

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

Case No: 3618/22P

In the matter between:

MFANISENI MBONISENI MTUNGWA

FIRST APPLICANT

**MEMBERS OF UMNDENI WENKOSI LISTED IN
ANNEXURE 'A' WHICH IS ATTACHED TO THE
NOTICE OF MOTION**

SECOND APPLICANT

and

PREMIER OF KWAZULU-NATAL

FIRST RESPONDENT

**DEPARTMENT OF CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS, KWAZULU-NATAL**

**SECOND
RESPONDENT**

THOKOZANI MTUNGWA

THIRD RESPONDENT

ORDER

The following order is made:

1. The review application is dismissed with costs, such costs to include the costs associated with the employment of senior counsel.

JUDGMENT

MOSSOP J:

[1] This is a review application, which is identified as being Part B of the notice of motion. By agreement between the parties, I am not required to deal with Part A. In the review application, the applicants seek the following relief:

- (a) that the decision taken by the first respondent on an unknown date, but which was made known by the second respondent on 24 February 2022, recognising the third respondent as the iNkosi of the Mabaso clan (the traditional community), be reviewed, declared invalid and set aside;
- (b) that insofar as any notice has been published of this decision and any certificate of recognition has been issued to the third respondent in terms of the provisions of section 19(2) of the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005 (the Act), they be withdrawn;
- (c) that the issue of the identification of the iNkosi of the traditional community be referred back to the umndeni wenkosi as provided for in section 19(4) of the Act; and
- (d) that the respondents pay the costs of the application.

[2] The first applicant is a natural person, and the second applicant is allegedly the umndeni wenkosi of the traditional community of which the first applicant is a member. Their application has been opposed by the first and second respondents. The first respondent is the Premier of KwaZulu-Natal and the second respondent is the Department of Co-operative Governance and Traditional Affairs of the same province. The third respondent has played no part in this application.

[3] When the matter was argued, the applicants were represented by Mr. Xulu and the first and second respondents were represented by Mr. Dickson SC. Both counsel are thanked for their most helpful submissions.

[4] In a nutshell, the applicants contend that the first applicant ought to be the person recognised as the iNkosi of the traditional community. Instead, the third respondent is the person so identified and recognised. This review seeks to undo this identification and recognition.

[5] The history of the leadership of the traditional community may be stated to be the following, shorn of any embellishments:

(a) Ndabankulu Mtungwa, the first iNkosi of the traditional community, was not succeeded by his eldest son upon his death but was succeeded by his last-born son, Thulwane,¹ because his oldest son was aged and could not fulfil the functions of an iNkosi. The inference from this is that if he had been capable, the eldest son would have been recognised as his successor;

(b) Thulwane was succeeded by his eldest son, Gqikazi;

(c) Gqikazi was succeeded by his eldest son, Madlala;

(d) Madlala had no children and passed the position of iNkosi to Bhekabantu, the eldest son of his brother, Dingindawo Mtungwa (Dingindawo), the first applicant's father;²

(e) Bhekabantu passed away in December 1980;

(f) There is a dispute as to who succeeded next. The applicants state that Bhekabantu was succeeded by his son, Mlindeleni (Mlindeleni) and that because of Mlindeleni's tender age at the time of his father's death, it was necessary for an iBambabukhosi³ to be appointed to assist him. The person so appointed was the middle son of Dingindawo, Thembitshe, the first applicant's brother. The first and second respondents do not agree with this. They assert that Mlindeleni predeceased his father and that Thembitshe was not appointed as iBambabukhosi, but as iNkosi in his own right;

¹ For the sake of convenience, and as the dispute involves parties who all share the same surname, the first names of the parties will be used. No disrespect is intended thereby.

² Dingindawo Mtungwa had three sons with his second wife, his first wife having borne him no children. His eldest son was Bhekabantu (Bhekabantu). The next eldest son was Thembitshe and the youngest is the first applicant.

³ Interim iNkosi or regent.

- (g) Irrespective of which of these versions is correct, Mlindeleni left no children;
- (h) It appears that for the next 38 years, Thembitshe was recognised as the iNkosi of the traditional community, with the first and second respondent stating that such recognition formally occurred on 9 November 1983;
- (i) Thembitshe had three wives and was blessed with 18 children, ten of whom were sons. His eldest son predeceased him. The next eldest son is the third respondent; and
- (j) Thembitshe passed away on 17 January 2021, and his death has sparked the contestation dealt with in this review.

[6] The true dispute between the parties arose after the death of Thembitshe. I deal firstly with the version of the applicants. They claim that the second applicant, which it asserts is the true umndeni wenkosi of the traditional community, identified the first applicant as the person to replace not the late Thembitshe but Bhekabantu, who died in 1980. This identification allegedly occurred at a series of meetings of the second applicant spanning from 31 January 2021 to 6 May 2021. On the last-mentioned date, a document was prepared confirming the identification of the first applicant (the identification document). A copy of the identification document has not been put up. The identification document was allegedly taken to the offices of the second respondent in Dundee, KwaZulu-Natal on 6 May 2021 where an attempt was made to deliver it to the functionaries of the second respondent. This was not, however, successful as the functionaries allegedly advised its bearers that they would not accept it because the traditional community was still in a state of mourning. The identification document was thus not delivered. No other attempt to deliver it appears to have been made. Towards the end of May 2021, a letter of complaint (the letter of complaint) was submitted to the second respondent by the applicants concerning the conduct of the functionaries of the second respondent at a gathering held on 20 May 2021, dealt with more fully below, but no response was ever received from the second respondent to this letter.

[7] That version is denied by the first and second respondents. Their version is that on 12 May 2021, the second respondent received the minutes of a gathering of the umndeni wenkosi of the traditional community (the first gathering), held on 8 May 2021, indicating that the third respondent had been identified as the successor to the

late Thembitshe. The functionaries of the second respondent thereafter resolved to convene a further gathering of the umndeni wenkosi and to this end prepared an agenda for that further gathering. A copy of the agenda has been put up. On 20 May 2021, the functionaries of the second respondent held that gathering with the umndeni wenkosi (the second gathering), all of whom were allegedly present, and confirmed from them that the third respondent had, indeed, been identified as the successor to Thembitshe at the first gathering on 8 May 2021. The second respondent's functionaries thereafter compiled a seven-page memorandum 'to the executive council' (the memorandum), dated 20 January 2022. The memorandum recommended that the third respondent be recognised as iNkosi. That led to the third respondent being formally recognised as the iNkosi of the traditional community by the first respondent and the notification thereof took place in Provincial Notice 189 of 2022, published on 16 March 2022.⁴

[8] The grounds upon which this review is based are succinctly set out in Mr. Xulu's

heads of argument. There are three grounds mentioned:

- (a) the umndeni wenkosi did not identify the third respondent as the next leader of the traditional community;
- (b) the first respondent did not consider the letter of complaint that was sent to him arising out of the second gathering of 20 May 2021; and
- (c) the first applicant, being the last-born son, is in terms of customary law the rightful successor to the late Bhekabantu.

I shall deal with each of these grounds sequentially.

[9] The first ground of review is that the umndeni wenkosi did not identify the third respondent as the person who was to become the leader of the traditional community. The complaint, in truth, extends beyond the simple allegation that no such identification occurred: the applicants contend that, factually, the first gathering, at which the first and second respondents contend the identification of the third respondent was made, never occurred, whether on 8 May 2021 or on any other date. That is why such identification could not have occurred. The first and second

⁴ PN 189 of 2022, *PG* 2378, 16 March 2022.

respondents assert that there was such a gathering and that what occurred at that gathering was minuted and those minutes are in its possession. There is thus an obvious dispute of fact.

[10] The applicants make the case that the umndeni wenkosi actually met on 6 May 2021, two days before the first gathering. The calendar records that date as being a Thursday, perhaps an unusual day for such a gathering considering that it was a working day. The applicants have produced minutes of that meeting. The minutes record that the following was said by a Mr. Ndukuyakhe Mntungwa:

‘He requested that his brother be supported so that he can take over the Chieftaincy position, he said he would rebuild the Chieftaincy of Madlala the house of MaNgubane. The entire Royal House was in agreement with Mfaniseni’s name as the person to take over the Chieftaincy, he said even though there are people who are not in agreement with it but the tribe should not forget this. A Chief is not elected and the Chieftaincy is not an inheritance what is a position that belongs to the family, and he emphasised a Chief is not merely elected but is a chief is born a Chief [sic].’

[11] Unfortunately, there is no attendance register to indicate who attended this meeting. The minutes of the meeting, however, refer to certain of the attendees by name: Mr. Ponono Mntungwa, who opened the meeting with a prayer, Mr. Mlushwa Mntungwa,⁵ who was the programme director, and Mr. Doda P. Mntungwa.

[12] However, I have no idea whether any of the persons named are members of the umndeni wenkosi or whether they were entitled to attend the meeting. While it is so that three confirmatory affidavits accompany the founding affidavit, only two of those affidavits are put up by persons who identify themselves as being members of the umndeni wenkosi. Neither of those deponents are the persons mentioned in the minutes.

⁵ A person named Mhlushwa Malungelo Amon Mabaso has deposed to a confirmatory affidavit in which he states, inter alia, that he is a member of the umndeni yesizwe Sakwa Mabaso. I am unable to find that he is the same person identified in the minutes as Mr Mlushwa Mntungwa.

[13] The minutes of the first gathering of 8 May 2021 put up by the first and second respondents are detailed and also refer to some of the persons in attendance by name. Thus, for example, reference is made to a 'Mr. Bonginkosi', who was the chairperson of the first gathering, and who records the presence thereof:

'... the Indlunkulu (First Wife), Ndlovukazi (Mother of the late Inkosi) and the children of the late inkosi.'

Other individuals in attendance are also mentioned by name.

[14] Of further significance is the fact that in the minutes, a Mr. Schibi:

'... announced the name Thokozani Mntungwa and said the reason for Thokozani being appointed is that he is the eldest child of the late Inkosi.'

[15] After the late iNkosi Thembitshe's mother had spoken at the first gathering, the minutes record that:

'The chairperson of the meeting Mr. Bonginkosi confirmed the name of Thokozani Mntungwa to be the name of the successor to the throne.

He thanked everyone for the successful meeting and thanked the presence of Umndeni.

He closed the meeting in prayer.'

[16] As correctly submitted by Mr Xulu, in this instance, just as with the meeting of 6 May 2021, there is also no attendance list establishing which individuals attended the first gathering. The absence of an attendance list at the first gathering, at first blush, conceivably raises a difficulty: how can it be said that the correct umndeni wenkosi were present at the first gathering if it is not known precisely who was there?

[17] There are two ways of addressing that issue. Firstly, the first gathering appears

to have included those who would be expected to attend a gathering of the umndeni wenkosi. Reference in the minutes to the presence of the immediate family members

of the late Thembitshe is recorded.⁶ In addition, it is also recorded that the umndeni wenkosi were in attendance.

[18] The Act defines the umndeni wenkosi as being:

‘the immediate relatives of an iNkosi, who have been identified in terms of custom or tradition, and includes, where applicable, other persons identified as such on the basis of traditional roles.’⁷

The first wife, mother and children of the late Thembitshe are the immediate relatives that would fall within this definition. The minutes of the meeting of 6 May 2021 are not sufficiently detailed for a similar comment to be made about those in attendance at that meeting. There is no reference to the Indlunkulu, Ndlovukazi or children of the late Thembitshe being present in those minutes. Indeed, at none of the meetings convened by the applicants is mention made of their attendance or the attendance of the third respondent.

[19] Secondly, twelve days after the first gathering occurred, the second gathering was convened at the behest of the second respondent’s functionaries. Unlike the first gathering, the second gathering occurred under the supervision of the second respondent. Attendance at the second gathering was accordingly recorded. It is thus known exactly who attended. While there are no minutes of the second gathering, what occurred at that gathering is contained in the memorandum. The attendance register records that the two deponents who put up confirmatory affidavits in which they confirmed that they were members of the umndeni wenkosi were present at the second gathering.

[20] The memorandum records that at the second gathering, the decision of the first

gathering was confirmed, namely that the third respondent had been identified as the new iNkosi. The memorandum thus states as follows:

‘On 20 May 2021, the Department met with *uMndeni wobuKhosi*, to confirm the resolution taken by the *uMndeni* at its meeting held on 08 May 2021. All *izindlu*

⁶ Indlunkulu, Ndlovukazi, and the children of the late iNkosi.

⁷ Section 1.

zobuKhosi were present and they confirmed the resolution of *uMndeni* as reflected in the minutes of *uMndeni* meeting.’

The first applicant was present at the second gathering according to the attendance register. Reference is also made to his presence in the memorandum. More about that later.

[21] That there is a dispute of fact over whether the first meeting occurred brooks of no doubt. In *Mamadi and another v Premier of Limpopo Province and others*,⁸ the Constitutional Court dealt with disputes of fact in review proceedings and held as follows:

‘[44] This does not mean that an applicant in a rule 53 application is entitled, as of right, to have a matter referred to oral evidence or trial. General principles governing the referral of a matter to oral evidence or trial remain applicable. Litigants should, as a general rule, apply for a referral to oral evidence or trial, where warranted, as soon as the affidavits have been exchanged. Where timeous application is not made, courts are, in general, entitled to proceed on the basis that the applicant has accepted that factual disputes will be resolved by application of *Plascon Evans*. Likewise, where an applicant relies on *Plascon Evans*, but fails to convince a court that its application can prevail by application of the rule, a court might justifiably refuse a belated application for referral to oral evidence. A court should however proceed in a rule 53 application with caution. An applicant might institute proceedings in good faith in terms of rule 53, in order to secure the advantages of the rule and on the basis that the application can properly be decided by application of *Plascon Evans*, only for the respondent to later show that this is not so. In these circumstances, provided the dispute of fact which emerges is genuine and far reaching and the probabilities are sufficiently evenly balanced, referral to oral evidence or trial, as the case may be, will generally be appropriate.

[45] It bears emphasis, however, that litigants cannot permissibly apply for referral to oral evidence or trial “where the affidavits themselves, even if accepted, do not make out a clear case, but leave the case ambiguous, uncertain or fail to

⁸ *Mamadi and another v Premier of Limpopo Province and others* [2022] ZACC 26 paras 44-45.

make out a cause of action.” In that event, the application should of course fail without recourse to *Plascon Evans* or oral evidence.’ (Footnotes omitted.)

[22] There was no request made by the applicants to have this issue, or any other disputes of fact that might exist, referred to oral evidence or trial when the matter was argued. There was no mention at all of this occurring. Accordingly, the approach adopted in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁹ must apply. In this regard, the applicants seem to agree that this is what must occur, as they indicate that:

‘The claims of the opposing respondents that there was a meeting, when evaluated according to the test as set out on [sic] *Plascon-Evan* [sic], are far-fetched and demonstrable improbable [sic].’

[23] I cannot accept that the allegations that the first gathering occurred are palpably false and capable of being dismissed out of hand. On the contrary, there is definite evidence that the first gathering did occur. I must accordingly accept the version of the first and second respondents.

[24] By virtue of the fact that the applicants dispute that the first gathering factually happened, it follows that they do not accept what occurred at that meeting nor can they accept the content of the minutes that purportedly recorded what happened at the first gathering. The first and second respondents hold the view that the minutes are a valid recording of what transpired at the first gathering. Again, a dispute of fact arises. Applying the *Plascon-Evans* test, I must again accept the first and second respondent’s version and find that the minutes are a true recordal of what occurred at the first gathering.

[25] It follows that I must resolve the first ground of review against the applicants by

⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

finding that a validly constituted gathering of the umndeni wenkosi was held at which the third respondent was identified as the successor to the late Thembitshe on the grounds that he was the eldest surviving son of the late Thembitshe.

[26] The second ground of review is that the first respondent did not consider the letter of complaint that was sent to him by the applicants arising out of the second gathering held on 20 May 2021. There is nothing on the papers to indicate that the first respondent received, read, or responded to the letter of complaint. The letter of complaint stated that the royal house of eMantungweni was unhappy with what occurred at the second gathering on 20 May 2021. The nub of the complaint is that the COGTA officials:

‘... on arrival they elected a Chief whereas there were two names nominated. We explained that we were supposed to sit down and have a discussion, we had not gathered yet but they did not accept that, they left us hanging.

They took the details (the name) that was nominated when not every member of the Royal House was present. They departed with only one name and left us as the Royal house in disarray.’

[27] Had he taken cognisance of the letter of complaint, so the applicants’ argument goes, the first respondent would have been obliged to refer the issue of the identity of the person to be recognised as iNkosi back to the umndeni wenkosi for reconsideration and resolution.

[28] There are several unsatisfactory aspects to the letter of complaint. It initially states that two names were nominated but concludes that the COGTA officials took the details of the name (singular) that was nominated. The further allegation that there had not been a gathering would, at the very least, appear to contradict the assertion that the umndeni wenkosi had met on 6 May 2021. Finally, the allegation that not every member of the royal house was in attendance appears to be open to doubt in the light of the fact that the attendance register shows that at least 39 people were in attendance.

[29] The first and second respondents, however, draw attention to the memorandum in this regard. The memorandum records the following regarding the events at the second gathering:

‘During the meeting, a group of *uMndeni* led by Mfaniseni Mntungwa, the younger brother of the late *iNkosi* Thembitshe opposed the resolution of *uMndeni*, stating that the late *iNkosi* was *iBambabukhosi*. The Department explained to *uMndeni* that according to the Departmental records *iNkosi* Thembitshe was indeed *iNkosi* not *iBambabukhosi* (**See Annexure “E”**). They also accused the officials that they were misleading *uMndeni*. It is worth mentioning that the late *iNkosi* held the Baso throne for more than thirty-seven years, as *iNkosi*, without any dispute ever reported. After that, Mfaniseni took the matter to court, with the MEC: Cooperative Governance and Traditional Affairs was cited as the first respondent, and the Premier of the KwaZulu-Natal Province the second respondent. As a result, all the processes of the recognition of *iNkosi* had to be suspended pending the court decision on the matter.’

[30] The objection raised by the first applicant was that the late Thembitshe was not an *iNkosi* in his own right but was merely an *iBambabukhosi* or a regent. In my view, that would appear to be improbable. The late Thembitshe had occupied the position of *iNkosi* for some 37 years without ever being challenged on his entitlement to do so. If the first applicant’s version is correct that Mlindeleni died in 1991, when the basis for the regency existing would have terminated, it is unlikely that Thembitshe would have continued to act as *iNkosi* for the next 30 years without any challenge to his entitlement to do so. Section 21(1)(c) of the Act would have allowed the *umndeni wenkosi* to move for his removal from office. It did not do so. Significantly, while the *umndeni wenkosi* did not challenge Thembitshe, neither did the first applicant. He had two prime opportunities to do so: firstly, upon the death of Bhekabantu he could, and should, have asserted that as the youngest son of Dingindawo he was entitled to succeed Bhekabantu and secondly, upon the death of Mlindeleni he could, and should, have made the same claim. He did not do so on either occasion. It is accordingly far more probable that Thembitshe was not challenged because he had been recognised as the *iNkosi*. The second respondent is the department that is required to keep formal records of the affairs of entities such as the traditional community, including their leadership structures. The second

respondent's records specifically state that Thembitshe was recognised on 9 November 1983.

[31] In addition, section 30(2) of the Act records that:

'[t]he recognition of iBambabukhosi must be reviewed by the Premier, after consultation with the responsible Member of the Executive Council, at least once every three years.'

As it was required to do, the first and second respondents delivered its record of documents for review purposes. There are no documents in the record to demonstrate that such review contemplated by the Act occurred or was resorted to. This reinforces the likelihood that Thembitshe was, indeed, iNkosi and not iBambabukhosi. The objection raised by the first applicant at the second gathering was accordingly without merit.

[32] It is interesting that the memorandum records that the first applicant's only objection at the second gathering concerned the status of Thembitshe. The first applicant did not also claim to have been identified as the successor to his brother Bhekabantu at the meeting on 6 May 2021, nor did he raise any complaint or objection to the fact that the functionaries of the second respondent had allegedly refused to accept the identification letter. He also made no attempt to again deliver the identification letter. In other words, the first applicant did not press his alleged identification as the next iNkosi. This was the opportune moment for him to do so. It was also the moment when he could have handed over the identification letter to ensure that it came to the attention of the first respondent. Yet he apparently allowed the moment to pass without doing either of these things.

[33] The memorandum prepared by the second respondent's functionaries was detailed and fairly dealt with the substance of the first applicant's complaint raised at the second gathering. The applicants have not challenged the content of the memorandum. I must therefore accept that the first respondent was fully apprised of the first applicant's views on the matter and the challenge that he raised. The first respondent, nonetheless, chose to recognise the third respondent.

[34] The applicants appear to make the case that the mere existence of a challenge, irrespective of its merits, requires the first respondent to remit the matter to the *umndeni wenkosi*. I am not sure that is the case. Section 19(4) of the Act reads as follows:

‘(4) Where there is evidence or an allegation that the identification of a person to be appointed as an *Inkosi* was not done in accordance with customary law, customs or processes, or was done in contravention of section 3 of this Act, the Premier-

- (a) may refer the matter to the Provincial House of Traditional Leaders for comment; or
- (b) may refuse to issue a certificate of recognition; and
- (c) must refer the matter back to *umndeni wenkosi* for reconsideration and resolution where the certificate of recognition has been refused.’

[35] The use of the word ‘may’ in a statute usually indicates the existence of a discretion.¹⁰ The relief that the applicants claim is not that identified in sub-paragraph (a) of section 19(4), but that referred to in sub-paragraphs (b) and (c). They want the issue of the identity of the new *iNkosi* to again be placed before the *umndeni wenkosi* for reconsideration, and if publication of the identity of the new *iNkosi* has already occurred and a certificate of recognition issued to the third respondent, that those be called back, pending resubmission of the matter to the *umndeni wenkosi*.

[36] From the wording of section 19(4) of the Act, the first respondent has a discretion as to whether to issue a certificate of recognition. He is, however, only obliged to refer the matter back to the *umndeni wenkosi* where he has exercised his discretion and decided not to issue a certificate of recognition. The wording of the subsection makes that plain. In this instance, the first respondent did not decline to issue a certificate of recognition. He recognised the third respondent. In those circumstances, there is no basis to compel him to refer the matter back to the *umndeni wenkosi* in terms of the Act.

¹⁰ *Nakedi v S* [2020] ZANWHC 83 para 13; *Metropol Consulting (Pty) Ltd v City of Johannesburg Metropolitan Municipality and another* [2020] ZAGPJHC 392 para 36.

[37] I must thus find that the first respondent did not respond directly to the letter of complaint but that such failure was of no legal significance. The second ground of review must accordingly be answered against the applicants.

[38] The third ground of review is that the first applicant, being the last-born son, is in terms of customary law the rightful successor to the late Bhekabantu. The complaint in this regard is articulated by the first applicant in his founding affidavit: 'Umndeni wenkosi must follow customs and culture in making a decision. The culture in Zulu is that the first son in the family is indlalifa and takes over the throne from the father. In the event the first son dies before the father dies, the reigns go to the last-born son.'

This view is shared by Mr. Vukuza Joseph Mtungwa, who has delivered a confirmatory affidavit in which he echoes this understanding.

[39] In presenting his argument for the applicants, Mr Xulu specifically adopted the approach of avoiding the merits of the first applicant's entitlement to be appointed as iNkosi and focused only on whether the correct procedural steps had been followed in identifying and recognising the third respondent as the new iNkosi of the traditional community. Considering the substance of the third ground of review, I am not sure that the legal entitlement to be appointed as iNkosi can be glossed over. It needs to be considered and resolved.

[40] The legislative framework within which succession to the traditional leadership positions of iNkosi occurs is regulated by section 19 of the Act. The relevant sections of that Act read as follows:

'(1) Whenever the position of an *Inkosi* is to be filled, the following process must be followed-

(a) *Umndeni wenkosi* must, within a reasonable time after the need arises for the position of an *Inkosi* to be filled, and with due regard to applicable customary law and section 3-

(i) identify a person who qualifies in terms of customary law to assume the position of an *Inkosi* after taking into account whether any of the grounds referred to in section 21(1)(a), (b) or (d) apply to that person;

(ii) provide the Premier with the reasons for the identification of that person as an *Inkosi*; and

(iii) the Premier must, subject to subsection (3) of this section and section 3, recognise a person so identified in terms of subsection (1)(a)(i) as *Inkosi*. Provided that if the reason for the vacancy is the death of the recognised *Inkosi*, *Umntweni* must, before identifying the person to be recognised as *Inkosi*, consider the content of the testamentary succession document referred to in section 19A.

(2) The recognition of a person as an *Inkosi* in terms of subsection (1)(a)(iii) must be done by way of-

(a) a notice in the *Gazette* recognising the person identified as an *Inkosi*; and

(b) the issuing of a certificate of recognition to the identified person.

(3) The Premier must inform the Provincial House of Traditional Leaders of the recognition or appointment of an *Inkosi*.¹¹

[41] In the minutes of the meetings of 3 April 2021 and 6 May 2021, relied upon by the applicants, reference is made to the fact that kings are not elected, kings are born. An iNkosi is thus not elected because he enjoys popular support or because he makes attractive promises to his clan members. A person is elevated to the position of iNkosi because of the observance of the time-honoured practices of custom, tradition, and the prescripts of customary law. This is emphasised in section 19(1)(a) and 19(1)(a)(i) of the Act. The methods prescribed by the ages are accordingly to be respected and applied.

[42] Implicit in this ground of review is that the applicants contend that the prescripts of custom and customary law have not been followed in identifying the third respondent as the successor to the position of iNkosi. In succession under Zulu law, the general rule is that the heir to the throne is the first-born son in the house of the chief wife, or Indlunkulu.¹¹ There are exceptions to this rule recognised in customary law.¹² Ignoring those exceptions, which are not relevant here, the oldest son of the deceased traditional leader is thus first in line to succeed to the position of

¹¹ In a Zulu polygamous marriage, each wife constitutes a separate house. The house of the first wife is known as 'indlunkulu' (chief wife), the house of the second, 'ikhohlo', (left hand or second wife) and the house of the third, 'iqadi' (third wife or bride of the first wife).

¹² *Mkhize NO v Premier of the Province of KwaZulu-Natal and others* [2018] ZACC 50; 2019 (3) BCLR 360 (CC) para 5.

the deceased traditional leader. If the eldest son predeceases the iNkosi, the second eldest son assumes the position and so on until there are no longer any sons.

[43] In a soon to be published work entitled *The Importance and Relevance of Customary Law in the Constitutional Democratic South Africa*,¹³ the acting judge president of this division, Mr. Justice M I Madondo, states the following:

‘The customary law of succession is fundamentally a system of primogeniture. Male primogeniture implies succession by males through males only in respect of the acquisition of positions of status. In the case of a deceased who was married to more than one wife, the oldest son in each house succeeds to the specific house. In his absence, the eldest son or his son succeeds until all the sons of the deceased and their sons have been exhausted before resort is had to the second son of the deceased and all his sons and their sons, and other sons of the deceased. The same rules are applicable to the succession to a monogamous family head.’

[44] The applicants acknowledge that the first-born son succeeds to his father. Mr. Vukuza Joseph Mtungwa states as much in his confirmatory affidavit when he states that:

‘According to our customs and culture the first-born son is the natural heir to the throne as Inkosi yesizwe when Inkosi passes on.’

However, he goes on to state that:

‘In the event the first-born son dies, the last-born son fill [sic] in the shoes of the first-born son as a natural successor to the title as heir to the throne.’

[45] It is the latter proposition that is contested, namely that where the first-born son dies, he is succeeded by the last-born son. I was not referred to any authority in this regard by Mr Xulu, nor could I find any myself. No expert evidence has been adduced to establish this proposition either.

[46] I have certain difficulties with the proposition:

¹³ Judge M I Madondo *The Importance and Relevance of Customary Law in the Constitutional Democratic South Africa*, chapter 11, to be published by LexisNexis in 2023; TW Bennett *Customary Law in South Africa* (2004) at 337-338 and C Himonga et al *African Customary Law in South Africa Post-Apartheid and Living Law Perspectives* (2014) at 162.

(a) Firstly, it is not relevant to the applicants' case. The applicants do not rely on the first applicant's affinity to the late Thembitshe, nor can they rely on the first applicant's affinity to his father. Their case is not that the first applicant should succeed to Thembitshe but that the first applicant should have succeeded to Bhekabantu, his eldest brother. In other words, they wish to rewind the clock 38 years to the date of Bhekabantu's death. However, Bhekabantu did not come by the position of iNkosi through his father, but through his uncle, Madlala. The first applicant's father was never an iNkosi and the first applicant cannot therefore on the principles of Zulu customary succession acquire something from his father that his father never had;

(b) Secondly, section 19(1)(a) of the Act contemplates that within a reasonable time after the need arises, the umndeni wenkosi must meet to identify a successor to an iNkosi. If there is any merit in what the applicants claim, then the umndeni wenkosi ought to have met 30 years ago upon the death of Mlindeleni, who allegedly died in 1991. It cannot be reasonable, in the absence of any explanation whatsoever for the delay, for it to meet in 2021 to determine the successor of Bhekabantu; and

(c) Thirdly, the history of succession in the traditional community demonstrates that the principle of the eldest son succeeding to his late father has been consistently applied. If that is the case, then in the light of the court having found earlier that Thembitshe was iNkosi and not iBambabukhosi, the eldest son of Thembitshe should succeed him. That is the third respondent. But if the first applicant's proposition is accepted as being correct, it still would not allow him to claim the title of iNkosi. It is so that Thembitshe's eldest son predeceased him. If the first applicant's proposition is accepted, then Thembitshe's youngest son should succeed him, not the first applicant.

[47] Section 19(1)(a)(i) of the Act states that the person identified by the umndeni wenkosi must be a person who:

'qualifies in terms of customary law to assume the position of an *Inkosi* ...'

Simply put, the first applicant does not qualify for such appointment, whereas the third respondent does. This is because the line of succession now runs through the sons of the late Thembitshe. If it is so that an iNkosi is not elected but is born, then as a direct blood relative of the previous iNkosi, the third respondent was born to succeed his father.

[48] The second respondent accepted the minutes of the first gathering held on 8 May 2021. Recorded therein is the allegation that at the burial of Thembitshe, the third respondent performed the ritual of stabbing the soil with a spear, such action being indicative of the fact that he is the heir of the deceased and his successor. That was significant and that symbolic act, which occurred independently of the disputed first gathering, has not been denied by the applicants.

[49] The third respondent was identified by the umndeni wenkosi at the first gathering as being the successor to the late iNkosi, his father. At the second gathering, the umndeni wenkosi confirmed this. The immediate history of the matter and the events at the first and second gatherings were documented in the memorandum, including the objection raised by the first applicant. The memorandum recommended that the first respondent recognise the third respondent. This he duly did. The decision was logical and reasonable in the circumstances and one that a reasonable administrator could have made.¹⁴ As Mr Dickson submitted, it was, in fact, the only decision that the first respondent could make.

[50] I must therefore find that the recognition of the third respondent is in accordance with custom, tradition, and customary law. The third ground of review must accordingly fail.

[51] I accordingly make the following order:

1. The review application is dismissed with costs, such costs to include the costs associated with the employment of senior counsel.

MOSSOP J

¹⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* [2004] ZACC 15; 2004 (4) SA 490 (CC) paras 44-45.

APPEARANCES

Counsel for the applicants : Mr M. N. Xulu
Instructed by: : S N Nxumalo Attorneys Incorporated
20 Otto Street
Pietermaritzburg

Counsel for the first and second : Mr A. J. Dickson SC
respondents
Instructed by : PKX Attorneys
Suite 36
3 on Cascades Crescent
Montrose
Pietermaritzburg

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