IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 3408/2019

(1) REPORTABLE: **NO/YES**

(2) OF INTEREST TO OTHER JUDGES: **NO/YES**

(3) REVISED.

[redacted] 05/09/2023.

In the matter between:

SHONGOANE CONSTANCE	**APPLICANT**
and	
COMMISSION ON TRADITIONAL LEADERSHIP DISPUTES AND CLAIMS	**1st RESPONDENT**
PREMIER OF THE LIMPOPO PROVINCE	**2nd RESPONDENT**
MEC FOR THE DEPARTMENT FOR CO-OPERATIVE	**3rd RESPONDENT**

GOVERNANCE, HUMAN SETTLEMENT

AND TRADITIONAL AFFAIRS

LIMPOPO HOUSE OF TRADITIONAL LEADERS **4th RESPONDENT**

RANARE JOSEPH SHONGOANE **5th RESPONDENT**

JUDGMENT

NAUDÈ-ODENDAAL J:

INTRODUCTION:

[1] This is an application for review and setting aside the findings, recommendations and the decision of the 1st and 2nd Respondents that gave effect to the recognition of the 5th Respondent as the Senior Traditional Leader of the Batlhalerwa ba Shongoane Traditional Council.

[2] The Applicant further seeks a declaratory order in the following:-

2.1 That her late grandmother, Constance, was the candle wife of Kgoshi Zachariah;

2.2 That Constance's lineage as the main wife, is the correct one to succeed Kgoshi Zachariah as the Senior Traditional Leader of Batlhalerwa community; and

2.3 That the Applicant, as the elder child of Arthur, who was the eldest son of Constance and Kgoshi Zachariah, should be appointed as the Senior Traditional Leader of the Batlhalerwa Community.

[3] The Applicant's grounds of review are as follows:-

3.1 The 1st Respondent misdirected itself with regard to the culture, practices and customs applicable to their tribe. As it appears from the report, the 1st Respondent considered the wrong evidence that was presented to it without having heard some of the other people that are affected like the Applicant. The 1st Respondent also ignored the evidence by late Kgosigadi Mapitso Anna that Constance was the senior and the main wife of Kgosi Zachariah. The 1st Respondent also disregarded the available literature in this respect which constituted a serious misdirection on the part of the 1st Respondent.

3.2 The 1st Respondent took a decision without considering the Applicant's submissions, submissions by the late Kgosigadi Mapitso Anna, their culture, practices, customs and available literature. The administrative action was therefore totally unlawful and procedurally unfair.

3.3 The decision taken by the 1st Respondent falls foul of the provisions of Section 6(2)(a)(i), 6(2)(b), 6(2)(c), 6(2)(e)(vi), 6(2)(f)(i) of PAJA, and accordingly stands to be set aside. This carries the natural corollary that the findings of the 1st Respondent and decision of the Second Respondent that the 5th Respondent is the rightful Senior Traditional Leader, that the 5th Respondent's lineage is the rightful and the legitimate one to succeed in the chieftainship of Kgosi Zachariah and that the Senior Traditional Leadership in the lineage of Constance is not the legitimate and the lawful one, must be set aside.

[4] The 1st, 2nd, 3rd and 4th Respondents in opposition to the application submitted as a starting point that the Applicant failed to join the Shongoane Royal Family, the Shongoane Traditional Community and the Limpopo House of Traditional Leaders. No explanation has been provided in the founding affidavit as to why they have not been joined.

[5] It needs to be stated from the onset that the Respondent's submission that the Applicant failed to join the Limpopo House of Traditional Leaders is without merit. It is clear from a plain reading of the Notice of Motion and the Founding Affidavit that the Limpopo House of Traditional Leaders were joined as the 4th Respondent to the application proceedings.

[6] In respect of the non-joinder of the Shongoane Royal Family, it was submitted that the Royal Family are the custodians of the traditional leadership and authority. The Shongoane Traditional Community are members of the community and the Chief would be exercising authority over them including allocating and distributing land and the settling of certain disputes, providing spiritual leadership and limited administration of justice. It was submitted that their non-joinder is fatal to the application.

[7] The Applicant in her replying affidavit submitted that the *point in limine* of non-joinder should be dismissed. The application is not against the decision of the Shongoane Traditional Community nor the Shongoane Royal Family. The aforesaid two parties had not taken any decision.

[8] It was further submitted by the Applicant that in the event that it is deemed necessary by the court to join these two parties as interested parties, they

can and will accordingly be joined by the Applicant. The omission is not fatal to the application and they can be joined at any time should it be deemed necessary.

THE LAW AND APPLICATION OF THE LAW TO THE FACTS:

[9] The test for non-joinder was restated by Schoeman A.J.A. in **Absa Bank Ltd v Naude NO 2016 (6) SA 540 (SCA)** as follows:

"The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject-matter of the litigation which may prejudice the party that has not been joined. In Gordon v Department of Health, KwaZulu-Natal it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."

[10] The relevant principles governing non-joinder in general were summarised by **Celliers A.J. (for a full bench) in Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd 2004 (2) SA 353 (W):**

"[11] It is important to distinguish between necessary joinder (where the failure to join a party amounts to a non-joinder), on the one hand, and joinder as a matter of convenience (where the joinder of a party is permissible and would not give rise to a misjoinder), on the other hand. In cases of joinder of necessity the Court may, even on appeal, mero motu raise the question of joinder to safeguard the interests of third parties, and decline to hear the matter until such

joinder has been effected or the court is satisfied that third parties have consented to be bound by the judgment of the Court or have waived their right to be joined.

*[12] The submission of the appellants that informal notice to a party not cited in judicial proceedings, coupled with mere non-intervention or even an intimation of non-intervention does not amount to a representation that such third party will submit to and be bound by any judgment given, is well-founded. (**Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 661 - 3.**)*

[13] In the absence of joinder of the third parties referred to above, and in the absence of judicial notice to and clear evidence of a waiver by such third parties of any right to be joined in the proceedings before the Court a quo, the relevant question is whether any of such third parties fall into the category of parties who should have been joined, as necessary parties, in these proceedings.

*[21] The notion that, in some unclear way, Downtown's or Intaprop's rights or obligations would be affected by the judgment of the Court a quo, or the success or failure of this appeal, is so remote and theoretical, that to regard the joinder of either as necessary in the present case would be wrongly to apply the rule of necessary joinder as 'a mechanical or technical rule which must be ritualistically . . . applied, regardless of the circumstances of the case'. (See **Wholesale Provision Supplies CC v Exim International CC and Another 1995 (1) SA 150 (T) at 158D - E**. See also **Ngcwase and Others v Terblanche NO and Others 1977 (3) SA 796 (A) at 806H - 807B and Kock & Schmidt v Alma Modehuis (Edms) Bpk 1959 (3) SA 308 (A) at 318D - 319A.**)"*

[11] In **Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA) Mlambo J.A.** held as follows:

"The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject-matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned. In the Amalgamated Engineering Union case (supra) it was found that 'the question of joinder should . . . not depend on the nature of the subject-matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'. The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance. This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined."

[12] What constitutes a "*direct and substantial interest*"? In **Pheko and Others v. Ekurhuleni City 2015 (5) SA 600 (CC) Nkabinde J** held: *"The test for joinder requires that a litigant have a direct and substantial interest in the*

subject matter of the litigation, that is, a legal interest in the subject matter of the litigation which may be affected by the decision of the court. This view of what constitutes a direct and substantial interest has been explained and endorsed in a number of decisions by our courts"

[13] **Nkabinde J** referred in **footnote 66 of Pheko and Others v Ekurhuleni City *supra*** to four judgments. The first is **National Union of Metal workers of South Africa v Intervalve (Pty) Ltd and Others 2015 (2) BCLR 182 (CC).** It was held at **para 188** that *""they had a direct and substantial interest" in the proceedings on the following basis: they "had a hand" in the dismissal of some of the employees, albeit through the medium of a shared HR Services entity, and that the three entities acted jointly and in a single process to effect the dismissals."*

[14] The second is **International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC)** Moseneke D.C.J was satisfied that Bridon did indeed have a direct and substantial interest and at **para 13** it was held as follows:-

"There can be no gainsaying that Bridon UK has a pressing commercial interest in the fate of the existing anti-dumping duties against its product. For, as long as the restraining order is in place, ITAC and the two ministers of state would be precluded from taking steps that would bring the sunset review to fruition and that may lead to the ending of the anti-dumping duties. The duties would remain in force to the obvious commercial detriment of Bridon UK's potential exports into South Africa."

[15] The third is **Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA)**. It concerned a dispute between G and the Department of Health. The Department had turned down G's application for a post, notwithstanding that a selection committee had found him to be the best candidate for that post. Instead, it had appointed M. G sought relief which, in substance would give him the benefits of the post, albeit that he would not be appointed. The Labour Appeal Court had held that M ought also to have been joined, on the basis that a finding in G's favour would carry the implication that M was unsuitable for appointment. On appeal to the **Supreme Court of Appeal, Mlambo J.A. (for a unanimous court)** disagreed:

"The successful appointee can only have a legal interest in the proceedings where the decision to appoint him is sought to be set aside which can lead to his removal from the post. He becomes a necessary party to the proceedings because the order cannot be carried into effect without profoundly and substantially affecting his/her interests."

[16] The fourth is ***Ex parte* Body Corporate of Caroline Court 2001 (4) SA 1230 (SCA)** concerned an *ex parte* application by a body corporate for an order in terms of Section 48(6) of the Sectional Titles Act 95 of 1986 that it be wound up for inability to pay its debts. The application was refused. In

an application for leave to appeal, **Navsa J.A.** *mero motu* raised the question of non-joinder and held that the local authority (as the major creditor), individual owners (being, by section 36 of the Act, members of the body corporate), and bondholders, were all "entitled to receive notice of the intended application". **Navsa J.A.'s** reasoning, insofar as owners is concerned, is instructive:

"This situation does not begin to compare with the asserted analogous situation of an ex parte application for a provisional winding-up of a company or for the provisional sequestration of an individual. The company being wound up or the individual being sequestrated is usually the debtor whose assets have to be surrendered so that they may be sold to meet debts owed to creditors. A body corporate established in terms of the Act represents its members and such debts as the body corporate incurs are usually incurred on behalf of its members. Members of a body corporate have assets apart from the body corporate. Usually the body corporate's assets will be negligible when seen against the collective assets of its members."

[17] In the present matter the successor (5th Respondent) was identified by the Royal Family as the Senior Traditional Leader. The procedure for recognizing a senior traditional leader, headman/woman is regulated by section 12 of the Limpopo Traditional Leadership and Institution Act, 6 of 2005.

[18] **Section 12(1) of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005** stipulates as follows:-

*"**Recognition of senior traditional leader, headman or headwoman***

(1) Whenever a position of a senior traditional leader, headman or head woman is to be filled-
(a) the royal family concerned must, within a reasonable time after the need arises for any of those positions to be filled, and with due regard to the customary law of the traditional community concerned-
(i) identify a person who qualifies in terms of customary law of the traditional community concerned to assume the position in question; and
(ii) through the relevant customary structure of the traditional community concerned and after notifying the traditional council, inform the Premier of the particulars of the person so identified to fill the position and of the reasons for the identification of the specific person.
(b) the Premier must, subject to subsection (2)-
(i) by notice in the Gazette recognize the person so identified by the royal family in accordance with paragraph (a) as senior traditional leader, headman or headwoman, as the case may be;
(ii) issue a certificate of recognition to the person so recognized; and
(iii) inform the provincial house of traditional leaders and the relevant local house of traditional leaders of the recognition of a senior traditional leader, headman or headwoman"

[19] **Section 12(2) of the Limpopo Traditional Leadership and Institutions Act, 6 of 2005** stipulates as follows

"(2) Where there is evidence or an allegation that the identification of a person referred to in subsection (1) was not done in accordance with customary law, customs or processes, the Premier-
(a) may refer the matter to the provincial house of traditional leaders and the relevant local house of traditional leaders for their recommendations; or

(b) may refuse to issue a certificate of recognition; and
(c) must refer the matter back to the royal family for reconsideration and resolution where the certificate of recognition has been refused."

[20] The Royal Family plays a pivotal role in the identification of Senior Traditional Leader and Headman/woman. The **Limpopo Traditional Leadership and Institutions Act *supra*** recognizes the establishment of a Royal Family for the identification and recommendation of a Senior Traditional Leader and that of Headman/woman. It was clearly the intention of the legislature in the **Limpopo Traditional Leadership and Institutions Act *supra*** that the Royal Family of the Senior Traditional Leader, Headman/woman should play a pivotal role and the community under the authority of such a Royal Family would be directly affected by the Senior Traditional Leader so identified and recommended to be ultimately appointed.

[21] In my view, the Shongoane Royal Family as the custodians and authority of traditional leadership in the Shongoane Traditional Community should have been joined as a party to the proceedings in that they have a direct and substantial interest in the matter. Furthermore, the same applies to the Shongoane Traditional Community.

CONCLUSION:

[22] In the result the *points in limine* in respect of the non-joinder of the Shongoane Royal Family and the Shongoane Traditional Community raised by the 1st to 4th Respondents stand to be upheld. It therefore follows that there is no need for me to deal with the merits of the application in light thereof that the *points in limine* are to be upheld.

COSTS:

[23] This brings me to the issue of costs. The general rule applicable to costs is that the costs should follow the event. In the present matter there were no submissions made by any party to deviate from the general rule applicable, however, I am alive to the fact that in these circumstances, the Biowatch-principle dictates that the costs must be borne by the State. This approach safeguards the *"over-arching principle of not discouraging the pursuit of constitutional claims."* In the result a just order in respect of costs would be each party to pay his/her own costs.

ORDER:

[24] I therefore make the following order:-

1. The points *in limine* raised in respect of non-joinder of the Shongoane Royal Family and Shongoane Traditional Community is upheld.

2. The point *in limine* raised in respect of non-joinder of the Limpopo House of Traditional Leaders is dismissed.

3. The application is struck from the roll.

4. Each party to pay his/her/its own costs.

M. NAUDÈ-ODENDAAL

JUDGE OF THE HIGH COURT,

POLOKWANE

APPEARANCES:

HEARD ON:	**25 MAY 2023**
JUDGMENT DELIVERED ON:	**5 SEPTEMBER 2023**
For the Applicant:	Adv. G.G. Mashimbye
Instructed by:	Maloka Thulare Attorneys Polokwane. info@malokaattorneys.co.za
For the 1st to 4th Respondents:	Adv. N. Ramakgoakgoa
Instructed by:	The State Attorney, Polokwane MRamabu@justice.gov.za
For the 5th Respondent:	None