties, at 9h30 or so soon thereafter as the matter may be heard for an order in the following terms:

1. That this application be and is hereby consolidated with the `action in this court under case number 4862/2015 in terms of the Uniform Rule 11, and shall henceforth proceed as one action.

Paragraph 2 and 3 deals with the citation of the parties' and the costs."

[3] The Applicant in the counter application/consolidation application acts in her capacity as executrix of the estate of the late Zwelibhekile Sibusiso Mbuyazi. She was substituted as such, in terms of an order of the Supreme Court of Appeal which was delivered on the 28 November 2014. I will deal with the Supreme Court of Appeal case later on in this judgment.

[4] As its evident from the papers the fundamental issues relates to the validity of the appointment of the Second Respondent as Inkosi and the corresponding determination of the appointment of the Applicant by the First Respondent.

[5] The ultimate question in both the application and the action referred to above is whether the removal of the late Zwelibhekile Sibusiso Mbuyazi (the Applicant) as Inkosi of the Mbuyazi Traditional Community was correct.

Background

[6] The following background facts are either common cause or not seriously disputed by the parties:

[7] On 14 August 2008 the Applicant Zwelibhekile Sibusiso Mbuyazi was appointed as Inkosi of the Mbuyazi Community in KwaMbonambi. A process was under taken to remove the deceased as Inkosi (the Applicant herein). This succeeded on 13 January 2010, his removal was gazetted, in terms of section 21(5) of the KwaZulu Traditional Leadership and Governance Act 5 of 2005 (hereinafter the fact referred to as (the Governance Act').

[8] The withdrawal of the recognition of an incumbent Inkosi is regulated by section 21 of the Governance Act which provides as follows:

"21 removal of traditional leader:

(1) A traditional leader maybe removed from office on the grounds of :

(a) Conviction of an offence with a sentence of imprisonment for more than 12 months without an option of a fine;

(b) Physical incapacity or mental infinity which, based on acceptable medical evidence, makes it impossible for that Inkosi to function as such;

(c) Wrongful appointment or recognition;

(d) A transgression of a customary rule or principle that warrants removal;

(e) A breach of the code of conduct; or

(f) Misconduct as contemplated in section 23

(2) Whenever any of the grounds as referred to in subsection 1(a), (b), (c), (d) and (e), come to the attention of Umndeni wenkosi, and Umndeni wenkosi concerned decides to remove a traditional leader, Umndeni wenkosi may, within a reason will try and do the relevant customary structure:

(a) Inform the Premier of the particulars of the traditional leader to be removed from office; and

(b) Furnish reasons for such removal.

(3) A traditional leader may only be removed from on the grounds set out in paragraphs (1)(a), (b) or (c) above after he or she has been given an opportunity to submit representations in responce to the grounds upon which his or her removal from office have been considered, and those representations have been considered by an appropriate authority.

(4) A traditional leader may only be removed from office on the grounds set out in subsection 1(d), (e) or (f) above, after an enquiry in terms of section 23.

(5) Where it has been decided to remove a traditional leader in terms of section 23, the Premier must:

(a) Withdraw the certificate of recognition with effect from the date of removal;

(b) Publish a notice in the Gazette with particulars of the removed leader; and

(c) Inform Umndeni wenkosi and the removed traditional leader concerned, and the Provincial House of Traditional Leaders of such removal.

(6) Where a traditional leader is removed from office, a successor maybe appointed in terms of this Act and in accordance with the prevailing customary law and custom."

[9] The issue of an appointment of an Inkosi went back to the Umndeni wenkosi and the Premier appointed Mkhanyiseni Mbuyazi (the Second Respondent herein) as Inkosi.

[10] On 29 March 2010 the Applicant brought an urgent application for a review with interim relief challenging the First Respondent's administrative decision of the withdrawal of his recognition as Inkosi of the uMbuyazi Traditional Community. This interim relief was to place him back in his position of the Inkosi in the meantime.

[11] This was originally granted, but this order was subsequently altered on the 26 May 2010 when the interim relief was changed to:

"4. Pending the final determination of the application for the said review and to operate as an interim order forthwith;

4.1 First Respondent is granted leave and is granted leave and directed to appoint an appropriate person to function in the interim as Ibambabukhosi (sic) (which question shall not be the Applicant or the Second Respondent) until such time as Inkosi has been recognized and appointed as contemplated in terms of section 3 of KwaZulu Traditional Leadership and Governance Act 5 of 2005.

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

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[12] The opposed review application came before Van Zyl J on 23 September 2010. On 7 June 2011 the Judge referred the disputed issues for trial and ordered that the current interim order (set out above) would remain in place.

[13] On 26 September 2011 the deceased, (Applicant herein), brought an application for the funding of the litigation by the Community Trust Fund. This was heard by (Honourable Judge) Henriques J who reserved the judgment.

[14] On 7 July 2012 the Applicant herein died.

[15] The death of the Applicant resulted in uncertainties and confusion mainly to the Applicant's surviving spouse, the Fourth Respondent, which resulted in various applications and processes by her and other parties.

[16] As the result of the death of the deceased the following applications were made:

1. The Premier (First Respondent herein) made an application that the review and the funding applications should be dismissed.

2. This was opposed by the deceased's wife (now the executrix) and the legal guardian of Phathokuhle, who brought a counter application that she be substituted for the deceased in both applications.

3. The current Inkosi, the Second Respondent herein, brought an application that his appointment should be declared to be valid and a dismissal of the 2

applications made by the deceased and the applications made by the deceased's wife.

[17] The applications were heard by Booyens AJ who made the following order on the 9 July 2013:

"(23) The following orders are made:

Case number 2367/2010

1. The application of the executrix to be substituted for the Applicant and her application in her capacity as a guardian of Phathokuhle to have him joined as Applicant is dismissed.
2. The application by the Premier (First Respondent) for discharged of the rule *nisi* and rescissions of the orders granted on 7 June 2011 is granted in respect of the Inkosi (Second Respondent), the rule *nisi* is discharged and the orders granted on 7 June 2011 are rescinded.

Case number 10169/2011

1. The application of the executrix to be substituted for the Applicant and in her capacity as guardian of Phathokuhle to have him joined as an Applicant is dismissed.
2. The application by the Premier for dismissal of this application is granted.

Costs

There will be no order as to costs to both applications".

[18] Leave to appeal was granted to the Supreme Court of Appeal.

[19] On 28 November 2014 the Supreme Court of Appeal upheld an appeal in part against the judgement of Booyens AJ.

[20] The order granted by the Supreme Court of Appeal was as follows:

"1. The appeal is upheld in part.

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

"(a) the Applicant, Sthembile Valenncia Mkhize, in her capacity as executrix of the estate of the late Zwelibhekile Sibusiso Mbuyazi, is hereby substituted as Applicant in the deceased's damages claim and in his funding application.

(b) The First and Second Respondents are ordered to pay the Applicant's costs in both applications, jointly and severally the one paying the other to be absolved.

(c) The First and Second Respondents applications for the discharge of the rule *nisi* and for the rescission of the orders granted on 7 June 2011 are both dismissed, with costs".

3. The First and Second Respondents are ordered to pay the costs of the appeal jointly and severally, the one paying the other to be absolved".

[21] As Mr Dickson SC for the First and Fifth Respondents correctly pointed out, this dispute has been complicated by the decision of the Supreme Court of Appeal which has given rise to this application and the action by the Fourth Respondent.

[22] Mr Dickson in the heads of arguments submitted that the conclusion of the SCA appeal left all parties confused as to the rights of the parties. For this reason First and Fifth Respondents and Fourth Respondent launched applications for leave

to appeal to the Constitutional Court but both these applications were refused. This uncertainty has caused various steps to be taken. Fourth Respondent has now instituted an action to achieve certainty and the Second and Third Respondents have brought this application. He submitted that the Premier persist in defending the recognition of the Second Respondent as Inkosi. However in this application First and Fifth Respondents abide the decision of the court. First and Fifth Respondents are required to be of assistance to this court and these submissions are made to that end on the issue of law. His input was of great assistance to this court and I thank him for that.

[23] What appears to be evident from the judgement of the SCA (SCA 822/2013) is the following:

1. The wife of the deceased, the Fourth Respondent herein, in her capacity as guardian of Phathokuhle is not substituted for the deceased.

2. The wife of the deceased, the Fourth Respondent herein, as executrix is substituted as Applicant in the damages claim and the funding application.

3. The rule *nisi* and the standing orders in the application granted and altered on the 26 May 2010 stand. The applicant's application to be substituted as Applicant in the review application was dealt with as follows by the Supreme Court of Appeal (paragraph 12 of the SCA judgment):

> "I propose to consider first the appellant's application to be substituted as applicant in the review application. I agree with the finding of the court below that the deceased's claim, in the review application, that the Premier's withdrawal of his recognition as Inkosi of Mbuyazi Community be set aside; that the Premier be directed to do all things necessary to withdraw the appointment of the Second Respondent as Inkosi of the Mbuyazi Community and reinstate him (the deceased) as such, was personal to him and therefore not transmissible to anyone else. He was the only one, were he to be

successful, who could be reinstated as Inkosi. However, since he has died an order setting aside the Premier's withdrawal of the deceased's recognition as Inkosi and directing the Premier to reinstate him as Inkosi can no longer be made. That claim, therefore, could no longer be pursued after the death of the deceased. It terminated upon his death. (see the relevant authorities referred to by Holmes JA in *Government of the Republic of South Africa v Khumbani* 1972 (2) SA 601(A) at 607 A-B). In my view the claim for the reinstatement could not be serious, even after *litis contes*tatius, and is thus not transmissible to the deceased' heirs. It follows that the appellant cannot be substituted as applicant in the review application proper".

[24] Counsel for the Second Respondent, Mr Ngema, submitted that the death of the Applicant, the Fourth Respondent's husband, terminated his mandate and *locu standi* in this matter which eventually terminated the Rule 53 review proceedings. He submitted further that for his review application to proceed where oral evidence had to be led, he needs to be alive and be present at court.

[25] He also argued that because the Fourth Respondent is not in a position to pursue the issue of her late husband as to the chieftainship that the order of reference to the hearing of oral evidence would be of no purpose and that order should be set aside. He finally argued that the Rule *nisi* which was kept alive by the Supreme Court of Appeal be discharged.

[26] Counsel for the Fourth Respondent, Mr Goddard SC, submitted that the Supreme Court of Appeal held that the Rule *nisi* should remain in place. Given that the Applicant has a valid claim in her capacity as executrix, and has already been substituted as the Applicant herein, there is no basis for the rescission of the order granted on 7 June 2011. He further submitted that the Supreme Court of Appeal further held that the minor son has a right to claim to be appointed Inkosi, although this could not be done in the same proceedings initially instituted under case number

2367/2010. The Applicant has accordingly instituted separate proceedings in her capacity as guardian of the minor son. The essential issue in both this matter (the salary claim), and the action (the minor's claim to appointment) is the question of whether the deceased was correctly identified and appointed as Inkosi, is the same. He then submitted that it is convenient, just and equitable for this application and that action to be consolidated.

[27] The fourth Respondent states that although she is only substituted in respect of the monetary claim that the SCA effectively ruled against this application, she contends that the first issue to be decided is whether the deceased was wrongfully removed as Inkosi and that it then follows that the deceased's son is next in line for succession.

[28] The issue in this matter appear to be revolving around the legal principles and the proper interpretation of the Supreme Court of Appeal judgment.

[29] The submission on behalf of the Fourth Respondent referred to above should be considered in the light of what was said in paragraph 15 of the Supreme Court of Appeal judgment. It would be appropriate at this stage to refer to the whole of paragraph 15 which provides as follows:

> "15. Thus, under Zulu Laws of hereditary succession Phathokuhle would be next in line for the position of Inkosi, were it to be proved that the deceased had been wrongfully removed as Inkosi. But section 3 of the Act obliges the traditional community to "transform and adapt customary law and custom so as to comply with the principles enshrined in the Constitution..." by, in particular, preventing unfair discrimination, promoting equality and seeking to progressively advance gender representation in the succession to traditional leadership position. Phathokuhle is not necessarily guaranteed, by reason only of his being the deceased's elder son, to

succeed the deceased as Inkosi (assuming it could be established that the deceased was wrongfully and unlawfully removed as Inkosi). That would depend on development, if any, within the Mbuyazi Community. But as elder son, he would have a right to be considered when Umndeni wenkosi goes into the process of identifying a person who qualifies in terms of customary law to assume the possession of Inkosi, (section 19(1) A of the Act). The question whether or not the deceased was wrongfully removed is not before us".

[30] What is therefore clear from reading of this paragraph of the judgment as a whole is that the court stated clearly that Phathokuhle is not necessarily guaranteed, by reason only of being the deceased's elder son to succeed as Inkosi assuming that it could be established that the deceased was wrongfully and unlawfully removed as Inkosi.

[31] It needs to be emphasised that the Supreme Court of Appeal found:

(1) That the deceased's review against the withdrawal of his recognition by the First Respondent was not transmissible to anyone else;

(2) That no decision on this review could be made in the future at the instance of anyone; and

(3) That the court *a quo* correctly dismissed the Fourth Respondent's claim to be substituted for the deceased in the review.

[32] What is clear from this judgment is that if no person other than the deceased has standing to bring the review of the Premier's decision to appoint the Second Respondent, than it would seem that his position is unassailable.

[33] In terms of this decision of the Supreme Court of Appeal, the Fourth Respondent has no claim in law to have the deceased's successor removed or the decision set aside.

[34] It therefore stands to reason that the submissions made on behalf of the Fourth Respondent as set out above are not sustainable.

[35] It is also important to emphasise that the issue of the monetary claim for damages is a totally separate issue wherein the Supreme Court of Appeal held that the Fourth Respondent was entitled to bring an action against the MEC in this regard, in her capacity as executor of the estate, to adjudicate on the monetary issue. This monetary issue, however, has nothing whatsoever to do with the declaration of the Second Respondent as Inkosi and Chief of Mbonambi Tribe or the fact that Zwelibhekile Sibusiso Mbuyazi may have been unlawfully removed as Inkosi.

[36] With the regard to the substitution of the Fourth Respondent to pursue a claim in her capacity as executrix in her late husband's estate, the Supreme Court of Appeal in paragraph 16 on page 14 of the judgment said there was no apparent reason as to why she should not be substituted to pursue her claim which was in fact described by the learned judge as a claim for damages founded on the allege wrong which resulted in the diminution in the patrimony of the deceased's estate. The learned judge rightly held in line 5 of paragraph 16 on page 14 of his judgment that whilst she may pursue her claim for payment of arrear salary or for damages, that does not destruct from the facts that it is claim distinct and separate from the one for reinstatement of the deceased's heir as Inkosi.

[37] The effect and import of the judgment of the Supreme Court of Appeal was to refer the matter back into this court to consider the main review application and to make a determination.

[38] The import of the Supreme Court of Appeal judgment is that there is no Applicant now to pursue the issue of chieftaincy of the Mbonambi Tribal Community as the Supreme Court of Appeal held that the deceased's widow can no longer pursue her claim and has no locu *standi* to pursue the finalisation of this review application regarding the issue of the chieftaincy of the Mbuyazi Tribal Community.

[39] In the light of the decision of the Supreme Court of Appeal and the fact that in the present review application there is no more an Applicant, this court is bound not to rescind the order and to discharged the rule *nisi* referred to earlier on in this judgment.

[40] It is therefore clear that the application for consolidation should also fail. It is clear from the reading of the SCA judgment that the Fourth Respondent's son cannot achieve anything in his favour in this litigation.

[41] It was submitted correctly in my view that in the light of the SCA decision and the fact that the Fourth Respondent is no longer in a position to pursue the issue of her late husband as to the chieftainship, that the order should be set aside and the rule *nisi* should therefore be discharged. There is no reason why costs should not follow the results in these matters.

"B 15"

[42] Having considered all the above, I make following order:

(counter-applicat--)

1) The application for consolidation of a review application with an action under case number 4862/2015 is accordingly dismissed.
2) The order of this court granted by **Honourable Mr Justice van Zyl** on 7 June 2011 is hereby rescinded.
3) The rule *nisi* granted by this court on 11 May 2010 and subsequently varied by this court on 26 May 2010 is hereby discharged.
4) In the interlocutory consolidation application the Applicant therein being the Fourth Respondent should pay the costs thereof.
5) In the review application the Fourth Respondent is also ordered to pay the costs of the review application.

SISHI J

LD basis: No applicant.

"B16"

Date of hearing	:	3 April 2016
Date delivered	:	06 October 2016

Appearances:

For the Appellant	:	Adv G.D. Goddard SC
Instructed by	:	Schreiber Smith Attorneys
		c/o Stowel & Co.
		295 Pietermaritz Street
		Pietermaritzburg
For the 1st & 5th Respondents	:	Adv A.J. Dickson SC
Instructed by	:	PKX Attorneys
		Suite 36, Cascades Crescent
		Montrose
		Pietermaritzburg
For the Second Respondent	:	Adv J.N.N. Ngema
Instructed by	:	Pretorious, Mdletshe & Partners Inc.
		Stanger
		c/o McGregor & Associates
		14 Leathern Street
		Pietermaritzburg

C1

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no. 2367/10

ON THE 6TH DAY OF OCTOBER 2016

Before The Honourable Mr Justice SISHI

In the matter between:

ZWELIBHEKILE SIBUSISO MBUYAZI	APPLICANT
and	
THE PREMIER OF THE PROVINCE OF KZN	FIRST RESPONDENT
MKHANYISENI MBUYANI	SECOND RESPONDENT
uMNDENI WENKOSI STHEMBILE VALENCIA MKHIZE N.O.	THIRD RESPONDENT
THE M.E.C. OF THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	FOURTH RESPONDENT

HAVING read the Notice of Motion and the other documents filed of record; and

HAVING heard Counsel on the 3rd day of April 2016 for the Applicant;

THE COURT RESERVED JUDGMENT;

THEREAFTER ON THIS DAY;

1. The application for consolidation of a review application with an action under case number 4862/2015 is accordingly dismissed.

2. The order of this court granted by **Honourable Mr Justice van Zyl** on 7 June 2011 be and is hereby rescinded.

3. The *rule nisi* granted by this court on 11 May 2010 and subsequently varied by this court on 26 May 2010 be and is hereby discharged.

"C2"

4. In the interlocutory consolidation application the Applicant therein being the Fourth Respondent should pay the costs thereof.

5. In the review application the Fourth Respondent is also ordered to pay the costs of the review application.

BY ORDER OF THE COURT,

R J JOOSTE
REGISTRAR

Stowell & Co.

/ssibiya

GRIFFIER VAN DIE HOOGGEREGSHOF
KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG
2016 -10- 11
REPUBLIC OF SOUTH AFRICA
PRIVATE BAG X9014, PIETERMARITZBURG, 3201
REGISTRAR OF THE HIGH COURT